

OPINION ON DRAFT LAW ON MEASURES TO PREVENT AND COUNTER MANIFESTATION OF HATRED ONLINE

ITALY

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The opinion has benefited from consultations with the Office of the OSCE Representative on Freedom of Media.

Based on an unofficial English translation of the Draft Law commissioned by the OSCE Office for Democratic Institutions and Human Rights.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Internet plays an important role in improving public's access to and dissemination of information and news, enhancing the right to freedom of expression, in general. At the same time, expression inciting to or resulting in violence, or other types of unlawful speech, is disseminated without borders and sometimes may persistently remain available online.

It is therefore essential to find a fair balance between the right to freedom of expression, respect for private life, and other fundamental rights, and crime prevention. Measures taken by State authorities or private-sector actors to block, filter or remove Internet content, or any request by State authorities to carry out such actions must comply with international human rights law requirements.

The Draft Law is designed to prevent and counter "manifestation of a hatred online". Articles 5 and 8 of the Draft introduce mechanisms for removing or blocking "illegal content" (as per relevant provisions of the Penal Code, Decree-Law No 122 of 26 April 1993 and Legislative Decree No. 215 of 9 July 2003, as well as data or images that are considered "offensive or damaging" to personal dignity, liberty, and identity (Article 8).

While the Draft Law aims to serve legitimate aim of protecting rights and legitimate interest of individuals, it will benefit from revision in order to avoid potentially erroneous or overbroad interpretation of its provisions, as well as excessive application of punitive measures.

There is a lack of coherency between the introductory note and provisions of the Draft Law, which it accompanies. While reference to the "hate speech" is frequently made in the introductory note, no such term is used in the Draft Law itself. There are discrepancies between the objectives provided in Articles 1 and 8, aiming to counter "manifestation of hatred, including by dissemination of false information" "aimed at damaging personal dignity and liberty" by former, while suggesting specific mechanism of blocking or removing content that is generally "offensive or damaging", without any reference to hateful or false nature of a content, by the latter.

Further, there is a lack of guidance to private actors on what can be considered as "illegal content". Article 5 defines illegal content by referring, among other, to the Decree-Law No 122 of 26 April 1993 (hereafter "Decree-Law") without specifying relevant provisions, as well as to the Legislative Decree No. 215 of 9 July 2003 (hereafter "Legislative Decree") that includes overbroad definitions, such as "unwanted behaviors". Lack of clarity together with an excessive penalties (ranging from 50 thousand to 5 million Euro) may have a chilling effect and result in

excessive self-censorship, especially affecting small website with limited resources.

It is therefore recommended to improve clarity and coherency across its various provisions, and to ensure consistency of applied terminology.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further improve the Draft Law and ensure its adherence to international human rights standards:

A. to revise the Draft Law with a view to:

1. ensure conformity of normative rules and terminology throughout the introductory note, Articles 1, 4, 5 and 8 of the Draft Law providing specific regulatory mechanisms against “clearly illegal content” and “offensive or damaging” to personal dignity information [pars 48-55];

2. clarify whether for the purpose of the Draft Law “offensive or damaging” information” should be discriminatory in nature and/or involving manifestation of hatred and/or spreading false information [pars 53-55];

3. provide guidance to private actors, in accordance with international norms, to identify type of online content that could be defined as “clearly illegal” per relevant provisions of the Penal Code, Decree-Law and Legislative Decree, or “offensive and damaging” per Article 8 of the Draft Law [pars 56, 59];

4. introduce exceptions regarding artistic, fictional, scientific or religious expressions, as well as journalistic/newsworthy content [par 57];

B. to revise Articles 2 and 5 of the Draft Law in a way to give a more precise definition of “website manager” and consider in this respect the number of customers and the commercial or non-commercial nature of the respective entity, when defining the nature of legal obligations on them, as well as to clarify cases when responsibility may be imposed on them [pars 60-63];

C. to clarify certain procedural aspects defined by Article 5 of the Draft Law with respect to notification, verification, blocking and removal of illegal content to make the procedure more foreseeable. In particular, it is recommended to:

1. consider revising tight timeframe for removing or blocking “illegal content”, while introducing remedies against abusive claims made to website managers [par 65];

2. clarify whether the manager should be exempted of liability in case when independent self-regulating body (hereafter “the Body”) fails to provide a decision within the deadline and whether the website manager is entitled to remove what he/she finds clearly illegal on his/her own [par 68];

3. elaborate more specific provisions concerning the Body’s formation, composition and functioning [par 69];

- D. to revise Chapter III in a way to include better safeguards for the freedom of speech [pars 72-77];
- E. to revise the scale of financial sanctions, taking into consideration the potential impact of the information published online, and given the size of the readership/users of the online platform [pars 78-82].

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

TABLE OF CONTENTS

I. INTRODUCTION.....	6
II. SCOPE OF THE OPINION	6
III. LEGAL ANALYSIS AND RECOMMENDATIONS	7
1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments.....	7
2. Background.....	17
3. Manifestation of Hatred and Illegal Content Online	18
4. The Role of Website Managers and the Procedure on Dealing with Illegal Content	23
4.1. Definition of Website Manager	23
4.2. Responsibilities of Website Managers and the Procedure Regarding Notification, Removal, and Blocking of Illegal Content	24
4.3. Responsibilities of Website Managers to Protect Personal Dignity.....	26
5. Financial penalties	28
ANNEX: Draft Law on Measures to Prevent and Counter Manifestation of Hatred Online	

I. INTRODUCTION

1. On 19 July 2021, the Chair of the Committee on Human Rights in the World of the Parliament of Italy sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Draft Law on Measures to prevent and counter manifestation of hatred online (hereinafter the “Draft Law”).
2. On 4 August 2021, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of this Draft Law with international human rights standards and OSCE human dimension commitments.
3. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.¹

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Draft Law submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating manifestation of hatred in Italy.
5. The Opinion raises key issues and provides indications of areas of concern and recommendations. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

1 [1] **GENDER and VAW/DV**: The OSCE/ODIHR conducted this assessment within its mandate as established by the OSCE Action Plan for the Promotion of Gender Equality, which states that “[t]he ODIHR, in co-operation with other international organizations and relevant national bodies and institutions, will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women’s rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments” – See [OSCE Action Plan for the Promotion of Gender Equality](#) adopted by Decision No. 14/04, MC.DEC/14/04 (2004). See also [OSCE Ministerial Council Decision 15/05 on Preventing and Combating Violence against Women](#) (2005), which calls on OSCE participating States to, among others, adopt and implement legislation that criminalizes gender-based violence and establishes adequate legal protection. The OSCE/ODIHR conducted this assessment within its mandate as established by the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination whereby the OSCE participating States committed to “where appropriate, seek the ODIHR’s assistance in the drafting and review of such legislation [to combat hate crimes]” – Footnote: See par 6 of the [OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination](#), taken at the Maastricht Ministerial Council Meeting on 2 December 2003; [The OSCE/ODIHR conducted this assessment within its mandate to “assist participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies”. Footnote: See par 20 of the [Annex to Decision No. 3/03 on Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area](#), MC.DEC/3/03 of 2 December 2003, par 9.

6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*² (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*³ and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
7. This Opinion is based on an unofficial English translation of the Draft Law commissioned by the OSCE/ODIHR which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.
8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Italy in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. According to international human rights law, the limitation of hateful expressions is only possible by adjustment of requirements to ensure free speech and debate, with a competing obligation to prevent attacks on individuals and ensure the equal and non-discriminatory participation of all in public life. The freedom of expression and the right to respect for private life, as well as the obligation of non-discrimination are mutually reinforcing. Human rights law permits States and companies to focus on protecting and promoting the speech of all (with due attention given to minorities and vulnerable groups), while also addressing the public and private discrimination that undermines the enjoyment of all rights.⁴ In short, restrictions on the right to freedom of expression must be exceptional, and the State bears the burden of demonstrating the consistency of such restrictions with international law; any prohibitions must be subject to strict and narrow conditions and States should generally deploy tools at their disposal other than criminalization and prohibition, such as education, counter-speech and the promotion of pluralism, to address all kinds of “hate speech”⁵.

United Nations instruments

10. The right to freedom of expression, including the right to seek, receive and impart information, is a human right crucial to the functioning of a democracy and is central to achieving other human rights and fundamental freedoms. The full enjoyment of this right

² *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Italy ratified the Convention on 10 June 1985.

