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The European legal framework on hate speech, blasphemy and its interaction with freedom of expression

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**DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE
UNION**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

The European legal framework on hate speech, blasphemy and its interaction with freedom of expression

STUDY

Abstract

At the request of the LIBE committee, this study provides an overview of the legal framework applicable to hate speech and hate crime on the one hand and to blasphemy and religious insult on the other hand. It also evaluates the effectiveness of existing legislation in selected Member States and explores opportunities to strengthen the current EU legal framework, whilst fully respecting the fundamental rights of freedom of expression and freedom of thought, conscience and religion. The study also provides the European Parliament with guidelines on dealing with hate speech within the EU institutions.

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COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

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LIST OF ABBREVIATIONS

- AA** Appointing Authority
- AC** Advisory Committee
- AGCOM** National Communication Authority
- APAs** Accredited Parliamentary Assistants
- AMSD** Audiovisual Media Services Directive
- CC** Criminal Code
- CEFRD** Convention on the Elimination of All Forms of Racial Discrimination
- CFD** Council Framework Decision 2008/913/JHA
- CJEU** Court of Justice of the European Union
- CoE** Council of Europe
- DACoRD** Documentary and Advisory Centre on Racial Discrimination
- DB** Disciplinary Board
- DG** Directorate General
- EC** European Commission
- ECB** European Central Bank
- ECD** Electronic Commerce Directive
- ECHR** European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECRI** European Commission against Racism and Intolerance
- ECTHR** European Court of Human Rights
- ENAR** European Network Against Racism
- EP** European Parliament
- ESR** National Radio and Television Council

- EU** European Union
- FRA** European Union Agency for Fundamental Rights
- IAP** Institute for Commercial Advertisement
- ICCPR** International Covenant on Civil and Political Rights
- IDOC** Investigation and Disciplinary Office
- ILGA** International Lesbian, Gay, Bisexual, Trans and Intersex Association
- LIBE** Committee on Civil Liberties, Justice and Home Affairs
- LGBTI** Lesbian, gay, bisexual, transgender and intersex
- MEP** Member of the European Parliament
- MEPs** Members of the European Parliament
- NGO** Non-Governmental Organisation
- ODIHR** Office for Democratic Institutions and Human Rights
- OSCE** Organisation for Security and Co-Operation in Europe
- RoP** European Parliament Rules of Procedure
- RVRN** Racist Violence Recording Network
- TFEU** Treaty on the Functioning of the European Union
- UK** United Kingdom
- UN** United Nations

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EXECUTIVE SUMMARY

Hate speech and hate crime incidents, including those committed online, are **on the rise** in Europe¹, despite the existence of a robust legal framework. This study provides an **overview of the legal framework** applicable to hate speech and hate crime, as well as to blasphemy and religious insult. It also evaluates the **effectiveness of existing legislation** in selected Member States and explores **opportunities to strengthen** the current **EU legal framework**, whilst fully respecting the fundamental rights of freedom of expression and freedom of thought, conscience and religion. The study also provides the European Parliament with **guidelines on dealing with hate speech** within the EU institutions.

Legal framework on hate speech and hate crime

At the EU level the legal framework includes *inter alia*: **Council Framework Decision 2008/913/JHA (CFD)**² (requiring Member States to penalise the most severe forms of hate speech and hate crime); and the **Audiovisual Media Services (AMSD)**³ and **Electronic Commerce Directives (ECD)**⁴ (controlling racist and xenophobic behaviours in the media and over the internet). It is important to view the EU measures aimed at addressing racism and xenophobia in the context of the broader EU legislative framework. Instruments aimed at supporting victims of crime and antidiscrimination measures are of particular relevance in this respect. These include Directive 2012/29/EU⁵ (Victims' Support Directive) and the EU's equality and anti-discrimination legislation (e.g. Directive 2000/43/EC⁶ (the Racial Equality Directive)). The Racial Equality Directive is complemented by other antidiscrimination legislative instruments such as Directive 2000/78/EC⁷ (the Employment Equality Directive) and Directives 2004/113/EC and 2006/54/EC⁸ (the Equal

¹ European Commission against Racism and Intolerance (ECRI), 'Annual report on ECRI's activities covering the period from 01 January to 31 December 2014', (2014), available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual%20report%202014.pdf.

² European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law', COM(2014)27 final, (2014), available at http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AMSD), OJ L 95, 15 April 2010, p. 1–24, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

⁴ 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 (ECD), OJ L 178, 17.7.2000, p. 1–16., available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031>.

⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victim Support Directive), OJ L 315, 14.11.2012, p. 57–73, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443106283046&uri=CELEX:32012L0029>.

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), OJ L 180, 19.7.2000, p. 22–26, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443106394309&uri=CELEX:32000L0043>.

⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ L 303, 2.12.2000, p. 16–22, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443106484156&uri=CELEX:32000L0078>.

⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443106574866&uri=CELEX:32004L0113> and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36, available at: http://eur-lex.europa.eu/search.html?DTN=0054&DTA=2006&qid=1443106705146&DB_TYPE_OF_ACT=directive&CASE_LA

Treatment Directives). The EU also provides its support in practice by financing projects aimed *inter alia* at fighting hate speech and hate crime (for example under the Europe for Citizens Programme 2014-2020⁹ or the Rights, Equality and Citizenship Programme 2014-2020¹⁰).

The current study, developed on the basis of information gathered through **seven national studies** (Belgium, Germany, Greece, France, Hungary, the Netherlands and Sweden), has revealed some major **drawbacks** of the current legal framework applicable to hate speech and hate crime:

Shortcomings related to the **transposition of the CFD** include its incomplete transposition. Gaps in transposition mainly arise in connection with Article 1(1)(c) and 1(1)(d) of the CFD requiring the penalisation of the condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes and of Nazi crimes, respectively. To ensure effective protection against the most severe forms of hate speech and hate crime, it is recommended that the European Commission (EC) initiates infringement proceedings against Member States failing to transpose the CFD. Another issue derives from the transposition of the **protected characteristics** (grounds upon which hate speech and hate crime are prohibited) set out in the CFD, the AMSD and the ECD. As a general rule, Member States' legislation refers to characteristics beyond those required by the CFD, the AMSD and the ECD. Member States have not taken a harmonised approach in this respect, thus the list of protected characteristics varies from Member State to Member State. Therefore an ambitious review of existing EU law might be necessary.

The use in practice of the CFD, the AMSD and the ECD is hindered by similar factors. Member States fail to collect sufficient **reliable data** on hate speech and hate crime incidents, which hinders the monitoring and assessment of the scale of the problem. This mainly results from the fact that data collection related competences are often divided between more than one authority, whose data collection efforts are not harmonised. To overcome the existing data gap, Member States with less developed or harmonised data collection methods could be encouraged to learn from Member States with good practices in place. The **underreporting** of hate speech and hate crime incidents by victims also hinders the understanding of the scale of the problem. Member States could be encouraged to raise awareness of the means of reporting incidents or to facilitate reporting through alternative means, such as anonymously, through the internet or victim support organisations.

The absence of **shared understanding** by practitioners of the **applicable legal provisions** seems to be an issue across the globe. The provision of clear guidance to practitioners, for example through awareness raising materials or training programmes, is therefore needed. These tools should provide practitioners with the skills necessary to duly investigate, prosecute and adjudicate hate speech and hate crime incidents.

In addition, applicable rules often fail to cover the **liability of operators for the publication of hate content** by bloggers or users of social media sites. The liability of bloggers and users of websites is often regulated; however these individuals are sometimes difficult to trace back, moreover it is often difficult to prove their motivation. The situation

[W_SUMMARY=false&DTS_DOM=ALL&typeOfActStatus=DIRECTIVE&type=advanced&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL.](#)

⁹ European Commission (EC) website, Europe for Citizens Programme 2014-2020, available at: http://ec.europa.eu/citizenship/about-the-europe-for-citizens-programme/future-programme-2014-2020/index_en.htm.

¹⁰ EC website, Rights, Equality and Citizenship Programme 2014-2020, available at: http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm.

is an issue of concern given that internet remains a critical tool for the distribution of racist and hateful propaganda. To overcome the potential impunity of offenders it is recommended to regulate the liability of operators, thereby encouraging them to better control the content of blogs and social media websites. Alternatively Member States could reinforce their efforts of monitoring the content of websites. This however, should be done in a manner ensuring the sufficient respect of freedom of expression.

In most Member States, no concerns have arisen regarding the **unnecessary limitation of freedom of expression by hate speech legislation**, or vice versa. France constitutes an exception in this respect where debates over the borderline between the protection of human dignity and the freedom of expression have recently reignited, when the French Government announced its new campaign against online hate speech. Some considered the French measures as too restrictive of the freedom of expression¹¹. Guidance on where the borderline stands between the two fundamental rights is found in the case law of the European Courts of Human Rights (ECtHR). The ECtHR has ruled that in a democratic society, which is based on pluralism, tolerance and broadmindedness, freedom of expression should be seen as a right extending also to information and ideas that might offend, shock or disturb others. Any limitation of the freedom of expression must be proportionate to the legitimate aim pursued¹². Member States could also be encouraged to sign and ratify the Council of Europe's (CoE) Additional Protocol to the Convention of Cybercrime¹³, which gives due consideration to freedom of expression, while requiring the criminalisation of racist and xenophobic acts committed online.

Finally, the absence of one **comprehensive policy** dealing with hate speech and hate crime is itself a matter that should be addressed. This could be addressed through the adoption of a comprehensive strategy for fighting hate speech and hate crime. The Strategy could define concrete policy goals for the Member States, targeting the most severe forms of hate speech and hate crime, including online crime. These policy goals could be set in light of the most important factors hindering the application of hate speech and hate crime legislation in practice. These factors, as explained in details above, include *inter alia* the insufficient transposition of applicable rules, the inadequate knowledge of practitioners of the rules applicable to hate speech and hate crime, the insufficient data collection mechanisms in place and the existence of severe underreporting. The Strategy should ensure the sufficient respect of freedom of expression and acknowledge that hate speech and hate crime are present in all areas of life (e.g. politics, media, employment).

Legal framework on blasphemy and religious insult

While being very active in the fight against hate speech and hate crime, the EU did not adopt specific instruments with regard to blasphemy and/or religious insult. Blasphemy laws are rarely used and blasphemy is rarely prosecuted in EU Member States. However, the **existence of these laws** may still have a **negative effect on freedom of expression**. Increasing attention has been reserved at international and EU levels to the assessment of possible clashes between blasphemy and religious insult laws and freedom of expression and freedom of thought, conscience and religion.

¹¹ The Guardian, 'France launches major anti-racism and hate speech campaign', (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>, and Joseph Bamat 'France prepares for war against online hate speech', (2015) available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

¹² ECtHR, *Handy Side v. UK*, application no. 5493/72, 7 December 1976, available at: [http://hudoc.echr.coe.int/eng?i=001-57499#{"itemid":\["001-57499"\]}](http://hudoc.echr.coe.int/eng?i=001-57499#{)

¹³ Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.

The current study, developed on the basis of information gathered through **eight national studies** (Austria, Denmark, Finland, Germany, Greece, Ireland, Italy and Poland) revealed that offence **provisions applicable to blasphemy/religious insult** often **overlap with hate speech provisions**, thereby calling into question the necessity to separately regulate blasphemy/religious insult. The study concludes that Member States should assess whether the need to protect public order by protecting individuals and groups belonging to minority religions could actually be better satisfied by reinforcing or duly implementing the existing national legislation on hate speech.

The use of applicable provisions in practice is also hindered by the **absence of clear definitions** of one or more crucial elements of the offence provisions (e.g. religious feelings, religion or religious denomination, lack of respect, disparagement or malice) or by the fact that the offence provisions might have a **'chilling effect' on the expression of opinions** via public debates and art performances. This effect might manifest in censorship and self-censorship of artists. Due to the provisions' possible clashes with constitutionally guaranteed principles and in view of the diversity of religious beliefs in Europe and of the democratic principle of the separation of state and religion, it seems **necessary to reconsider the criminalisation of blasphemy/religious insult**.

In some Member States, media self-regulations specifically address blasphemy/religious insult. However, their scope of application and effect vary considerably. The national studies revealed that **self-regulations** could potentially **better protect freedom of expression and freedom of religion, conscience and thought** (also with respect to atheist or agnostic groups) than criminal law rules, therefore the adoption of such rules should be promoted.

Press complaints bodies, media ombudspersons or other self-regulatory bodies dealing with blasphemy and or religious insults are not present in all Member States. Such bodies **should be created**, where they do not yet exist, and should discuss possible remedies for offences to religion.

Guidelines on addressing hate speech within the EU institutions

The study provides an overview of the legal framework that would apply to hate speech offences committed by officials of EU institutions and Members of the European Parliament and Commission and suggests ways to effectively deal with such occurrences.

Although general provisions ban the use of offensive language including insulting and/or defamatory remarks there is **no provision specifically tackling hate speech** within the EU institutions. Therefore, it is recommended that the EU institutions consider introducing an explicit reference to hate speech in the Staff Regulations and Annex IX of the said Regulations as well in all pertinent legal standards. Additionally, detailed standards of conduct of officials of EU institutions and Members of the Commission and Parliament, including in relation to the use of language, should be defined in the form of Guidelines.

Different liability regimes apply to hate speech offences depending on whether the offence is perpetrated by officials or Members of the Parliament and Commission. Members of the European Parliament enjoy absolute immunity for votes cast and opinions expressed in the performance of their duties (Article 8 of the Protocol on the Privileges and Immunities of the European Union). Absolute immunity may not be waived or renounced and applies even after the end of the mandate. Therefore, MEPs may not be subject to prosecution for hate speech if the statements in question have been made in the

performance of their duties . As regards statements which are not linked to parliamentary duties and thus fall outside the scope of Article 8 of the Protocol, Article 9 of the Protocol granting relative immunity comes into play. The scope of relative immunity however partly depends on national law. Relative immunity may be waived by the European Parliament. The case-law of the Court of Justice (CJEU) clarifies what amounts to an exercise of a Member's duties. It is recommended that interpretations of the scope of absolute immunity ensure a balance between the freedom of expression of Members of the European Parliament and the fundamental rights of citizens (e.g. right to access to justice) who become victims of insulting statements.

Stakeholders consulted indicated that **reactions** to hate speech incidents are **often weak** and the **sanctions** applied in practice are **low**. Existing rules should be reviewed to ensure that sanctions are sufficiently effective, dissuasive and proportionate to tackle hate speech offences. EU institutions could qualify hate speech offences as 'serious' cases of misconduct in the Staff Regulations and Annex IX of the said Regulations.

1. INTRODUCTION

1.1. Background

The beginning of 2015 was marked by a string of terrorist attacks. On 7 January, 11 people were killed in the Charlie Hebdo shooting in France, and on 15 February a terrorist attack hit the main synagogue of the Jewish community in Copenhagen, leaving one person dead and two wounded. Some attempted attacks were also reported in Belgium. In the aftermath of these events, evidence shows¹⁴ that negative sentiments against certain groups, in particular against Jewish people and Muslims, have escalated.

It is claimed that legal measures available to fight hate speech and hate crime against certain groups are inefficient. As an example, a recent report of the European Commission on the transposition and implementation of Council Framework Decision 2008/913/JHA¹⁵ (CFD), which Decision provides criminal law protection against hate speech and hate crime, notes that the transposition of the provisions set out therein is often incomplete and/or incorrect. The same report highlights that the implementation of the CFD is hindered by various factors in practice, including practitioners' insufficient knowledge of the relevant legislation. A recent public consultation preceding the European Commission's Annual Colloquium on Fundamental Rights¹⁶ also revealed that most stakeholders active in the field find the transposition and implementation of legislation applicable to discrimination, hate crime and hate speech inefficient and call for its reinforcement¹⁷.

Despite the existence of potential issues with the currently applicable legal framework, there is no consensus regarding the way forward. Concerns mainly arise from the potential limitations of some fundamental rights, and in particular of the fundamental rights of freedom of expression and freedom of thought, conscience and religion, that might result from any potential responses to hate speech and hate crime.

Such concerns have arisen in connection with internet and social media in particular. On the one hand these are seen as important fora for expressing opinions freely, whereas on the other hand evidence shows that these platforms provide easy support for the proliferation of hate speech and hate crime. In the aftermath of the recent terrorist attacks, some Member States, such as France, took a radical stand point in this respect by announcing the possible adoption of stricter laws on online hate speech, allowing the authorities to for example shut down offending websites¹⁸. In other Member States, concerns have arisen about the further radicalisation of applicable legislation, taking into account the potential clashes thereof with some fundamental rights. Moreover, non-

¹⁴ Examples of incidents against these communities have been highlighted by the Fundamental Rights Agency of the European Union (FRA) in the following report, 'Reactions to the Paris attacks in the EU: fundamental rights considerations' (2015), available at http://fra.europa.eu/sites/default/files/fra-2015-paper-01-2015-post-paris-attacks-fundamental-rights-considerations-0_en.pdf.

¹⁵ EC, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law', COM(2014)27 final, (2014), available at http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

¹⁶ The Annual Colloquium on Fundamental Rights is called 'Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe'. The Colloquium will take place on 1-2 October 2015. More information is available at: http://ec.europa.eu/justice/events/colloquium-fundamental-rights-2015/index_en.htm.

¹⁷ EC's Directorate-General (DG) Justice and Consumers, 'Public Summary Report', (2015) available at: http://ec.europa.eu/justice/events/colloquium-fundamental-rights-2015/files/colloquium_public_consultation_summary_web.pdf.

¹⁸ Joseph Bamat, 'France prepares for war against online hate speech', (2015), available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira/>.

governmental organisations (NGOs) such as Amnesty International, expressed concerns that Member States might rush into measures that impose restrictions that impact on the right to freedom of expression and other fundamental rights¹⁹.

Other concerns were pertinent to the existence of blasphemy laws in some of the EU Member States. As recalled by, for example, the Council of the European Union's Guidelines on the promotion and protection of freedom of religion and belief²⁰, which is mainly used by the European Union (EU) in its external relations, 'laws that criminalise blasphemy [...] can have serious inhibiting effect on freedom of expression and on freedom of belief'. Therefore the Guidelines recommend the decriminalisation of such offences. The Venice Commission²¹ and the Parliamentary Assembly of the Council of Europe²² have also recommended the abolition of provisions penalising blasphemy and religious insult, which latter offence is considered as similar to blasphemy. Both organisations argued that decriminalisation is necessary in view of Articles 10 (freedom of expression) and 9 (freedom of thought, conscience and religion) of the European Convention of Human Rights²³, which are mirrored in Articles 11 and 10 of the EU Charter of Fundamental Rights²⁴. Whereas in some Member States, such as Austria and Ireland²⁵, where such provisions still exist, debates are ongoing on the decriminalisation of existing laws, in other Member States, such as Denmark, debates concluded that provisions penalising blasphemy should remain in force²⁶.

In addition, concerns have also arisen that internal mechanisms currently in place within the EU institutions fail to address occurrences of hate speech effectively. A recent report of the European Network Against Racism (ENAR)²⁷ suggests that during the 2014 electoral campaign for the European elections, 42 hate speech incidents were reported. The report claims that out of the persons who committed these incidents, five are currently Members of the European Parliament (MEPs)²⁸. Estimates also suggest that over 10% of all MEPs are from parties propagating racist and/or xenophobic ideas²⁹. Despite these unsettling developments, the ENAR report notes that existing mechanisms within the EU institutions fail to effectively monitor and sanction hate speech³⁰.

¹⁹ Amnesty International, 'Gagging in the wake of Charlie Hebdo', (2015), available at: <https://www.amnesty.org/latest/news/2015/01/gagging-in-the-wake-of-charlie-hebdo/>.

²⁰ Council of the European Union, 'Guidelines on the promotion and protection of freedom of religion and belief', (2013), available at: http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_%28june_24_2013_fac%29.pdf.

²¹ Study no. 406/2006 of the Venice Commission, 'Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred', doc. CDL-AD(2008)026, 23 October 2008, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e).

²² CoE Recommendation 1805 'Blasphemy, religious insults and hate speech against persons on grounds of their religion', (2007), available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1805.htm>.

²³ European Convention of Human Rights (ECHR), available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁴ Charter of Fundamental Rights of the European Union, 2010/C 83/02, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>.

²⁵ International Press Institute, 'In EU, calls to repeal blasphemy laws grow after Paris attacks', (2015) available at: <http://www.freemedia.at/newssview/article/in-eu-calls-to-repeal-blasphemy-laws-grow-after-paris-attacks.html>.

²⁶ 19th Meeting, 28th Regular Session of Human Rights Council, available at: <http://webtv.un.org/meetings-events/human-rights-council/watch/id-contd-sr-on-religion-19th-meeting-28th-regular-session-of-human-rights-council/4102796729001>.

²⁷ ENAR, 'How to combat hate speech in the EU?' (2014), available at: <http://www.enargywebzine.eu/spip.php?article377>.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

1.2. Objectives and roadmap

This study aims to provide **an overview and analysis of the legal framework** applicable to hate speech and hate crime on the one hand and to blasphemy and/or religious insult on the other hand, throughout the EU by evaluating the effectiveness of existing legislation in selected Member States and exploring opportunities to strengthen the current EU legal framework. Crimes committed via or by the media might have a significant social impact, given the potentially large number of persons reached by the media or targeted by the crime. Considering this, the description and analysis of the applicable regulatory framework also extend to rules regulating the liability of the media for publishing hate crime, hate speech, blasphemy and/or religious insult. The study also aims to **map any inefficiencies** hindering the application of the legislation or rules identified. Moreover it examines decisions of higher courts (such as constitutional courts) to assess the interactions and/or conflicts of existing rules on hate speech and hate crime with the freedom of expression and of rules on blasphemy and/or religious insult with the freedom of expression and freedom of thought, conscience and religion. The interaction of the different aspects of the legal framework is a key consideration in the development of **recommendations** on the possible improvement of the current framework, as part of the study. In addition, the study aims to provide the European Parliament with **guidelines** on dealing with hate speech within the EU institutions. To this end, the study describes the rules, procedures and mechanisms in place within the EU institutions and assesses any potential factors hindering their application. As part of the guidelines, recommendations aimed at addressing existing inefficiencies and improving the applicable framework, are put forward.

In line with the objectives, the Study is structured as follows:

- **Section 2:** Description of methodological considerations.
- **Section 3:** Description of the EU and international legal framework regulating hate speech and hate crime on the one hand and blasphemy and/or religious insult on the other hand.
- **Section 4:** Description and evaluation of the national legal framework regulating hate speech and hate crime and of rules regulating publishers' responsibility for such crimes. Recommendations on ways to improve the current framework, with particular attention given to the relationship of the current framework with freedom of expression, as well as the necessity of extending the scope of the current EU criminal law on racism and xenophobia to all forms of hate crime and bias motive, including *inter alia* to sexual orientation, gender identity and disability.
- **Section 5:** Description and evaluation of the national legal framework regulating blasphemy and/or religious insult and of the rules regulating publishers' responsibility for such crimes. Recommendations on the necessity of regulating blasphemy and/or religious insult and on potential ways to improve the current frameworks, with particular attention given to the relationship of the current framework with freedom of thought, conscience and religion.
- **Section 6:** Guidelines on handling hate speech within the EU institutions, including a description of existing rules, mechanisms and procedures and the assessment of their effectiveness. Recommendations related to the potential improvement of the currently existing framework.

2. METHODOLOGY FOR THE STUDY

As described under Section 1, the study aims to map the Member States' legislative responses to address hate speech and hate crime, blasphemy and/or religious insult, evaluate their effectiveness and put forward recommendations for improving the systems currently in place. To achieve this objective, national studies were prepared by a team of national experts, for a selection of Member States.

Section 2.1 below describes:

- The scope of the national level research;
- The considerations behind the selection of Member States for the national level research;
- The methodological considerations for the national level research.

The study also aims to map the current legal standards on hate speech within all EU institutions, to detect any gaps and inefficiencies of the standards and to put forward recommendations on how to best deal with incidents of hate speech. In line with the objective, the Legal Research Team carried out research.

Section 2.2 below describes:

- The scope of the guidelines;
- The methodological considerations used while completing the guidelines.

2.1. Methodology for national level research

2.1.1. Scope of national level research

As part of the study, 15 national studies were prepared: seven mapping and evaluating Member States' legislation on hate speech and hate crime and eight covering and assessing the Member States' legislation on blasphemy and religious insult.

Reference to the Member States covered is provided in the box below:

<p style="text-align: center;">Hate speech and hate crime Belgium, France, Germany, Greece, Hungary, Sweden and the Netherlands</p> <p style="text-align: center;">Blasphemy and/or religious insult Austria, Denmark, Finland, Germany, Greece, Ireland, Italy and Poland</p>
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The **national studies on hate speech and hate crime**, largely, but not exclusively focused on the description and evaluation of responses that the Member States had developed in line with existing EU law. Hate speech and hate crime are behaviours which, as described under Section 3, are extensively regulated by EU law and therefore should also be regulated by Member States' legislation. The national studies mapped and assessed the effectiveness of national legislation penalising the behaviours set out in Articles 1(1)(a)-(d) and 4 of the CFD, and the national legislation transposing Article 6 of the Audiovisual Media Services Directive (AMSD) and Articles 3(2) and 3(4)(a)(i) of the Electronic Commerce Directive (ECD).

The national studies also mapped and evaluated the framework regulating the responsibility of the media for publishing hate speech and hate crime.

The **national studies on blasphemy and/or religious insult** described and evaluated the national legal framework applicable to the said behaviours and the rules regulating the media's liability.

As part of the evaluation, the national studies described and evaluated the relationship of the existing frameworks with certain fundamental rights.

2.1.2. Selection of Member States

The Member States referred to above were carefully selected on the basis of desk research and in consultation with the Senior Experts involved in the study and the European Parliament (Committee on Civil Liberties, Justice and Home Affairs (LIBE)/Policy Department for Citizens' Rights and Constitutional Affairs). While selecting the Member States, due consideration was given to the need to:

- Choose Member States with national legislation in place on hate speech and hate crime on the one hand and blasphemy and/or religious insult on the other hand;
- Ensure a geographical balance between the Member States chosen;
- Ensure the coverage of a diversity of legal systems, thus covering Member States with both common and civil law systems;
- Select Member States where national legislation has recently been amended or is planned to be amended;
- Select Member States where hate speech and hate crime as well as blasphemy and/or religious insult incidents are more present or where the national context is such that incidents are more likely to occur.

Desk research on **hate speech and hate crime** mainly focused on three reports, one published by the European Commission and two by FRA.

The European Commission's report provides insight into the transposition of the CFD³¹, which as described under Section 3 of this report, provides a common criminal law approach to certain forms of hate speech and hate crime by requiring the penalisation of certain offences. As set out in the report, the level of transposition differs depending on the offence provision concerned. Most of the Member States transposed Article 1(1)(a) and (b) of the CFD, whereas the criminal conducts referred to under Article 1(1)(c) and (d) are not criminalised in a large number of Member States. For example, in 13 Member States³² there are no criminal law provisions governing the conducts set out in Article 1(1)(c) of the CFD, whereas in 15 Member States³³ the criminal conduct set out in Article 1(1)(d) is not penalised. The final list referred to above aimed to include Member States, such as France, where national legislation reflects all offence provisions contained in the CFD and Member States which do not penalise all criminal conducts contained therein.

³¹ EC, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law', COM(2014)27 final, (2014) available at: http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

³² Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Ireland, Hungary, Netherlands, Austria, Finland, Sweden and the UK.

³³ Bulgaria, Denmark, Estonia, Greece, Ireland, Spain, Croatia, Italy, Spain, Croatia, Italy, Latvia, Malta, Netherlands, Portugal, Finland, Sweden and the UK.

In addition, a recent FRA report containing both quantitative and qualitative information on hate crime was consulted³⁴. The report *inter alia* contains data on the number of hate crime incidents in all Member States, with a note that due to differences in data collection methods used by the Member States, existing data do not ensure full comparability. On the basis of data contained in the FRA report, it seems that hate crime incidents are common in Belgium, France, the Netherlands, Finland and Sweden.

To ensure further comparability, a recent FRA study reporting *inter alia* on the number of hate crime incidents in the aftermath of the Paris terrorist attacks was also consulted³⁵. The report highlights the increasing number of incidents in France, Belgium and Germany.

As part of the desk research, information was also collected on factors determining the prevalence of hate speech and hate crime. Among the factors studied, particular attention was paid to the emergence of radical voices in the political era. The research revealed the existence of radical voices in for example Greece, France, Hungary, Sweden, the Netherlands, Austria and the United Kingdom (UK)³⁶.

Regarding **blasphemy**, the desk research revealed legislation on blasphemy and/or religious insult in only a limited number of Member States, including Austria, Cyprus, Denmark, Finland, the region of Alsace-Moselle in France, Germany, Greece, Ireland, Italy, Malta, Poland, Spain and Northern Ireland of the UK³⁷.