³ See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, par 4, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

⁵ *Ibid*, par 28.

is one of the foundations of a free, democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can voice their opinions.

11. The International Covenant on Civil and Political Rights (hereafter “ICCPR”)⁶, Article 19 protects the rights to hold opinions without interference (par 1) and to freedom of expression, including the “*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*” (par 2). This right should be guaranteed to everyone, including in respect of access to the media, without discrimination.
12. Any restriction on freedom of expression must meet the three-part test under international human rights law, namely that it is provided for by law, it serves to protect a legitimate interest recognized under international law (i.e., respect of the rights or reputations of others and protection of national security, public order, public health or morals) and it is necessary and proportionate to protect that interest (Article 19 par 3 of the ICCPR). A legitimate ground for restriction must be demonstrated in a specific and individualized manner. Such grounds must be narrowly interpreted, and the necessity for restricting the right to freedom of expression and to impart or receive information must be convincingly established to be compatible with international human rights standards. In addition, laws that impose restrictions on freedom of expression must not violate the non-discrimination principle.⁷ Moreover, administrative measures which directly limit freedom of expression, including regulatory systems for the media, should always be applied by an independent body and subject to appeal before an independent court or other adjudicatory body.⁸
13. Article 20 of the ICCPR states that any propaganda for war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. At the same time, Article 2 par 1 of the ICCPR guarantees rights to all individuals “*without distinction of any kind*”, and Article 26 expressly provides that “*the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground*”. This may include protection on grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including indigenous origin or identity, disability, migrant or refugee status, sexual orientation, or gender identity. Given the expansion of protection worldwide, the prohibition of incitement should be understood to apply to the broader categories now covered under international human rights law⁹.
14. The provisions of Article 20 of ICCPR should be interpreted with care that “*a person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, for example, a person advocating a minority or even offensive interpretation of*

⁶ International Covenant on Civil and Political Rights (hereinafter “ICCPR”) adopted on 16 December 1966 and entered into force on 23 March 1976; Italy ratified ICCPR on 15 Sep 1978.

⁷ UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of opinion and expression](#), 12 September 2011, par 26.

⁸ International Mandate-holders on Freedom of Expression, [2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, 4 May 2015, par 4 \(a\)](#).

⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, para. 9, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

*a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under article 20 (or any other provision of human rights law)."*¹⁰. Further in its General Comment No. 34 the UN Human Rights Committee states that whenever a State limits expression, including the kinds of expression defined in article 20 par 2 of the ICCPR, it must still "*justify the prohibitions and their provisions in strict conformity with article 19*"¹¹.

15. Another set of rules can be found in the International Convention on the Elimination of Racial Discrimination (hereafter "CERD")¹² requiring the States to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. States are called upon to eradicate all incitement to, or acts of racial discrimination, with due regard to other rights protected by human rights law, including the freedom of expression (see Articles 4 and 5 of CERD).
16. The Committee on the Elimination of Racial Discrimination (hereafter "CERD Committee") explained that the conditions defined in Article 19 of the ICCPR also apply to restrictions under Article 4 of the CERD¹³. With regard to the qualification of dissemination and incitement as offences punishable by law, the CERD Committee found that States must take into account a range of factors in determining whether a particular expression falls into those prohibited categories, including the speech's "*content and form*", the "*economic, social and political climate*" during the time the expression was made, the "*position or status of the speaker*", the "*reach of the speech*" and its "*objectives*". The CERD Committee also recommends that States parties to CERD consider "*the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question*"¹⁴. In this respect, CERD requires the prohibition of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination only when it "*clearly amounts to incitement to hatred or discrimination*"¹⁵. It is to be also noted that the terms "*ridicule*" and "*justification*" are extremely broad and are generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the ties to incitement and to the framework established under Article 19 par 3 of the ICCPR help to constrain such a prohibition to the most serious category¹⁶.

¹⁰ Ibid., para. 10

¹¹ UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of opinion and expression](#), 12 September 2011, par 11.

¹² International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD"), adopted on 21 December 1965, entered into force on 4 January 1969; Italy ratified CERD on 5 January 1976.

¹³ see CERD, General recommendation No. 35 (2013), para 19-20; available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCAqhKb7yhssyNNtgI51ma08CMa6o7Bglz8iG4SuOjovEP%2Bcqr8joDoVEbW%2BQ1MoWdOTNEV99v6FZp9aSSA1nZya6gtpTo2JUBMI0%2BoOmjAwk%2B2xJW%2BC8e>

¹⁴ Ibid, para 15-16

¹⁵ Ibid, para 13

¹⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, para. 17, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

17. In the Rabat Plan of Action¹⁷ on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, key terms are defined as follows: “*Hatred*” and “*hostility*” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term “*advocacy*” is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term “*incitement*” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups¹⁸. It is also clarified that criminalization should be left for the most serious sorts of incitement under Article 20 par 2 of the ICCPR, and that, in general, other approaches deserve consideration first.¹⁹ These approaches include public statements by leaders in society that counter hateful expressions and foster tolerance and intercommunity respect; education and intercultural dialogue; expanding access to information and ideas that counter hateful messages; and the promotion of and training in human rights principles and standards. The recognition of steps other than legal prohibitions highlights that prohibition will often not be the least restrictive measure available to States confronting “hate speech” problems²⁰.
18. With respect to protection from bias-motivated crimes, at the international level there is also the States’ obligation to exercise due diligence to prevent, investigate, punish and redress deprivation of life and other acts of violence by adopting legislative and other measures to ensure that every person is effectively protected against such acts²¹. The UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”)²², Article 16 par 5 requires States Parties to “*put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted*”.

¹⁷ Freedom of expression vs incitement to hatred: OHCHR and the Rabat Plan of Action, available at: <https://www.ohchr.org/en/issues/freedomofexpression/articles19-20/pages/index.aspx#:~:text=The%20Rabat%20Plan%20of%20Action%20on%20the%20prohibition%20of%20advocacy,Bangkok%20and%20Santiago%20de%20Chile.>

¹⁸ In 2013, the Committee on the Elimination of Racial Discrimination (hereafter “the Committee”) followed the lead of the Human Rights Committee and the Rabat Plan of Action. It clarified the “due regard” language in article 4 of the CERD as meaning that strict compliance with freedom of expression guarantees is required. In a sign of converging interpretations, the Committee emphasized that criminalization under article 4 should be reserved for certain cases, as follows: The criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity; see CERD, General recommendation No. 35 (2013), para. 12, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICaQhKb7yhssyNNtgI51ma08Cma6o7Bglz8iG4SuOjovEP%2Bcqr8joDoVEbW%2BQ1MoWdOTNEV99v6FZp9aSSA1nZya6gtpT02JUBMI0%2BoOmjAwk%2B2xJW%2BC8e>

¹⁹ Annual report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4 of 11 January 2013, appendix, para. 34; available at: <https://undocs.org/A/HRC/22/17/Add.4>

²⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, para. 18, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

²¹ See Article 6 par 1 of the ICCPR which provides that “[e]very human being has the inherent right to life” which shall be protected by law; Article 7 of the ICCPR which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; Article 26 of the ICCPR which provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. See also UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras 7-8, available at: http://tbintem.net.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en

²² UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by General Assembly resolution 61/106 on 13 December 2006. Italy ratified the CRPD on 15 May 2009.

Illegal content online

19. Content available on the Internet is, in principle, subject to the same human rights regime as traditional media, such as printed materials and speech. Resolution 20/8 of the United Nations Human Rights Council affirms that the “*same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice*”.²³ As such, all forms of audio-visual as well as electronic and internet-based modes of expression are protected.²⁴
20. At the same time in the report of 16 May 2011 (A/HRC/17/27) to the Human Rights Council, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression²⁵ (hereafter “Special Rapporteur”) emphasizes that due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals’ reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate.
21. In the context of the freedom of expression and access to information on the Internet, the importance of the role of online intermediaries should be underlined. By offering alternative and complementary means or channels for the dissemination of media content, they ensure broad outreach and enhance media effectiveness. At the same time there is also a risk of censorship operated by authorities through intermediaries, as well as private censorship (in respect of media to which intermediaries provide services or of content they carry). In this respect an “intermediary liability” law designed by states to hold intermediaries legally liable for failing to prevent access to content deemed to be illegal is typically aimed at restricting expression and should be assessed in the light of the provisions of Article 19 par 3 of the ICCPR to ensure consistency with international standards on free expression.²⁶

OSCE human dimension commitments

22. As an OSCE participating State (hereafter “pS”), Italy committed to “*respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion*” in the Helsinki Final Act²⁷. Furthermore, the pSs reaffirm that everyone will have the right to freedom of expression including the right to communication.²⁸ This right will include freedom to hold opinions and to receive and impart information and ideas without interference by

²³ See UN Human Rights Council, [2012 Resolution 20/8 on the Promotion, Protection and Enjoyment of Human Rights on the Internet](#), A/HRC/RES/20/8, 16 July 2012, par 1.