A comparative report³⁸ assessing the legislative framework and practices of the Member States showed differences between the Member States. The main differences manifest themselves *inter alia* in the type and level of sanctions imposed by the Member States against the perpetrators. In this respect, Italy and Ireland seem to be the only two Member States where the sanction of imprisonment can be imposed on perpetrators.

Literature noting any planned or recent legislative developments was also consulted. This revealed on-going debates about the abolition of legislation on blasphemy and/or religious insult in Austria and Ireland³⁹ and a recent decision from Denmark on keeping the legislation on blasphemy in force⁴⁰.

³⁴ FRA, 'Making hate crime visible in the European Union: acknowledging victims' rights', (2012), available at: <http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>.

³⁵ FRA, 'Reactions to the Paris attacks in the EU: fundamental rights considerations', (2015), available at: http://fra.europa.eu/sites/default/files/fra-2015-paper-01-2015-post-paris-attacks-fundamental-rights-considerations-0_en.pdf.

³⁶ Parliament magazine, 'Alarming' rise in support for far-right European parties', (2014) available at: <https://www.theparliamentmagazine.eu/articles/news/alarming-rise-support-far-right-european-parties> and Athena Institute, 'Domestic Extremist Groups – Europe – the Map', (2010), available at: <http://www.athenaintezet.hu/en/europe/map>.

³⁷ Venice Commission, 'Blasphemy, insult and hatred: finding answers in a democratic society', (2010), available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e> and International Press Institute, 'Out of Balance – Report on Defamation Law', (2015), available at: http://www.freemedia.at/fileadmin/user_upload/Chart_H_Blasphemy_and_Religious_Insult.pdf; and <https://ec.europa.eu/digital-agenda/en/news/out-balance-%E2%80%93-report-defamation-law>.

³⁸ International Press Institute, 'Out of Balance – Report on Defamation Law', (2015), available at: http://www.freemedia.at/fileadmin/user_upload/Chart_H_Blasphemy_and_Religious_Insult.pdf; and <https://ec.europa.eu/digital-agenda/en/news/out-balance-%E2%80%93-report-defamation-law>.

³⁹ International Press Institute, 'In EU, calls for blasphemy laws grown after Paris attacks', (2015), available at: <http://www.freemedia.at/newssview/article/in-eu-calls-to-repeal-blasphemy-laws-grown-after-paris-attacks.html>.

⁴⁰ 19th Meeting, 28th Regular Session of Human Rights Council, (2015), available at: <http://webtv.un.org/meetings-events/human-rights-council/watch/id-contd-sr-on-religion-19th-meeting-28th-regular-session-of-human-rights-council/4102796729001>.

2.1.3. Research methods

The **national experts** were requested to complete **national studies** on the basis of detailed methodological guidance provided in national study and stakeholder consultation templates. The national studies aimed to:

- Identify and analyse the applicable national legislation on hate speech, hate crime, blasphemy and/or religious insult and the rules regulating the liability of the media;
- Assess the effectiveness of the legislation and rules identified;
- Analyse the relationship of the legislation and rules identified with the fundamental rights of freedom expression in the case of hate speech and hate crime and with the freedom of expression and freedom of thought, conscience and religion in the case of blasphemy and/or religious insult.

The national experts based their findings on **desk research** and on **interviews** with national level stakeholders.

As part of the desk research, the national experts were asked to consult the applicable legislation; rules regulating the liability of the media, which extends to media self-regulations; case law; academic articles and any other reports prepared on the topic.

To verify and complete the findings of the desk research and in particular to ensure a clear understanding of the factors hindering the application of the rules identified in practice, the national experts interviewed national level stakeholders. These included judges, prosecutors, lawyers, academics, representatives of the Police, NGOs and competent media authorities.

2.2. Methodology for guidelines

2.2.1. Scope of guidelines

The primary focus of the **Guidelines on addressing hate speech within the EU institutions** is on the rules applicable to MEPs taking into account their immunity status and to EU officials. To a lesser extent and in so far as necessary for the comparison with the rules applicable to the EP, rules regulating the responsibility of officials and/or members of other EU institutions and in particular of the European Commission are also assessed.

Since none of the rules analysed refer to hate speech offences, the study focuses on general rules applicable to cases of non-compliance with the required standards of conduct as well as on rules on related conduct such as discrimination and harassment, which are explicitly covered by the rules analysed.

In particular, the Guidelines focus on:

- What rules, procedures and mechanisms are in place to monitor and/or sanction hate speech committed by MEPs, EU officials and/or members of other EU institutions including in particular the European Commission.
- Whether these rules, procedures and mechanisms are comprehensive and effective in monitoring and sanctioning hate speech incidents.
- If not, how they could be enhanced in order to ensure that hate speech is effectively tackled.

2.2.2. Research methods

In order to address the issues above, a **Legal Research Team** was set up to conduct **desk research** and analyse rules applicable to hate speech. The Legal Research Team also conducted **stakeholder interviews** with EU officials and the Commission responsible for disciplinary and/or human resources matters. The results of the interviews complemented the findings of the desk research and enabled the team to gain insight on any issues relating to the implementation of the applicable rules as well as on gaps and inefficiencies of those rules. Incidents of hate speech involving MEPs were also analysed in order to assess how the rules and procedures are applied in practice.

Based on the mapping of relevant standards and conclusions drawn from the interviews, a list of practical recommendations on how the EU institutions and in particular the European Parliament could best deal with hate speech incidents was developed. The feasibility of these recommendations was assessed in consultation with stakeholders. Taking into account stakeholder feedback, a shortlist of recommendations was included in the Guidelines. The recommendations intend to be user-friendly and straight to the point in order to provide the Parliament with clear guidance in this area.

3. OVERVIEW OF INTERNATIONAL AND EU LEGAL FRAMEWORK

3.1. International legal framework

At international level, the United Nations (UN) system, the Organisation for Security and Co-Operation in Europe (OSCE) and the Council of Europe (CoE) have been active in promoting legal instruments aimed at criminalising conducts and acts motivated by racial and ethnic hatred, anti-Semitism, religious and ideological grounds, xenophobia and discrimination.

Hate speech and hate crime

The most relevant international bodies and instruments with regard to **hate speech and hate crime** are described in the following paragraphs.

The **International Covenant on Civil and Political Rights** (ICCPR) adopted by the UN General Assembly in 1966 prohibits 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'⁴¹ and the landmark UN **Convention on the Elimination of All Forms of Racial Discrimination** (CEFRD) requires State Parties to outlaw hate speech and criminalise membership in racist organisations⁴². For example, Article 4 provides that 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 must be declared an offence punishable by law.

The **Organisation for Security and Co-operation in Europe** has declared its commitment to combatting hate crimes on several occasions⁴³. It also set up the **Office for Democratic Institutions and Human Rights** (ODIHR) that has the role to assist States and support their efforts to combat hate crimes and incidents of racism, anti-Semitism, and other forms of intolerance, including against Muslims.

With regard to the Council of Europe, Article 14 of the **Convention for the Protection of Human Rights and Fundamental Freedoms**⁴⁴ (ECHR) is a basis for combatting hate crimes in providing that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The ECHR, also protects everyone's freedom of expression (Article 10) stating that it should 'include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. It is worth noting that according to this Article, freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the

⁴¹ Article 20 ICCPR. The ICCPR entered into force on 23 March 1976, available at <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/international-covenant-on-civil-and-political-rights-1966.html>.

⁴² The CEFRD was adopted by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969. As of October 2011, it has 86 signatories and 175 parties. All 27 EU Member States have ratified the Convention available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

⁴³ All 28 EU Member States are Members of the OSCE.

⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm>.

interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others'.

The Council of Europe also set up in 1993 the **European Commission against Racism and Intolerance** (ECRI) with the aim of combatting racism, racial discrimination, xenophobia, anti-Semitism and intolerance. ECRI has issued several general policy recommendations focusing on the fight against racism (general policy recommendation no. 9), intolerance against Roma (general policy recommendation no. 3), against Muslims (general policy recommendation no. 5), combatting the dissemination of racist, xenophobic and anti-Semitic material via the internet (general policy recommendation no. 6), and blasphemy, religious insult and hate speech against persons on grounds of their religion (recommendation no. 1805).

With regard to hate crime and hate speech committed online, through the **Additional Protocol to the Convention on Cybercrime**, the Council of Europe promoted the criminalisation of acts of a racist and xenophobic nature committed through computer systems⁴⁵.

The **European Court of Human Rights** (ECtHR) also reinforced the responsibility of State authorities stating that it is their duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in an incident. This was the case in *Šečić v. Croatia* (application no. 40116/02⁴⁶) concerning an attack committed by members of a 'skinhead' group on Mr. Šečić. The ECtHR emphasised that the 'failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified discriminatory treatment irreconcilable with Article 14 of the Convention'. The ECtHR has dealt with instances related to racist or xenophobic hate speech/hate crime under Article 10 ECHR, for example, in the case *Giniewski v. France* (application no. 64016/00⁴⁷). This case involved the condemnations by a French court for defamation of a journalist and his editor for publishing a critical analysis of the Pope's encyclical and possible links with the Holocaust. The French court had acquitted the applicant in the criminal proceedings. However, 'in the civil action, he was ordered [...] to publish a notice of the ruling in a national newspaper at his own expense'⁴⁸. The ECtHR assessed the parties' arguments and stated in its judgment that 'While the publication of such a notice does not in principle appear to constitute an excessive restriction on freedom of expression [...], in the instant case the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect and the sanction thus imposed appears disproportionate in view of the importance and interest of the debate in which the applicant legitimately sought to take part'⁴⁹. The ECtHR therefore consequently hold that there had been a violation of Article 10 of the ECHR.

Blasphemy and religious insult

Discussions surrounding **blasphemy and religious insult** have also been recurrent at international level. The UN, the OSCE and CoE, together with other international

⁴⁵ Additional Protocol to the Convention on Cybercrime, available at:

<http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>.

⁴⁶ Šečić v. Croatia (application no. 40116/02) (2007), available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80711#{"itemid":\["001-80711"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80711#{).

⁴⁷ Giniewski v. France, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{"itemid":\["001-72216"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{).

⁴⁸ Giniewski v. France, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{"itemid":\["001-72216"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{).

⁴⁹ Giniewski v. France, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{"itemid":\["001-72216"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216#{).

organisations, have analysed how blasphemy is dealt with at national level and how legislation on blasphemy and/or religious insult might interfere with freedom of expression and freedom of thought, conscience and religion.

In a **Joint Declaration on Defamation of Religions** of 2008, the special rapporteurs on free expression of the UN, the OSCE, the Organisation of American States and the African Commission on Human and People's Rights proclaimed that restrictions on the freedom of expression⁵⁰ 'should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones'. This declaration also clarified that 'the concept of defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own'⁵¹.

At regional level, the **ECHR** promotes everyone's freedom of thought, conscience and religion specifying that anyone is allowed to change his or her religion or belief and to manifest it individually or in communities. The manifestation of one's religion or belief is only subject to the limitations needed in a democratic society to protect elements such as public safety and public order as well as the rights and freedoms of others (Article 9).

In a **Resolution on Freedom of expression and respect for religious beliefs**⁵², the **Parliamentary Assembly of the Council of Europe**, addressed the question of whether freedom of expression should be limited (and to what extent) by the respect for religious beliefs. It came to the conclusion that freedom of expression should not be further restricted to meet sensitivities of certain religious groups. However, it underlined that hate speech against any religious group was incompatible with the ECHR⁵³.

In 2007, the Parliamentary Assembly issued a '**Recommendation on blasphemy, religious insults and hate speech against persons on grounds of their religion**'⁵⁴, where it reiterates its commitment to the freedom of expression and the freedom of thought, conscience and religion recognising them as fundamental cornerstones of democracy. It also clarified a concept that is key to set balance in the dialectic between freedom of expression and freedom of religion. In fact it stated that 'freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of Article 10 of the ECHR'. One of the basic principles to enjoy such freedom is therefore that any democratic society should permit open debate on matters relating to religion and religious beliefs. However, the Parliamentary Assembly also underlined that 'in multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience and religion'. This means that it may also be necessary 'to place restrictions on these freedoms [...] any such restrictions must be

⁵⁰ International Press Institute, 'In EU, calls to repeal blasphemy laws grow after Paris attacks', (2015), available at:

<http://www.freemedia.at/newssview/article/in-eu-calls-to-repeal-blasphemy-laws-grow-after-paris-attacks.html>.

⁵¹ Joint Declaration on 'Defamation of Religions, and Anti-terrorism and Anti-extremism Legislation' (2008), available at: <http://www.osce.org/fom/35639?download=true>.

⁵² Parliamentary Assembly of the CoE, Resolution 1510 (2006) on 'Freedom of expression and respect for religious beliefs', available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17457&lang=en>.

⁵³ Study no. 406/2006 of the Venice Commission, 'Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred', doc. CDL-AD(2008)026, 23 October 2008', available at: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en>.

⁵⁴ Parliamentary Assembly of the CoE, Recommendation 1805 (2007) on 'Blasphemy, religious insults and hate speech against persons on grounds of their religion', available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1805.htm>.

prescribed by law, necessary in a democratic society and proportionate to the legitimate aims pursued⁵⁵.

With regard to blasphemy and/or religious insult, the Parliamentary Assembly specified that States are responsible for determining what should be considered a criminal offence. However, such criminalisation should always take into account the limits imposed by the case law of the ECtHR. The Parliamentary Assembly considered that blasphemy, as an insult to a religion, should not be considered a criminal offence. It also underlined that 'in a democratic society, religious groups must tolerate critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion'⁵⁶.

The necessity of abolishing blasphemy laws was also highlighted by the **Venice Commission**⁵⁷, in its 'Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred'. The Venice Commission highlighted the importance of an open debate in achieving mutual understanding and respect. It also highlighted that democratic society can preserve fundamental values only through persuasion and open public debate and not by using ban or repression. According to the Venice Commission, unlawful forms of expression affecting respect for one's beliefs should be criminalised only as a last resort. The use of criminal sanctions should therefore be justified by the fact that no other means is capable of protecting individual rights in the public interest⁵⁸.

The Venice Commission, however, concluded that blasphemy, as an insult to a religion, should not be deemed a criminal offence. Such conclusion is based on the fact that Europe presents a greater diversity of religious beliefs and that the democratic principle of the separation of State and religion should be protected. It therefore supports the fact that 'a distinction should be made between matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere'⁵⁹.

3.2. EU legal framework

Hate speech and hate crime

The EU has been very active in addressing hate speech and hate crime. The first EU measures aiming to combat racism and xenophobia were adopted in the 1990s, as a result of an increasing awareness of the challenges posed by racist and xenophobic behaviours. Following a Resolution of the European Parliament in 1995⁶⁰ that required the EU to take

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ Study no. 406/2006 of the Venice Commission, 'Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred', doc. CDL-AD(2008)026, 23 October 2008, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e).

⁵⁸ *ibid.*

⁵⁹ Study no. 406/2006 of the Venice Commission, 'Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred', doc. CDL-AD(2008)026, 23 October 2008', available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e).

⁶⁰ European Parliament Resolution on 'Racism, xenophobia and anti-Semitism', (1995) available at: http://www.europarl.europa.eu/workingpapers/libe/102/text5_en.htm.

action in this field, the Council adopted a Joint Action in 1996⁶¹ that encouraged measures to combat racism and xenophobia in the EU. The Tampere Council in 1999 and the European Parliament in 2000⁶² called for further action in this field. In the Hague Programme, the Council reaffirmed its commitment towards combatting racism, anti-Semitism and xenophobia.

In 2008, the Council adopted **Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law**⁶³ (CFD) and subsequently repealed Joint Action 96/443/JHA. The CFD provides for the approximation of laws and regulations of the Member States on certain offences involving xenophobia and racism. Member States were obliged to comply with the provisions of the Framework Decision by 28 November 2010.

The CFD focuses on criminalising racist and xenophobic hate speech and obliges Member States to ensure that for any other offences (already criminalised by Member States) a racist or xenophobic motivation is considered as an aggravating circumstance.

An overview of the most relevant provisions of the CFD is provided in the box below.

Overview of the most relevant provisions of the CFD

Article 1(1)(a): public incitement to violence or hatred directed against a group of persons or a member of such group defined by race, colour, religion, descent or national or ethnic origin.

Article 1(1)(b): public dissemination or distribution of tracts, pictures or other materials containing expressions of racism and xenophobia.

Article 1(1)(c) and 1(1)(d): public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group of a member of such a group.

Article 4: necessity to consider racist and xenophobic motivation as an aggravating circumstance or to ensure that courts take such motivations into account in the determination of penalties.

Legislation controlling racist and xenophobic behaviours in the media and over the internet (e.g. the Audiovisual Media Services Directive⁶⁴ and the Electronic Commerce Directive⁶⁵) is also relevant. Moreover, it is important to also view the EU measures aimed at addressing racism and xenophobia in the context of the **broader EU legislative framework**. Instruments aimed at supporting victims of crime and antidiscrimination measures are of particular relevance in this respect. These include Directive 2012/29/EU (Victims' Support

⁶¹ Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, OJ L 185, 24 July 1996.

⁶² European Parliament Resolution on 'the European Union's position at the World Conference against Racism and the current situation in the Union', (2001) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0501+0+DOC+XML+V0//EN>.

⁶³ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l33178>.

⁶⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AMSD), OJ L 95, 15 April 2010, p. 1–24, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

⁶⁵ 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 (ECD), OJ L 178, 17.7.2000, p. 1–16., available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031>.

Directive)⁶⁶ and the EU's equality and anti-discrimination legislation (e.g. Directive 2000/43/EC (the Racial Equality Directive))⁶⁷. The Racial Equality Directive is complemented by other antidiscrimination legislative instruments such as Directive 2000/78/EC (the Employment Equality Directive)⁶⁸ and Directives 2004/113/EC and 2006/54/EC (the Equal Treatment Directives)⁶⁹. The EU also provides its support in practice by financing projects aimed *inter alia* at fighting hate speech and hate crime (see below for some examples).

The key obligation of the **Audiovisual Media Services Directive** requires Member States to ensure that audiovisual media services provided under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality (Article 6). Moreover, Member States are obliged to ensure that audiovisual commercial communications provided by media service providers under their jurisdiction do not, *inter alia*, prejudice respect for human dignity; or include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation (Article 9).

Under the **Electronic Commerce Directive**, Member States may derogate from the Directive's main objective to ensure free movement of information society services for reasons, *inter alia*, of 'public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons' (Article 3(4)(a)(i)).

The **Victims' Support Directive** provides comprehensive rights for victims and clear obligations to be respected by Member States to promote victims' rights to information and support as well as basic procedural rights in criminal proceedings. It also provides that in assessing the needs of individuals, particular attention must be paid to victims of hate crime (Article 22).

The **Racial Equality Directive** is the legislative tool adopted by the EU to combat discrimination on the grounds of racial or ethnic origin and for giving effect to the principle of equal treatment in the EU Member States. The Racial Equality Directive requires EU Member States to prohibit discrimination on the grounds of racial or ethnic origin and adopt specific positive actions to prevent or compensate the disadvantages linked to these grounds (Article 2). Member States are therefore required to adopt adequate measures to implement the Racial Equality Directive and to set up judicial and/or administrative procedures for individuals to pursue their rights (Article 5). The Racial Equality Directive also provides that equality bodies should be set up to offer assistance to victims (Article 13). EU Member States must also authorise civil society organisations to engage on behalf

⁶⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, p. 57–73, 14 November 2012, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>.

⁶⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, p. 22–26, 19 July 2000, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043>.

⁶⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16–22, 2 December 2000, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0078>.

⁶⁹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, p. 37–43, 21 December 2004, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113>; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, p. 23–36, 26 July 2006, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>.

of, or in support of, a claimant in judicial or administrative proceedings (Article 12)⁷⁰.

The Racial Equality Directive is complemented by other antidiscrimination legislative instruments such as the Employment Equality Directive, which establishes a general framework for equal treatment in employment and occupation prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation and the Equal Treatment Directives that prohibit discrimination on the ground of sex in employment and in access to goods and services. A proposal for a new Equality Directive was put forward by the Commission in 2008⁷¹ and is currently under discussion. This new Directive aims to 'implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market'⁷². The proposal covers sectors such as education, social protection and access to goods and services⁷³.

The EU also provides its support in practice by financing projects aimed *inter alia* at fighting hate speech and hate crime. For example, under the Europe for Citizens Programme 2014-2020⁷⁴, the Commission co-finances projects raising awareness of European values, notably tolerance, mutual respect, and promotion of engagement in civil society activities. Moreover, the Rights, Equality and Citizenship Programme 2014-2020⁷⁵ aims to contribute to the promotion of equality and the rights of persons, as enshrined in the Treaty, the Charter and international human rights conventions. For 2015, it is supporting projects focusing on preventing and combatting anti-Semitism and anti-Muslim hatred and intolerance, as well as projects promoting the development of tools and practices to prevent, monitor and combat online hate speech.

Blasphemy and religious insult

While being very active in the fight against hate speech and hate crime, the EU did not adopt specific instruments with regard to **blasphemy and/or religious insult**. MEPs have addressed questions to the European Commission asking how the Commission will ensure that freedom of expression is not restricted by laws against blasphemy and/or religious insult, both within and outside the EU⁷⁶. In its answers the Commission stated that national blasphemy laws are a matter for the domestic legal order of the Member States. It is therefore the Member States' responsibility to ensure that freedom of speech is safeguarded when implementing this type of legislation⁷⁷.

EU legal instruments must respect the freedom of expression and non-discrimination principle stated in international legislation. The principle of non-discrimination is further

⁷⁰ FRA, 'The Racial Equality Directive: application and challenges' (2011), available at: http://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf.

⁷¹ EC, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2008:0426:FIN>.

⁷² EC, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2008:0426:FIN>.

⁷³ A Jewish Contribution to an inclusive Europe, 'Proposal for an Equality Directive', (2010) available at: <http://www.ceji.org/sites/default/files/publications/2010-03%2BEquality%2BDirective%2BPolicy%2BResponse%2BFinal.pdf>.

⁷⁴ EC, DG Education, Audiovisual and Culture Executive Agency, 'Europe for citizens 2014-2020 – Funding activities to strengthen remembrance and to enhance civic participation at EU level', (2014), available at http://eacea.ec.europa.eu/europe-for-citizens_en.

⁷⁵ DG Justice 'Rights, Equality and Citizenship Programme 2014-2020', (2014) available at http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm.

⁷⁶ Parliamentary questions of 8 October 2012 'Blasphemy laws within the European Union', available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-009015&language=EN>.

⁷⁷ Parliamentary questions of 3 January 2013 'Answer given by Mrs Redings on behalf of the Commission', available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-009015&language=EN>.

reinforced by the Lisbon Treaty and Article 21(1) of the Charter of Fundamental Rights of the European Union which states that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

The rights to freedom of expression and freedom of thought, conscience and religion, as enshrined in Articles 10 and 9 of the ECHR respectively, are also protected through Articles 11 and 10 of the Charter of Fundamental Rights of the European Union.

4. LEGAL FRAMEWORK ON HATE SPEECH AND HATE CRIME

KEY FINDINGS

- This Section covers the regulatory responses of seven Member States to address hate speech and hate crime (Belgium, Germany, Greece, France, Hungary, the Netherlands and Sweden).
- Various regulatory instruments (e.g. criminal, civil, administrative law instruments, self-regulations) addressing hate speech and hate crime exist in all Member States. Differences partially arise from the lack of universal definitions of the terms 'hate speech' and 'hate crime'.
- Articles 1(1) and 4 of Council Framework Decision 2008/913/JHA (CFD) require the penalisation of the most severe forms of hate speech and hate crime. It appears that a number of Member States have not fully or correctly transposed all provisions of the CFD. This could be resolved by more rigorous enforcement from the European Commission's side.
- Shortcomings of existing legislation hinder the application of the rules set out therein in practice. The lack of clear terms in applicable legislation hinders the shared understanding of what constitutes hate speech and hate crime by the police, the prosecution service and courts. This leads to insufficient investigation, prosecution and adjudication. Practical tools, including training are necessary for enhancing the knowledge of professionals.
- The lack of reliable and comprehensive data hinders the understanding of the use of the Council Framework Decision 2008/913/JHA in practice. The underreporting of crimes by victims as well as the existence of insufficient data collection methods are the main factors behind the phenomenon. Therefore it is recommended to encourage the exchange of good practices among the data collection authorities, and to increase the awareness of victims of existing reporting mechanisms.
- All Member States have transposed the provisions of the Audiovisual Media Services (AMSD) and the Electronic Commerce (ECD) Directives, prohibiting incitement to hatred based on race, sex, religion or nationality in audiovisual media services, and restricting freedom to provide information society services from another Member State on this basis, respectively.
- Existing data on the use of the transposing provisions of AMSD and ECD are limited and/or show low numbers of decisions. This may be due to insufficient data collection, underreporting or to the law abiding behaviour of media content providers. Research in this area is limited, therefore it is recommended to better map the reasons behind the existing numbers.
- In all Member States, legal consequences are attached to the publication of hate speech by the media. Sometimes, however, applicable legislation fails to provide for the liability of publishers. In the case of blogs, the liability of operators remains largely unregulated. Therefore it is recommended to introduce amendments to the applicable regulatory framework.

4.1. General overview of legislation on hate speech and hate crime

This Section of the study maps the regulatory framework applicable to hate speech and hate crime and assesses its effectiveness. It provides information with respect to seven Member States: Belgium, Germany, Greece, France, Hungary, the Netherlands and Sweden.

In all Member States, **various regulatory responses** have been developed to address hate speech and hate crime. A general introduction to these responses is provided in this Section. The assessment under the subsequent Sections focuses on certain legislative measures regulating hate speech and hate crime. In particular, under Section 4.2 the national legislation transposing the CFD is described and its effectiveness is assessed. Section 4.3 describes and assesses the national legislation transposing the AMSD and the ECD, whereas Section 4.4 focuses on the rules regulating the liability of publishers.

The fact that different areas of law provide protection against hate speech and hate crime might derive from the fact that the **terms 'hate speech' and 'hate crime'** do not have universal definitions and thus are interpreted differently by the Member States. Along this line, the terms 'hate crime' and 'hate speech' are not referred to explicitly in applicable legislation in any of the Member States covered by this study. In some Member States, such as in Greece, applicable legislation contains synonyms while referring to the concept of hate crime. In Greece the synonym used is racist crime, which is a crime committed due to hatred bias on the grounds of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability of the victim⁷⁸. As opposed to the Greek solution, in Hungary for example 'hate crime' and 'hate speech' are defined in existing literature and are commonly used in practice. Hate crime is defined as a crime committed by bias motive against a certain group⁷⁹. Hate speech refers to a behaviour which may offend, harass or intimidate other people on the grounds of their protected characteristics, such as skin colour, ethnicity, nationality, sex, religion, etc⁸⁰.

In the Member States covered by this study, the legislative responses developed to address hate speech and hate crime range from those provided by criminal law, to civil law measures and protection provided by administrative law or media self-regulations.

The table below provides an overview of the way hate speech and hate crime are regulated in the Member States assessed. 'Ticks' (✓) indicate the existence of rules that specifically provide for protection against hate speech and hate crime. Empty cells highlight the lack of hate speech and hate crime specific rules.

Table 1 : Overview of legislative responses to address hate speech and hate crime

Member State	Criminal law rules	Civil law rules	Administrative law rules	Media self-regulation
BE			✓	
DE			✓	
EL			✓	
FR		✓	✓	
HU			✓	
NL				
SE				

⁷⁸ Article 81^A of the Criminal Code; the text of the Criminal Code (in Greek) is available online *via* the Ministry of Justice portal at:

<http://www.ministryofjustice.gr/site/kodikos/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CE%BF/%CE%A0%CE%9F%CE%99%CE%9D%CE%99%CE%9A%CE%9F%CE%A3%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3/tabid/432/language/el-GR/Default.aspx>.

⁷⁹ Éva Henriett Diók, 'General questions on the regulation of hate crimes – pros and cons against providing criminal law protection' (*A gyűlöletbűncselekmények szabályozásának általános kérdései – A kiemelt büntetőjogi figyelem mellett és ellen szóló érvek*), (2014) available at: http://jog.tk.mta.hu/uploads/files/Allam-20es%20jogtudomany/2014_4/2014-4-beliv-DINOK.pdf.

⁸⁰ Mediatorveny.hu, 'The presence of hate speech and offensive illustration of minority groups in the media' (*A gyűlöletbeszéd, valamint a kisebbségi csoportok sérelmes bemutatásának megjelenése a médiában*), (2013), available at: http://mediatorveny.hu/dokumentum/616/Gyuloletbeszed_korabbi_celvizsgalatok.pdf.