²⁴ UN Human Rights Committee (CCPR), [General Comment no. 34 on Article 19: Freedoms of opinion and expression](#), 12 September 2011, par 12.

²⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue of 16 May 2011, para 27; available at: https://www2.ohchr.org/english/bodies/hrCouncil/docs/17session/a.hrc.17.27_en.pdf

²⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, para. 30, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

²⁷ Questions Relating to Security in Europe: 1. (a) “Declaration on Principles Guiding Relations between Participating States – Principle VII”, Helsinki, 1975, available at <https://www.osce.org/helsinki-finalact?download=true>

²⁸ For OSCE commitments with respect to freedom of expression see specifically https://www.osce.org/files/f/documents/4/f/99565_0.pdf

public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright.²⁹

23. Numerous OSCE commitments also concern OSCE participating States' fight against discrimination and "hate crimes"³⁰, notably Ministerial Council Decision No. 9/09 on Combating Hate Crimes which calls upon OSCE participating States to "[e]nact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes"³¹. The ensuing recommendations will also make reference, as appropriate, to the OSCE/ODIHR Practical Guide on Hate Crime Laws (2009)³² which, although not binding, may serve as a useful resource in the context of legislative reform pertaining to "hate crimes" and related issues.
24. In the context of anti-terrorism, OSCE pSs committed themselves to combat "hate speech" and to take the necessary measures to prevent the abuse of the media and information technology for terrorist purposes, ensuring that such measures are consistent with domestic and international law and OSCE commitments.³³ Also the OSCE Ministerial Council decided to take strong public positions "against hate speech and other manifestations of aggressive nationalism, racism, chauvinism, xenophobia, anti-Semitism and violent extremism, as well as occurrences of discrimination based on religion or belief"³⁴.

Council of Europe documents

25. Human rights instruments of the Council of Europe (hereafter "CoE") also articulate standards related to freedom of expression.
26. In this respect, the CoE Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "European Convention on Human Rights")³⁵ is of particular importance as a binding instrument being interpreted by the European Court of Human Rights (hereafter "ECtHR"). It is to be noted, however, that Article 10 of the European

²⁹ [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#) (Copenhagen, 5 June-29 July 1990), para. 9.1

³⁰ See e.g., OSCE Ministerial Council Decision No. 4/03 of 2 December 2003, par 8; OSCE Permanent Council Decision No. 621 on Tolerance and the Fight against Discrimination, Xenophobia and Discrimination of 29 July 2004, par 1; and Annex to Decision No. 3/03 on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, par 9, available at <http://www.osce.org/odihr/17554?download=true>, which recommends the "[i]mposition of heavier sentences for racially motivated crimes by both private individuals and public officials".

³¹ See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, 2 December 2009, par 9; available at: <http://www.osce.org/cio/40695?download=true>.

³² See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, Preamble, available at <http://www.osce.org/cio/40695?download=true>. See also OSCE/ODIHR, Hate Crime Laws: A Practical Guide (2009) (hereinafter "2009 ODIHR Practical Guide on Hate Crime Laws"), available at <http://www.osce.org/odihr/36426?download=true>, page 16.

³³ The OSCE Charter on Preventing and Combating Terrorism (2002) para 22; available at: <https://www.osce.org/odihr/16609>.

³⁴ Porto Ministerial Decision No. 6 on tolerance and non-discrimination: promoting mutual respect and understanding para. 8; available at: <https://tandis.odihr.pl/bitstream/20.500.12389/19931/1/03547.pdf>

³⁵ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953; Italy ratified the Convention on 26 October 1955.

Convention on Human Rights guaranteeing the right to freedom of expression does not include provisions of Article 20 ICCPR and Article 4 of CERD. At the same time, when dealing with cases concerning incitement to hatred and freedom of expression, the ECtHR uses the approach of exclusion from the protection of the European Convention on Human Rights in case of “abuse of rights”. For example, using some expressions amounting to “hate speech” and negating the fundamental values of the European Convention on Human Rights can be considered by the ECtHR as a ground to find that claims of violation of the right to freedom of expression inadmissible³⁶. On the other hand, where the speech in question is not apt to destroy the fundamental values of the European Convention on Human Rights, the approach of setting restrictions on protection, provided for by Article 10 par 2 might be applicable. Based on this, certain statements that in some jurisdictions amount to punishable expressions, become subject to proportionality analysis in the case-law of the ECtHR and may be even fully protected³⁷.

27. However, in a number of judgments of the ECtHR the freedom of speech is restricted where the incitement of hatred is intended to generate violence or discriminatory acts against a specific group (identified by specific markers) or its members for reasons of membership³⁸.
28. Furthermore, the European Commission to Democracy through Law (hereafter “Venice Commission”) also states that “[...] *where speech incites to violence against an individual or a sector of the population, the State authorities enjoy a wider margin of appreciation and may regulate such expression by introducing formalities, conditions, restrictions or penalties*”. At the same time, it is doubtful whether every exercise of the freedom of speech aimed at “*violating the dignity of any ethnic, racial or religious community*” should be qualified as “hate speech”³⁹. In this respect the Venice Commission also refers to a certain quality of the law in question necessary to acknowledge a limitation on the right to freedom of expression “lawful”: if the law is not sufficiently clear, accessible or if its application is unforeseeable, the condition that a

³⁶ For an overview of practice, see CoE, “Guide on article 17 of the European Convention on Human Rights: prohibition of abuse of rights”, updated 31 August 2019; ECtHR, case *Seurot v. France* (Application No. 57383/00, decision of 18 May 2004): “[T]here is no doubt that any remark directed against the Convention’s underlying values would be removed from the protection of Article 10 [freedom of expression] by Article 17 [prohibition of abuse of rights] (...)”.

³⁷ See, in particular, ECtHR, case *Perincek v Switzerland* (Application no. 27510/08, judgment of 15 October 2015 (GC)). In this respect the ECtHR takes into consideration the circumstances and not only the expression itself. The ECtHR “has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups”. The ECtHR found generalised negative statements about non-European and in particular Muslim immigrants, vehement anti-Semitic statements; portrayal of non-European immigrant communities in Belgium as criminally minded, direct calls for violence against Jews, the State of Israel, and the West in general; and allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and Aids. However, in matters of immigrants and homosexuals the interference into these kinds of speech were held justified on the ground of proportionality analysis. See also ECtHR, cases of *Gündüz v. Turkey* (Application no. 35071/97; judgment of 14 June 2004); *Dink v. Turkey* (Applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of 14 December 2010); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (Application no. 22947/13, judgment of 2 May 2016); *Ibragim Ibragimov and Others v. Russia* (Applications nos. 1413/08 and 28621/11, judgment of 28 August 2018).

³⁸ ECtHR, case *Delfi AS v. Estonia* (Application no. 64569/09, judgment of 10 June 2015 (GC)). See also *Leroy v. France* (Application no. 36109/03, judgment of 6 April 2009), *Féret v. Belgium* (Application No. 15615/07, judgment of 10 December 2009).

³⁹ See Venice Commission, CDL-AD(2015)004, Opinion on the draft Amendments to the Media Law of Montenegro, §12, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)004-e).

limitation of the freedom of speech has to be “foreseen by law” will not be complied with⁴⁰.

29. Finally, at the CoE level, general anti-discrimination standards can be found in Article 14 of the European Convention on Human Rights, which prohibits discrimination in conjunction with the enjoyment of rights protected under the Convention, including the right to life and security (Articles 2 and 3).
30. The CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”)⁴¹ also requires State Parties to “*take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person*” (Article 12 par 2). This includes gender-based violence against women (i.e., violence directed against a woman because she is a woman or that affects women disproportionately (Article 3 (d) of the Istanbul Convention)).

Illegal content online

31. In the Declaration on freedom of communication on the Internet of 28 May 2003⁴², the Committee of Ministers of CoE adopted certain principles in the field of communication on the Internet, including, among others, not subjecting the content on the Internet to restrictions which go further than those applied to other media; encouraging self-regulation or co-regulation regarding content disseminated on the Internet, as well as absence of prior state control by avoiding general blocking or filtering measures, denying the public access to information and other communication on the Internet.
32. In its Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet (adopted on 7 November 2007)⁴³, the Committee of Ministers noted that the Internet could, on the one hand, significantly enhance the exercise of certain human rights and fundamental freedoms while, on the other, it could adversely affect these and other such rights. It was recommended in this respect for the States to draw up a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies.

⁴⁰ Venice Commission, CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, §22; see also CDLAD(2008)026, §50.

⁴¹ The Council of Europe’s *Convention on Preventing and Combating Violence against Women and Domestic Violence*, CETS No. 210 (hereinafter “the Istanbul Convention”); Italy ratified the Convention on 10 September 2013.

⁴² Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dfbd5

⁴³ Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet (adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers’ Deputies); available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d4a39

33. In this context, the Recommendation of the Parliamentary Assembly of the CoE on the Blasphemy, religious insults and hate speech against persons on grounds of their religion⁴⁴ should be mentioned.
34. Moreover, in its Recommendation CM/Rec(2011)7 on a new notion of media (adopted on 21 September 2011)⁴⁵ the Committee of Ministers recommended, among others, to review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights.
35. In the Guide to human rights for Internet adopted on 16 April 2014⁴⁶ the guarantees of right to freedom of expression were interpreted in the context of online communication, including "*political speech, views on religion, opinions and expressions that are favourably received or regarded as inoffensive, but also those that may offend, shock or disturb others*". At the same time, a due regard was required with respect to the reputation or rights of others, including their right to privacy. The restrictions on expressions which incite discrimination, hatred or violence must be lawful, narrowly tailored and executed with court oversight.
36. According to the ECtHR case-law, Internet news portals which, for commercial and professional purposes, provide a platform for user-generated comments, assume the "duties and responsibilities" associated with freedom of expression in accordance with Article 10 par 2 of the European Convention on Human Rights where users disseminate hateful comments amounting to direct incitement to violence. In this respect, the conflicting realities between the benefits of Internet, notably the unprecedented platform it provides for freedom of expression, and its dangers, namely the possibility of hate speech and speech inciting violence being disseminated worldwide in a matter of seconds and sometimes remaining persistently available online, have been specifically emphasized by the ECtHR⁴⁷. Therefore, in cases, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of society as a whole may entitle the states to impose liability on Internet news portals, without contravening Article 10, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties⁴⁸. However, in a case⁴⁹ concerning the applicant's conviction for inciting hatred after making insulting remarks about police officers in a comment under a blog post, the ECtHR found a violation of Article 10, having

⁴⁴ Recommendation of the Parliamentary Assembly of the CoE 1805 of 29 June 2007; available at: <https://pace.coe.int/en/files/17569#trace-5>

⁴⁵ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies), available at: <https://www.osce.org/files/f/documents/1/f/101403.pdf>

⁴⁶ Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users (Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies), available at: https://www.coe.int/en/web/freedom-expression/news-internet/-/asset_publisher/7AgdXqdBEoL3/content/recommendation-cm-rec-2014-6-of-the-committee-of-ministers-to-member-states-on-a-guide-to-human-rights-for-internet-users-adopted-by-the-committee-of-ministers?inheritRedirect=false

⁴⁷ See ECtHR, Factsheet – Hate speech, September 2020; available at: https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf

⁴⁸ ECtHR, case *Delfi AS. v. Estonia* (Application no. 64569/09, judgment of 10 June 2015 (GC)), para 110

⁴⁹ ECtHR, case *Savva Terentyev v. Russia* (Application no. 10692/09; judgment of 04 February 2019).

established, in particular, that while the applicant's language had been offensive and shocking, that alone was not enough to justify interfering with his right to freedom of expression: "*the domestic courts should have looked at the overall context of his comments, which had been a provocative attempt to express his anger at what he perceived to be police interference, rather than an actual call to physical violence against the police*".

EU instruments

37. It is important to note that Italy is bound in the context of internet regulation by European Union (hereafter "EU") legislation, in particular Directive 2000/31/EC⁵⁰ which has established a notice and take down system. Furthermore, Directive 98/34/EC⁵¹ of the European Parliament and of the Council of 22 June 1998 as amended by Directive 98/48/EC lays down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.
38. To prevent and counter the spread of "illegal hate speech online", in May 2016, the EU Commission agreed with Facebook, Microsoft, Twitter and YouTube (with other platforms joining later) on a Code of conduct on countering illegal hate speech online⁵². The participating companies agreed to review the majority of the content flagged within 24 hours and remove or disable access to hate speech content, if necessary. The Code of conduct on countering illegal hate speech online refers to "illegal hate speech" as defined by the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and national laws transposing it. Here "hate speech" means 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.

Comparative law material

39. National constitutional practices differ considerably among the OSCE pSs. It is judicially recognized in some states that, due to its "*tendency to silence the voice of its target group*" "hate speech" can "*distort or limit the robust and free exchange of ideas*" and is therefore detrimental to the values underlying freedom of speech. However, at least according to the Supreme Court of Canada, only speech of an "*ardent and extreme*" nature should be considered to meet the definition of "hatred."⁵³
40. In a number of the pSs – which are also members of the EU – the Directive on electronic commerce, as transposed into national law, constitutes a primary source of law in the area in question. It would also appear that the greater the involvement of the operator in the third-party content before online publication – whether through prior censoring, editing, selection of recipients, requesting comments on a predefined subject or the

⁵⁰ 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 ("Directive on electronic commerce"); available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031> at:

⁵¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 as amended by Directive 98/48/EC; available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998L0034:20070101:EN:PDF>

⁵² https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1937

⁵³ Saskatchewan (Human Rights Commission) v. Whatcott, Supreme Court Judgment of 27 February 2013; available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12876/index.do> 2013 SCC 11.

adoption of content as the operator's own – the greater the likelihood that the operator will be held liable for that content.

41. A number of pSs⁵⁴ have recently enacted legislation on take-down of allegedly unlawful content on the Internet and provisions concerning distribution of liability in this context inspired by the legislative proposal of the European Commission to adopt a Digital Services Act (hereafter “DSA”) intended to improve content moderation on social media platforms to address concerns about “illegal content”.⁵⁵ It should be noted, however, that in this respect the UN Special Rapporteur expressed reservations⁵⁶ regarding the duty to take down “manifestly unlawful speech” in the context of the respective German initiative.

2. BACKGROUND

42. The Draft Law contains 4 chapters (Chapter I: Preventing and countering the manifestation of hatred online; Chapter II: Amendments to the Penal Code and provisions for removing illegal content online; Chapter III: Provisions for protecting personal dignity online; Chapter IV: Digital education).
43. According to the introductory note of the Draft Law it is meant “*to foster responsibility among the digital platforms to swiftly remove hate speech*”, while at the same time establishing procedures to ensure that this private enforcement mechanism does not unreasonably impinge on user freedom of expression. The introductory note further explains the phenomenon of a “hate speech”, describing it as a “*speech designed to damage personal dignity and liberty that targets individuals belonging to certain social groups or minorities, including members of the lesbian, gay, bisexual, and transgender communities, religious minorities, foreigners and in particular immigrants, the disabled, and especially and increasingly, women.*”
44. It is also mentioned that the Draft Law was inspired by other countries' experience in adopting regulations to prevent and counter “hate speech” and illegal content. The reference is made to Germany being the first to approve an anti-hate speech law that went into effect on 1 January 2018. It should also be noted that even though “hate speech” is mentioned in the introductory note, the Draft Law itself makes no reference to it but rather seeks to “prevent and counter every instance of manifestation of hatred online” (par 2,

⁵⁴ See, for example, Germany's Network Enforcement Act, or NetzDG law representing a key test for combatting hate speech on the internet. Under the law, which came into effect on January 1, 2018, online platforms face fines of up to €50 million for systemic failure to delete illegal content. Supporters see the legislation as a necessary and efficient response to the threat of online hatred and extremism. A similar pattern occurred in France, where the government started with an experiment of co-regulation, envisioned by Emmanuel Macron and Mark Zuckerberg. But the initiative ended up as a general report on social networks regulation, and a bill targeting content moderation, inspired by NetzDG and the EU proposal on Online Terrorist Content Regulation (2018)—broad text aimed at limiting the spread of terrorist material on online platforms -, was introduced under the name of Avia law, after the name of its rapporteur, in early 2019. Both laws contained the same flagship measure making platforms liable to substantial fines if they failed to delete illegal content within 24 hours. In a letter addressed to the French government, the European Commission warned about the risks of this measure to freedom of speech and fundamental rights, picking up arguments already made by digital rights activists and platforms themselves in France and Germany. The French constitutional court used a similar reasoning to shatter the Avia law in June 2020, arguing that the measure disproportionately infringed on free speech, notably because it would incentivize platforms to block suspicious but lawful content to avoid fines, a practice described as “over-blocking.” The court also condemned the absence of judiciary control along the process, which equates to granting online platforms quasi-judicial power in the assessment of content legality.