In all Member States assessed the most severe forms of hate speech and hate crime constitute **criminal offences**. Criminalising the most severe forms of hate speech and hate crime is an obligation of Member States deriving from EU law, namely from the CFD.

Member States' legislation on hate speech and hate crime is not limited to criminal law. In two Member States, namely Hungary and France, specific **civil liability** schemes addressing hate speech are in place. In both Member States, due consideration was given to the protection of freedom of expression while establishing the liability schemes. In France, the applicable rules are set out in Law 29 July 1881 on the freedom of press⁸¹ (Law 29 July 1881), which imposes legal obligations on publishers and criminalises certain specific press related behaviours, such as hate speech. According to French Courts, the setting up of this liability scheme was necessary, as the French Civil Code, which provides for general rules for the compensation of damages, did not provide sufficient procedural safeguards for the protection of the freedom of expression. In Hungary a specific civil liability scheme was established recently, in 2013, when the country's new Civil Code⁸² was adopted. The relevant provision is set out in Article 2:54(4) of the Civil Code, entitling members of a community to invoke sanctions against those who by making statements in public seriously offend and maliciously hurt a community, provided that certain conditions set out in the said Article are met. Debates had preceded the adoption of the said provision, claiming its non-compliance with the freedom of expression. It was argued that allowing an individual to file a civil action in cases where the conduct targets a community that he/she belongs to would have been unconstitutional⁸³. To ensure the provision's constitutional compliance, an amendment to the Hungarian Fundamental Law was introduced in 2013, allowing for the limitation of freedom of expression in cases where an expression violates the dignity of certain communities⁸⁴.

In other Member States civil law does not provide for specific liability relating to hate speech. However, victims of hate speech are allowed to file civil claims for the compensation of their damages under general civil law rules.

Hate speech and hate crime, if committed by the media are punishable under **administrative law** in certain Member States, namely in Belgium, Germany, Greece, France, and Hungary. Moreover, in some Member States, **self-regulatory** bodies of media service providers have developed rules and procedures regulating the liability of publishers for hate speech. The only Member State where self-regulations expressly provide for the liability of publishers for hate speech is Hungary.

4.2. Council Framework Decision 2008/913/JHA

4.2.1. Transposition of Council Framework Decision 2008/913/JHA

The CFD requires Member States to ensure criminal law protection against the most severe forms of hate speech and hate crime. As regards hate speech the punishable conducts are

⁸¹ Law of 29 July 1881 on the freedom of press, OJFR of 30 July 1881, p. 4201, available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=28C000A759064DE3CB8369810553BB0D.tpdjo06v_1?cidTexte=JORFTEXT000000877119&categorieLien=id.

⁸² Act V of 2013 on the Civil Code, available at: njt.hu/cgi_bin/njt_doc.cgi?docid=159096.239298.

⁸³ Gardos, Orosz Fruzsina (2013), *The new civil law regulation of hate speech (Az Új polgári jogi gyűlöletbeszéd-szabályozásáról)*, Fundamentum, 2013/3, p. 32, available at: www.fundamentum.hu/sites/default/files/13-4-4.pdf.

⁸⁴ Fourth Amendment to the Fundamental Law, available at: <http://www.complex.hu/kzldat/a1300325.htm/a1300325.htm>.

set out in Article 1(1) of the CFD whereas hate crime is defined by Article 4 of the said Decision.

In accordance with Article 10(1) of the CFD, Member States needed to ensure compliance with the CFD's requirements by 28 November 2010. As highlighted by a recent report of the European Commission on the transposition and implementation of the CFD, 'it appears that a number of Member States have not transposed fully or correctly all the provisions of the Framework Decision'⁸⁵.

The table below provides an overview of the existence of measures penalising the criminal behaviours set out in Articles 1(1)(a)-(d) of the CFD. The behaviours punishable by Article 1(1) of the CFD are:

- Public incitement to violence or hatred directed against a group of persons or member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin (Article 1(1)(a));
- The above mentioned offence when carried out by the public dissemination or distribution of tracts, pictures or other materials (Article 1(1)(b));
- Public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Article 1(1)(c)) and crimes defined in Article 6 of the Charter of the International Military Tribunal (Article 1(1)(d)), when the conduct is carried out in a manner likely to incite to violence or hatred 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.

Explanation on the penalisation of the behaviours set out in Article 4 is provided at the end of this Section. In the table below, the term transposition is used. It is noted however that some of the relevant national provisions are not transposing measures *per se*, as they had already been in place prior to the adoption of the CFD. For the sake of comparability, however, all measures reflecting the CFD offence provisions are referred to as transposing measures in the table below. 'Ticks' (✓) indicate the existence of transposing provisions; whereas empty cells indicate the lack of transposing measures.

Table 2 : Existence of provisions transposing the CFD

Member State	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art. 1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
BE				
DE				✓
EL				
FR				
HU				
NL				
SE				

⁸⁵ EC, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law', COM(2014)27 final, (2014), available at: http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

Whilst **all Member States** assessed **penalise the criminal behaviours** set out in Article **1(1)(a) and (b)** of the CFD, the criminal behaviours set out in **Article 1(1)(c) and (d)** of the CFD are punishable only in **certain Member States**. Out of the seven Member States assessed, two (Greece and France) have criminal law provisions governing the conduct set out in Article 1(1)(c) of the CFD. It is noted however that as opposed to the text of Article 1(1) of the CFD, neither the French nor the Greek transposing provisions expressly refer to the Statute of the International Criminal Court, while mentioning genocide, crimes against humanity and war crimes. The criminal legislation of five Member States, namely Belgium, Germany, Greece, France and Hungary, refers to the conduct set out in Article 1(1)(d) of the CFD. Similarly to Article 1(1)(d) of the CFD, French legislation explicitly refers to the Charter of the International Military Tribunal. Legislation in other Member States does not provide such an explicit reference; instead reference is made to crimes committed by the National Socialist regime or the Nazi regime in Germany.

In three Member States, namely Germany, Hungary and the Netherlands, the **national Criminal Codes (CC)**⁸⁶ contain the relevant offence provisions. In Belgium, France and Greece, **sectorial legislation** penalises the criminal behaviours set out in Article 1(1) of the CFD. It is noted however that in France, following the terrorist attacks against the Charlie Hebdo magazine, the Government announced that hate speech offences are likely to be moved from sectorial legislation into the Criminal Code. This legislative amendment would *inter alia* allow courts to apply fast-tracked procedures against suspects and to order immediate sentencing⁸⁷. In Belgium, the relevant criminal offence provisions are set out in the Anti-Racism Act⁸⁸, the Non-discrimination Act⁸⁹ and the Act on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War (Act of 23 March 1995)⁹⁰. These laws cross-refer to Article 444⁹¹ of the Criminal Code, setting out circumstances under which the offences could be committed. In Greece the principal legal instrument penalising hate speech and hate crime is Law 927/1979 on publishing acts or activities aiming at racial discrimination, as last amended by Law 4285/2014⁹². In France, Law 29 July 1881 provides criminal law protection against the conducts set out in Article 1(1) of the CFD⁹³. In Sweden the criminal conducts set out in Article 1(1) of the CFD constitute criminal offences and the applicable rules are set out in both the **Criminal Code**⁹⁴ and the fundamental laws⁹⁵ of the

⁸⁶ Hungary: Act C of 2012 on the Criminal Code, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=152383.283328; Netherlands: Criminal Code, available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/geldigheidsdatum_25-05-2015; Germany: Criminal Code, available at: <http://www.iuscomp.org/gla/statutes/StGB.htm>.

⁸⁷ Guardian, 'France launches major anti-racism and hate speech campaign', (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>.

⁸⁸ Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1981073035&table_name=wet.

⁸⁹ Act of 10 May 2007 aiming at combating certain forms of discrimination, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2007051035&table_name=wet.

⁹⁰ Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1995032331&table_name=wet.

⁹¹ Criminal Code, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet.

⁹² Law 927/1979 on the condemnation of acts or actions with aim to racial, Government Gazette A' 139/1979. Law 4285/2014 on the Amendment of Law 927/1979 (A' 139) and adjustment to the Framework Decision 2008/913/JHA of November 28, 2008, for combating certain forms and acts of racism and xenophobia through Criminal Law (L 383) and other, Government Gazette A' 191/2014).

⁹³ Law of 29 July 1881 on the freedom of the press, OJFR of 30 July 1881, p. 4201, adopted on 29 July 1881, available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=28C000A759064DE3CB8369810553BB0D.tpdjo06v_1?cidTexte=JORFTEXT000000877119&categorieLien=id.

⁹⁴ Criminal Code (Act 1962:700) available at: <http://www.notisum.se/rnp/sls/lag/19620700.htm>.

Constitution⁹⁶. The relevant fundamental laws of the Constitution (i.e. Freedom of the Press Act and the Fundamental Law on Freedom of Expression) apply in cases when hate speech is committed by means of publication via printed matter and audiovisual media. Crimes committed by other means are regulated by the Criminal Code. Penalties to be imposed against the perpetrators are set out in the Criminal Code, regardless of the means of commission of the crime.

The table below identifies the relevant **transposing provisions** and their **titles**. Empty cells indicate the lack of transposing measures.

Table 3 : Overview of provisions transposing the CFD

Member State	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art.1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
BE	Arts. 3 and 20 Anti-Racism Act, Art. 444 CC - Incitement to hatred and violence Arts. 3 and 22 Non-discrimination Act, Art. 444 CC -Incitement to hatred and violence	Arts. 3 and 20 Anti-Racism Act, Art. 444 CC - Incitement to hatred and violence Arts. 3 and 22 Non-discrimination Act, Art. 444 CC -Incitement to hatred and violence		Art. 1 Act 23 March 1995, Art. 444 CC - Condoning, denying or grossly trivialising the crime of genocide
DE	Section 130(1)-(2) CC - Incitement to hatred	Section 130(1)-(2) CC - Incitement to hatred		Section 130(3)-(4) CC- Incitement to hatred
EL ⁹⁷	Art. 1 Law 4285/2014 - Public incitement to violence or hatred	Art. 1 Law 4285/2014 - Public incitement to violence or hatred	Art. 2 Law 4285/2014 - Public condoning or denial of crimes	Art. 2 Law 4285/2014 - Public condoning or denial of crimes
FR	Art. 24(7) Law 29 July 1881 - no title	Arts. 24(7) and 23 Law 29 July 1881- no title	Art. 24(5) Law 29 July 1881 - no title	Art. 24bis Law 29 July 1881 - no title
HU	Art. 332 CC - Incitement against a community	Art. 332 CC - Incitement against a community		Art. 333 CC - Public denial of sins of national socialist and communist regimes
NL	Art. 137d CC - Incitement to hatred, discrimination or violence Art. 137e CC- Dissemination or distribution of	Art. 137e CC - Dissemination or distribution of expression		

⁹⁵ The Swedish Constitution is the highest law. It consists of four fundamental laws: the Instrument of Government (1974:152), the Act of Succession (1810:0926), the Freedom of the Press Act (1949:105) and the Fundamental Law on Freedom of Expression (1991:1469). In the context of this study the two latter fundamental acts are of relevance.

⁹⁶ The Constitution including the Freedom of Press Act and the Fundamental Law on Freedom of Expression is available in English at: <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>.

⁹⁷ Law 4285/2014 amends Law 927/1979.

	expression			
SE	Arts. 4 and 6, Chapter 7, and Freedom of Press Act of Constitution; Art. 9, Chapter 1 and Art. 1, Chapter 5, Fundamental Law on Freedom of Expression of Constitution; Section 8, Chapter 16, CC - Incitement against a population group	Arts. 4 and 6, Chapter 7, and Freedom of Press Act of Constitution; Art. 9, Chapter 1 and Art. 1, Chapter 5, Fundamental Law on Freedom of Expression of Constitution; Section 8, Chapter 16, CC - Incitement against a population group		

The nature and extent of the **legal protection** provided by the offence provisions referred to above differ from Member State to Member State. This study focuses on three main differences, namely:

- **Protected grounds** covered by the offence provisions;
- **Type and level of penalty** foreseen by the offence provisions;
- **Coverage of online commission** by the offence provisions.

Regarding the first point it is noted that Article 1(1) of the CFD penalises the criminal conducts set out therein if committed against victims defined by their race, colour, religion descent, national or ethnic origin. With respect to the type and level of penalties, Article 3 of the CFD provides that conducts set out in Article 1(1) of the CFD should be punishable by criminal penalties of 'a maximum of at least' between one to three years. By acknowledging the emergence of new forms of hate speech, Article 9 of the CFD requires the Member States to establish jurisdiction over cases committed through information systems.

Along these criteria, the table below highlights existing differences in the Member States covered by this assessment. In cases where a specific provision of Article 1(1) of the CFD has been transposed by more than one offence provision, the information provided in the table below is broken down per transposing provision separately.

Table 4 : Main characteristics of provisions transposing the CFD

Member State	Criteria	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art. 1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
BE	Protected ground(s)	Incitement to hatred and violence (first provision): nationality, so-called race ⁹⁸ , skin colour, descent or national or ethnic origin Incitement to hatred (second provision): age, sexual orientation, marital status, birth, wealth, religion or belief, political opinions, union opinion, language, current or future health condition, disability, physical or genetic characteristic or social origin	Same as for Art. 1(1)(a)	NA – not transposed	Not specified
	Type and level of penalty	Incitement to hatred and violence (first and second provisions): Imprisonment, one month to one year and/or fine EUR 50-1,000	Same as for Art. 1(1)(a)	NA – not transposed	Imprisonment, eight days to one year, fine EUR 26-5,000
	Coverage of online crime	Not specified in legislation	Same as for Art. 1(1)(a)	NA – not transposed	Same as for Art. 1(1)(a)
DE	Protected ground(s)	Nationality, race, religion, ethnic origin	Same as for Art. 1(1)(a) and other segments of population	NA – not transposed	Not specified
	Type and level of penalty	Imprisonment three months to five years	Imprisonment up to three years or fine	NA – not transposed	Imprisonment up to five years, fine
	Coverage of online crime	Yes	Yes	NA – not transposed	Yes

⁹⁸ The wording of the Belgian legislation refers to 'so-called race' rather than 'race' as it presumes that there is only one race – the human race – and that skin colour or ethnicity are not markers of another 'race'.

EL	Protected ground(s)	Race, colour, religion, descent, national or ethnic origin, disability, sexual orientation, gender identity	Same as for Art. 1(1)(a)	Same as for Art. 1(1)(a)	Same as for Art. 1(1)(a)
	Type and level of penalty	Depending on severity: imprisonment, three months to three years and fine EUR 5,000-20,000; imprisonment, min. six months and fine EUR 15,000-30,000; imprisonment, six months to three years and fine EUR 10,000-25,000; imprisonment, min. one year and fine EUR 25,000- 50,000	Same as for Art. 1(1)(a)	Depending on severity: imprisonment, three months to three years and fine EUR 5,000-20,000; imprisonment six months to three years and fine EUR 10,000-25,000	Same as for Art. 1(1)(c)
	Coverage of online crime	Yes	Same as for Art. 1(1)(a)	Yes	Same as for Art. 1(1)(c)
FR	Protected ground(s)	Art. 24(7): origin, ethnicity, nationality, race, religion	Same as for Art. 1(1)(a)	Art. 24(5): Not specified	Art. 24bis: Not specified
	Type and level of penalty	Art. 24(7): imprisonment one year or fine EUR 45,000	Same as for Art. 1(1)(a)	Art. 24(5): imprisonment five years and/or fine EUR 45,000	Art .24bis: imprisonment, one year, fine EUR 45,000, public display or dissemination of decision taken
	Coverage of online crime	Art. 24(7): Yes – cross-reference to Art. 23	Same as for Art. 1(1)(a)	Art. 24(5): Yes – cross-refers to Art.23	Art. 24bis: Yes – cross-refers to Art. 23
HU	Protected ground(s)	Hungarian nation, national, ethnic, racial, religious group, certain group of population	Same as for Art. 1(1)(a)	NA – not transposed	Not specified
	Type and level of penalty	Imprisonment, up to three years	Same as for Art. 1(1)(a)	NA – not transposed	Imprisonment, up to three years
	Coverage of online crime	Yes	Same as for Art. 1(1)(a)	NA – not transposed	Yes
NL	Protected ground(s)	Incitement to hatred, discrimination or violence: Race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability	Dissemination or distribution of expression: Race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability	NA – not transposed	NA – not transposed
		Dissemination or distribution of expression: Race, religion or belief, sex, sexual orientation, or physical, psychological or			

		intellectual disability			
	Type and level of penalty	Incitement to hatred, discrimination or violence/ Dissemination or distribution of expression: Disqualification from practicing profession and/or depending on severity: imprisonment, up to one year or fine up to EUR 8,100; imprisonment, up to two years or fine up to EUR 20,250	Dissemination or distribution of expression: Disqualification from practicing profession and/or depending on severity: imprisonment, up to one year or fine up to EUR 8,100; imprisonment, up to two years or fine up to EUR 20,250	NA – not transposed	NA – not transposed
	Coverage of online crime	Yes	Yes	NA – not transposed	NA – not transposed
SE	Protected ground(s)	National, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation	Same as for Art. 1(1)(a)	NA – not transposed	NA – not transposed
	Type and level of penalty	Imprisonment, up to four years, or fine	Same as for Art. 1(1)(a)	NA – not transposed	NA – not transposed
	Coverage of online crime	Yes	Yes	NA – not transposed	NA – not transposed

In all Member States assessed, the provisions penalising the behaviours set out in **Article 1(1)(a) and (b)** of the CFD refer to **protected grounds**. In most of these Member States, the transposing provisions provide an exhaustive list of protected grounds. In two Member States, however, namely Germany and Hungary, the list of protected grounds is open-ended. The German Criminal Code refers to 'other segments of population', whereas the Hungarian legislation uses the term 'certain group of a population'.

In some of the Member States assessed, the transposing provisions expressly provide protection on grounds beyond those set out in the CFD. For example in Belgium, incitement to hatred is prohibited on a large number of grounds, including *inter alia* disability, political opinion or current or future health condition. Greece seems to be the only Member State assessed that specifically mentions gender identity.

Legislation in five Member States fails to cover all protected characteristics mentioned in Article 1(1)(a) and (b) of the CFD. In Germany, the transposing provisions do not explicitly refer to colour, descent or national origin. Similarly to Germany, Hungarian legislation fails to provide explicit reference to colour and religion. These characteristics are nevertheless covered, given the open-ended nature of the list of protected grounds. French legislation does not mention colour and descent, whereas the Dutch transposing provisions make no explicit reference to colour, descent or national origin. Finally, Swedish legislation fails to mention descent.

As a general rule, the national provisions penalising the criminal conducts set out in **Article 1(1)(c) and (d)** fail to list protected grounds. Greek legislation constitutes an exception in this respect. The transposing provisions explicitly refer to race, colour, religion, descent, national or ethnic origin, disability, sexual orientation and gender identity.

In all Member States assessed, the transposing provisions of Article 1(1) foresee imprisonment as a **type of penalty**, in accordance with the CFD's requirements. Provisions transposing **Article 1(1)(a) and (b)** seem to foresee the same or a lower **level of penalties** than those transposing **Article 1(1)(c) and (d)**. As an example, the ceiling for the penalty of imprisonment in Belgium seems to be the same, i.e. one year, in all provisions transposing Article 1(1). As an exception, the maximum penalty in French legislation is higher for the conducts set out in Article 1(1)(c) and (d) than for those set out in Article 1(1)(a) and (b) of the CFD. In the latter case, the maximum penalty foreseen is one year of imprisonment, whereas in the former case, the ceiling for imprisonment is five years.

Compared to other Member States, Belgian legislation has the lowest level of penalties, namely imprisonment of between one month and one year. The threshold seems to be the highest in Germany, where imprisonment of between three months and five years could be imposed against the perpetrators.

In all Member States assessed, except for Hungary, the transposing provisions specifically allow courts to impose fines or other sanctions, such as disqualification from a profession, as alternatives to imprisonment. In Hungary, it is also possible to impose alternative sanctions, however, the relevant applicable rules are not set out in the transposing offence provisions, but in general (i.e. non-offence specific) criminal law provisions⁹⁹.

⁹⁹ The relevant rules are set out in Article 30(4) of the Criminal Code.

Online hate speech seems to be punishable in all Member States assessed. Specific reference to online commission is rarely provided in the transposing provisions themselves. Such reference is only available in the Greek provisions transposing Article 1(1) of the CFD, which explicitly mention the commission of hate speech via internet. Rather, general criminal law rules cover online hate speech situations or such coverage could be derived from case law. As an example of the former situation, under Hungarian legislation, the term 'general public', which is used in the transposing provisions of Article 1(1) of the CFD, is defined as covering online crime. The definition is set out in the General Part of the Criminal Code¹⁰⁰, which contains provisions and principles applicable to all criminal offences. In the Netherlands and Belgium, the applicable provisions remain silent about the coverage of online commission. Relevant literature notes that courts in the Netherlands have interpreted the applicable provisions as covering online commission¹⁰¹. In Belgium, as described in more detail under Section 4.2.2, relevant case law does not seem to be consistent.

Article 4 of the CFD specifically requires Member States to either address racist or xenophobic motivation in their criminal law as an aggravating circumstance (**first option**) or to ensure that courts take such motivation into consideration in the determination of penalties (**second option**).

In two Member States, namely Greece¹⁰² and Sweden¹⁰³, general criminal law rules consider racist or xenophobic motivation as an aggravating circumstance with respect to all crimes. This implies that all offence provisions set out in the applicable criminal law are affected by the transposing provision of Article 4 of the CFD.

The same requirement applies with respect to certain crimes in Belgium, France and Hungary. In Belgium and Hungary, specific offence provisions (ten¹⁰⁴ and six¹⁰⁵ offence provisions, respectively) refer to racist or xenophobic motive as an aggravating circumstance. In France, the regulatory situation is comparable to those in Hungary and Belgium, in the sense that specific offence provisions, namely 12¹⁰⁶, requiring the more severe penalisation of crimes committed by racist or xenophobic motive exist. In France, however legal protection against crimes committed with a racist or xenophobic motive, is also provided by a general criminal law provision stating that the penalty is increased when

¹⁰⁰ The relevant provision is set out in Article 459(22) of the Criminal Code.

¹⁰¹ Nieuwenhuis, AJ., Janssens, ALJ., *Medium offences (Uitingsdelicten)* (3rd edn, Deventer, Kluwer, 2011), 205-206, 291-292.

¹⁰² Article 81^A, Greek Criminal Code, as amended by Article 10 of Law 4285/2014.

¹⁰³ Chapter 29, Section 2, para 7 of the Criminal Code.

¹⁰⁴ Articles 377bis, 405quarter, 422quarter, 438bis, 442ter, 453bis, 514bis, 525bis, 532bis, 534bis, penalising respectively the criminal offences of assault and rape; manslaughter and intentional infliction of personal injury; non-assistance to a person in danger; deprivation of liberty, torture & trespassing by particular persons; stalking; insult, slander, defamation and desecration of a grave; arson; destruction of buildings or engines; damage to personal property; graffiti and damage to real estate.

¹⁰⁵ Articles 160(2), 164(4) and (6), 194(2), 226(1), 304(3), 449(2) of the Criminal Code, penalising respectively, the criminal offences of homicide, bodily harm, limiting someone's personal liberty, defamation, unlawful deprivation of liberty and insulting a subordinate.

¹⁰⁶ Articles 221-4, 222-3, 222-8, 222-10, 222-13, 225-18, 311-4, 322-8, 312-2, 222-18-1, 322-2 of the Criminal Code and L333-7 of the Sport Code, penalising respectively the criminal offences of wilful causing of death and assassination; torture or acts of barbarity; acts of violence causing an unintended death, acts of violence causing mutilation or permanent disability; acts of violence causing a total incapacity to work; violation of the physical integrity of a corpse; theft; destroying; defacing or damaging property belonging to other persons by an explosive substance, a fire or any other means liable to create a danger to other persons; extortion; a threat to commit a crime or major offence against persons; destroying, defacing or damaging property belonging to other persons; introducing, wearing or displaying in a sports arena, or in the conduct of public broadcasting in a sporting event, badges, signs or symbols reminiscent of a racist or xenophobic ideology.

'the offence is committed because of the victim's actual or supposed membership or non-membership to a given ethnic group, nation, race or religion'¹⁰⁷.

In Germany and the Netherlands, the first option under Article 4 of the CFD has not been transposed.

The **second option** offered by Article 4 of the CFD is only reflected in German legislation. The relevant provision was introduced into German legislation on 1 August 2015. This recent legislative amendment added the wording 'racist, xenophobic or other inhuman motives and aims' to the text of Section 46 of the Criminal Code, requiring courts to take into consideration these motives and aims while sentencing. The adoption of the legislative amendment was preceded by a long debate starting in 2010. For a long time, the German Parliament held the position that in any case the practice of the courts was to take into account such motives while sentencing, even without an explicit reference thereto in applicable legislation¹⁰⁸.

In the Netherlands, this option is reflected in an official guidance document¹⁰⁹ and not in legislation. Courts are not bound by this guidance. Reports have highlighted that in practice the instructions are not complied with¹¹⁰. In its fourth report on the Netherlands, ECRI recommends that the Dutch authorities introduce a legal provision explicitly establishing racist motivation as a circumstance to be taken into account by courts while sentencing¹¹¹.

To conclude, the Member States covered by this study have chosen different regulatory techniques to transpose Article 4 of the CFD. In some cases, Article 4 has been transposed through a large number of criminal offence provisions, whereas in other cases, one provision reflects the provision set out in Article 4 of the CFD. In the latter case, however, the transposing provision is of horizontal nature, applying to all criminal offences, or setting out general obligations for all courts. In the light of the above, it can be concluded that the transposition of Article 4 of the CFD has affected a large number of provisions in the Member States concerned. Considering this, the Section below on the effectiveness of the transposing provisions, does not provide a detailed assessment of each provision concerned, instead it provides some general remarks regarding the effectiveness of the applicable rules.

4.2.2. Effectiveness of legislation transposing Council Framework Decision 2008/913/JHA

This Section assesses the **effectiveness of Member States' legislation** transposing Article 1(1) of the CFD and its relationship with the fundamental right of freedom of expression. As referred to above, Article 1(1) of the CFD penalises the most severe forms of hate speech, including incitement to violence and hatred (Articles 1(1)(a) and (b)) and the public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes (Article 1(1)(c) and (d)).

¹⁰⁷ Article 132-76 of the Criminal Code.

¹⁰⁸ BUG e.V., Dossier 'Hate Crime and its legal frame', (*Dossier 'Hasskriminalität und ihre rechtlichen Rahmenbedingungen'*), (2014) available at: <http://www.bug-ev.org/themen/schwerpunkte/dossiers/hasskriminalitaet/gesetzgebung-gegen-hasskriminalitaet/aenderung-46-stgb/einschaetzungen-zur-gesetzesanderung-des-46-stgb.html>.

¹⁰⁹ Discrimination Directive, 2007A010, Government Gazette 2007, 233, available at: https://www.om.nl/onderwerpen/discriminatie/@86289/aanwijzing/#_ftn2.

¹¹⁰ Anne Frank Stichting, 'Third report racism, antisemitism and extreme right-winged violence', (2014), available at: http://www.annefrank.org/ImageVaultFiles/id_17108/cf_21/Racisme_2013_VJI.PDF.

¹¹¹ ECRI, 'Report on the Netherlands - fourth monitoring cycle', p. 13, (2013), available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

It provides some general observations regarding the effectiveness of national legislation transposing Article 4 of the CFD. The said provision requires Member States to consider racist or xenophobic motivation either as an aggravating circumstance, or alternatively to ensure that such motivation is considered by courts while determining the penalties.

The assessment is based on information gathered through the national studies, which evaluated the national legal frameworks on the basis of four criteria:

- First criterion: Interaction of national transposing provision(s) with the freedom of expression;
- Second criterion: Quantitative data on the use of transposing provision(s) in practice;
- Third criterion: Factors hindering the effective application of the transposing provision(s);
- Fourth criterion: Drivers behind any recent or planned legislative amendments.

First criterion-Interaction of national transposing provision(s) with the freedom of expression

The CFD provides legal protection against hate speech and hate crime within a fundamental rights context, respecting *inter alia* the fundamental right of freedom of expression. As set out in Recital 14 of its Preamble, the CFD respects the fundamental right of freedom of expression, as set out in the ECHR and the Charter of Fundamental Rights.

Freedom of expression is a fundamental right, which could be subject to limitations under certain conditions as specified in Article 10(2) of the ECHR¹¹² and Article 52(1) of the Charter of Fundamental Rights¹¹³. Both EU and national law should respect these limits.