⁵⁵ “‘illegal content’ means any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law”.

⁵⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, para. 32, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

Article 1). The objective of the Draft Law is defined as protecting the personal dignity, liberty, and psychophysical health of internet users, banning abuses that spread, incite, promote, or justify hate, discrimination, or violence (Article 1). Whilst introducing regulatory mechanisms of online content, the Draft also proposes amendments to a hate crime legislation. In particular, Chapter II Article 3 of the Draft Law provides an extended list of protected grounds covering most of those groups which are most frequently targeted for bias-motivated crimes defined under the Penal Code.

45. Platforms that do not adopt the mechanisms proposed by the Draft Law will incur penalties and will be required to produce and publicise annual reports on the actions taken to achieve the said goals. Having acknowledged, however, that restrictive or punitive actions alone are not enough to prevent and counter manifestation of hatred online, the Draft Law also intends to invest in “digital civic education” for an informed and respectful use of the internet by all.

3. MANIFESTATION OF HATRED AND ILLEGAL CONTENT ONLINE

46. According to Article 1 par 2 of the Draft Law, the website managers are required “to prevent and counter every instance of manifestation of hatred online”. Furthermore, Article 1, par 2, while introducing protected grounds against discriminatory expression and violence (such as, ethnicity, nationality, religion, sexual orientation, sex, gender, gender identity, disability, serious illness, age, and immigration, refugee, and asylum-seeking status), also offers instances of manifestation of hatred online that includes “*the spreading of false information aimed at damaging personal dignity and liberty, as well as discrimination and violence...*” based on the above mentioned protected grounds.
47. **It should be noted, however, that even though the Draft Law refers to discrimination based on “refugee and asylum-seeking status” in Article 1 par 2 when mentioning protected grounds against discriminatory expression and violence, it is not included in the expanded list of protected grounds under proposed amendment to the Penal Code (see in par 50 below description of proposed amendments) and thus may not qualify as “illegal content” subject to removal.**
48. Article 5 of the Draft Law introduces an obligation to remove and block “online content that is clearly illegal”, which (on the basis of Article 4) is defined in accordance with Articles 604-bis (propaganda and incitement to discriminatory conduct and incitement to violence⁵⁷), 604-ter (the aggravating circumstance of Article 604-bis) of the Penal Code, as amended by the Draft Law, and to Articles 612-bis (stalking) and 612-ter (the illegal transmission of sexually explicit images or video) of the Penal Code, as well as in accordance with the Decree-Law No.122 of 26 April 1993, converted with amendments into Law No. 205 of 25 June 1993 and with the Legislative Decree No. 215 of 9 July 2003.
49. Article 604 *bis* of the Penal Code, as amended by the Draft Law, refers to propagation of ideas based on superiority or racial or ethnic hatred, or instigation to commit acts of discrimination, or instigation to commit or committing violence or provoking violence

⁵⁷ Incitement to violence then, based on ODIHR’s consistent approach can constitute a hate crime, if committed with a bias motivation. See OSCE/ODIHR, Hate Crime Laws: A Practical Guide (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), page 25, available at <http://www.osce.org/odihr/36426?download=true>

on the basis of racial, ethnic, national or religious reasons or based on sex, gender, sexual orientation, gender identity, or disability. In its current version the Penal Code outlaws: (i) disseminating ideas based on racial superiority or hatred; (ii) inciting to commit or committing racially motivated acts of discrimination or violence; (iii) promoting, directing, participating or supporting racist organizations or groups; (iv) condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes, as provided for by the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. It is to be noted, thus, that the above understanding of the “illegal content” is limited to propaganda and incitement in accordance with Article 20 of the ICCPR. Group defamation motivated by racial hatred is also punishable in accordance with Penal Code 604 *ter*.⁵⁸

50. The Draft Law also adds to the Penal Code new protected grounds beyond race and religion, such as sex, gender, sexual orientation, gender identity, and disability. It should be mentioned that the ECtHR has acknowledged in its case law that the protection against discrimination afforded by Article 14 of the European Convention on Human Rights extends to the grounds of sexual orientation and gender identity, although they are not expressly mentioned in this provision.⁵⁹ The grounds of sexual orientation have been recognized by the ECtHR, moreover, as calling for a high level of protection.⁶⁰ The UN High Commissioner for Human Rights,⁶¹ the Parliamentary Assembly of the CoE,⁶² and the CoE Commissioner for Human Rights⁶³ have all called upon states to ensure that anti-discrimination legislation includes gender identity among the prohibited grounds.⁶⁴ Such amendments would also correspond to existing practice in the majority of OSCE pSs, which specifically include or refer to sexual orientation and gender identity as protected characteristics in their criminal legislation.⁶⁵
51. In defining what should be considered as illegal content the Draft Law also refers to the Decree-Law No 122 of 26 April 1993 (hereafter “Decree-Law”) without specifying,

⁵⁸ Case of *Sentenza n. 32862/2019*. Art. 604 *ter* of the Criminal Code states that “For crimes punishable with a penalty other than life imprisonment committed for the purpose of discrimination or ethnic, national, racial or religious hatred, or in order to facilitate the activity of organizations, associations, movements or groups that have among their purposes for the same purposes, the penalty is increased by up to half” The position of the Cassation court is in line with the principles established by the ECtHR (see the case of *Aksu v Turkey* (Applications nos. 4149/04 and 41029/04; judgment of 15 March 2012 (GC)).

⁵⁹ On nationality, see ECtHR, *Gay gusuz v. Austria* (Application no.17371/90, judgment of 16 September 1996), par 41 ; on sexual orientation, ECtHR, *Gay gusuz v. Austria* [GC] (Application no.43546/02, judgment of 22 January 2008), par 91; on gender identity, see ECtHR, *Identoba and others v. Georgia* (Application no.73235/12, judgment of 12 May 2015), par 96.

⁶⁰ On nationality, see *ibid.* par 41 (ECtHR, *Gay gusuz v. Austria*, 16 September 1996); on sexual orientation, see *ibid.* par 91 (ECtHR GC, *Gay gusuz v. Austria*, 22 January 2008).

⁶¹ United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (4 May 2015) UN Doc No. A/HRC/29/23, par 79(c).

⁶² Parliamentary Assembly of the Council of Europe, ‘Promoting the human rights of and eliminating discrimination against intersex people’, Resolution 2191 (2017).

⁶³ Commissioner for Human Rights of the Council of Europe, *Human Rights and Gender Identity* (29 July 2009) CommDH/Issue Paper (2009), p. 18.

⁶⁴ On this issue, see more generally, M. Van den Brink and P. Dunne, *Trans and intersex equality rights in Europe. A Comparative Analysis*, European network of legal experts in gender equality and non-discrimination, European Commission, DG Justice and Consumers, Nov. 2018.

⁶⁵ The protected grounds of “sexual orientation” and/or “gender identity” or similar wording are expressly mentioned in the criminal legislation of many OSCE participating States either as an aggravating circumstance or when incitement to hatred are based on such characteristics (see <http://www.legislationline.org/topics/country/4/topic/4/subtopic/79>), such as: Albania, Austria, Andorra, Azerbaijan (“motives of sexual belonging” although mentioned only in Article 109 on Discrimination), Belgium, Bosnia and Herzegovina, Canada, Croatia (“gender” and “sexual preference”), Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland (“sexual inclination”), Lithuania, Luxembourg, Malta, Monaco, Montenegro, the Netherlands (“gender” and “heterosexual or homosexual orientation”), Norway (“homosexual orientation”), Portugal, Romania, Serbia, Slovenia, Spain, Slovak Republic, Sweden, the United Kingdom and the United States.

however, which provisions of it are concerned⁶⁶ and to the Legislative Decree No. 215 of 9 July 2003 (hereafter “Legislative Decree”) that prohibits the discrimination which expressly includes harassment or unwanted behaviors, put in place for reasons of race or ethnic origin, having the purpose or effect of violating a person’s dignity and of creating an intimidating, hostile, degrading climate. It appears however that the Legislative Decree, although having a legitimate aim of addressing racial discrimination (“*put in place for reasons of race or ethnic origin*”), does not cover other protected grounds and discriminatory acts on the basis of religion, disability etc. Furthermore, some of the elements of discrimination described in the Legislative Decree (for example, formulations such as “*creation of intimidating climate*”) seem to be broad and are to some extent precluded from restriction under international human rights law, which protects the rights to offend and mock. Such broad interpretation of discrimination would have an undesired effect of restricting expressions online that some people might consider outrageous, unacceptable or even disturbing them and therefore clearly illegal. It should be mentioned that restrictions imposed on freedom of speech should be clearly defined and satisfy requirements under Articles 19 and 20 of ICCPR, Article 4 of CERD and Article 10 of the ECHR. **Without clarity and precision in the definitions, there is significant risk of abuse and restriction of legitimate content**⁶⁷.

52. It should be recalled that the precise legal modalities in respect of what should be considered as clearly illegal content are fundamentally important to vindicating the principle of legality - that law should be *ex ante* promulgated in a clear manner so that individuals may be certain that their conduct is in conformity with it.⁶⁸ International human rights law vindicates this fundamental principle of the rule of law by stipulating that measures interfering with human rights are “prescribed by law”.⁶⁹ The risk of an unclear definition of “online content that is clearly illegal” and/or of the type of material that must be taken down is that it may fail the ECtHR test of “prescribed by law”⁷⁰. A sufficient quality of the law in question is necessary to acknowledge a limitation on the right to freedom of expression “lawful”: if the law is not sufficiently clear, accessible or if its application is unforeseeable, the condition that a limitation of the freedom of speech has to be “foreseen by law” will not be complied with⁷¹. The failure of the Draft Law to define its key terms in a sufficiently precise manner could undermine the claim that its requirements are consistent with international human rights law.⁷²
53. Article 8 (Chapter III) of the Draft Law also allows anyone affected to request to shut down, remove, or block “*personal data or images that have been shared over the internet*

⁶⁶ It is assumed that most likely it concerns Article 1 of the Decree-Law referring to a) “whoever disseminates in any form ideas based on superiority or racial or ethnic hatred, or incites to commit or commits acts of discrimination for racial, ethnic, national or religious reasons; b) [whoever], in any way, incites to commit or commits violence or acts of provocation of violence for racial, ethnic, national or religious”.

⁶⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, par 31, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf.

⁶⁸ Alan Greene, “Defining Terrorism: One Size Fits All?” (2017) 66(2) *International and Comparative Law Quarterly* 411, 421.

⁶⁹ ECtHR, case of *Hashman and Harrup v UK* (Application No 25594/94; judgment of 25 November 1999), pars. 29-43.

⁷⁰ *ibid*

⁷¹ Venice Commission, Compilation of VC opinions and reports concerning freedom of expression and media, 19 September 2016, page 9, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)011-e).

⁷² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of 9 October 2019, par 32, available at: https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf.

and are considered offensive or damaging to their personal dignity, liberty, and identity". Apparently, Article 8 provides general right to request blocking and removal of offensive or damaging content but without necessarily being a manifestation of hatred. If that is the case, it may become confusing why this is regulated by the Draft Law, which is meant to prevent and counter "manifestation of hatred". Without further clarification, Article 8 may potentially overlap with Italy's other laws regulating defamation or tortious acts. For instance, it is important to clarify whether the Draft Law may overlap, for example, with the Penal Code which imposes penalties for defamation⁷³ and was subject to the review recently by the Constitutional Court, which found some provisions of the Penal Code unconstitutional, also calling on legislator to adequately balance the right to freedom of expressing and the protection of individual reputation.⁷⁴

54. However, given the purpose and title of the Draft Law (see par 46 above), it is also possible that Article 8 is interpreted narrowly, creating an individual right to seek the removal of incidents of hateful expressions infringing on an individual's personal dignity. At the same time, it should also be noted that differently from Article 1, which refers to *false information*, Article 8 contains no such reference and mandates to request removal or blocking of data or images which are *offensive or damaging*. It is important that the legislation regulating freedom of expression, including online speech, leaves no room for vagueness and remains in line with constitutional requirements and norms of international law. It is also crucial to ensure consistency between the provisions of the Draft Law as well as across other relevant legislation.
55. **Given the above considerations, the Draft Law would benefit from general revision to ensure conformity of its normative part and terminology throughout the introductory note and provisions of the Draft Law (such as Articles 1, 4, 5 and 8). It is also advisable to clarify whether for the purpose of the Draft Law "offensive or damaging" information" should be discriminatory in nature, involving manifestation of hatred or spreading false information.**
56. Apart from that, whilst imposing on the website managers an obligation to make judgments and remove the online content that is clearly illegal or infringes with individual's personal dignity, the Draft Law does not contain any guidance on how to identify whether a particular, especially controversial, content, should be defined as "illegal", per relevant provisions of the Penal Code, Decree-Law and Legislative Decree, or "offensive and damaging" in accordance with the Article 8 of the Draft.
57. Moreover, neither the Penal Code, nor the Draft Law, contain exceptions regarding artistic, fictional or scientific (historic) or religious considerations, as well as journalistic /newsworthy content as necessary information to the public. For example, expressions reflecting the opinion on a religious subject or an opinion based on a belief in a religious text, as well as statements being relevant to any subject of public interest and if for reasonable grounds they are believed to be true should not be equated to illegal content.⁷⁵

⁷³ Defamation and Insult Laws in the OSCE Region: A Comparative Study (Commissioned by the OSCE Representative on Freedom of the Media), March 2017, available at <https://www.osce.org/fom/303181>.

⁷⁴ Judgment of the Constitutional Court of Italy, 22 June 2021 (https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20200609201114.pdf)

⁷⁵ Compare and contrast Art 319 (3) the Criminal Code of Canada: No person shall be convicted of an offence under subsection (2): (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument

Moreover, the UN Human Rights Committee noted that opinions that are “erroneous” and “an incorrect interpretation of past events” may not be subject to general prohibition, and any restrictions on the expression of such opinion “should not go beyond what is permitted” under par 3 Article 19 or “required under article 20” of the ICCPR⁷⁶. In the light of these and other interpretations, the denial of the historical accuracy of atrocities should not be subject to criminal penalty or other restrictions without further evaluation under the definitions and context noted above.

58. The scheme set out in the Draft Law will require web companies to make judgments that, if wrong, or if certain administrative tasks are delayed or mishandled, could result in significant financial penalties. Therefore, uncertainty in what amounts to “clearly illegal content” in the Draft Law may result in overbroad application of the restrictions, with website managers taking an overly cautious approach and removing legal content out of fear of penalties or significant burdens on resources. If the law is violated, the natural instinct will be to avoid risk and suppress speech that is, in fact, legal and valuable to public debate.
59. **It is therefore advisable to provide guidance to private actors to identify type of online content amounting to “clearly illegal” per relevant provisions of the Penal Code, the Decree-Law and the Legislative Decree, or "offensive and damaging", taking into consideration the relevant international standards.**

RECOMMENDATION A

It is recommended to revise the Draft Law with a view to:

- 1. ensure conformity of normative rules and terminology throughout the introductory note, Articles 1, 4, 5 and 8 of the Draft Law providing specific regulatory mechanisms against “clearly illegal content” and “offensive or damaging” to personal dignity information;**
- 2. clarify whether for the purpose of the Draft Law “offensive or damaging” information” should be discriminatory in nature and/or involving manifestation of hatred and/or spreading false information;**
- 3. provide guidance to private actors, in accordance with international norms, to identify type of online content that could be defined as “clearly illegal” per relevant provisions of the Penal Code, Decree-Law and Legislative Decree, or "offensive and damaging" per Article 8 of the Draft Law;**
- 4. introduce exceptions regarding artistic, fictional, scientific or religious expressions, as well as journalistic/newsworthy content.**

an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

⁷⁶ Human Rights Committee, general comment No. 34 (2011), para. 49. See also Sarah Cleveland, *Hate Speech at Home and Abroad*, in Lee C. Bollinger and Geoffrey R. Stone, eds., *The Free Speech Century* (New York, Oxford University Press, 2019). See also A/67/357, par 55.