This Section aims to assess the **relationship** between Member States' **legislation transposing the CFD** and the fundamental right of **freedom of expression**. In particular it aims to describe any controversies linked to the thresholds set by the national offence provisions to limit freedom of expression. As these limits are typically subject to court interpretation, focus is placed on any relevant decisions of higher courts (such as constitutional courts) on the matter.

The table below gives an overview of whether or not the relationship described above between the freedom of expression and each of the offence provisions transposing Article 1(1)(a)-(d) of the CFD has been assessed in decisions of higher courts. 'Ticks' (✓) highlight the existence of higher court decisions, whereas empty cells indicate the lack of relevant higher court decisions. Where absence of relevant court decisions is due to the lack of transposing measures, this is explicitly stated.

¹¹² Article 10(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹¹³ Article 52(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Table 5 : Existence of relevant higher court decisions

Member State	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art. 1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
BE ¹¹⁴	✓	✓	NA – not transposed	✓
DE	✓	✓	NA – not transposed	✓
EL	✓	✓		
FR	✓	✓	✓	✓
HU	✓	✓	NA – not transposed	✓
NL	✓	✓	NA – not transposed	NA – not transposed
SE	✓	✓	NA – not transposed	NA – not transposed

In all Member States, higher court decisions assessing the **relationship** between some of the **transposing provisions** and the **freedom of expression** exist. The national courts found that freedom of expression can be limited under certain conditions and within certain thresholds. These thresholds and the supporting reasoning of the courts differ from Member State to Member State.

The Belgian Constitutional Court has assessed the relationship of all transposing provisions with the freedom of expression. Regardless of the facts of the case, all Constitutional Court rulings¹¹⁵ seem to echo the requirements set out in Article 10(2) of the ECHR. In its decisions the Constitutional Court has consistently ruled that freedom of expression is not an absolute right and could be subject to limitations prescribed by law. Such limitations should be clear, objective, reasonable and proportionate to the aim pursued¹¹⁶.

In case of the offence provisions penalising the criminal conducts set out in Article 1(1)(a) and (b) of the CFD¹¹⁷, the Constitutional Court assessed the meaning of 'incitement to hatred and violence' and its compliance with the criteria referred to above. With respect to the provision reflecting the conducts set out in Article 1(1)(c) and (d) of the CFD¹¹⁸, the Constitutional Court interpreted the compliance of the criminal conducts of 'denying, minimising, justifying or approving' with the fundamental right of freedom of expression. Regarding both conducts the Constitutional Court found that the limitations imposed thereby on freedom of expression were constitutional¹¹⁹.

¹¹⁴ In case of Belgium, there are two offence provisions transposing both Article 1(1)(a) and (b). The Constitutional Court decision assessed under the table concerned both offence provisions.

¹¹⁵ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §B.59, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>; Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, §A.32, available at: <http://www.const-court.be/fr/common/home.html> and Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.15, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>.

¹¹⁶ *ibid.*

¹¹⁷ Incitement to hatred and violence - nationality, so-called race, skin colour, descent or national or ethnic origin, as set out in Articles 3 and 20 of the Anti-Racism Act and Article 444 of the Criminal Code and Incitement to hatred and violence - religion as set out in Articles 3 and 22 of the Non-discrimination Act and Article 444 of the Criminal Code.

¹¹⁸ Condoning, denying or grossly trivialising the crime of genocide as set out in Art. 1 of the Act on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War and Article 444 of the Criminal Code.

¹¹⁹ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, A.4.5, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>.

The French Court of Cassation's rulings are similar to the Belgian ones. Decisions seem to echo the requirements set out in Article 10(2) of the ECHR as well as the criteria of objectivity and necessity¹²⁰.

The Supreme Court of Sweden has a similar stand point to the Belgian one. While assessing the offence provision of 'agitation against a national or ethnic group'¹²¹, transposing Article 1(1)(a)-(b) of the CFD, the Supreme Court in its decision¹²² recalled that any limitations of the freedom of expression should be necessary in a democratic society; therefore it should be assessed whether the restriction is proportionate to the protected interests. The Supreme Court also adds that the perpetrator should intend to express a message, which realises the criminal conducts, which are threatening and expressing contempt.

The German Constitutional Court¹²³, while assessing the constitutional nature of Article 130(4) of the Criminal Code on Holocaust denial, also relied on the test of necessity and proportionality. In particular, it noted that conscious lying about established historical facts does not fall within the boundaries of freedom of expression. Regarding the historical facts in question, the Constitutional Court recalled the horror and injustice caused by the National Socialist regime in Europe and the world. The Constitutional Court reached similar conclusions regarding the transposing provisions of Article 1(1)(a) and (b) of the CFD¹²⁴. The Constitutional Court's position seemed to be that freedom of expression could be limited *inter alia* in cases where an expression in objective terms breaches the human dignity of others.

Greek higher courts have ruled on the relationship of the offence provision of 'public incitement to violence or hatred'¹²⁵, transposing Article 1(1)(a)-(b) of the CFD, with freedom of expression. Two recent decisions, one of the Supreme Court¹²⁶ and one of the Athens Single-Member Court of Misdemeanours¹²⁷, stipulate that the offence provision should be applied *stricto sensu*, and in a way that does not endanger the freedom of expression.

The Dutch Supreme Court has set clear rules for the limitation of freedom of expression in the context of hate speech provisions. It has developed a so-called 'three-step-test'¹²⁸, which is consistently used in practice. This test was developed in the context of Article 130(c) of the Criminal Code, which offence provision does not constitute a transposing provision *per se*. However, courts in practice often make use of the provision to penalise

¹²⁰ Examples of relevant decisions are: Criminal Chamber of the French Supreme Court, 30 May 2007, n°06-84328; Criminal Chamber of the French Supreme Court, 7 June 2011, n°10-85179; Criminal Chamber of the French Supreme Court, 13 June 1995 n°93-82144.

¹²¹ Section 8, Chapter 16 of the Belgian Criminal Code.

¹²² Swedish Supreme Court, NJA 2005 p.805, available at: <https://lagen.nu/dom/nja/2005s805>.

¹²³ Wunsiedel Order (1 BvR 2150/08) is not publicly available. A summary thereof is available in the Order of the First Senate of the Constitutional Court of 4 November 2009 - 1 BvR 2150/08, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html.

¹²⁴ Decision of 12 November 2002, 1 BvR 232/97, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=1%20BvR%20232%2F97&Suche=1%20BvR%20232%2F97> and Decision of 04 February 2010 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=1%20BvR%20370/04>.

¹²⁵ Article 2, Law 4285/2014 amending Law 927/1979.

¹²⁶ Decision 3/2010 of the Supreme Court. In Greece court judgments are not publicly available online.

¹²⁷ Decision 65738/2014 Athens Single-Member Court of Misdemeanours. In Greece court judgments are not publicly available online.

¹²⁸ The 'three-step-test' was developed by the Supreme Court *inter alia* in the following cases: Dutch Supreme Court, crim. ch., 9 January 2001, Netherlands Jurisprudence 2001, 203; Dutch Supreme Court, crim. ch., 9 January 2001, Netherlands Jurisprudence 2001, 204, annotation De Hullu; Dutch Supreme Court, crim. ch., 14 January 2003, Netherlands Jurisprudence 2003, 261, annotation Mevis.

the behaviours set out in Article 1(1) of the CFD. The founding idea behind the test is that courts while determining the punishability of an expression under Article 137(c) of the Criminal Code must take the suspect's freedom of expression into account. To this end, as a first step they should assess whether the expression was made in isolation or in front of public and whether the nature and purpose of it was insulting. As a second step, they need to assess the broader context of the expression and in particular if the context could remove the punishable, insulting character of the expression. This could be the case, when for example the offender enters into a public debate. The second step, however should be seen together with the third one in accordance with which even if the second step would justify an expression, it still remains punishable if it is gratuitously offensive. This three-step-test has never been used by the Dutch Supreme Court while ruling on cases linked to provisions transposing Article 1(1)(a) and (b) of the CFD. In these cases the Dutch Supreme Court usually assesses the context and the circumstances of the expression while deciding on the liability of the perpetrator. The Amsterdam District Court has in one case used the three-step-test in an Article 137(d) case.

Decisions of higher courts in Hungary have shown some controversy. Since 1992, the threshold for limiting freedom of expression by the applicable criminal offence provisions has been assessed in many instances. The Constitutional Court in its first landmark decision from 1992¹²⁹, which is of direct relevance in the context of the transposing provisions of Article 1(1)(a) and (b), noted that freedom of expression could be subject to restrictions, as it is not an absolute fundamental right. These limitations, however should comply with the so-called 'necessity test', implying that legislation should be necessary to restrict the said freedom on the one hand and proportionate on the other hand; legislation should be necessary and adequate for the aim to be achieved. Along this line the Constitutional Court's jurisprudence¹³⁰ suggests that only the criminal conduct of incitement to hatred constitutes a legitimate restriction of freedom of expression. According to the Constitutional Court, incitement to hatred takes place only when it imposes a clear and present danger for individuals of a community. The Curia (Hungary's supreme court)¹³¹ further defined the meaning of incitement to hatred. In accordance with the Curia's jurisprudence incitement to hatred occurs when the criminal conduct of the perpetrator incites to hatred to such an extent that is capable of generating violence, given that the perpetrator's conduct puts other people's rights into concrete and direct danger and that the danger of violence is concrete. This interpretation of the Curia has been considered as too stringent by ECRI in its latest report covering hate speech¹³². According to ECRI this overly restrictive interpretation of 'incitement to hatred' results in the impunity of perpetrators.

No higher court decisions of relevance, assessing the relationship of the provisions transposing Article 4 of the CFD with the freedom of expression, have been highlighted by the national studies.

¹²⁹ Constitutional Court Decision 30/1992 (V.26), available at: http://www.mkab.hu/hatarozat-kereso?OpenAgent=&kereses=1&hatarozat_sorszam=&hatarozat_evszam=&ugyszam_sorszam=&ugyszam_evszam=&kelte=&rendelkezo_resz=&indoklas=k%C3%B6z%C3%B6ss%C3%A9g+elleni+usz%C3%ADt%C3%A1s&vele_menyek=&alkotmanybiro=&inditvanyozo_tipusa=&eljaras_tipusa=&ugyallapot=&alkotpanasz_ugyall=&jogszabaly=&lenyeg=&feltetel1=2&targymutato%5B%5D=&feltetel2=2&alkotmany_hivatkozas_import%5B%5D=&befejezes_tipusa.

¹³⁰ Examples of relevant decisions are: Constitutional Court Decision 18/2004 (V.25) is available at: <http://public.mkab.hu/dev/dontesek.nsf/0/4EA2726C0A3F263EC1257ADA00529A10?OpenDocument>; Constitutional Court Decision 12/1999 is available at: <http://public.mkab.hu/dev/dontesek.nsf/0/492D281B4506140EC1257ADA0052AA1E?OpenDocument>.

¹³¹ A relevant decision is Supreme Court Decision 1998.251, available at: <https://jak.ppke.hu/uploads/articles/12069/file/gv%C5%B1.BH.pdf>. The decision is not available on the Curia's (previously called as Supreme Court) website.

¹³² Example of such report is ECRI, 'Report on Hungary – Fifth monitoring cycle', (2015) <https://www.coe.int/t/dgh/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf>.

Second criterion-Quantitative data on the use of transposing provision(s) in practice

Based on the information gathered it seems that all Member States collect **hate speech and hate crime related data**. Data collection methods however differ from Member State to Member State. Data collection efforts in Germany, Sweden, France and the Netherlands are more centralised, with one organisation being in charge of publishing relevant quantitative data on a regular basis. On the other hand, in Hungary, Belgium and Greece, there is more than one organisation collecting the relevant data. Data collection mechanisms of the different competent authorities typically lack harmonisation. Moreover, as highlighted by *inter alia* a recent FRA report¹³³, quantitative data collected by the Member States do not give a real indication of the extent of the problem, as many hate speech and hate crime cases remain underreported. It is also noted that data collection efforts of the different Member States might focus on different aspects of the proceedings, including the number of reported (i.e. providing an account of an incident to the competent authorities typically in writing), investigated (i.e. examining an incident by the competent authorities), prosecuted (i.e. filing charges against a suspect of a crime) or adjudicated cases (i.e. making a judgment on a disputed matter).

As mentioned above, Belgium is one of the Member States where data collection falls under the remit of more than one authority. Regarding the Belgian system it is noted that data are not published by these authorities. Data referred to in this report were provided by the responsible authorities upon request. In Belgium both the Federal Police and the Prosecution Service collect official data on the number of cases the penalisation of which is required by Article 1(1) of the CFD. These authorities do not record data dedicated to each transposing provision, instead the relevant offence provisions together with some other ones are grouped under the entry 'racism, xenophobia, other discrimination and homophobia'¹³⁴. The registration of crimes under the said entry is regulated by two circulars¹³⁵, which are largely unknown to the competent services. This results in the incorrect and insufficient registration of crimes. As a result of these factors, the Interfederal Centre for Equal Opportunities considers the data available unreliable; moreover the latest ECRI report considered the data available too fragmented to provide a precise overview of hate speech cases in Belgium¹³⁶. Underreporting does not seem to be an issue of concern for Belgian authorities. During the reference period of 2010-2014, around 1,000 cases per year were registered under the entry 'racism, xenophobia, other discrimination and homophobia'. The year 2013 saw the lowest number of investigated cases, i.e. 819, whereas in 2012 a record number of cases, i.e. 1,017 were investigated¹³⁷. The number of cases prosecuted was close to 800 each year, with 750 being the lowest number in 2011 and 861 being the highest one in 2014¹³⁸. As opposed to these the number of cases in which courts took decisions seems to be low. In 2014, which year records the lowest numbers, 24 judgments were issued, whereas in 2010, when the highest numbers were recorded, judgments were issued in 79 cases¹³⁹. The stakeholders consulted could not provide an explanation on the low number of court judgments.

¹³³ FRA, 'Making hate crime visible in the European Union: acknowledging victims' rights', (2012) available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

¹³⁴ ECRI, 'Report on Belgium -fifth monitoring cycle', p. 17 (2014), available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-ENG.pdf>.

¹³⁵ Circulars No COL 6/2006 and COL 13/2013.

¹³⁶ *ibid*, p. 20.

¹³⁷ Information collected in June 2015 through consultation with national stakeholder (representative of Federal police).

¹³⁸ Information collected in June 2015 through consultation with national stakeholder (Public Prosecutor).

¹³⁹ Information collected in June 2015 through consultation with national stakeholder (Public Prosecutor).

Similarly to Belgium, in Hungary official data collection activities are carried out by the Police, the Prosecution Service and the Hungarian judiciary. Some of the data collected by the Prosecution Service¹⁴⁰ are available online, whereas others can only be accessed upon request. In addition to these data sources, recently the Ministry of Interior's Department responsible for Coordination and Statistics launched a website dedicated to criminal statistics. The website¹⁴¹ provides data on the number of cases registered and prosecuted. Some discrepancies between the data available through this website and those collected by the Prosecution Service have been identified. The reason behind the discrepancy is unclear. It could potentially be due to different data collection techniques. Existing data sets all disaggregate data per offence provision. In accordance with the data collected by the Prosecution Service, the number of 'incitement against a community' cases (cases corresponding to the behaviours set out in Article 1(1)(a) and (b) of the CFD) registered by the Police is low. For example¹⁴², in 2010 eight cases were registered, whereas in 2013 three cases were registered. The number of prosecuted cases was even lower than this, namely four in 2010 and zero in 2013. With respect to the number of court decisions, no official data could be collected. According to non-official sources (i.e. secondary sources processing official statistics)¹⁴³, in 2010 three court decisions were issued, whereas in 2013 there were none. Numbers related to the investigation, prosecution and adjudication of 'public denial of sins of national socialist or communist regimes' (offence provision penalising the criminal conduct set out in Article 1(1)(d) of CFD) are similar to those for 'incitement against a community'. In 2013 four cases were recorded by the Police, there was no prosecution in 2013 and no court judgments were issued¹⁴⁴. Numbers seemed to be higher in 2014, when 18 cases were recorded and prosecution started in eight cases¹⁴⁵. No data on the number of court judgments from 2014 are available. Regarding the above data sets it is noted that in Hungary underreporting constitutes a major issue of concern. Some estimates suggest that existing statistics represent around 0.3% of hate crimes and/or hate speech¹⁴⁶.

In Greece there are no mechanisms in place for the systematic collection of data on hate speech and hate crime¹⁴⁷. In the absence of centralised rules, each court compiles its own datasets in a unique way; moreover some data are collected by the Police and the Prosecution Service. These datasets however are not publicly available. Upon request of international organisations some data of relevance have been published. Some data have been provided by the Police and the Prosecution Service to ECRI¹⁴⁸. According to the report, in 2013, 15 cases were investigated and nine prosecuted under Law 927/1979, which penalises the criminal conducts set out in Article 1(1)(a) and (b) of the CFD. Law 927/1979

¹⁴⁰ Example of data sets available online is the General Prosecutor's Office's report, 'Statistical data on criminality from 2013', (2013) available at: <http://www.mklu.hu/repository/mkudok8770.pdf>.

¹⁴¹ Website of the Ministry of Interior's Department responsible for Coordination and Statistics dedicated to criminal statistics, available at: <https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuncselekmenyiAdatok>.

¹⁴² General Prosecutor's Office, 'Statistical data on criminality from 2013', (2014) available at: <http://www.mklu.hu/repository/mkudok8770.pdf>.

¹⁴³ Lídia Balogh, Henrietta Dinók, András László Pap, 'Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice' (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012) available at: <http://www.fundamentum.hu/atirt-alapjogok/cikk/jog-aital-lathatatlan-gyulolet-buncselekmenyek-szabalyozasi-kerdesei-es-gyakorl>.

¹⁴⁴ Information collected in August 2015 through written consultation with national stakeholder (Public Prosecutor from General Prosecutor's Office).

¹⁴⁵ Information collected in August 2015 through written consultation with national stakeholder (Public Prosecutor from General Prosecutor's Office).

¹⁴⁶ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary – Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), p. 10, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

¹⁴⁷ ECRI, 'Report on Greece - Fifth Monitoring Cycle', pp. 17-18, (2014), available at:

<http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>.

¹⁴⁸ *ibid.*

was recently amended by Law 4285/2014. To date only one case has been investigated under the amended Law. The case concerns the offence provision of 'public condoning or denial or crimes', penalising the criminal conducts set out in Article 1(1)(c) and (d) of the CFD. No information on the number of cases prosecuted or adjudicated under the new system is available. Underreporting is an issue in Greece¹⁴⁹.

As mentioned above, data collection efforts in some Member States seem to be more centralised than in others. In Sweden, the Swedish National Council for Crime Prevention is the sole body in charge of compiling all relevant statistics on hate speech and hate crime. The said organisation relies on various sources, such as data collected by the Police or through the Swedish Crime Survey or the Politician's Safety Survey. The Swedish National Council for Crime Prevention annually publishes reports on the statistical data compiled¹⁵⁰. The latest datasets concern 2012 and 2013, and provide information on the number of cases prosecuted and reported. No data are available on the number of investigations and on the number of court decisions. In 2013 in connection with the criminal offence of 'agitation against a national or ethnic group', transposing Article 1(1)(a) and (b) of the CFD and other hate crimes (i.e. crimes committed with hate motive as an aggravating circumstance) 5,508 cases were reported. In 2012¹⁵¹, 161 cases led to so-called 'person based clearances', which term refers to decisions linking a person to a crime by means of a decision to prosecute, to the acceptance of prosecutor fines or to decisions granting waiver of prosecution.

Germany also has centralised data collection methods in place. The Federal Criminal Police prepares annual reports on the number of crimes investigated and prosecuted on the basis of data provided by the 16 State Criminal Police Offices. Datasets published by the Federal Criminal Police dedicate a separate entry to Section 130 of the Criminal Code, which penalises the criminal conducts set out in Article 1(1)(a)-(b) and (d) of the CFD. Existing datasets do not disaggregate per subsection of Section 130. This hinders the clear understanding of the hate speech situation in Germany. Latest datasets from 2014 indicate a high number of investigated¹⁵² and prosecuted¹⁵³ cases, namely 2,670 and 1,836, respectively. Underreporting is an existing phenomenon in Germany, thus in practice, it is likely that the number of hate speech incidents is actually higher than what appears in the official statistics¹⁵⁴.

In the Netherlands, the main authority responsible for the collection of data is the Dutch Public Prosecution Service. Data collected by the Dutch Public Prosecution Service are regularly published by the National Expert Centre on Discrimination. The latest report maps all discrimination cases, which category includes hate speech under the meaning of the CFD. While the report specifies the number of investigated cases per article, the numbers of prosecuted and adjudicated cases are not specified per article and comprise all

¹⁴⁹ RVRN, '2014 Annual Report', (2014), available at:

http://rvrn.org/wp-content/uploads/2015/05/Report_2014eng.pdf.

¹⁵⁰ Swedish National Council for Crime Prevention 'Hate Crime statistics 2013', (*Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott*), No. 2014:14, (2014), available at: https://www.bra.se/download/18.5e2a4a6b14ab166759928c/1421243287010/2014_14_Hatbrott_2013.pdf.

¹⁵¹ The 2012 statistics are based on estimated numbers since only 67% of the cases reported in 2012 had been closed.

¹⁵² Federal Ministry of Interior Affairs, 'Police Crime Statistics 2014' (*Polizeiliche Kriminalstatistik 2014*), (2014), available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

¹⁵³ Federal Ministry of Interior Affairs, 'Police Crime Statistics 2014' (*Polizeiliche Kriminalstatistik 2014*), (2014), available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

¹⁵⁴ Hieronymus, Andreas, 'Racist Violence in Germany', (2011), available at:

<http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Report%20Germany%20-%20online.pdf>.

discrimination articles. This hinders the clear understanding of the extent of the problem of hate speech in the Netherlands. In 2010, 33 cases of hate speech under the meaning of Article 1(1)(a) and (b) of the CFD were investigated in the Netherlands. This compared to 13 in 2013. As stated above, no clear indication to the number of hate speech cases prosecuted or adjudicated is available in existing statistics. According to ECRI, the lack of data makes it difficult to analyse whether there has been an improvement in the effectiveness of the responses provided to hate speech. ECRI therefore recommends the development of a central and consistent monitoring system¹⁵⁵. By letter of 11 February 2015 to the Dutch Parliament, the Government declared its commitment towards reinforcing its anti-discrimination policy, amongst others by facilitating the reporting of hate speech and hate crimes with the authorities and by improving the registration of hate speech and hate crimes by the authorities¹⁵⁶. In the Netherlands there are no data available on underreporting.

The main authority responsible for publishing criminal statistics in France is the National Consultative Commission for Human Rights. This organisation carries out data collection activities itself and receives data from the Ministry of Justice, the Police and the Gendarmerie¹⁵⁷. The data collected give a general overview of the number of hate speech and hate crime cases investigated, prosecuted and adjudicated. These data however are not broken down per applicable offence provision. In accordance with a recent dataset, in 2013, 1,765 hate crime cases were registered by the Police, and 579 cases were prosecuted. From 2013, no data are available regarding the number of court decisions reached¹⁵⁸.

With respect to the application of the transposing provisions of Article 4 in practice, very little data are available. This results from the fact that as a general rule, the data collected do not indicate the aggravating motive (in the given case racist or xenophobic motive) by which the crime was committed. Similarly statistical data on court decisions do not spell out cases in which courts took into account racist or xenophobic motive while sentencing.

Some data could be derived from unofficial sources. In Greece for example, a network, consisting of around 20 NGOs, the National Human Rights Commission and the United Nations High Commissioner for Refugees, was set up to record racist crimes. The network, which is called Racist Violence Recording Network (RVRN), has on various occasions indicated that Greece is experiencing an 'explosion' of racist violence. In 2012, RVRN registered two racially motivated murders and 154 incidents¹⁵⁹. 2013 saw an increase in racist incidents, which reached a total of 166 attacks¹⁶⁰. In other Member States, no similar data collection efforts were highlighted by the national studies.

¹⁵⁵ ECRI 'Report on the Netherlands, fourth monitoring cycle', p. 17, (2014), available at:

<http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

¹⁵⁶ Letter of progress discrimination of the Ministers of Internal Affairs, Social Affairs and Employment, and Security and Justice of 11 February 2015, 2015-0000039792, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2015/02/12/kamerbrief-bij-jaarlijkse-rapportage-discriminatie.html>.

¹⁵⁷ ODIHR website dedicated to hate crime monitoring, available at: <http://hatecrime.osce.org/france?year=2013>.

¹⁵⁸ ODIHR website dedicated to hate crime monitoring, available at: <http://hatecrime.osce.org/france?year=2013>.

¹⁵⁹ RVRN, '2012 Annual Report', (2012), available at: <http://rvrn.org/2013/04/2012-annual-report/>.

¹⁶⁰ RVRN, '2013 Annual Report', (2013), available at: http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf.

Third criterion-Factors hindering the effective application of transposition provision(s)

This Section of the study assesses any **inefficiency linked to the existing legal framework**, which hinders practical application. To ensure a certain level of comparability, the national studies, which serve as the main source of information for this study, assessed the inefficiencies from the angle of the clarity of the applicable offence provision(s), and the suitability of the offence provision(s) to:

- address online crime,
- ensure freedom of expression,
- protect vulnerable groups, and
- respond to any challenges posed by the national contexts.

The national studies also contain information on any other inefficiency identified.

The table below summarises the information gathered. 'Ticks' (✓) highlight where existing inefficiencies were identified; whereas empty cells indicate the lack of inefficiency. Where the lack of information results from the fact that one provision or another has not been transposed, this is clearly stated.

Table 6 : Factors hindering the effective application of the provisions transposing the CFD

Member State/Provision ¹⁶¹	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art. 1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
Clarity of offence provision				
BE	✓	✓	NA - not transposed	No info
DE	✓	✓	NA - not transposed	
EL				
FR				
HU	✓	✓	NA - not transposed	
NL	✓	✓	NA - not transposed	NA - not transposed
SE			NA - not transposed	NA - not transposed
Suitability to cover online crime				
BE	✓	✓	NA - not transposed	✓
DE			NA - not transposed	
EL				
FR				
HU			NA - not transposed	
NL			NA - not transposed	NA - not transposed
SE			NA - not transposed	NA - not transposed
Suitability to ensure freedom of expression				
BE			NA - not transposed	
DE			NA - not transposed	
EL				
FR	✓	✓	✓	✓

¹⁶¹ In Belgium there are two offence provisions transposing both Article 1(1)(a) and (b) of Council Framework Decision 2008/913/JHA.

HU			NA – not transposed	
NL			NA – not transposed	NA – not transposed
SE			NA – not transposed	NA – not transposed
Suitability to protect vulnerable groups				
BE			NA – not transposed	✓
DE			NA – not transposed	
EL				
FR				
HU	✓	✓	NA – not transposed	
NL	✓	✓	NA – not transposed	NA – not transposed
SE	✓	✓	NA – not transposed	NA – not transposed
Suitability to address national context				
BE			NA – not transposed	
DE			NA – not transposed	
EL				
FR				
HU			NA – not transposed	
NL			NA – not transposed	NA – not transposed
SE			NA – not transposed	NA – not transposed
Other				
BE			NA – not transposed	
DE	✓	✓	NA – not transposed	✓
EL	✓	✓	✓	✓
FR				
HU	✓	✓	NA – not transposed	
NL			NA – not transposed	NA – not transposed
SE			NA – not transposed	NA – not transposed

In some Member States covered by this study certain elements of the transposing provisions of Article 1(1) of the CFD seem to be **unclear**. In the Netherlands and Hungary the interpretation of the criminal conduct of ‘incitement to hatred’ has given rise to interpretation difficulties. In both cases, the **main issue lies in the fact that ‘incitement to hatred’ is not** defined in applicable legislation. In the Netherlands, higher and lower instance courts have interpreted the term ‘incitement’ differently. According to the Supreme Court an expression that either implicitly or indirectly incites to hatred already amounts to the criminal conduct of incitement. As opposed to the Supreme Court’s interpretation, the standpoint of the lower courts seems to be that incitement takes place when the expression is explicit and precise and when it constitutes a risk of violent conflict or a direct threat to the public order. In Hungary the situation is comparable to that in the Netherlands. To overcome the legal uncertainty caused by the lack of legal definition, the term ‘incitement to hatred’ has been subject to the interpretation of higher courts on several occasions. These interpretations however are not in full compliance with each other; while the Constitutional Court¹⁶² defined incitement to hatred as a behaviour that constitutes a clear and present danger to the community, the Curia and lower instance

¹⁶² Example of such decision is Constitutional Court Decision 18/2004 (V.25), available at: <http://public.mkab.hu/dev/dontesek.nsf/0/4EA2726C0A3F263EC1257ADA00529A10?OpenDocument>.

courts¹⁶³ developed a more stringent interpretation thereof. In accordance with this interpretation incitement to hatred occurs when three conditions are met: the criminal conduct of the perpetrator is capable of generating violence, the conduct puts other people's rights into concrete and direct danger and the danger of violence is concrete. This latest interpretation seems to be used by the Hungarian authorities in practice. In its fifth report, ECRI¹⁶⁴ noted that this stringent interpretation of the provision hinders due prosecution and adjudication. Therefore it has called on the Hungarian authorities to take a less restrictive approach while interpreting the criminal conduct of incitement to hatred.