4. THE ROLE OF WEBSITE MANAGERS AND THE PROCEDURE ON DEALING WITH ILLEGAL CONTENT

4.1. Definition of Website Manager

60. The Draft Law applies to website managers (hereafter “managers”, “web-managers”), as defined (on the basis of Article 2 of the Draft Law) in accordance with Article 1(3) of the Law No 71 of 29 May 2017 (hereafter “Cyberbullying Act”), i.e. the entities which manage the content of a website/social media by making it publicly accessible and shareable that are different from the so called “Information Society Services Providers” (i.e., mere conduit, caching and hosting providers), referred to in Articles 14, 15 and 16 of the Legislative Decree No 70 of 9 April 2003, which is the implementation of Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market.
61. Given the above, the Draft Law seems to apply to all website managers, irrespective of the number of customers and the commercial or non-commercial nature of the respective entity. At the same time, such a broad applicability and coverage of the Draft Law seems to be excessive and contrary to the considerations of the case-law of the ECtHR as to the necessity to distinguish with respect to Article 10 par 2 of the European Convention on Human Rights between “duties and responsibilities” of large professionally managed Internet news portals running on a commercial basis which publish news articles of their own and invite readers to comment on them, and other fora on the Internet where third-party comments can be disseminated⁷⁷; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby⁷⁸. Accordingly, excessive coverage of the Draft Law may impair the services of sites which are important conduits in the exchange of ideas.
62. It should also be noted that the definition of “website manager” referred to in Article 2 of the Draft Law does not address one of the crucial issues: who is the responsible party when a website, blog, or other digital forum has a presence on larger social media platforms? For instance, if a publisher posts content on a social network with a link to the publisher’s website, it is unclear whether the managerial responsibility set out in the Draft Law falls to the platform or to the publishers that post their content on the platform⁷⁹.
63. Based on the above considerations, **it is recommended to revise Articles 2 and 5 of the Draft in a way to give a more precise definition of the website manager and consider in this respect the greater impact of large Internet portals given their wide readership compared to social media platforms/blogs with a relatively small audience and thus, involving less public concern regarding the controversial nature of the comments they attract.**

⁷⁷ For example, an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum’s manager.

⁷⁸ ECtHR, case *Delfi AS. v. Estonia* (Application no. 64569/09, judgment of 10 June 2015 (GC)), paras. 115-117.

⁷⁹ It should be recalled in this context that hyperlinks are protected speech under the ECtHR case-law (see *Magyar Jeti Zrt v. Hungary* (Application no. 11257/16, judgment of 4 March 2019) (see also *GS Media v. Sanoma*, CJEU). Therefore, the hyperlink to a hateful content may be part of counter speech, i. e. the post serves the criticism of that content.

RECOMMENDATION B.

To revise Articles 2 and 5 of the Draft Law in a way to give a more precise definition of “website manager” and consider in this respect the number of customers and the commercial or non-commercial nature of the respective entity, when defining the nature of legal obligations on them, as well as to clarify cases when responsibility may be imposed on them.

4.2. Responsibilities of Website Managers and the Procedure Regarding Notification, Removal, and Blocking of Illegal Content

64. In accordance with the Draft Law, the manager has a duty to remove/block “online content that is clearly illegal” upon any reporting by anyone and to notify the postal police swiftly and in any case within 12 hours of receiving notice.
65. The verification of the allegedly “illegal” nature of the online content is left to an independent self-regulating body (hereafter “the Body”), which is to be notified by the website manager. In case online content is considered as “clearly illegal”, the removal/blocking shall take place within 24 hours from the original notification, which might be insufficient given the procedural/technical aspects. Even assuming that it is a reasonable duty of network managers to maintain a constantly available service 24/7, the required reaction of manager within 12 hours and verification of illegal content by the Body within 24 hours, may be difficult to implement in practice, especially given the duty of justification in writing. **Combined with the vagueness of some of the provisions of the Draft Law, which runs risk of error or abuse of the right by users, as well as severity of penalties (see pars 78-82 below), the Draft Law may result in an unjustified burden on a website manager.**
66. Furthermore, the Draft Law does not clearly set out the aforementioned verification process. For example, it is unclear whether the manager is still required to seek verification from the Body, in case when he/she finds content to be legal, or it falls to the citizen-requester to trigger the verification process. If the intention of the Draft in this respect is that the manager should seek the Body’s verification in any case when being notified about allegedly illegal communication by users (even if the content seems to be legal with the manager), **the Draft Law should clearly indicate this procedural aspect.** However, in that case an excessive burden could be put on the Body which might be overloaded with verification requests being invoked upon possibly abusive notifications from a vast amount of users.
67. In case the Body does not order removal of the illegal content, the Draft Law envisages a possibility of appeal to the Personal Data Protection Supervisor (hereinafter “Supervisor”), whilst the decision of the latter is subject to judicial review. At the same time it is not clear enough who has the right to appeal to the Supervisor in case of the decision not to remove: only the party that initiated the whole procedure or any user referred to in Article 5 of the Draft. The Draft Law also does not define the deadline in

this respect. **Thus, it is recommended to further elaborate the respective provisions of the Draft.**

68. Whilst acknowledging that the procedure for dealing with illegal content proposed by the Draft Law seems to be quite transparent and accessible to users, it lacks clarity as to the procedural rights of the person who posted the original content, in particular when the Body decides to remove the content, and of the manager who may disagree with the take down conclusion. Importantly in this respect, the original poster has no right to appeal to the Supervisor according to the Draft Law. Also it is not clear what happens if the Body fails to provide a decision within the deadline. **It is advisable to clarify in this respect whether a manager should be exempted from liability if the Body fails to provide decision on time or finds online content to be legal, as well as whether a manager is entitled to remove what he/she finds clearly illegal on his/her own.**
69. Article 5 of the Draft Law also charges the operating expenses of the Body to the website manager. The Draft Law is not clear however whether this obligation implies pro-rated charges (i.e. for each review) or a lump sum. Moreover, it appears that the manager would be liable for the fee even if the post is not illegal. Even in the absence of any information as to the amount of such costs in each particular case, it could potentially open the door for malicious actors to launch a takedown campaign against an unpopular website with controversial but legal content as a way to punish the website by imposing undue costs. One of the ways to **ameliorate this risk could be excusing managers from costs when they have made a good-faith decision, even if the decision is found to be wrong. Moreover, the Draft could be more specific concerning the Body's formation, composition and functioning, instead of simply leaving it to the manager to establish and finance one.** Lack of information in this respect may result in further uncertainty as different managers may have different concepts of independence and thus, divergent, conflicting or unsatisfactory solutions may emerge.
70. The Draft's proposed self-regulating verification process raises profound questions as to how the Body should interact with the algorithms in their monitoring of expression on online fora. For example, it could be worth indicating that the Body may operate an automated system under human supervision (i.e. if the algorithm indicates that there should be a removal of the content this has to be reviewed by a human being) to be able to make use of artificial intelligence to facilitate the exercise of its power. **It would be also useful to clarify whether a company that currently uses algorithms to monitor and police content should replace this algorithm with establishing the Body in accordance with the provision of the Draft Law.** One important aspect in this regard is whether such a labour-intensive process as envisaged by the Draft could be capable of tackling the sheer volume of material posted on large digital platforms in accordance with the set time-limits.
71. Finally, as a general observation, the Draft seems to have a gap in regulation with respect to the web-platforms hosted and managed abroad, as well as those offering posts in languages other than Italian (whether and how the manager and/or the Body have the obligation to ensure translation of the reported illegal materials in foreign languages?).

RECOMMENDATION C.