In Belgium, clarity seems to be hindered by a lack of a legal definition of the term 'religion', which is referred to in the offence provision of 'incitement to hatred and violence' on the ground of *inter alia* religion, transposing Article 1(1)(a) and (b) of the CFD. The Interfederal Centre for Equal Opportunities recommends the insertion of the description of the term into the Explanatory Memorandum of the Anti-Racism Act. Currently the offence provision is used in cases where religious elements are directed against an ethno-cultural group¹⁶⁵.

In Germany, it seems to be an issue of concern that the meaning of the protected characteristics as referred to in Article 130(1) and (2), transposing Article 1(1)(a) and (b) of the CFD, respectively, is not defined. Stakeholders noted that as a result of this gap in legislation, police officers, prosecutors and judges interpret these concepts according to their own understanding¹⁶⁶. Germany is the only Member State where concerns have arisen regarding the clarity of transposition of Article 4 of the CFD. The transposing provision, which was introduced into the German Criminal Code in August 2015, was criticised by the German Institute for Human Rights as being unclear. In particular the terms 'xenophobic' and 'racist' were subject to criticism. To overcome this issue, it was suggested to complete the transposing provision with reference to Section 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEFRD)¹⁶⁷.

The **suitability of the offence provisions** transposing the CFD to cover **online commission** seems to be an issue of concern in one Member State, namely Belgium. In Belgium the problem arises from the lack of reference in the transposing provisions to the means of commission of the criminal behaviours. The fact that Belgian legislation remains technology neutral has led to contradictory court interpretations. Courts seem to disagree on whether or not criminal offences could be committed online. The Court of Cassation in two cases has ruled that crimes could be committed by the press, which category extends to the internet¹⁶⁸. The Criminal Court of Antwerp in its judgment of 30 March 2012 interpreted this case law more narrowly by ruling that criminal audiovisual or verbal expressions or opinions on the internet or weblogs do not qualify as offences committed via the press¹⁶⁹. More recently, in 2013, the Court of Cassation confirmed that offences could

¹⁶³ Examples of relevant decisions include Supreme Court Decision 1997.165, Supreme Court Decision 1998.251, Supreme Court Decision 1999.5, etc. These decisions are not available online on the website of the Curia.

¹⁶⁴ ECRI, 'Report on Hungary -fifth monitoring cycle, (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf>.

¹⁶⁵ Information collected in June 2015 through consultation with national stakeholder (Centre for Equal Opportunities and Opposition to Racism).

¹⁶⁶ German Institute for Human Rights, 'Racist motivated Crime: Law enforcement must become more effective' (*Rassistisch motivierte Straftaten: Strafverfolgung muss effektiver werden*), (2014), available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/aktuell_3_2014_Strafverfolgung_muss_effektiver_werden.pdf.

¹⁶⁷ *ibid.*

¹⁶⁸ Court of Cassation, 6 March 2012, No. P.11.1374.N/1 and No. P.11.0855.N/1, available at: <http://jure.juridat.just.fgov.be>.

¹⁶⁹ Dirk Voorhoof, Criminal expressions on the internet, the qualification of press crime and the crime stalking (*Strafbare uitingen op internet, de kwalificatie drukpersmisdrif en het misdrijf belaging*), *Auteurs & Media* 2012/5, 484-486, available at:

be committed via internet. It ruled that so as in the case of written press, internet provides a platform, where words are made available to the wider public¹⁷⁰.

In other Member States, the applicable offence provisions seem to be suitable to cover online crime. Swedish stakeholders noted, however that in cases where a crime is committed online, investigation, prosecution and consequently adjudication could be hindered by certain elements, and in particular the difficulties linked to the identification of the suspect and his/her motive. German stakeholders also raised concern regarding the commission of crimes online. In particular they noted that investigation and prosecution might become problematic in cases where servers are run from countries with legislation providing less stringent protection against hate speech.

Most of the national studies noted that the **borderline between freedom of expression and the provisions prohibiting hate speech** was clear and carefully considered. France constitutes an exception in this respect. The national study revealed that debates over the issue have been increasingly present in France since the violent attack against the satirical magazine of Charlie Hebdo. Debates mainly centred around the question of whether cartoons such as the ones published by Charlie Hebdo fell within the limits of democratic principles, such as the freedom of expression or whether they went beyond these, thereby constituting hate speech¹⁷¹. Another stream of discussions resulted from the increasing number of online hate speech incidents in France, which ultimately led to the Government's announcement of a campaign against hate speech¹⁷². The Government announced, as part of a three-year plan, its aim of strengthening hate speech legislation and its enforcement, by *inter alia* setting up a platform for monitoring online hate speech, foreseeing more stringent penalties against perpetrators and allowing authorities to shut down offending websites¹⁷³. Whilst some considered the French initiative as a progressive one, others saw it as a measure curtailing the freedom of expression¹⁷⁴.

Regarding the **suitability of the offence** provisions to **protect all vulnerable groups**, inefficiencies have been reported on in Belgium, Hungary, the Netherlands and Sweden. In Sweden discussions are on-going regarding the suitability of the offence provision transposing Article 1(1)(a) and (b) of the CFD to cover transgender people¹⁷⁵. The fact that transgender people are not covered by the existing offence provisions does not seem to be a major issue of concern, considering that hate speech incidents against this group are not

http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/AM%202012%205%20Sharia4Belgium%20NOOT%20DV.final.pdf.

¹⁷⁰ Joint Circular COL 13/2013 of the Ministry of Justice, Ministry of Interior and the College of General Prosecutors of 17 June 2013 on the research and prosecution policy for discriminations and hate offences (including discrimination based on sex), p. 23, available at: <http://www.diversiteit.be/sites/default/files/documents/law/getfile.pdf>.

¹⁷¹ Strengthening journalism in Europe, 'When satire incites to hatred: Charlie Hebdo and the freedom of expression debate', (2015), available at: <http://journalism.cmpf.eu.eu/discussions/when-satire-incites-hatred/>.

¹⁷² The Guardian, 'France launches major anti-racism and hate speech campaign' (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>.

¹⁷³ The Guardian, 'France launches major anti-racism and hate speech campaign' (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>, and Joseph Bamat 'France prepares for war against online hate speech', (2015) available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

¹⁷⁴ The Guardian, 'France launches major anti-racism and hate speech campaign' (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>, and Joseph Bamat 'France prepares for war against online hate speech', (2015) available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

¹⁷⁵ Conclusion based on stakeholder consultation carried out on 29 May 2015 (Official at the Ministry of Justice) and Committee Directive 2014/115, available at: https://www.riksdagen.se/sv/Dokument-Lagar/Utdredningar/Kommittedirektiv/Starkt-skydd-for-transpersoner_H2B1115/.

common in Sweden. As an example, according to the ProTrans Project, which collects data on transphobic discrimination, hate speech and violence, no cases of relevance since May 2014 have occurred in Sweden¹⁷⁶. In Belgium, concerns have arisen regarding the transposing provision of Article 1(1)(d) of the CFD. The provision of 'condoning, denying or grossly trivialising crime of genocide' only covers genocide perpetrated by the German National Socialist Regime, thereby creating a gap with respect to other genocides, such as the ones committed against Armenians. There is political will to extend the material scope of the provision to other vulnerable groups. For example, a bill was presented in 2010 to punish the denial, minimisation, justification or approval of any crime of genocide or crime against humanity¹⁷⁷. With respect to two Member States, namely Hungary and the Netherlands, ECRI¹⁷⁸ noted that it is an issue of concern that hate speech legislation fails to refer to citizenship and language. ECRI argued that the gap in legislation hinders the protection provided against hate speech. The CFD does not require Member States to grant legal protection against hate speech and hate crime on these grounds.

None of the national studies have raised concerns about the **suitability of the offence** provision to address any challenges of the **current national context**.

Five national studies, namely the ones for Belgium, Germany, Greece, Hungary and Sweden reported also on **inefficiencies other than the above**. The nature of inefficiencies differs from Member State to Member State. In Greece, the number of hate speech cases against immigrants has reportedly increased. Along this line it seems to be an issue that Greek legislation does not provide sufficient protection for undocumented migrants from detention or deportation. Out of fear of these consequences, undocumented migrants refrain from reporting crimes. In Sweden, the offence provision currently in force does not provide explicit protection against hate speech, if committed against individuals. Such crimes are often penalised as defamation, insulting behaviour, unlawful threat or abuse. In these cases the provision penalising hate motive as an aggravating circumstance could be used. Stakeholders note, however that it is often difficult to prove the motive of the perpetrator¹⁷⁹. In Belgium, in cases where a hate speech offence is committed via the press, the protected characteristic concerned by the crime determines the competence of courts. Whilst crimes committed based on racism and xenophobia are heard by criminal courts, crimes committed on the grounds of religion and sexual orientation are heard by Assize Courts. These latter types of courts are temporary courts, the organisation of which is labour intensive and costly. Therefore prosecutors are reluctant to proceed with cases that would be heard by Assize Courts. To overcome the issue, the Interfederal Centre for Equal Opportunities has called for the amendment of the Constitution, extending the competence of criminal courts to all press offences regardless of the protected characteristics concerned¹⁸⁰.

In Germany and Hungary, problems lie in the way the provisions are monitored and applied in practice. In Germany, the main problem derives from the understanding of hate speech

¹⁷⁶ ProTrans Project website, available at: <http://tgeu.org/pro-trans/>.

¹⁷⁷ Belgium, Senate, 'Proposal aiming at punishing the denial, minimisation, justification or approval of any crime of genocide or crime against humanity', 8 September 2010, available at: <http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=66&VOLGNR=1&LANG=fr>.

¹⁷⁸ ECRI, 'Report on Hungary – Fifth monitoring cycle', (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf> and ECRI, 'Report on the Netherlands – Fourth monitoring cycle', (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

¹⁷⁹ Information collected in May 2015 through consultation with national stakeholder (Public Prosecutor).

¹⁸⁰ Interfederal Centre for Equal Opportunities, 'Annual Report 2014' (*Rapport Annuel 2014*), pp. 44-45, (2014), available at: http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf.

and hate crime as politically motivated crime. In order to qualify a crime as a hate speech or hate crime, the perpetrator should show some political motivation or ties with an organised right-wing group. This understanding derives from German history, where hate speech and hate crime were originally associated with the Nazi regime. The current interpretation of hate speech and hate crime is problematic in cases where the perpetrator lacks identifiable political motive. Such motive is difficult to prove in cases where for example the perpetrator's behaviour targets people with disability or lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Considering this situation, hate speech and hate crime cases are not always investigated, prosecuted or adjudicated as such, instead they are treated as other crimes¹⁸¹. On a similar note, under-recording of hate speech and hate crime cases also results from the fact that investigating authorities, prosecutors and judges lack the knowledge necessary for identifying racist motives¹⁸². The lack of trust in the competent authorities, and in particular in investigating authorities from the side of victims also seems to be an issue of concern¹⁸³. It was also noted that victim support organisations in Germany are not informed by the police of hate speech and hate crime incidents, thereby hindering the provision of assistance to victims¹⁸⁴.

Similar issues as in Germany regarding the offence provision of 'incitement against a community' (i.e. provision transposing Article 1(1)(a) and (b) of the CFD) were identified in Hungary¹⁸⁵. It seems to be an issue that professionals working in the field lack specialised training on hate speech and hate crime issues. This contributes to insufficient investigation and prosecution, often ignoring circumstances that indicate the commission of hate speech. Deriving from the missed opportunities at the investigation and prosecution phases, courts classify crimes as those other than hate speech. As in Germany, underreporting is an issue of concern. The causes behind underreporting include the low level of trust in the authorities, fear of secondary victimisation, and fear of the prejudices also from the authorities' side. As a final element, the shortcomings of Hungary's victim support system could be mentioned. The main issues derive from the unavailability of victim support services during the investigation phase and the fact that psychological support is not part of the victim support package. It also seems to be an issue that only those who are legally residing in Hungary can benefit from the services of victim support organisations.

No inefficiencies other than the above were identified regarding the transposing provisions of Article 4 of the CFD.

Fourth criterion-Drivers behind any recent or planned legislative amendments

This Section aims to provide an overview of **any recent legislative changes, or legislative changes planned** in connection with the provisions transposing the CFD. The assessment focuses in particular on legislative changes resulting from the inefficiencies of previously existing legislation. It also highlights any legislative changes that concern the list

¹⁸¹ Human Rights Watch, 'Briefing Paper: The State Response to "Hate Crimes" in Germany', (2011), available at: <http://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

¹⁸² German Institute for Human Rights, 'Racist motivated Crime: Law enforcement must become more effective' (*Rassistisch motivierte Straftaten: Strafverfolgung muss effektiver werden*), (2014), available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/aktuell_3_2014_Strafverfolgung_muss_effektiver_werden.pdf.

¹⁸³ Human Rights Watch Briefing Paper, 'The State Response to "Hate Crimes" in Germany', (2011), available at <http://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

¹⁸⁴ Human Rights Watch Briefing Paper, 'The State Response to "Hate Crimes" in Germany', (2011), available at <http://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

¹⁸⁵ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary – Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), pp. 12-19, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

of protected grounds or the motive of the crime. Member States in which the legislation transposing the CFD was recently amended or is planned to be amended are referred to in the table below. 'Ticks' (✓) highlight cases where such amendments exist; whereas empty cells refer to cases where no relevant amendments are foreseen or have taken place recently. Indication to offence provisions which are currently not transposed is provided in the table below. Planned amendments that concern these non-transposed provisions are specifically spelled out in the assessment below.

Table 7 : Recent or planned amendment to provisions transposing the CFD

Member State	Provision transposing Art. 1(1)(a) <i>Public incitement to violence or hatred</i>	Provision transposing Art. 1(1)(b) <i>Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred</i>	Provision transposing Art. 1(1)(c) <i>Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes</i>	Provision transposing Art. 1(1)(d) <i>Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal</i>
BE ¹⁸⁶	✓	✓	NA – not transposed	
DE			NA – not transposed	
EL	✓	✓		
FR	✓	✓		
HU			NA – not transposed	
NL			NA – not transposed	NA – not transposed
SE	✓	✓	NA – not transposed	NA – not transposed

Recent legislative changes took place in Greece. Law 4285/2014¹⁸⁷ was adopted to adapt Law 927/1979 to the CFD. In particular, Law 4285/2014 amended the offence provision of 'public incitement to violence or hatred', transposing Article 1(1)(a) and (b) of the CFD and introduced the new offence provision of 'public condoning or denial of crimes', thereby transposing Article 1(1)(c) and (d) of the CFD.

Legislative changes are **planned** in Belgium, and Sweden, whereas in Hungary and France some initiatives are in the pipeline; however these initiatives have not been subject to parliamentary discussions. In the Netherlands, there were some initiatives of relevance underway; however these initiatives were rejected by the National Parliament.

In Belgium, the changes in question have been pending before the Belgian legislator since 2012. A proposed amendment to repeal the Anti-Racism Act, regulating the offence provision of 'incitement to hatred' on the grounds of nationality, race, skin colour, descent, or national or ethnic origin, which covers the criminal conducts set out in Article 1(1)(a) and (b) of the CFD, was introduced by members of the right wing political party called Flemish Interests. The amendment was introduced on the ground that the Act restricts the

¹⁸⁶ In case of Belgium, there are two offence provisions transposing both Article 1(1)(a) and (b). The legislative amendment described under the table concerns only one of the offence provisions, namely 'incitement to hatred on the grounds of nationality, race, skin colour, descent, or national or ethnic origin'.

¹⁸⁷ Law 4285/2014 'on the Amendment of Law 927/1979 (A' 139) and adjustment to the Framework Decision 2008/913/JHA of November 28, 2008, for combating certain forms and acts of racism and xenophobia through Criminal Law (L 383) and other' Government Gazette A' 191/2014.

freedom of expression and positively discriminates against Belgian autochthones¹⁸⁸. The second amendment concerns the offence provision of 'condoning, denying, grossly trivialising the crime of genocide', which reflects the criminal conducts set out in Article 1(1)(c) and (d) of the CFD. The amendment aims to extend the scope of application of the provision to crimes other than those perpetrated by the German National Socialist Regime during the Second World War¹⁸⁹.

In Sweden the legislative amendment seeks to extend the scope of protected grounds to transgender people. Discussions are also on-going on whether or not it is appropriate to use the term 'race' in applicable legislation¹⁹⁰.

In the Netherlands, there were two initiatives of relevance. One concerned the existing provisions, whereas the other aimed to introduce a new one to the Criminal Code. The first initiative, filed by the Freedom Party, concerned the possible abolition of the offence provisions set out in Article 130(c)-(e) of the Criminal Code. The initiative argued that the offence provisions were too vague and that the interests and values covered thereby were sufficiently protected by other offence provisions, such as defamation, incitement to violence, etc.¹⁹¹. In its critical advice of 5 December 2014, the Council of State concluded that the bill was contrary to the Netherlands' obligations under international law (including those deriving from the CFD), in accordance with which certain behaviours need to be penalised by criminal law means¹⁹². The second initiative, filed by the Christian Union in 2006, concerned the introduction of a new offence provision into the Criminal Code, penalising explicitly the denial of genocide. The legislative proposal was severely criticised by the Council of State and rejected by a majority in Parliament in 2011¹⁹³. It was argued that despite the express reference in legislation to the denial of genocide, such behaviour was already penalised under Article 137(c)-(e) of the Criminal Code. These provisions require from the perpetrator's side a malicious intent to incite to hatred, discrimination or violence or the existence of suspicion that an expression is insulting, which behaviours according to the Council of State, cover the denial of genocide. Despite the Council of State's explanation, ECRI in its last report has called on the Netherlands to reconsider its assessment and to include for preventive purposes an explicit offence provision dedicated to the criminal behaviour of denial of genocide.

France is in the process of amending the applicable hate speech provisions. The Government announced the need to make the legislation applicable to online hate speech more stringent. This possible amendment has not yet been subject to parliamentary discussions¹⁹⁴.

¹⁸⁸ Proposed amendment 1956/001 of 14 December 2011 to repeal Act of 30 July 1981 aiming at punishing certain acts based on racism and xenophobia, available at:

<http://www.lachambre.be/FLWB/PDF/53/1956/53K1956001.pdf>.

¹⁸⁹ Belgian Senate, 'Proposal aiming at punishing the denial, minimisation, justification or approval of any crime of genocide or crime against humanity 8 September 2010', available at:

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=66&VOLGNR=1&LANG=fr>.

¹⁹⁰ Information collected in May 2015 through consultation with national stakeholder (Official at the Ministry of Justice).

¹⁹¹ Parliamentary Minutes (*Kamerstukken II*), 13 October 2014, 2014-2015, 34051, no. 1-2; 3, p. 3-7.

¹⁹² Parliamentary Minutes (*Kamerstukken II*), 29 January 2015, 2014-2015, 34051, no. 4-5.

¹⁹³ Parliamentary Minutes (*Kamerstukken II*) 2005-2006, 30579, no. 5; Proceedings (*Handelingen*) II 13 September 2011, 105-15, p. 64.

¹⁹⁴ The Guardian, 'France launches major anti-racism and hate speech campaign', available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign> and Joseph Bamat, 'France prepares for war against online hate speech', (2015), available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira/>.

Although there is no legislative proposal *per se* in the pipeline in Hungary, the General Prosecutor's Office filed an initiative regarding the potential amendment of the offence provision of 'incitement against a community', with the Ministry of Interior. The position of the General Prosecutor's Office is that the criminal conduct set out in the offence provision, namely inciting to hatred is too restrictive and therefore is rarely used in practice. This is despite the fact that the penalisation of hate speech by criminal law means is a requirement deriving both from European and international legislation (e.g. from Article 4 point a of the International Convention on the Elimination of All Forms of Racial Discrimination (CEFRD)¹⁹⁵, or from Article 20 point 2 of the ICCPR¹⁹⁶). Considering the lack of sufficient legal protection, the General Prosecutor's Office has initiated the adoption of a new offence provision banning unlawful differentiation. The offence provision would aim to criminalise the following criminal conducts: calling on to discriminate, commit violence or to show offensive behaviour; public dissemination of ideas based on racial superiority or hate; racial discrimination or the support of activities based on racial discrimination. The Ministry of Justice, which received the initiative of the General Prosecutor's Office, has not taken further actions.

Finally, it is noted that there is one Member State covered by this report, namely Germany, which recently amended its national legislation with the objective of ensuring compliance with Article 4 of the CFD. The legislative change in question, which was adopted on 1 August 2015, introduced new wording into Section 46 of the Criminal Code, requiring criminal courts to take into account 'racist, xenophobic and other inhuman motives and aims' while considering the penalty to be imposed against perpetrators. Previously such motives were not referred to in the German Criminal Code and each initiative for a potential legislative amendment was rejected by the German Parliament on the ground that such an explicit reference was unnecessary given that in practice such motives were taken into account by courts while adjudicating¹⁹⁷.

4.3. Audiovisual Media Services and the Electronic Commerce Directives

4.3.1. Transposition of the Audiovisual Media Services and the Electronic Commerce Directives

The AMSD and the ECD require Member States to put in place appropriate means against incitement to hatred in the media and through internet. The most relevant provisions are Article 6 of the AMSD and Article 3(2) and 3(4)(i) of the ECD. Article 6 of the AMSD requires Member States to ensure that audiovisual media services provided under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. Under Article 3(2) and 3(4)(i) of the ECD, Member States may restrict the

¹⁹⁵ Pursuant to Article 4, point a) of the CEFRD, State Parties '[...] (a) shall 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 [...]'. The Convention is available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

¹⁹⁶ Pursuant to Article 20 point 2 of the ICCPR, 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The ICCPR is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁹⁷ BUG e.V., 'Dossier "Hate Crime and its legal frame"', (*Dossier "Hasskriminalität und ihre rechtlichen Rahmenbedingungen"*), (2014) available at: <http://www.bug-ev.org/themen/schwerpunkte/dossiers/hasskriminalitaet/gesetzgebung-gegen-hasskriminalitaet/aenderung-46-stgb/einschaetzungen-zur-gesetzesanderung-des-46-stgb.html>.

provision of cross-border information society services if it is necessary for the fight against incitement to hatred on the grounds of race, sex, religion or nationality.

An overview of the main provisions transposing the abovementioned Articles is provided in the table below.

Table 8 : Overview of provisions transposing the AMSD and the ECD

Member State	Provision(s) transposing Art. 6 of AMSD <i>Prohibition of incitement to hatred via audiovisual media services</i>	Provision(s) transposing Arts. 3(2) and 3(4)(i) of ECD <i>Restriction of cross-border information society services in order to fight against incitement to hatred</i>
BE	<p>Flemish community: Arts. 38, 44, 218 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009¹⁹⁸</p> <p>German-speaking community: Arts. 4, 80.1 of the Government of the German-speaking Community Decree of 27 June 2005 on Radio Broadcasting and Cinema¹⁹⁹</p> <p>French-speaking community: Arts. 9, 159(4) of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services²⁰⁰</p>	Art. 2, Act of 11 March 2003 on certain legal aspects of information society services ²⁰¹
DE	<p>Section 130(2), CC</p> <p>Section 7(1), 13th Amendment to the Inter-State Broadcasting Treaty²⁰²</p> <p>Section 4(1), Interstate Treaty on the protection of minors²⁰³</p>	Section 3(5), Telemedia Act ²⁰⁴
EL	Art. 7, PD 109/2010 ²⁰⁵	Art. 2(2)(4), PD 131/2003 ²⁰⁶

¹⁹⁸ Decree of 27 March 2009 of the Flemish Government on radio and television broadcasting, available at: http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=09-04-30&numac=2009035356.

¹⁹⁹ Decree of 27 June 2005 of the German-speaking Community on Radio Broadcasting and Cinema, available at: http://medienrat.be/files/Dekret_27_Juni_2005_Stand_25_Maerz_2013.pdf.

²⁰⁰ Decree of 26 March 2009 of Government of the French-speaking Community on audiovisual media services, available at: http://www.csa.be/system/documents_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%2012%20mars%202015.pdf?1431957507.

²⁰¹ Act of 11 March 2003 on Certain Legal Aspects of Information Society Services as defined in Article 77 of the Constitution, available at: http://www.ejustice.just.fgov.be/cgi/loi/change_lg.pl?language=nl&la=N&cn=2003031132&table_name=wet.

²⁰² Interstate Treaty for Broadcasting and Telemedia in the version of the 13th Amendment to the Inter-State Broadcasting Agreement (30.10./04.11./20.11.2009), available at: http://www.telemedicus.info/uploads/Dokumente/RStV_13-RAeStV_hervorgehoben_Lesefassung.pdf.

²⁰³ Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (10-27 September 2002), available at: http://www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_english.pdf.

²⁰⁴ Telemedia Act of 26 February 2007 (Federal Gazette I, p. 179), available at: http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TMA_.pdf.

²⁰⁵ P.D. 109/2010, Harmonisation of the Greek radiotelevision legislation to the provisions of Directive 2010/13/EU of the EP and EC et al., Government Gazette A' 190/2010.

FR	Art. 15, Law No. 86-1067 of 30 September 1986 on freedom of communication ²⁰⁷	Art. 43-8, Law No. 86-1067 of 30 September 1986 on freedom of communication
HU	Arts. 17(1)-(2), 21(1), Act CIV of 2010 on the freedom of press and fundamental rules on medial content ²⁰⁸ and Arts. 176(1), 177(1), 178(1) ²⁰⁹ , 186-189 Act CLXXXV of 2010 on Media Services and Mass Media ²¹⁰	Art. 3/A(1)(a)(aa) of Act CVIII of 2001 on electronic commerce and information society services ²¹¹
NL	Art. 137d-e CC	Art. 54a CC Article 6:196c, Civil Code ²¹²
SE	Arts. 4, 6, Chapter 7, Freedom of the Press Act, Constitution; Arts. 6, 9 Chapter 1, Art.1, Chapter 5, Art. 1, Chapter 7, Fundamental Law on Freedom of Expression, Constitution	Section 3, Act on Electronic Commerce and other information society services

All Member States have **transposed the relevant provisions** prohibiting incitement to hatred in audiovisual media services, and restricting freedom to provide information society services from another Member State on this basis, as set out in the AMSD and ECD, respectively.

With the exception of Belgium, **national level legislation** contains the applicable rules. In Belgium, the media fall within the competence of the Communities; therefore Article 6 of the AMSD has been transposed into Belgian legislation at the **level of the Communities**.

In most Member States assessed, namely Belgium, Greece, France, and Hungary, the relevant provisions are contained in **administrative law**, whereas in some, such as the Netherlands, and to a smaller extent Germany, transposing measures are also set out in the national **Criminal Codes**. There is one Member State, namely the Netherlands, where the national **Civil Code** also provides legal protection against incitement to hatred as set out in the ECD. In Sweden, Article 6 of the AMSD has been transposed by means of **constitutional provisions**, which provisions however do not mention the sanctions to be imposed. Reference to sanctions is provided in the **Swedish Criminal Code**.

As regards the quality of transposition, some differences exist among the Member States, in particular in relation to the transposition of the **list of protected grounds**. The AMSD and the ECD require the prohibition of incitement to hatred on the grounds of race, sex, religion or nationality. These protected characteristics are expressly echoed in the transposing provisions of all the Member States assessed, except for Germany and the Flemish Community in Belgium. In Germany, the transposing provisions fail to explicitly list

²⁰⁶ PD 131/2003 on the adjustment to Directive 2000/31/EC of the EP and EC on certain legal aspects of services of the information society, especially of electronic commerce, in the internal market, Government Gazette A' 116/2003.

²⁰⁷ Law No. 86-1064 of 30 September 1986 on freedom of communication, OJFR, 1 October 1986, p. 11755.

²⁰⁸ Act CIV of 2010 on the freedom of press and fundamental rules on medial content, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=132460.256038.

²⁰⁹ Arts. 176(1), 177(1), 178(1) only apply in case of media content providers which are established in a different Member State.

²¹⁰ Act CLXXXV of 2010 on Media Services and Mass media is available in Hungarian at: http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=133252.231232.

²¹¹ Act CVIII of 2001 on certain issues of electronic commerce services and information society services, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=57566.296201.

²¹² Article 6:196c of the Civil Code is available at:

http://wetten.overheid.nl/BWBR0005289/Boek6/Titel3/Afdeling4A/Artikel196c/geldigheidsdatum_29-05-2015.

sex as a protected ground; instead they leave the list of protected grounds open-ended, by referring to 'other segments of the population'. As explained above, in Belgium the regulation of audiovisual media services falls within the competence of the Communities. In Flanders, the transposing provision of the AMSD prohibits incitement to hatred in general terms, without reference to specific protected grounds²¹³. It is reasonable to conclude that these transposition techniques allow for a broad interpretation of the protected characteristics.

In other Member States, the transposing provisions expressly refer to a broader range of characteristics than those listed in the AMSD and the ECD, thereby going beyond the Directives' original scope of application. As an example, in Greece the following characteristics are spelled out in the transposing provisions: race, gender, religion, belief, nationality, disability, age and sexual orientation²¹⁴.

4.3.2. Effectiveness of legislation transposing the Audiovisual Media Services and the Electronic Commerce Directives

This Section assesses the **effectiveness of Member States' transposing legislation**. The national legal frameworks were assessed on the basis of the following four criteria:

- First criterion: Interaction of national transposing provisions with the freedom of expression.
- Second criterion: Quantitative data on the use of transposing provision(s) in practice.
- Third criterion: Factors hindering the effective application of the transposing provisions.
- Fourth criterion: Drivers behind any recent or planned legislative amendments.

First criterion-Interaction of national transposing provisions with the freedom of expression

Both the AMSD and the ECD provide that measures taken to protect human dignity, which include protection against incitement to hatred, should be carefully balanced with the freedom of expression²¹⁵.

Along this line, this Section seeks to assess, through decisions of higher courts, the **relationship** between Member States' legislation **transposing the said Directives** and the **fundamental right of freedom of expression**. An overview of the existence of related higher court decisions is provided in the table below. 'Ticks' highlight the existence of higher court decisions, whereas empty cells indicate the lack of relevant higher court decisions.

Table 9 : Existence of relevant higher court decisions

Member State/Provision	Provision(s) transposing Art. 6 of AMSD <i>Prohibition of incitement to hatred via audiovisual media services</i>	Provision(s) transposing Arts. 3(2) and 3(4)(i) of ECD <i>Restriction of cross-border information society services in order to fight against incitement to hatred</i>
BE		
DE		
EL		
FR		
HU	✓	
NL	✓	
SE	✓	

²¹³ Arts 38, 44, 218 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009.

²¹⁴ Art. 7, PD 109/2010.

²¹⁵ Point 60 of the Preamble of the AMSD; Points 9 and 46 of the Electronic Commerce Directive.

Higher court decisions seem to exist in only three Member States: Hungary, the Netherlands and Sweden. In these Member States, the relevant court decisions concern the transposing provisions of Article 6 of the AMSD. In the Netherlands and Sweden, the transposing provisions of Article 6 of the AMSD are identical to those transposing Article 1(1) of the CFD. Therefore the relevant court decisions have already been described in detail under Section 4.2.2. For ease of reference, a short summary of the relevant decisions is also provided below.

In Sweden, the compliance of the provision called 'incitement against a population group'²¹⁶ with the freedom of expression was subject to the interpretation of the Supreme Court. The Supreme Court recalled the requirements set up by the ECtHR in its judgments, such as *Steel and Morris v. UK*²¹⁷, by stating that any restriction of the freedom of expression should be necessary and proportionate to the purpose to be achieved. Regarding necessity, it was clarified that a pressing social need is required for any limitations. Besides these two requirements it was considered as important to assess the circumstances of the statement and not only the content thereof. In the Netherlands, the Supreme Court developed the so-called 'three-step-test'²¹⁸, requiring criminal courts to take into account the accused person's freedom of expression while deciding on his/her guilt under Article 137c of the Criminal Code. In accordance with the test, courts should assess the circumstances, the nature and the purpose of the crime; the existence of factors which could potentially lift the criminal liability of the perpetrator and whether or not the perpetrator's conduct was gratuitously offensive. As explained under Section 4.2.2, this test is not consistently used with respect to Article 137d of the Criminal Code. According to the Supreme Court it is sufficient to assess the context and the circumstances of the expression while deciding on the liability of the perpetrator.

In Hungary, one Constitutional Court decision²¹⁹ touching upon the balance between freedom of expression and Article 17 of Act CIV of 2010 was identified. The court decided that the restriction set out in the said provision of Act CIV of 2010 was necessary, could be justified by constitutional values and objects and complied with the requirement of proportionality.

In Greece, there is a pending case before the Supreme Court. The Supreme Court is scheduled to issue its judgment in September 2015²²⁰. The decision is likely to concern the transposing provision of Articles 3(2) and 3(4)(a)(i) of ECD.

Second criterion-Quantitative data on the use of transposing provision(s) in practice

In line with the Directives' requirements Member States should take measures against those service providers who incite to hatred. This Section assesses the extent to which the relevant provisions of the AMSD and ECD are **used in practice**. A summary of whether or not quantitative data on the decisions of the competent authorities exist is provided in the

²¹⁶ The provision is set out in Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 4, para 11 and in Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1.

²¹⁷ ECtHR, Case *Steel and Morris vs. UK*, (15 May 2005) available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68224#{"itemid":\["001-68224"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68224#{).

²¹⁸ The 'three-step-test' was developed by the Supreme Court *inter alia* in the following cases: Dutch Supreme Court, crim. ch., 9 January 2001, *Netherlands Jurisprudence* 2001, 203; Dutch Supreme Court, crim. ch., 9 January 2001, *Netherlands Jurisprudence* 2001, 204, annotation De Hullu; Dutch Supreme Court, crim. ch., 14 January 2003, *Netherlands Jurisprudence* 2003, 261, annotation Mevis.

²¹⁹ Constitutional Court Decision 165/2011. (VI.20.), available at: <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798F004FEC26>.

²²⁰ Information collected in June 2015 through consultation with national stakeholders (police/prosecutor/academic/NGO and with Mr Sotiropoulos, human rights lawyer, previously a Citizen's Ombudsman for the Athen's Municipality and currently, Citizen's Ombudsmen on a regional level).

table below. 'Ticks' (✓) highlight the existence of data, whereas empty cells highlight the lack of relevant data.

Table 10 : Existence of data on decisions taken against service providers

Member State	Provision(s) transposing Art. 6 of AMSD <i>Prohibition of incitement to hatred via audiovisual media services</i>	Provision(s) transposing Arts. 3(2) and 3(4)(i) of ECD <i>Restriction of cross-border information society services in order to fight against incitement to hatred</i>
BE	✓	
DE		
EL		
FR		
HU	✓	
NL		
SE	✓	

Based on the information collected it seems that none of the Member States collect **data on the use in practice** of the provisions transposing Articles 3(2) and 3(4)(a)(i) of ECD. The datasets available, mainly concern the provision(s) transposing Article 6 of the AMSD.

Out of the seven Member States covered by this assessment, three (Belgium, Hungary and Sweden) collect data on the use of the transposing provision(s) in practice. Data are partially available to the public in Sweden, whereas in Belgium and Hungary such data are available upon request.

Sweden and Hungary have national level authorities designated for the collection of data. In Sweden, the Chancellor of Justice, responsible for the prosecution of the offence of 'incitement against population', collects some data. Regarding the number of prosecuted cases, the limited data available suggest that there are four on-going cases before the Chancellor of Justice²²¹. Data available also suggest that to date only three court decisions condemning an audiovisual media service provider for 'incitement against population' have been issued²²².

In Hungary, the Media Council as part of its annual activity report to the National Parliament, collects some data on the number of cases in which media content incites to hatred. Between 2011 and 2014 the Media Council took nine decisions, out of which the breach of obligation was established in three cases²²³. None of these decisions concerned the restriction of cross-border services.

As opposed to the centralised data collection system of Sweden and Hungary, in Belgium such activities are carried at the level of the Communities. Culture and media fall within the competences of the three Communities, notably the Flemish, the German-speaking and the French-speaking Communities. Data gathered to date from stakeholders suggest that no service provider has ever been condemned for incitement to hatred under the provisions transposing Article 6 of the AMSD²²⁴.

²²¹ The on-going cases prosecuted by the Chancellor of Justice are available at: <http://www.jk.se/Rattegangar/tryck-och-yttrandefrihet/pagaende.aspx>

²²² Cases prosecuted by the Chancellor of Justice are available at: <http://www.jk.se/Rattegangar/tryck-och-yttrandefrihet/avslutade.aspx>

²²³ Information received via email from the Media Council on 8 September.

²²⁴ The transposing provisions are set out in: Flemish Community: Article 38 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009; German-speaking Community: Article 4 of the Government of

In Germany and the Netherlands, some of the provisions (i.e. Section 130(2) of the German Criminal Code and Article 137d-e of the Dutch Criminal Code) transposing Article 6 of the AMSD are identical to those transposing the CFD. Statistical data of relevance in the context of the transposing provisions of the CFD are provided under Section 4.2.2. The data quoted under Section 4.2.2 however should be treated with caution, as existing statistical data are not broken down per type of perpetrator or medium used to express an opinion. For ease of reference some indication to the data quoted under Section 4.2.2 is provided below.

In Germany data are collected regarding the use of Section 130 of the Criminal Code in practice. Existing data however, are not broken per the subsections of the said provisions. Consequently it is not possible to estimate the total number of cases investigated, prosecuted and adjudicated under Section 130(2). The total numbers for Section 130 suggest a high number of investigated and prosecuted cases (in 2014 2,760 and 1,836, respectively). In the Netherlands information on the number of investigated cases is available. In 2010, 33 cases of hate speech under the meaning of Article 1(1)(a) and (b) of the CFD were investigated in the Netherlands. Some data of relevance are also collected by the Dutch NGO Complaint Bureau for Discrimination on the Internet²²⁵. The organisation in question handles notifications of hatred and discrimination on the Internet. In 2014, the organisation noted around 493 notifications in connection with hate speech as set out in Article 137c-g of the Criminal Code²²⁶. These numbers capture hate speech provisions other than those transposing Article 6 of the AMSD, and thus should be treated with caution.

To conclude, data collection efforts seem to be limited in the Member States assessed. The lack of data or the existence of limited data, often providing insight into the number of decisions taken only, hinders the full understanding of the use of the transposing provisions in practice. The very little data available might suggest however that either cases of incitement to hatred through the media are non-existent or that such cases remain unexamined by the competent authorities. It might also mean that media content providers comply with their obligations set out in applicable legislation.

Third criterion-Factors hindering the effective application of transposing provision(s)

This Section assesses any **inefficiency linked to the existing legal framework**, which hinders practical application. It focuses on: clarity of the applicable offence provision(s), suitability of the offence provision(s) to ensure freedom of expression, and to protect vulnerable groups. Other inefficiencies are also referred to in the assessment. 'Ticks' (✓) are used to show the existence of inefficiencies, whereas empty cells indicate the lack of inefficiencies.

the German-speaking Community Decree of 27 June 2005 on Radio Broadcasting and Cinema; French-speaking Community: Article 9 of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services.

²²⁵ More information on the Complaint Bureau for Discrimination on the Internet is available at: <http://www.meldpunt.nl/site/page.php?lang=1&pageID=24>.

²²⁶ Complaint Bureau for Discrimination on the Internet, 'Annual Reports 2014', (2015), available at: <http://www.meldpunt.nl/site/page.php?lang=&pageID=34>.

Table 11 : Factors hindering the effective application of the provisions transposing the AMSD and the ECD

Member State/Provision	Provision(s) transposing Art. 6 of AMSD <i>Prohibition of incitement to hatred via audiovisual media services</i>	Provision(s) transposing Arts. 3(2) and 3(4)(i) of ECD <i>Restriction of cross-border information society services in order to fight against incitement to hatred</i>
Clarity of offence provision		
BE		
DE	✓	
EL		
FR		
HU		
NL	✓	
SE		
Suitability to protect vulnerable groups		
BE		
DE	✓	✓
EL	✓	
FR		
HU	✓	
NL	✓	
SE	✓	
Suitability to ensure freedom of expression		
BE		
DE		
EL		
FR		
HU		
NL		
SE		
Other		
BE		
DE		
EL		✓
FR		
HU	✓	
NL		
SE	✓	

Overall the **transposing provisions** seem to be clear in the Member States assessed. German and Dutch legislation constitute an exception in this respect. In both Member States however, interpretation difficulties are linked to transposing provisions set out in the Criminal Code. As mentioned above, these transposing provisions are identical to those transposing Article 1(1) of the CFD. Assessment on the efficiency of these provisions is provided under Section 4.2.2. For ease of reference a short summary of the main issues is provided here. In Germany the main issue arises from the lack of definition of certain terms, resulting in the authorities' contradictory interpretation²²⁷. In the Netherlands the term 'incitement to hatred' has given rise to interpretation difficulties²²⁸.

In some Member States, the transposing provisions are seen **as unsuitable to protect vulnerable groups**. In the case of Sweden and the Netherlands, the transposing

²²⁷ Information collected in July 2015 through consultation with national stakeholder (Academic).

²²⁸ Dutch Supreme Court, Crim. Ch., 2 April 2002, *LJN* AD8693, *NJ* 2002, 421, annotation Mevis, para. 3.4.

provisions in question are identical to those transposing Article 1(1) of the CFD; thus detailed assessment on the implications of existing inefficiencies is provided under Section 4.2.2. For ease of reference a short summary of the main issues is provided here. With respect to the Netherlands ECRI has claimed that the lack of reference to the protected characteristics of citizenship and language was problematic. In Sweden the lack of coverage of transgender people by applicable legislation has given rise to concerns.

German, Greek and Hungarian legislation seems to provide insufficient protection to certain groups. In Germany, neither the transposing provisions of the AMSD nor of the ECD contain reference to sexual orientation and disability. In Greece, similar observations were made regarding the lack of coverage of gender identity in the transposing provisions of the AMSD and the absence of reference to gender identity, sexual orientation and age in the transposing provisions of the ECD²²⁹. In both Member States, it was argued that the inclusion of these protected grounds was necessary given *inter alia* the vulnerability of the said groups to hate speech.

In Hungary, the views of stakeholders regarding the suitability of the provision transposing Article 6 of the AMSD to protect vulnerable groups differed. Some argued that the list of subjects as set out in Article 17 of the Act CIV of 2010 (i.e. 'any nations, communities, national, ethnic, linguistic and other minorities or any majority or religious group') was too extensive, covering literally everyone²³⁰. As opposed to this, but also deriving from the potentially too extensive interpretation of the transposing provisions, some argued that the list of protected grounds should be more specific, covering expressly for example women²³¹. Some other stakeholders held a different view, finding the current provisions suitable and broad enough to cover all vulnerable groups²³².

The relationship between **freedom of expression and the transposing provisions** does not seem to be an issue of concern in the Member States covered by this assessment.

In three Member States, **inefficiencies** linked to factors other than the ones described above were identified. In Sweden, the legislation transposing Article 6 of the AMSD does not provide legal protection against hate speech if committed against individuals. In Greece, the application of the provisions transposing the ECD is hindered by the fact that judges are not well acquainted with issues of information services and are not familiar with the implementation mechanisms of the Directive²³³. In Hungary, one stakeholder argued that the penalties foreseen for the breach of obligations set out in Article 17 of Act CIV of 2010 transposing Article 6 of the AMSD were too strict. According to the stakeholder, these potentially strict sanctions might lead to the self-censorship of media content providers²³⁴.

²²⁹ Information collected in June 2015 through consultation with national stakeholders (police/prosecutor/academic/NGO and with a human rights lawyer, previously a Citizen's Ombudsman for the Athen's Municipality and currently, Citizen's Ombudsmen on a regional level).

²³⁰ Ildikó Vincze 'Amendments to media related acts' (*A médiatörvények módosításai*), (2012) available at http://www.mediakutato.hu/cikk/2012_04_tel/07_mediatorvenyek_modositasai.

²³¹ Sexual violence is not funny – Press release by 'For Women' Association and its partner associations (*A nemi erőszak nem vicces - a Nőkért Egyesület és a csatlakozó szervezetek sajtónyilatkozata*), (2014), available at: <http://nokert.hu/index.php/a-nkert-egyesulet/2014-09-15-14-52-28/1329-2014-09-03-19-18-54>.

²³² Information collected in July-September 2015 through consultation with national stakeholders (representative of Self-regulatory body, Hungarian Publishers' Association (August 2015); and representative of NGO, Hungarian Civil Liberties Union (July 2015); representative of public authority, Media Council (September 2015)).

²³³ Information collected in June 2015 through consultation with national stakeholders (police/prosecutor/academic/NGO and with a human rights lawyer, previously a Citizen's Ombudsman for the Athen's Municipality and currently, Citizen's Ombudsmen on a regional level).

²³⁴ Information collected in July 2015 through consultation with national stakeholder (NGO, Hungarian Civil Liberties Union).

Fourth criterion-Drivers behind any recent or planned legislative amendments

The Section provides an overview of **any recent legislative changes, or legislative changes planned**. The assessment focuses in particular on legislative changes resulting from the inefficiencies of previously existing legislation. It also highlights any legislative changes that concern the list of protected grounds.

Legislative amendments are not **planned** in any Member State concerned by this assessment. **Recent legislative amendments** only took place in Belgium, where Article 9 of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services²³⁵, transposing Article 6 of the AMSD, was subject to a minor amendment. The amendment was adopted in 2013 with the aim of enhancing the protection of minors against certain inappropriate content²³⁶.

4.4. Publishers' responsibility for hate speech

4.4.1. Rules on publishers' responsibility for hate speech

Hate speech published by the media might reach a wider audience or could target a larger number of people. Therefore it might have a significant social impact. Consequently, it is of particular importance to appropriately regulate the responsibility of the media for publishing hate speech.

In all Member States assessed, legal consequences are attached to the publication of hate speech by the media. These consequences are set out in applicable legislation on the one hand and in self-governing rules of professional associations on the other hand. This Section provides an overview of the different rules in place and highlights some of their most relevant features.

The table below maps the way liability for the publication of hate speech is regulated in the Member States covered. Only those liability schemes which are specific to hate speech are referred to below. In other words, general rules, covering also behaviours other than the publication of hate speech are not reflected in the table below. 'Ticks' (✓) show the existence of specific rules, whereas empty cells refer to the lack of rules.

Table 12 : Overview of rules regulating publishers' liability for hate speech

Member State	Criminal law	Civil law	Specific media law	Self-regulation
BE	✓		✓	
DE	✓		✓	
EL	✓		✓	
FR	✓		✓	
HU			✓	✓
NL	✓			
SE	✓			

Liability schemes set out in **self-regulations** seem to be **different from those provided**

²³⁵ Decree of 26 March 2009 of Government of the French-speaking Community on audiovisual media services, available at:

http://www.csa.be/system/documents_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%2012%20mars%202015.pdf?1431957507.

²³⁶ Decree of 7 February 2013 providing for adaptations on the protection of minors to the Decree of 26 March 2009 on audiovisual media services, available at:

http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=13-03-18&numac=2013029222.

by legislation. The main difference lies in the scope of application of the two regulatory instruments. Whilst legislation applies to all falling within its scope, self-regulations apply only to those who voluntarily agree to be bound by them. As an example, in Hungary, **self-regulations** typically bind members of professional organisations and those who voluntarily agree to comply with the rules set out therein. In Hungary, almost all major professional associations of media content providers (radio and television broadcasters constitute an exception) have developed self-regulations²³⁷. Under each self-regulation a separate disciplinary body has been established, with the remit of ensuring compliance with the rules set out therein. As a matter of fact Hungary seems to be the only Member State, where self-regulations of media content providers specifically prohibit hate speech. In other Member States, namely Belgium, Germany, Greece, and the Netherlands, where self-regulations also exist, the applicable documents fail to expressly prohibit hate speech, and/or have been developed by professional associations of journalists. In this latter case, the self-regulations in principle contain professional rules for journalists only (and not for publishers). It is noted however that in some Member States, the provisions set out in self-regulations of journalist associations seem to be interpreted broadly, extending *inter alia* to editors. This is the case for example in Greece, where in a recent case from July 2015 the Code of Conduct of the Athens Journalists' Union was applied against a chief editor²³⁸. This Code of Conduct does not expressly refer to the prohibition of hate speech.

In terms of applicable legislation, in most Member States, the publication of hate speech is expressly penalised by means of **criminal law**. In these Member States, the legislation explicitly mentions publishers. This is the case in Member States, where applicable legislation has set up a so-called 'cascade system of liability', namely in Belgium, France and Sweden. In Belgium this cascade system has been set up by Article 25 of the Constitution²³⁹ and applies to liability under criminal and civil law. Pursuant to the said provision, 'when the author is known and resident in Belgium, neither the publisher, nor the printer or the distributor is prosecuted'. This provision implies that in Belgium, first the author is held liable, if unknown then the publisher, and so on. In France, the cascade system varies depending on the type of media concerned. In the case of written press²⁴⁰, publishers are the ones who are primarily responsible. In the absence of such persons, the authors could be held liable. In the absence of authors, printers are the main liability holders, whereas liability falls on vendors, distributors and displayers in the absence of printers. In case of audio-visual media services²⁴¹, publishing directors or co-directors will be held liable. In the absence of such persons the author is the main holder of criminal and/or civil liability. Under French law, exceptions under the general rules exist. For example, in cases where a message is published online, the director and co-editor could be exempt from liability if two conditions are met: (i) the message went online without being read by the director and co-editor of the site, and (ii) upon becoming aware of the existence of the message, these people acted promptly with the aim of removing it²⁴². The Swedish system is comparable to that in France in the sense that depending on the type of media, different rules apply. In case of periodicals the order of liability holders is the following: the editor, the owner of the periodical, the printer, the disseminator of the

²³⁷ Hungarian Publishers' Association (*Magyar Lapkiadók Egyesülete*), the Hungarian Electronic Broadcasters (*Magyar Elektronikus Műsorszolgáltatók Egyesülete*), Association of Hungarian Content Providers (*Magyarországi Tartalomszolgáltatók Egyesület*) and the Advertising Self-regulatory Body (*Önszabályozó Reklám Testület*).

²³⁸ Proto Thema, 'Unprecedented disciplinary prosecution of journalists by ESHEA', (*Πρωτοφανής πειθαρχική δίωξη δημοσιογράφων από την ΕΣΗΕΑ*), (2015), available at: <http://www.protothema.gr/greece/article/491197/protofanis-peitharhiki-dioxi-dimosiografon-apo-tin-esiea/>.

²³⁹ Article 25 of the Belgian Constitution is available at: http://www.const-court.be/en/basic_text/belgian_constitution.pdf.

²⁴⁰ Article 42 of Law of 29 July 1881 on the freedom of press.

²⁴¹ Article 93-3 of Law of 29 July 1982 on mass media.

²⁴² Article 27 of the law HADOPI I 2009.

periodical²⁴³. In case of non-periodicals the rules regulating liability are altered as follows: author, editor, publisher, printer and distributor²⁴⁴. Again a different set of rules apply when the offence is committed via radio programmes or technical recordings. In accordance with these rules the order of liability is as follows: editor, person responsible for appointing the editor, owner and disseminator²⁴⁵.

Dutch criminal legislation has not set up a cascade system. Instead, it specifies (Article 48 of the Criminal Code) that next to the author of expression, (chief) editors and radio and television broadcasters can be liable as accomplices for the publication of hate speech if they have actually been involved in the creation of the media content. Distributors who might not have actual knowledge about the content of expression, but who have 'reasonable grounds to suspect its punishable nature' can also be held liable.

In other Member States, criminal legislation is less explicit than in Belgium, France, the Netherlands and Sweden. Applicable criminal legislation states that any person can commit hate speech. The term 'any person' could be interpreted broadly, as covering also publishers. In Hungary, however a stakeholder²⁴⁶ noted that in practice media content providers would not be held liable under criminal law for the publication of hate content. Their liability would be limited to that deriving from administrative law. In Germany²⁴⁷ and Greece²⁴⁸ case law suggests that criminal sanctions have already been imposed against publishers for breaching the hate speech related criminal offence provisions.

Regarding criminal liability, it is also noted that the provisions covering the publication of hate speech largely overlap with those transposing the CFD. This seems to be the case in Sweden, where the main rules are set out in the freedom of press and freedom of expression related provisions of the Constitution's fundamental laws, which rules as specified under Section 4.2 transpose Article 1(1)(a) and (b) of the CFD. In other Member States, however, other instruments also contain relevant rules. For example, in the Netherlands, besides the provisions transposing the CFD (i.e. Article 137d and 137e of the Criminal Code), relevant rules are set out *inter alia* in Articles 53 and 54 of the Criminal Code²⁴⁹, providing legal protection against 'press offences'. In the Netherlands, press offences are those committed by means of printed media. Offences committed via audiovisual media materials and the internet are excluded from the scope of press offences²⁵⁰. Offences committed through these means could be punishable under criminal offence provisions other than those penalising press offences²⁵¹.

In most Member States publishers could also be held liable under **civil law**, implying that victims could seek for the compensation of their damages through civil claims. However, the civil liability schemes in place are rarely specific to hate speech. In fact, specific civil liability schemes are only available in France and Hungary. Legislation setting out the

²⁴³ Freedom of Press Act, Chapter 8.

²⁴⁴ Freedom of Press Act, Chapter 8.

²⁴⁵ Freedom of Press Act, Chapter 6.

²⁴⁶ Information collected in September 2015 through consultation with national stakeholder (representative of public authority, Media Council).

²⁴⁷ Federal Review Board for Media Harmful to Minors) 'Statistics' (*Statistics*), (no date available), available at: <http://www.bundespruefstelle.de/bpjm/Service/statistik.html>.

²⁴⁸ First Single-Member Court of Appeals, Decision 5919/18-9-2008.

²⁴⁹ Articles 53 and 54 of the Criminal Code are available at:

http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelV/Artikel53/geldigheidsdatum_29-05-2015 and http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelV/Artikel54/geldigheidsdatum_29-05-2015.

²⁵⁰ Radio and television broadcasting companies are generally involved in the creation and the content of expression and are therefore liable for the publication or the dissemination of hate speech under Articles 137c-e of the Criminal Code.

²⁵¹ Example of relevant provision is set out in Article 54a of the Criminal Code.

applicable rules, namely the 1881 Law on the Freedom of Press in France and the Civil Code in Hungary, do not contain explicit reference to the liability of publishers; instead they specify the liable persons in general terms, by referring to any person. In the case of Hungary, a stakeholder confirmed that civil liability plays a role in particular when hate content is published through a blog or an online forum. Operators of such platforms in Hungary are as a general rule²⁵² not covered by media laws; therefore rules regulating administrative liability do not extend to them. Those whose rights have been breached might initiate civil actions against the operators of such platforms²⁵³.

Administrative liability arises when administrative law is breached through the publication of hate speech, making it possible for the competent authorities to impose administrative sanctions. Administrative liability exists in all Member States, except for France, the Netherlands and Sweden. It is nevertheless worth noting that administrative liability of publishers did formerly exist in the Netherlands (between 2008 and January 2014)²⁵⁴. In accordance with the applicable provisions, the Dutch Media Authority was entitled to impose certain administrative sanctions, including the withdrawal of licences in cases where the media content provider incited to hatred. Rules applicable to administrative liability were abrogated, as the sanctions foreseen by the provisions were considered as disproportionate²⁵⁵. Moreover, legislation did not allow for the judicial review of the Dutch Media Authority's decisions. Since the abolition of the applicable rules, media content providers can be held liable for press offences, in accordance with the Criminal Code provisions. In Sweden, the only liability scheme available for the publication of hate speech is regulated by the fundamental laws of the Constitution. These laws however do not specify the sanctions to be imposed. Rules setting out the applicable sanctions are set out in the Swedish Criminal Code²⁵⁶. In France, only civil and criminal liability schemes exist for the publication of hate speech²⁵⁷.

In Member States where administrative liability applies, the applicable provisions largely correspond to those transposing Article 6 of the AMSD and Article 3(2) and (4)(i) of the ECD. This is the case in for example Hungary, where the transposing provisions of the said Directives provide for the imposition of sanctions in cases where the media content is capable of generating hatred. In Greece, in addition to the provisions transposing the AMSD, some rules are set out in Presidential Decree (PD) 77/2003 regulating radio and television news and political broadcasting²⁵⁸. The said Decree prohibits the broadcasting of racist and xenophobic and intolerant views.

As a final element it is noted that as a general rule national legislation of the Member States assessed does not exclude the **co-existence of different liability schemes**. For instance, a publisher might typically be held liable both under criminal and civil law, in cases where he/she publishes hate speech. More precisely in the Member States assessed, victims of crimes might seek compensation for damages through a civil action.

²⁵² Cases where operators carry out editorial responsibilities constitute an exception.

²⁵³ Information collected in September 2015 through consultation with national stakeholder (representative of public authority, Media Council).