It is recommended to:

- 1. to consider revising tight timeframe for removing or blocking “illegal content”, while introducing effective remedies against abusive claims made to website managers;**
- 2. clarify whether a manager should be exempted of liability in case the Body fails to provide a decision within the deadline and whether the manager is entitled to remove what he/she finds clearly illegal on his/her own;**
- 3. elaborate more specific provisions concerning the Body’s formation, composition and functioning.**

4.3. Responsibilities of Website Managers to Protect Personal Dignity

72. The Draft Law (Chapter III) envisages that everyone has the right to request the removal of their own personal data shared on the internet that is considered offensive or damaging to their personal dignity, liberty, and identity. The responsible party (data controller or manager) must confirm receipt of the request within 24 hours and remove the content within 48 hours. Lack of these measures entitles the right holder to request the Supervisor who shall take action within 48 hours.
73. It should be recalled that the protection of personal dignity is a legitimate aim justifying the restriction of the right to freedom of expression under international human rights law. Further, attacks on an individual’s reputation can also interfere with the right to privacy⁸⁰. That stated, restrictions on this right must be proportionate. Laws pertaining to defamation must therefore carefully balance the right to freedom of expression with the right to reputation and private life. Importantly, where the allegations in question may contribute to a debate of legitimate public interest, the issue of the role of a free press in a democratic society must also be factored into the equation.
74. The ECtHR defined⁸¹ more precisely the scope of this right in the online sphere, as well as attempted to establish a more nuanced balance between the right to freedom of expression and the right to private life. The ECtHR outlined six criteria to be considered when balancing between the right to freedom of expression and the right to privacy: 1) whether the publication contributes to a debate of general interest; 2) how well known is the person concerned and what is the subject of the report; 3) the prior conduct of the

⁸⁰ECtHR, case *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (Application no. 17224/11, judgment of 27 June 2017 (GC)), para 79. ECtHR has found that attacks on an individual’s professional reputation, and accusing a person of being disrespectful towards a group of another ethnicity and religion was not only capable of tarnishing his/her reputation, but also of causing prejudice against him/her in both professional and social environment, so that the accusations attained the requisite level of seriousness as could harm the right to privacy under Article 8. In this respect, considerations of relevance that apply in the proportionality analysis include, among others, the comparative importance of the concrete aspects of the two rights that were at stake; the need to restrict or to protect each of them and the proportionality between the means used and the aim sought to be achieved; the nature of the offensive statements (post); the context in which the interference occurred; the extent to which the statement affected the private life (identity) rights; and the severity of the interference (see ECtHR, case *Perincek v Switzerland* (Application no. 27510/08, judgment of 15 October 2015 (GC)), para 198).

⁸¹ ECtHR, case of *Hurbain v. Belgium* (Application no. 57292/16, judgment of 22 June 2021); case of *Axel Springer v. Germany* (Application no. 39954/08, judgment of 7 February 2012).

person concerned; 4) the method of obtaining the information and its veracity; 5) the content, form and consequences of the publication; and 6) the severity of the sanction imposed.

75. Therefore, if a statement contributes to a debate of public interest, the margin of appreciation afforded to the state's laws that restrict this form of expression will be narrower. Furthermore, the ECtHR has frequently found that there is little scope under Article 10 to restrict expression with a political element.⁸² The ECtHR has repeatedly stressed the importance of a free press in a democratic society. The media perform a vital role as a “public watchdog” that is fundamental to the democratic process.⁸³ The media also perform a vital role in vindicating the public's right to receive information and ideas of public concern,⁸⁴ including those on divisive political issues.⁸⁵ Furthermore, news is a “perishable commodity”, meaning that its value depreciates rapidly as time progresses.⁸⁶ If content is wrongfully removed for even a short period of time, this may have a substantial impact on the media's important watchdog role. In this context, the Draft's silence as to the importance of freedom of expression in a democratic society, particularly political expression is problematic, notwithstanding the opening paragraph's acknowledgment of this importance. For instance, there is a potential risk under the proposed Draft that legitimate criticism of government officials may be taken down by digital platforms on the basis that it potentially harms their personal dignity.
76. Finally, it should be recalled that the Right to Be Forgotten legal paradigm adopted in various European nations and acknowledged by the case law of the ECtHR⁸⁷ has recognized an exception for newsworthiness and/or journalism. The Court of Justice of the European Union (hereafter “ECJ”) in case of *Google Spain SL and Google Inc*⁸⁸ established and defined the right to be forgotten, which lacked a legal basis until it was codified in Article 17 of the General Data Protection Regulation 2018 (GDPR). The above exception is an important protection for free expression and the free flow of needed information to the public. Unless there is a recognized exception for newsworthy content, nothing prevents the politician or other public figures from effectively scrubbing public media of accounts of his/her misdeeds or other information that is relevant for the public, and democracy in particular – an outcome that would run counter to the best interests of the public.
77. **It is, therefore, recommended to revise Chapter III in a way to include better safeguards for the freedom of speech.**

⁸² ECtHR, case of *Wingrove v UK* (Application no. 17419/90, judgment of 25 November 1996), para. 58.

⁸³ ECtHR, case of *Sunday Times v UK* (Application no. 6538/74, judgment of 26 April 1979).

⁸⁴ ECtHR, case of *News Verlags GmbH and Co KG v Austria* (Application no. 31457/96, judgment of 11 April 2000), para.56.

⁸⁵ ECtHR, case of *Lingens v Austria* (Application no. 9815/82, judgment of 8 July 1986), para. 42.

⁸⁶ ECtHR, case of *Observer and Guardian v UK* (Application no 13585/88, judgment of 26 November 1991) para. 60.

⁸⁷ See ECtHR, case of *Hurbain v. Belgium* (Application no. 57292/16, judgment of 22 June 2021; case of *M.L. and W.W. v. Germany* (Applications nos. 60798/10 and 65599/10, judgment of 28 September 2018).

⁸⁸ Court of Justice of the European Union Judgment, 2014; available at: (<https://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=35163103>)

RECOMMENDATION D.

To revise Chapter III in a way to include better safeguards for the freedom of speech.

5. FINANCIAL PENALTIES

78. The Draft Law (Article 7(3)-(5)) specifies the administrative financial penalties that can be imposed on managers violating the requirements regarding notification, shutting down, removal, or blocking of illegal content, as well as preparation of reports on notification management. The amount of the penalty is proportional to the seriousness of the violation. In particular, the managers are subject to an administrative financial penalty from Euro 50,000 to Euro 500,000 if they do not prepare or publish the biannual report described in Article 6 of the Draft Law (in case if 100 notifications of illegal content are made within the calendar year) or if they fail to prepare or publish it in the manner or time limit required. The same penalty applies where there is a violation of the requirement to save the illegal content for 180 days from the date of removal for evidentiary purposes. Unless the act constitutes a crime, managers are subject to an administrative financial penalty from Euro 500,000 to Euro 3,000,000 if they are in violation of the requirements on notification, verification and blocking of the illegal content. Unless the act constitutes a crime, managers can be charged with administrative financial penalty from Euro 3,000,000 to Euro 5,000,000 if they violate the requirements regarding removing/blocking of illegal content. Finally, failure of the manager to remove the offensive data or to have an adequate complaint/removal system as described in Chapter III of the Draft results in a penalty from Euro 500,000 to Euro 5,000,000 based on the nature, seriousness, and frequency of the violation.
79. It is to be noted that the size of the financial penalties will likely have a chilling effect on websites, especially given a certain vagueness of the respective Draft Law's provisions on the issue of what should amount to "illegal content" (see pars 48-52 above) and offensive and damaging for personal dignity information (see pars 53-54 above), as well as the lack of the guidance for web-managers to make decisions on the said issues in case of uncertainty about the nature of the respective content, whether or not it could be defined as "illegal", per relevant provisions of the Penal Code, Decree-Law and Legislative Decree, or "offensive and damaging" per Article 8 of the Draft Law.
80. While the Draft Law envisages the possibility to consider ameliorating factors and impose a lower penalty, even the lowest permitted amount is substantial, especially in the case of a website that has made only an administrative error, such as delaying a takedown. While the idea behind this regulatory mechanism could be that a website simply needs to have better administrative process in place to avoid penalties, it is easy to imagine that a small website with limited resources will not be able to survive the penalty. Thus, the Draft Law may have a chilling effect and result in excessive self-censorship.

81. Furthermore, it should be taken into account that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages. It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public, including whether the respective web-resource was generally highly visited, as well as the actual number of users who had accessed that resource during the period when the specific publication/comment remained available.⁸⁹
82. **Thus, it is recommended to revise the scale of financial sanctions, taking into consideration the potential impact of the information published online, and given the size of the readership/users of the online platform.**

RECOMMENDATION E.

to revise the scale of financial sanctions, taking into consideration the potential impact of the information published online, and given the size of the readership/users of the online platform.

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