²⁵⁴ It concerned the following articles of the Media Act: 2.32 (1)(b); 2.33 (1)(b); 2.46 (1)(b); 2.47 (1)(b); 2.65 (3); 2.67 (1)(b); 3.3 (1); 3.4 (1)(c); 6.10 (2)(3); and 7.15. The text of these articles are incorporated in Act of 29 December 2008, Government Gazette 2012, 583, available at: <https://zoek.officielebekendmakingen.nl/stb-2008-583.html>.

²⁵⁵ Act of 18 December 2013, available at: <https://zoek.officielebekendmakingen.nl/stb-2013-570.html>.

²⁵⁶ Freedom of the Press Act Chapter 1 Article 5, Fundamental Law on Freedom of Expression Chapter 1, Article 7 and Chapter 25 of the Criminal Code.

²⁵⁷ Relevant rules are set out in Law of 29 July 1881 on Freedom of the Press and Law of 29 July 1982 on mass media.

²⁵⁸ P.D. 77/2003, Codex of deontology of news and other media and political broadcasts, Government Gazette, A' 75/2003.

In other cases however liability schemes cannot co-exist. In Hungary for example, procedural guarantees have been set up to ensure that procedures of self-regulatory bodies do not run in parallel with those of the Hungarian media authority and courts. Upon receipt of a complaint, the self-regulatory body examines whether or not parallel proceedings are on-going. If other proceedings are already underway, the self-regulatory body will not commence its own proceedings²⁵⁹.

4.4.2. Effectiveness of rules on publishers' responsibility for hate speech

As described in detail under Section 4.4.1, the Member States' systems differ to a large extent. Considering the complexity of the topic, differences between the Member States' systems are not illustrated in tables, instead, the assessment on efficiency of the existing rules is provided in narrative form.

The assessment is structured around the following elements:

- First criterion: Interaction of national provisions with the freedom of expression.
- Second criterion: Quantitative data on the use of applicable provision(s) in practice.
- Third criterion: Factors hindering the effective application of the applicable provisions.
- Fourth criterion: Drivers behind any recent or planned legislative amendments.

First criterion-Interaction of national provisions with the freedom of expression

In most Member States the criminal and administrative provisions covering the liability of publishers are the same as those transposing the CFD and the AMSD and ECD, respectively. Therefore, assessment on the interaction of the national provisions with the freedom of expression is covered in detail in Sections 4.2.2 and 4.3.2. For ease of reference a summary of the main issues is provided here. In some Member States, there are provisions other than those transposing the CFD, AMSD and ECD. However, no relevant higher court decisions regarding these provisions have been identified.

Regarding **criminal liability** in all Member States, higher courts have assessed the relationship of the transposing provisions of the CFD with freedom of expression. In most Member States, such as Belgium, France, Sweden and Germany higher courts have relied on the criteria of necessity and proportionality, while assessing the compliance of the transposing provisions with the freedom of expression. In the Netherlands, the courts developed a 'three-step-test', the founding idea of which is that while sentencing, courts should take into account the suspect's freedom of expression. In Greece, courts ruled that the offence provisions should be applied *stricto sensu* and in a way that does not endanger the freedom of expression.

It is noted that none of the higher court decisions referred to in Section 4.2.2 explicitly covered the liability of publishers. Instead they assessed the relationship of the offence provisions with the freedom of expression in general terms, regardless of the type of perpetrator.

Regarding the transposing provisions of the AMSD and the ECD, it is noted that in some Member States **administrative liability** arises in cases where the provisions set out in the said Directives are breached. In other cases, however different liability schemes might

²⁵⁹ Information collected in August 2015 through consultation with national stakeholder (representative of self-regulatory body, Hungarian Publishers' Association).

arise, such as criminal and/or civil liability. Higher court decisions have been identified in Hungary, the Netherlands and Sweden. In the two latter Member States, due to an overlap between the transposing provisions of the CFD and the AMSD and ECD, decisions of higher courts are described above. Regarding Hungary, the Constitutional Court has assessed in one case the compliance of the transposing provisions of the AMSD with freedom of expression. The Constitutional Court ruled that the limitation of freedom of expression by the transposing provision was necessary, proportionate and justifiable²⁶⁰.

In Member States where specific **civil** law rules applying to the **liability** of publishers exist, no relevant higher court decisions have been identified.

Higher court decisions do not seem to cover the relationship of **self-regulations** with the freedom of expression.

Second criterion-Quantitative data on the use of applicable provision(s) in practice

Based on existing data **it is difficult to judge the extent** to which publishers are made liable for the publication of hate speech in practice. This is due to various factors, including:

- Publishers could be held liable under various liability schemes, which implies the involvement of different competent authorities, each, as a general rule, having its own data collection techniques in place;
- In cases where data are collected by the competent authorities, they are often not comparable due to the different data collection methods used and the nature of the proceedings under which the publisher's liability was decided upon. As an example to this latter case, in criminal judicial proceedings, data collected often cover various stages of the proceedings, namely investigation, prosecution and adjudication. As opposed to this, by nature in case of civil judicial proceedings, data collection efforts only focus on the number of decisions issued;
- Existing data rarely specify the person who was made responsible. Similarly very little data are collected about the means of commission of certain behaviours.

The data presented below should be considered in the light of these constraints.

As mentioned above in most Member States publishers could be held liable under **criminal law**. Rules applying to the liability for the publication of hate speech largely overlap with those transposing the CFD. Section 4.2.2 contains a detailed assessment of the quantitative data available regarding the transposing provisions of the CFD. For ease of reference a short summary of the assessment is provided here. In some Member States, provisions other than those transposing the CFD also exist. No quantitative data regarding the use of these provisions in practice have been identified.

All Member States collect hate speech related data. However, data collection methods differ from Member State to Member State, thereby hindering the full understanding of the extent of the problem. Underreporting is also a factor hindering obtaining a complete picture of the extent of hate speech in the Member States covered. In Belgium and Germany the data collected suggest a high number of investigated, prosecuted and adjudicated cases. However, existing data are collected under catch all entries covering all crimes of 'racism, xenophobia, other discrimination and homophobia' (Belgium)²⁶¹ and all

²⁶⁰ Constitutional Court Decision 165/2011 (VI.20.), available at: <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798F004FEC26>.

²⁶¹ ECRI, 'Report on Belgium - fifth monitoring cycle', p. 17 (2014), available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-ENG.pdf>.

crimes falling under Section 130 of the Criminal Code (Germany)²⁶². Both entries cover, among other crimes, statistical data of relevance regarding hate speech as understood by the CFD. As a few examples illustrating the high numbers: in Belgium 1,017²⁶³ cases were investigated under the entry referred to above in 2012. In Germany, 2,670 cases were investigated under Section 130 in 2014²⁶⁴.

As opposed to these high numbers, in Greece for example 15 cases were investigated and 9 prosecuted under Law 927/1979, which penalises the criminal conducts set out in Article 1(1)(a) and (b) of the CFD.

With respect to the numbers above, it is important to recall the constraints described at the beginning of the Section and in particular the fact that the extent to which these numbers related to publishers is unclear.

Regarding **civil liability**, specific schemes are in place in Hungary and France²⁶⁵. No data on the number of relevant court decisions are available.

As noted above, in most Member States the provisions regulating **administrative liability** largely overlap with those transposing Article 6 of the AMSD and Article 3(2) and 3(4)(i) of the ECD. Quantitative data of relevance regarding the application of the transposing provisions in practice are provided under Section 4.3.2. For ease of reference a short summary of the relevant assessment is provided here.

It seems that data collection efforts in most Member States assessed only extend to the application of the AMSD in practice. Regarding the application of the AMSD, data sets seem to be collected in Belgium, Hungary and Sweden. In Sweden the transposing provision of the AMSD is not administrative in nature, but criminal, thus it is not described here in more detail. Regarding Belgium, quantitative data are collected at the level of the Communities, given that the regulation of media falls under Community competence. Available data suggest that the transposing provisions have never been made use of in practice. In Hungary, the data available suggest that the Media Council, the authority responsible for the monitoring of media activities, has only taken a limited number of decisions in the context of the transposing provisions. Between 2011 and 2014 nine decisions were taken²⁶⁶.

No quantitative data of relevance could be collected for Germany. It is noted however that according to the Annual Report of the German Media Authorities, it has happened that online texts and blog posts disseminated ethnically offensive statements or denied Holocaust. Besides this general statement, the said report does not quantify the extent of

²⁶² Example of report on criminal statistics: Federal Ministry of Interior Affairs, 'Police Crime Statistics 2014' (*Polizeiliche Kriminalstatistik 2014*), (2014), available at http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

²⁶³ Information collected in June 2015 through consultation with national stakeholder (representative of Federal police).

²⁶⁴ Federal Ministry of Interior Affairs, 'Police Crime Statistics 2014' (*Polizeiliche Kriminalstatistik 2014*), (2014), available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

²⁶⁵ The applicable rules are set out in Law of 29 July 1881 on the freedom of press and in Act V of 2013 on the Civil Code.

²⁶⁶ Information collected in September 2015 through written consultation with national stakeholder (representative of public authority, Media Council).

the issue²⁶⁷. Despite the lack of an existing data collection method in Greece, reference to a case of relevance was identified. The case dates back to 2011 and concerns the decision of the National Council for Radio and Television. The case concerned the broadcasting of a programme that was found capable of inciting to hatred on the ground of ethnic origin²⁶⁸.

Regarding self-regulatory rules, it is noted that rules regulating specifically the liability of publishers for hate speech is only available in Hungary. In Hungary the number of decisions taken for publishing hate speech is zero. According to a stakeholder interviewed this could be explained by the fact that Hungarian media abide by the rules set out in legislation and in self-regulations. Therefore cases where published media content would constitute hate speech are rare. Such cases might occur through blogs or other online fora, which fora however are not regulated by media rules or self-regulations. Bloggers could be held liable under criminal law for posting hate content, whereas operators of such platforms could be subject to civil liability²⁶⁹.

Third criterion-Factors hindering the effective application of the applicable provisions

In other Sections dedicated to assessing the effectiveness of provisions transposing the CFD (Section 4.2.2) and the AMSD/ECD (Section 4.3.2), data on factors hindering effective application were collected around some evaluation criteria. In the case of publishers' responsibility, given the complexity of the matter, data collection efforts focused on understanding the main factors hindering the application of the existing provisions in practice. Considering this, unlike in other Sections, information here is not presented in the form of comparative tables, but in the form of a narrative highlighting the main issues.

As explained under Section 4.4.1, **criminal law** provisions regulating the liability of publishers largely overlap with those transposing the CFD. A detailed assessment of the issues identified regarding the use of the transposing provisions in practice is provided under Section 4.2.2. For ease of reference, a summary of the main issues per Member State is provided here. Issues related to the clarity of the applicable offence provisions arose in Belgium, Germany and the Netherlands. It seems that the coverage of online commission by the applicable offence provisions constituted an issue only in Belgium. In the Netherlands, Sweden and Belgium the sufficient coverage of protected groups was questioned. Finally, some other issues were reported in Belgium, Germany, Greece and Sweden.

Specific **civil liability** schemes only exist in Hungary and France. In France, no issues regarding the application in practice of the existing rules have been identified. In Hungary some claim that the Civil Code provision is too restrictive of the exercise of freedom of expression²⁷⁰.

Rules regulating the **administrative liability** of publishers largely overlap with those transposing the AMSD and the ECD. A detailed assessment of the effectiveness of the applicable rules is provided under Section 4.4.3 of this study. For ease of reference, a summary of the main issues per Member State is provided here. It seems that provisions

²⁶⁷ German media authorities (*die Medienanstalten*), Annual Report 2014/15, (*Jahrbuch 2014/2015*), (2015) available at:

http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/ALM-Jahrbuch/Jahrbuch_2015/ALM_Jahrbuch_2014_2015_finale_Fassung.pdf.

²⁶⁸ National Council for Radio and Television, Decision No. 417/10.10.2011.

²⁶⁹ Information collected in September 2015 through consultation with national stakeholder (representative of public authority, Media Council).

²⁷⁰ Legal Forum (*Jogi Fórum*), 'The forgotten complaint' (*Egy elfeledett indítvány*), (2014), available at: <http://www.jogiforum.hu/hirek/31501>.

are in general clear; however concerns about the clarity of the offence provisions were raised in Belgium²⁷¹. Regarding the suitability of the transposing provisions to protect vulnerable groups, some concerns were raised in Germany, Greece and Hungary²⁷². Some additional inefficiencies were reported on in Hungary and Greece²⁷³.

As explained above, **self-regulations** regulating the liability of publishers for hate speech only exist in Hungary. A stakeholder referred to the lack of coverage by self-regulations of operators of blogs and similar online fora as a shortcoming²⁷⁴.

Fourth criterion - Drivers behind any recent or planned legislative amendments

As a general rule, the Member States assessed have not recently introduced and do not plan to introduce **changes to the regulatory framework** on the responsibility of publishers. The legislative amendments referred to under Sections 4.2.2 and 4.3.2 concern the relevant offence provisions in general terms without direct relevance for the liability of publishers.

Belgium and the Netherlands seem to constitute exceptions in this respect. In Belgium, prior to the latest legislative elections some provisions of the Constitution were subject to revisions. Article 25 of the Constitution regulating the freedom of the press was subject to a proposed amendment aiming to extend the scope thereof to new forms of media, including internet²⁷⁵. The adoption of the proposed amendment is still pending.

In the Netherlands, the New Computercriminality Act III²⁷⁶ aims to introduce a new Article 125p-q to the Criminal Procedure Code. This amendment would provide an independent, explicit statutory basis for public prosecutors who upon receipt of authorisation from the Examining Magistrate issue a so-called 'Notice and Take Down' (NTD) order against an 'electronic communication provider' (ECP) in order to stop or prevent criminal offences. The Explanatory Memorandum to the draft act explains that this order could be directed against website administrators, even though this does not result from the statutory wording of Article 125p-q²⁷⁷. If the information is hosted abroad, public prosecutors could order access providers to make the information inaccessible in the Netherlands by blocking IP addresses as long as the information remains available. Certain specialists concluded that this competence of the prosecution service under certain circumstances might result in an obligation for access providers to filter specific websites²⁷⁸.

²⁷¹ An issue on the matter was also raised in the Netherlands. However in the Netherlands the rules transposing the AMSD and the ECD are not administrative in nature, therefore these rules are not referred to here.

²⁷² Issues on the matter were also raised in the Netherlands and Sweden. However in these Member States the rules transposing the AMSD and the ECD are not administrative in nature, therefore these rules are not referred to here.

²⁷³ Issues on the matter were also raised in Sweden. However in Sweden the rules transposing the AMSD and the ECD are not administrative in nature, therefore these rules are not referred to here.

²⁷⁴ Information collected in August 2015 through consultation with national stakeholder (representative of self-regulatory body, Hungarian Publishers' Association).

²⁷⁵ Draft declaration of revision of the Constitution, 24 April 2014, available at: <https://www.dekamer.be/flwb/pdf/53/3567/53K3567003.pdf>.

²⁷⁶ The concept for a New Computercriminality Act III is published on: <https://www.internetconsultatie.nl/computercriminaliteit>.

²⁷⁷ The Explanatory Memorandum to the draft act for a New Computercriminality Act III is published on: <https://www.internetconsultatie.nl/computercriminaliteit>.

²⁷⁸ Oerlemans, J.J., From a "Take down"-order to Internetfilters for police purposes? (*Van een "Take down"-bevel naar internetfilters voor politiedoeleinden?*), posted on 23 July 2013 at:

<http://oerlemansblog weblog.leidenuniv.nl/2013/07/23/van-een-take-down-bevel-naar-internetfilters-voor-politiedoeleinden/>; Oerlemans, J.J., The draft act reinforcing the fight against computercriminality, a closer look (*Het conceptwetsvoorstel versterking bestrijding computercriminaliteit nader bezien*), Tijdschrift voor Internetrecht No. 5 October 2010, 148-152.

4.5. Concluding remarks and recommendations related to hate speech and hate crime

Despite the existence of applicable EU legislation, hate speech and hate crime incidents are perceived to be on the rise in the EU²⁷⁹. This results from various factors, which are often specific to the legal instruments concerned. Therefore the recommendations put forward under this Section are divided according to the legal instrument concerned.

Recommendations linked to Council Framework Decision 2008/913/JHA (CFD):

- **Recommendation to ensure the effective transposition of the CFD:** Given the importance of the CFD in ensuring legal protection against the most severe forms of hate speech and hate crime, it is crucial to ensure its effective transposition. This could ultimately be ensured by initiating infringement proceedings against those Member States that do not fulfil their obligations deriving from the CFD. Pursuant to Article 10(1) of Protocol No 36 to the Treaties²⁸⁰, as of 1 December 2014, the European Commission is entitled to launch infringement proceedings against Member States for failing to fulfil their obligations deriving from 'acts of the Union in the field of police cooperation and judicial cooperation in criminal matters'.
- **Recommendation to reinforce data collection:** The collection of reliable data is important for the assessment of the scale of problem and for the monitoring and evaluation of the progression of hate speech and hate crime cases. Existing national and European level data on hate speech and hate crime, as collected *inter alia* by the OIDHR, or FRA, provide a patchy picture of hate speech and hate crime incidents. This is due to several factors, including the underreporting of crimes by the victims or insufficient data collection methods at Member State level. Regarding this latter point, it is noted that in many Member States data collection efforts are not harmonised. This results in cases where the competent investigation and prosecution authorities and courts collect different sets of data. In order to overcome the existing data gap, Member States with less developed or harmonised data collection methods could be encouraged to learn from those Member States with good practices in place²⁸¹.
- **Recommendation to overcome underreporting:** With the aim of better reflecting the reality on the ground, victims should be encouraged to report hate speech and hate crime. From the victims' side, underreporting is due to a large variety of factors, including lack of confidence, fear, shame or guilt, lack of trust in law enforcement and criminal justice or lack of awareness about where or how to report incidents²⁸². Depending on the issue in question, Member States could be encouraged to raise awareness of the means of reporting incidents or to facilitate reporting through alternative means, such as anonymously, through the internet or to victim support organisations²⁸³.

²⁷⁹ Concerns about the rising levels of hate speech and hate crime have been expressed *inter alia* in the European Parliament Resolution on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP)), (2013), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-90>.

²⁸⁰ Consolidated version of the Treaty on European Union - Protocol (No 36) on transitional provisions, Official Journal 115, 09/05/2008 P. 0322 – 0326, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/36:EN:HTML>.

²⁸¹ FRA, 'Making hate crime visible in the European Union: acknowledging victims' rights', (2012), available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

²⁸² FRA, 'Working Party Improving Reporting and Recording of Hate Crime in the EU : Inaugural Meeting Report', 4 November 2014, available at http://fra.europa.eu/sites/default/files/fra_working_party_on_hate_crime_-_meeting_report.pdf; FRA, 'Hate Crime', FRA website, available at <http://fra.europa.eu/en/theme/hate-crime>; FRA, 'Fundamental Rights Conference 2013: Combating hate crime in the EU: Giving victims a face and a voice', 12-13 November 2013, available at: http://fra.europa.eu/sites/default/files/frc2013-conclusions_en.pdf.

²⁸³ FRA, 'Working Party Improving Reporting and Recording of Hate Crime in the EU: Inaugural Meeting Report', 4 November 2014, available at: http://fra.europa.eu/sites/default/files/fra_working_party_on_hate_crime_-_meeting_report.pdf; FRA, 'How can EU Member States combat hate crime effectively? Encouraging reporting &

Considering the fact that victims are often unaware of the work of victim support organisations, the work of the said organisations could be promoted through awareness raising programmes or campaigns. The role of victim support organisations could be reinforced by making their services accessible already during the investigation phase or by extending them to psychological support. To increase public trust in the police, Member States could be encouraged to develop programmes of cooperation with the most vulnerable communities and to develop transparent and accountable policies²⁸⁴.

- **Recommendation to ensure a shared understanding of hate speech and hate crime among practitioners:** Other gaps in current practices to combat hate speech and hate crime at national level include an absence of a shared understanding of hate speech and hate crime by the police, the prosecution services and courts. Shared understanding is hindered by the lack of clear definitions of certain key terms in applicable legislation. This gap in legislation leads to the contradictory or overly restrictive interpretation of the applicable hate speech and hate crime provisions and ultimately to the contradictory assessments of cases and to the lack of consistent supervision of cases throughout the criminal justice system, with no or few connections made between the stages of reporting, investigation, prosecution and sentencing²⁸⁵.

Authorities responsible for investigation and prosecution need practical tools and skills to be able to identify and deal with the offences covered by the CFD, and to interact and communicate with victims²⁸⁶. They should have sufficient knowledge and understanding of relevant legislation. Clearer guidance on the meaning of certain terms is needed in the form of legislation or by other means. The existence of special police hate crime units, special prosecutors' offices for hate speech and crime, detailed guidelines, as well as specific training for police, prosecutors and judges are good practices which may support the implementation of this legislation²⁸⁷. Training should focus on enabling staff to recognise incidents of hate crime and deal with incidents and victims appropriately²⁸⁸. Law enforcement officers should also be trained and watchful for indications of bias motivation when investigating crimes²⁸⁹.

- **Recommendation to ensure the better tracking of hate speech and hate crime:** In order to tackle hate speech and hate crime more effectively, cooperation and synergies between governmental bodies, law enforcement, criminal justice and civil society organisations should be enhanced²⁹⁰. Such cooperation could, for

improving recording: Seminar report', 28-29 April 2014, available at http://fra.europa.eu/sites/default/files/hate-crime-seminar-report-2014_en.pdf, European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law' COM(2014) 27 final, 27 January 2014, available at http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

²⁸⁴ FRA, 'Fundamental Rights Conference 2013: Combating hate crime in the EU: Giving victims a face and a voice', 12-13 November 2013, available at: http://fra.europa.eu/sites/default/files/frc2013-conclusions_en.pdf.

²⁸⁵ FRA, 'Working Party Improving Reporting and Recording of Hate Crime in the EU: Inaugural Meeting Report', 4 November 2014, available at: http://fra.europa.eu/sites/default/files/fra_working_party_on_hate_crime_meeting_report.pdf.

²⁸⁶ EC, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law' COM(2014) 27 final, 27 January 2014, available at: http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

²⁸⁷ *ibid.*

²⁸⁸ FRA, 'Working Party Improving Reporting and Recording of Hate Crime in the EU: Inaugural Meeting Report', 4 November 2014, available at: http://fra.europa.eu/sites/default/files/fra_working_party_on_hate_crime_meeting_report.pdf.

²⁸⁹ FRA, 'Equal protection for all victims of hate crime- The case of people with disabilities', (March 2015), available at <http://fra.europa.eu/en/publication/2015/equal-protection-all-victims-hate-crime-case-people-disabilities>.

²⁹⁰ FRA, 'Working Party Improving Reporting and Recording of Hate Crime in the EU: Inaugural Meeting Report', 4 November 2014, available at http://fra.europa.eu/sites/default/files/fra_working_party_on_hate_crime_meeting_report.pdf.

example, enable better tracking of cases of hate speech or hate crime throughout the criminal justice procedure²⁹¹. In addition, cooperation between governmental bodies, law enforcement, criminal justice and civil society can foster trust in these organisations among those most likely to become targets of hate crime²⁹².

- **Recommendation to ensure the coverage of all vulnerable groups:** Legal protection provided by the CFD covers a limited number of protected characteristics, namely race, colour, religion, descent, and national or ethnic origin. Hate crime incidents often target other segments of the population, including in particular LGBTI people and people with disabilities. The transposing legislation of most Member States goes beyond the CFD's requirements, by referring to characteristics other than those set out in the CFD. However, Member States have not taken a harmonised approach in this respect, thus the list of protected characteristics in applicable legislation varies from Member State to Member State. Considering these differences, either the ambitious review of the CFD²⁹³ or the adoption of a new legal instrument might be necessary. Regarding this point it is noted that the Lisbon Treaty has put an end to the previous pillar structure, thereby prohibiting the adoption of previously existing third pillar instruments such as Framework Decisions²⁹⁴. The Lisbon Treaty does not prohibit the amendment of Framework Decisions though. Nevertheless, introduction of amendments to the CFD might not be favourable for two main reasons: in accordance with the legal possibility set out in Article 10(4) of Protocol 36²⁹⁵ to the Lisbon Treaty, the UK has decided to opt out from the application of the CFD²⁹⁶. This contributes to the varied landscape of legal protection against hate crime and hate speech across the EU. Secondly, it is advisable to align 'the acts of the former Third Pillar with the hierarchy of norms of the Lisbon Treaty'²⁹⁷.

In most Member States, no concerns have arisen regarding the unnecessary limitation of freedom of expression by hate speech legislation, or *vice versa*. France constitutes an exception in this respect with on-going debates about the borderline between the two. Debates, as explained under Section 4.2, have reignited after the terrorist attack against the Charlie Hebdo magazine and the Government's announcement of strengthening the legislation applicable to hate speech and its enforcement. Considering that only one national study revealed potential clashes between the freedom of expression and the legislation applicable to hate speech, no recommendation in this regard is put forward. It is noted however that guidance as to what constitutes hate speech and what falls under freedom of expression has been developed *inter alia* by the ECtHR. The ECtHR has ruled that in a democratic society, which is based on pluralism, tolerance and broadmindedness, freedom of expression should be seen as a right extending also to information and ideas

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ EP, 'Resolution on strengthening the fight against racism, xenophobia and hate crime', (2013/2543 (RSP)), (2013) available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-90>.

²⁹⁴ Under the current regime, five types of legal acts could be adopted, namely regulations, directives, decisions, recommendations and opinions.

²⁹⁵ Consolidated version of the Treaty on European Union - Protocol (No 36) on transitional provisions, Official Journal 115, 09/05/2008 P. 0322 – 0326, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/36:EN:HTML>.

²⁹⁶ UK Government – Home Department, 'Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union', (July 2013), available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf.

²⁹⁷ EP, 'Resolution of 13 March 2014 on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)), (2013), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2014-0249%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

that might offend, shock or disturb others²⁹⁸. Any limitation of the freedom of expression must be proportionate to the legitimate aim pursued. As an example of such a legitimate aim, the ECtHR referred to the protection against all 'forms of expression which spread, incite, promote or justify hatred based on intolerance'²⁹⁹. The Council of Europe's Additional Protocol to the Convention of Cybercrime³⁰⁰, which has not been signed nor ratified by all Member States, also touches upon the borderline between the freedom of expression and the necessity of criminalising racist and xenophobic acts committed online.

Recommendations linked to the Audiovisual Media Services Directive (AMSD) and the Electronic Commerce Directive (ECD):

- **Recommendation to reinforce the understanding of the applicable provisions:** The national studies raise concerns as to whether the provisions applicable to information society services are fully understood by legal practitioners and in particular by judges. It is therefore recommended to organise training programmes for practitioners on the main features of hate speech and hate crime committed through audiovisual media or other electronic means.
- **Recommendation to reinforce data collection:** Data collection efforts seem to be limited in the Member States assessed. The lack of data or the existence of limited data, often providing insight into the number of decisions taken only (and not the number of complaints), hinders the full understanding of the use of the transposing provisions in practice. Reasons behind this phenomenon are not researched. The very little data available might suggest that either cases of incitement to hatred through the media are non-existent or that such cases remain unexamined by the competent authorities. It might also mean that media content providers comply with their obligations set out in applicable legislation. It is recommended to sufficiently map the reasons behind the lack of reliable data.
- **Recommendation to ensure effective application in practice:** The lack of clear definitions in applicable legislation and in particular the absence of clarity regarding the meaning of 'incitement to hatred' seems to hinder the effective practical application of the AMSD and ECD. It is thus recommended to clarify the meaning of certain terms either by amending the said Directives or by providing training or other practical tools to professionals responsible for monitoring compliance by media content providers with the AMSD and ECD requirements.
- **Recommendation to ensure the coverage of all vulnerable groups:** In Member States where the transposing measures do not go beyond the Directives' requirements, the insufficient coverage of certain vulnerable groups seems to be an issue. Therefore it is recommended to introduce legislative changes to the AMSD and the ECD, thereby extending their scope of application to other protected characteristics, such as disability or sexual orientation.

It was not confirmed by the national studies that the necessity to protect freedom of expression would override the practical application of the provisions transposing the AMSD and ECD. The Hungarian national study noted that the too strict sanctions in place for breaches of the transposing provisions of the AMSD might lead to self-censorship on the

²⁹⁸ ECtHR, *Handy Side v. UK*, application no. 5493/72, 7 December 1976, available at: [http://hudoc.echr.coe.int/eng?i=001-57499#{"itemid":\["001-57499"\]}](http://hudoc.echr.coe.int/eng?i=001-57499#{)

²⁹⁹ ECtHR, *Erbakan v. Turkey*, application no. 599405/00, 6 July 2006, available at: <http://hudoc.echr.coe.int/eng?i=003-1728198-1812055>.

³⁰⁰ Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.

side of media content providers. Considering that this view was only expressed by one stakeholder and the fact that such a problem was not referred to in any other national study, no recommendation linked to the relationship of the transposing provisions with the freedom of expression is put forward.

Recommendations linked to publishers' responsibility:

- **Recommendation to reinforce the regulatory framework applicable to the liability of publishers:** Rules regulating the liability of publishers, including both legislation and self-regulation, sometimes fail to spell out the liability of publishers and/or to mention the prohibition of hate speech. This might lead to the impunity of offenders. Therefore it is recommended to reconsider the applicable regulatory framework and expressly indicate the holder of liability and the prohibited conduct.
- **Recommendation to reinforce data collection:** Data collection efforts related to the liability of publishers are limited and are often shared between numerous competent authorities, each having its own data collection techniques. Even in cases where data are collected about the publication of hate speech, these are not broken down to identify the liable person. Therefore it is recommended to reinforce the monitoring of the activities of publishers and to record cases where the rules applicable to hate speech are breached. To ensure the more harmonised collection of data it is recommended to create platforms for the sharing of good practices among the stakeholders in charge of the collection of data.
- **Recommendation to establish clear rules on the liability of website operators:** Applicable rules often fail to cover the liability of operators for the publication of hate content by bloggers or users of social media sites. The liability of bloggers and users of websites is often regulated; however these individuals are sometimes difficult to trace back³⁰¹, moreover it is often difficult to prove their motivation. The situation is an issue of concern given that internet remains a critical tool for the distribution of racist and hateful propaganda³⁰². To overcome the potential impunity of offenders it is recommended to regulate the liability of operators, thereby encouraging them to better control the content of blogs and social media websites. Alternatively Member States could reinforce their efforts of monitoring the content of websites. This however, should be done in a manner ensuring the sufficient respect of freedom of expression.

As highlighted under Section 2, protection at the EU level against hate speech and hate crime is provided by a large number of instruments. It is possible to put forward recommendations in relation to each of the instruments analysed in this study. In addition, the absence of one comprehensive policy dealing with hate speech and hate crime is itself a matter that should be addressed. As previously highlighted by the European Parliament³⁰³, this could be addressed through the adoption of a comprehensive strategy for fighting hate speech and hate crime. The Strategy could define concrete policy goals for the Member States, targeting the most severe forms of hate speech and hate crime, including online crime. These policy goals could be set in light of the most important factors hindering the application of hate speech and hate crime legislation in practice. These factors include *inter alia* the inadequate knowledge of practitioners of the rules applicable to hate speech and

³⁰¹ This can be due to the fact that bloggers can use pseudo names or could comment on an anonymous basis. Moreover bloggers may contribute to websites from all over the world, due to the borderless nature of the web.

³⁰² FRA, 'Fundamental Rights: challenges and achievements in 2014', (2015), p.54 available at: http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf.

³⁰³ EP 'European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP))', available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-90>.

hate crime, the insufficient data collection mechanisms in place and the existence of severe underreporting. The Strategy should ensure the sufficient respect of freedom of expression and acknowledge that hate speech and hate crime are present in all areas of life (e.g. politics, media, employment).

5. LEGAL FRAMEWORK ON BLASPHEMY AND/OR RELIGIOUS INSULT

KEY FINDINGS

- This Section covers the regulatory responses of eight Member States (Austria, Denmark, Finland, Greece, Italy, Germany, Poland and Ireland) to address blasphemy/religious insult. These are criminal offences in the Member States analysed and the prohibition applies with respect to blasphemy or religious insult against any religion. The criminal provisions also apply to the offence committed through the media. Sometimes, however, applicable legislation fails to specifically refer to the liability of publishers or editors.
- Blasphemy/religious insult is punishable by either a penalty or a fine. In some Member States, the severity of these penalties might depend on the likelihood of the offence committed to disrupt public order or public peace or on whether the offence was committed using violence and threats.
- In some Member States, an overlap between blasphemy/religious insult provisions and hate speech provisions was identified. Member States should assess whether the need to protect public order by protecting individuals and groups belonging to minority religions could actually be better satisfied by reinforcing or duly implementing the existing national legislation on incitement to hatred.
- A lack of clarity in some national provisions relating to the absence of a clear definition of one or more crucial elements (e.g. religious feelings, religion or religious denominations lack of respect, disparagement or malice) was identified.
- The provisions criminalising blasphemy/religious insult might have a 'chilling effect' in public debates and art performance in some Member States. This is confirmed by the several cases of censorship and self-censorship of artists.
- Media self-regulatory rules concerning blasphemy and religious insult exist in Austria, Denmark, Finland, Germany, Greece, Italy and Poland. However, their scope and effect vary considerably among and within Member States depending on the actors involved (e.g. journalists, editors, publishers, advertisement company) and are usually based on such actors' voluntary commitment to them.
- Media self-regulations would be able to better protect religious feelings as they do not touch upon the legal guarantees that the penal system needs to protect. The use of media self-regulations should therefore be promoted at EU and national level as they could better protect freedom of expression and freedom of religion, conscience and thought by extending the promotion of such freedoms to atheist or agnostic groups.

This Section of the study maps the applicable regulatory framework and assesses the effectiveness thereof. The Section provides information with respect to all seven Member States covered by this study, namely, Denmark, Finland, Germany, Greece, Ireland, Italy, Poland and Austria

5.1. General overview of legislation on blasphemy and/or religious insult

As mentioned in Section 1, increasing attention has been reserved at international level to the assessment of possible clashes between blasphemy and religious insult and freedom of expression and freedom of thought, conscience and religion. Although blasphemy is still

criminalised in some Member States, there is no single definition of blasphemy in the EU. Blasphemy can be understood for example as³⁰⁴:

The act of insulting or lack of reverence for God or anything considered sacred;
The act of claiming the attributes of deity;
Irreverence towards something considered sacred or inviolable;
Outrage to a substantial number of adherents of any religion by virtue of insulting content considered sacred by that religion.

Religious insult provisions may cover:

- Insult based on belonging to a particular religion; and
- Insult to religious feelings³⁰⁵.

The Section below aims to provide an overview of the legislative framework applicable to blasphemy and religious insult in the above mentioned Member States. It will also clarify whether media self-regulatory rules exist in this field and whether and how blasphemy committed through the media is sanctioned.

The research carried out at national level highlighted the challenge of drawing a clear distinction between blasphemy and religious insult; the Member States' national legislation does not clearly differentiate between these two types of offences which in many instances appear to be covered by a single provision. A clear differentiation could, however, be found in the literature with regard to Italy (Section 5.2.1). Interestingly in other Member States, the national research showed that religious insult are understood as insults on the ground of religion and may therefore be covered by general rules on insulting or mockery violating human dignity (e.g. Austria) or by the provision addressing hate speech/hate crime on the ground of religion (see Section 4).

This Section will, in principle, analyse both blasphemy and religious insult highlighting any differentiation present in national legislation where religious insult do not fall within the scope of general rules on insulting or mockery or the rules on hate speech/hate crime on the ground of religion.

Blasphemy and/or religious insult is still an offence in Austria, Denmark, Finland, Greece, Italy, Germany, Poland and Ireland.

The table below aims to give an overview of the legislative framework applicable to blasphemy and religious insult in those Member States. 'Ticks' (✓) indicate the existence of legislation on blasphemy and/or religious insult in various areas, whereas empty cells refer to the lack of applicable provisions.

³⁰⁴ CoE, 'Blasphemy, insult and hatred: finding answers in a democratic society – Science and technique of democracy, no. 47' (2010), available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>.

³⁰⁵ CoE, 'Blasphemy, insult and hatred: finding answers in a democratic society – Science and technique of democracy, no. 47' (2010), available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>.

Table 13 : Overview of legislative responses developed to address blasphemy and religious insult

Member State	Criminal law	Civil law	Administrative law	Media self-regulation
AT	✓			✓
DE	✓			✓
DK	✓			
FI				
EL	✓			✓
IE				
IT				
PL	✓			

Blasphemy/religious insult are regulated by **criminal law** in the Member States analysed. **Media self-regulatory** rules concerning blasphemy and religious insult also exist in Austria, Denmark, Finland, Germany, Greece, Italy and Poland. The national research carried out did not identify any specific civil law rules or administrative law rules that apply to blasphemy and religious insult. Relating to civil legislation, it is assumed that the general regime concerning compensation for damages would also apply with regard to the commission of such offences.

The Irish Constitution considers blasphemy as an offence punishable by law and it is then criminalised by a specific law (Defamation Act)³⁰⁶. In Austria, Denmark, Finland, Germany, Greece, Italy and Poland neither blasphemy nor religious insult are mentioned in the Constitution. However, they are considered as a specific offence in the Criminal Code. It is worth noting that in the Member States analysed, blasphemy/religious insult are considered offences when committed against any religion. However, such an approach can be considered relatively new in Italy as the provisions of the Criminal Code were only amended in 2006 to cover all religions rather than only the Catholic religion³⁰⁷.

In two Member States (e.g. Greece³⁰⁸ and Denmark³⁰⁹) the relevant legal provisions specify that protection is guaranteed against blasphemy/religious insult towards any religion recognised or tolerated in the Member State. In Austria in fact, the Criminal Code sanctions any blasphemy/religious insult committed against a church or religious community **located** in the country. The Greek Criminal Code provisions refer to any **tolerable** religion in the sense of any known religion³¹⁰. The term '**known religion**' describes every religion whose teachings are public and not apocryphal and whose worship is obvious and not mystical³¹¹.

A narrower approach is taken by Polish sectorial legislation. In Poland the Broadcasting Act³¹² provides that the public radio and TV programme services and other services of public radio and television should respect the Christian system of values. The research carried out seems to confirm that this provision applies to all religious beliefs. However,

³⁰⁶ Defamation Act 2009 no. 31 of 2009), available at:

<http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0036.html#sec36>.

³⁰⁷ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

³⁰⁸ Article 198 of the Greek Criminal Code.

³⁰⁹ Criminal Code, Consolidated Act no. 871 of 04 July 2014, available at:

<https://www.retsinformation.dk/Forms/r0710.aspx?id=164192 - Kap14>.

³¹⁰ Information collected in August 2015 through consultation with national stakeholder (Ombudsman).

³¹¹ Tsatsos D., Stathopoulos M., Melissas D., 'Freedom of religious conscience and freedom of conscience' (*Ελευθερία θρησκευτικής συνείδησης και ελευθερία συνείδησης*), *Greek Justice law review (Ελληνική Δικαιοσύνη)* 44, 2003, pp.355-364.

³¹² Article 21(2)(6) of Law of 29 of December 1992 – Broadcasting law (O.J. 1993 no 7 item 34 (with later amendments)), available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930070034>.

special protection has been reserved to the Christian religion in the wording of the relevant provisions.

5.2. Legislation on blasphemy and/or religious insult

5.2.1. Description of legislation on blasphemy and/or religious insult

This Section describes the criminal legal framework applicable to blasphemy/religious insult.

The table below provides an **overview of this legal framework**.

Table 14 : Overview of legal provisions regulating blasphemy and religious insult

Member State	Legal reference to provision	Title/short definition of offence
AT	Article 188 of Criminal Code ³¹³	Disparage of religious precepts
	Article 189 of Criminal Code ³¹⁴	Disturbance of the practice of religion
DE	Section 166 of the German Criminal Code ³¹⁵	Defamation of religions, religious and ideological associations
DK	Section 140 in Chapter 15 of the Criminal Code ³¹⁶	Crimes against public order and peace
FI	Criminal Code, Chapter 17, Section 10 (RL 17 luku 10 §) ³¹⁷	Breach of religious peace
EL	Article 198 of the Criminal Code ³¹⁸	Malicious blasphemy
	Article 199 of the Criminal Code ³¹⁹	Religious insult
IE	Articles 36 of the Defamation Act 2009 ³²⁰	Publication or utterance of blasphemous matter
IT	Article 403 of the Criminal Code ³²¹	Insulting a religion by insulting individuals
	Article 404 of the Criminal Code ³²²	Insulting a religion by offending against property
	Article 405 of the Criminal Code ³²³	Disrupting religious ceremonies Blasphemy and insulting the dead

³¹³ Law 60/1975 'Criminal Code', Federal Law Gazette, available at:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029737>.

³¹⁴ Law 60/1975 'Criminal Code', available at:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029738>.

³¹⁵ Criminal Code (*Strafgesetzbuch, StGB*), as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322), available at: <http://www.iuscomp.org/gla/statutes/StGB.htm>.

³¹⁶ Criminal Code, Consolidated Act no. 871 of 04 July 2014, available at:

<https://www.retsinformation.dk/Forms/r0710.aspx?id=164192-Kap14>.

³¹⁷ Act 39/1889, Criminal Code, available at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

³¹⁸ Article 198 of the Greek Criminal Code.

³¹⁹ Article 199 of the Greek Criminal Code.

³²⁰ Defamation Act 2009 no. 31 of 2009, available at:

<http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0036.html#sec36>.

³²¹ Article 403 of the Criminal Code updated to 3 June 2013, available at:

<http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³²² Article 404 of the Criminal Code updated to 3 June 2013, available at:

<http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³²³ Article 405 of the Criminal Code updated to 3 June 2013, available at: <http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

	Article 724 of the Criminal Code ³²⁴	
PL	Article 196 of the Criminal Code ³²⁵ Article 257 of the Criminal Code ³²⁶	Offending religious feelings Insulting a group or an individual because of their religious affiliation

As mentioned in Section 5.1, in Austria, Italy, Ireland, Denmark, Germany, Greece, Poland and Finland, blasphemy and religious insult are considered an **offence**. It is not possible to draw a clear distinction between blasphemy and religious insult as national legislation does not clearly differentiate between the two types of offences which, in many instances, appear to refer to the same provision. According to the national research carried out, such a distinction could, however, be drawn in Italy and Greece.

In fact, the Italian Criminal Code provides two types of criminal offences: vilification and blasphemy³²⁷. Vilification could be considered a religious insult as in the case of insulting a religion by publicly insulting individuals, by offending against property and by disrupting religious ceremonies. In the last two cases the use of violence or threats characterise the offending behaviour. Such provisions are not to be confused with the one criminalising hate speech/hate crime on the ground of religion which is covered by a specific sectorial law³²⁸. Although still covered by the Criminal Code, blasphemy was de-penalised in 1999 as it was considered a minor offence that would occur when someone blasphemes against the divinity in public³²⁹.

In Greece, blasphemy and religious insult constitute two different criminal offences. A specific chapter of the Criminal Code 'Plots against Religious Peace' deals with such offences and includes four Articles. The provisions more frequently used in case-law are the Article on malicious blasphemy³³⁰ and an Article on blasphemy concerning religions/religious insult³³¹. There are different opinions amongst legal practitioners about the perception of the interests protected by these Articles³³². The title of the Chapter indicates that the protected good is religious peace. However, the explanatory memorandum and relevant doctrine consider elements such as religion, the religious sense, a sense of reverence, religious freedom and the predominant position of the Eastern Orthodox Church within the scope of application of these Articles³³³. According to the

³²⁴ Article 724 of the Criminal Code updated to 3 June 2013, available at:

<http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³²⁵ Law of 6 June 1997 – Criminal Code, available at:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.

³²⁶ Law of 6 June 1997 – Criminal Code, available at:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.

³²⁷ Information collected in July 2015 through consultation with national stakeholder (academic).

³²⁸ Article 3(1) of Law No. 654/1975 (referring to the CEFRD), as amended by Article 1 Law n. 205/1993 and by Law 85/2006.

³²⁹ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

³³⁰ Article 198 of the Criminal code.

³³¹ Article 199 of the Criminal Code.

³³² Tsapogas M., 'Blasphemy and justice in a Greek Orthodox context' in Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, Science and technique of democracy No. 47, Council of Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.114-115. Information collected in August 2015 through consultation with national stakeholder (Lawyer).

³³³ Tsapogas M., 'Blasphemy and justice in a Greek Orthodox context' in Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, Science and technique of democracy No. 47, Council of

research carried out, the prevailing trend in literature and among stakeholders consulted, supports the view that the legally protected good is the religious feeling of citizens.

In Austria, Denmark, Finland, Germany, Greece, Italy and Poland such offences are dealt with in the **Criminal Code**, while in Ireland, a **specific criminal law** criminalises such behaviours.

All national provisions have the element of publicity in common, meaning that to be considered an offence the behaviour needs to take place **in public** or it must be **likely to reach an indefinite number of persons**.

Two similar provisions apply in Germany and Ireland. In fact the former criminalises blasphemy/religious insult³³⁴ as the conduct of publicly defaming an ideology or religion through the dissemination of written materials, while the latter criminalises the publication or utterance of material that is insulting in relation to matters held sacred by any religion³³⁵.

The Criminal Codes of Austria, Denmark and Finland criminalise the public mocking or insulting of religious doctrines or worship. In Denmark, the provision therefore protects religious feelings of individuals that are connected with the doctrines and worship of a religion³³⁶. Unlike Denmark, in Austria and Finland the disturbance of services and of religious practices is also forbidden.

Similarly, Polish law provides sanctions for offences against religious feelings. These offences consist of outraging in public an object of religious worship or a place dedicated to the public celebration of religious rites. The publicity of the behaviour implies the offender's intention to make sure that his/her behaviour is perceived by a larger, often indeterminate, group of people³³⁷.

The intention of the offender is also relevant in Greece. In fact, the Greek Criminal Code sets two types of criminal offences, namely malicious and non-malicious/simple blasphemy. The 'maliciousness' relates to the existence or lack of intention of the perpetrator. Any direct or indirect manifestation of contempt towards God or the divinity (e.g. the Holy Trinity, the saints, the holy mysteries and rites), which would be particularly insulting³³⁸ falls under malicious blasphemy. The manifestation of contempt needs to take place publicly³³⁹ where public means that the act must be brought to the attention of an indefinite number of people (regardless of whether it took place in a public place or if indeed third parties perceived it)³⁴⁰.

The table below shows the type of **penalty** imposed for blasphemy and religious insult and whether national provisions cover **online crime**. 'Ticks' (✓) indicate that the provisions are

Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.114-115. Information collected in August 2015 through consultation with national stakeholder (Lawyer).

³³⁴ Article 166 of German Criminal Code.

³³⁵ Article 166 of German Criminal Code.

³³⁶ Criminal Code, Consolidated Act no. 871 of 04 July 2014, available at: <https://www.retsinformation.dk/Forms/r0710.aspx?id=164192-Kap14>.

³³⁷ Stefański, R., (ed), Commentary of Polish Criminal Code (*Kodeks Karny. Komentarz*) (Beck, Warszawa, 2014) online edition.

³³⁸ Karanikas D., Manual of Penal Law – vol.B (*Εγχειρίδιο Ποινικού Δικαίου- τομ.Β*), 1955, p.217.

³³⁹ Supreme Court judgment no. 119/1988 and no. 1083/2004.

³⁴⁰ Mallios V., Papapantoleon C., 'Satire and blasphemy: The Adventures of a right' (*Σάτιρα και βλασφημία: οι περιπέτειες ενός δικαιώματος*) in Hellenic League for Human Rights, God does not need a prosecutor: Church, blasphemy and Golden Dawn (*Ο Θεός δεν έχει ανάγκη εισαγγελέα. Εκκλησία, Βλασφημία και Χρυσή Αυγή*), Ed. Nefeli, 2013, p.5-6.

applicable to online crime; whereas empty cells indicate the inapplicability of the provisions to online crime.

Table 15 : Main characteristics of provisions on blasphemy and religious insult

Member State	Legal reference to provision	Penalties foreseen	Provision applicable to online crime
AT	Disparage of religious precepts ³⁴¹	Fine or imprisonment up to six months	✓
	Disturbance of the practice of religion ³⁴²	Fine or imprisonment up to two years	
DE	Defamation of religions, religious and ideological associations ³⁴³	Fine or imprisonment not exceeding three years.	
DK	Crimes against public order and peace ³⁴⁴	Fine or imprisonment up to four months	✓
FI	Breach of religious peace ³⁴⁵	Fine or imprisonment for up to six months.	✓
EL	Malicious blasphemy ³⁴⁶	Confinement ³⁴⁸ of up to two years and detention of up to six months or a fine of up to EUR 3,000 (for non-malicious blasphemy)	✓
	Religious insult ³⁴⁷	Confinement of up to two years	✓
IE	Publication or utterance of blasphemous matter ³⁴⁹	Fine not exceeding EUR 25,000	
IT	Insulting a religion by insulting individuals ³⁵⁰	Fine between EUR 1,000 to 6,000	
	Insulting a religion by offending against property ³⁵¹	Fine between EUR 1,000 to 5,000 or imprisonment up to two years	
	Disrupting religious ceremonies ³⁵²	Imprisonment from one to three years	

³⁴¹ Article 188 of the Austrian Criminal Code.

³⁴² Article 189 of the Austrian Criminal Code.

³⁴³ Article 166 of the German Criminal Code.

³⁴⁴ Criminal Code, Consolidated Act no. 871 of 04 July 2014, available at:

<https://www.retsinformation.dk/Forms/r0710.aspx?id=164192 - Kap14>.

³⁴⁵ Act 39/1889, Finnish Criminal Code, available at: <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

³⁴⁶ Article 198 of the Greek Criminal Code.

³⁴⁷ Article 199 of the Greek Criminal Code.

³⁴⁸ Article 18 of the Greek Criminal Code distinguishes criminal behaviour into three categories (felonies, misdemeanours and infringements), on the basis of the penalty foreseen in each specific provision, as follows:

a) Felonies: life imprisonment -if specifically stated in the provision / imprisonment, of five to twenty years (Article 52 PC); b) Misdemeanours: confinement of ten days to five years / monetary penalty of EUR 150 to EUR 15,000 (Articles 53 and 57 PC); c) Infringements: detention from one day to one month / fine of €29 to €590 (Articles 55 and 57 PC).

³⁴⁹ Defamation Act 2009 no. 31 of 2009, available at:

<http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0036.html#sec36>.

³⁵⁰ Article 403 of the Italian Criminal Code updated to 3 June 2013, available at:

<http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³⁵¹ Article 404 of the Italian Criminal Code updated to 3 June 2013, available at:

<http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

	Blasphemy and insulting the dead ³⁵³	Fine between EUR 51 to EUR 309	✓
PL	Offending religious feelings ³⁵⁴ Insulting a group or an individual because of their religious affiliation ³⁵⁵	A fine or penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years. Deprivation of liberty for up to 3 years.	✓

In the Member States analysed the penalties imposed are of two types: a fine or imprisonment.

In Ireland only a **fine** is applicable to blasphemy and it should not exceed EUR 25,000. In Austria, Denmark, Finland, Germany, Greece, Italy and Poland either a fine or **imprisonment** are imposable. However, national legislation does not specify whether such penalties can be imposed together. No further elements are provided in the provisions. It can therefore be assumed that the penalty will be aligned with the level of disturbance of the public peace and the judge will interpret what is considered to be a disturbance of public peace.

The severity of such penalties might relate to the fact that according to the national criminal provisions of some Member States the offence committed is likely to disrupt **public order or public peace** e.g. in the cases of Germany and Poland.

In Germany, public defamation of ideology or religion through dissemination of written materials in a manner that is capable of disturbing the public order is punishable with a fine or imprisonment not exceeding three years.

Polish law provides for imprisonment of up to two years in case of offences against religious feelings and imprisonment of up to three years for insults against a group or an individual because of their religious affiliation. However, similarly to German legislation, this last provision aims at protecting public order rather than religious feelings and this aim might justify the higher penalty.

For other Member States the penalty of imprisonment only indirectly relates to the disruption of public order or public peace. In fact the relevant criminal provisions in Italy, Finland and Austria foresee imprisonment when acts aimed at damaging religious objects or disrupting ceremonies are performed through **violence and threats**. However, for offences that look similar as they involve the use of violence or threats or the disruption of religious ceremonies, the penalty applied in Finland is less severe than the one applied in

³⁵² Article 405 of the Italian Criminal Code updated to 3 June 2013, available at: <http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³⁵³ Article 724 of the Italian Criminal Code updated to 3 June 2013, available at: <http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

³⁵⁴ Article 196 of the Law of 6 June 1997 – Criminal Code, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.

³⁵⁵ Article 257 of the Law of 6 June 1997 – Criminal Code, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>.

Italy. For such offences, the imprisonment in Finland cannot exceed six months while in Italy it can be up to three years.

In Denmark and Greece a penalty of imprisonment is foreseen (four months in Denmark and a considerably higher one in Greece (up to three years)). However, it is interesting to note that, unlike all the other national legislation analysed such a penalty does not relate to any behaviour affecting public order/public peace or involving violence or threat.

Although not specifically stated in the wording of the national provisions, the penalty provisions also cover blasphemy and religious insult committed **online**, in all considered Member States, to the extent possible. For example, in Italy, out of the four provisions assessed, two provisions are suitable to cover online crime, namely the ones covering blasphemy and insults against individuals. Two other provisions are specifically aimed at insults against a religion by offending property and the disruption of religious ceremonies. Such offences involve physical violence and violence against property and it is therefore not possible to commit them online.

5.2.2. Effectiveness of legislation on blasphemy and/or religious insult

The Section aims to assess the **effectiveness of Member States' legislation** with regard to blasphemy and religious insult.

The assessment provided in this Section is based on information gathered through the national studies, which evaluated the national legal frameworks on the basis of four criteria:

- First criterion: Interaction of national legal provisions on blasphemy and religious insult with the freedom of expression and/or freedom of thought, conscience and religion;
- Second criterion: Quantitative data on the use of legal provision(s) in practice;
- Third criterion: Factors hindering the effective application of the current legal framework; and
- Fourth criterion: Drivers behind any recent legislative amendments or planned amendments.

First criterion-Interaction of national legal provisions on blasphemy and religious insult with the freedom of expression and/or freedom of thought, conscience and religion

The ECHR protects everyone's freedom of expression (Article 10) by stating that it should 'include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. According to this Article freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others'. Such protection is also mirrored in the Charter of Fundamental Rights (Article 52(1)).

The ECHR also protects everyone's freedom of thought, conscience and religion specifying that anyone is allowed to change religion or belief and to manifest it individually or in communities. The manifestation of one's religion or belief is only subject to the limitations needed in a democratic society to protect elements such as public safety and public order, as well as the rights and freedoms of others (Article 9).

This Section aims to assess the **relationship** between Member States' **legislation with regard to blasphemy and religious insult** and the fundamental right of **freedom of expression and/or freedom of thought, conscience and religion**. In particular it aims to describe any controversies linked to the judicial interpretation of national offence provisions in relation to such freedoms. Focus is placed on any relevant decisions of higher courts (such as constitutional courts) on the matter.

The table below gives an overview of whether or not the relationship described above between national legislation on blasphemy and religious insult and freedom of expression and/or freedom of thought, conscience and religion was assessed by national higher courts. The 'ticks' (✓) in the table indicate the existence of higher court decisions; whereas empty cells indicate the lack of such decisions.

Table 16 : Existence of relevant higher court decision

Member State	Freedom of expression	Freedom of thought, conscience and religion
AT	✓	
FI	✓	
DE	✓	
DK		
EL	✓	
IE		
IT	✓	
PL		

Higher court decisions assessing the relationship between some of the offence provisions set out in legislation and the freedom of expression and/or freedom of thought, conscience and religion, exist in **Austria, Finland, Germany, Greece and Italy**. The courts of those Member States found that such **freedoms can be limited under certain conditions that always need to be justified** and that may differ from Member State to Member State.

The analysis carried out on the basis of the national case law identified, highlighted the courts' tendency to assess the relation between blasphemy/religious insult provisions and freedom of expression according to two main criteria: 1) **protection of public order** and 2) avoidance of **offences and mockery as an end in itself**.

With regard to public order, for example, in Austria the court's reasoning in assessing such relation focussed on the fact that a limitation of the freedom of expression is justifiable in order to protect **religious peace and religious order**. Moreover, in the adjudicated case, the defendants' statements/assertions were qualified as purely derogatory remarks and not as objective religious discussion³⁵⁶.

In Germany, the Federal Administrative Court³⁵⁷ stated that freedom of expression is guaranteed within the limits of respect for the fundamental rights of others. If there is a conflict between different principles, the court must therefore find a proportionate balance between opposed, but equally constitutionally, protected interests. The Court also considered that the main purpose of the performance was the denigration and vilification of the Christian faith and it considered tolerance with regard to religious and ideological matters important for **keeping peace in society**.

³⁵⁶ Higher Regional Court, Graz, decision N° 150s52/12d, 11 December 2013.

³⁵⁷ Decision *BVerwG 1 B 60.97* from 11 December 1997 of the Federal Administrative Court.

With regard to the avoidance of **offences and mockery as an end in itself**, the Italian court³⁵⁸ that was asked to assess the relation between blasphemy/religious insult' provisions and freedom of expression, stated that the mockery and the offence as an end in itself are considered to constitute vilification, which is at once an injury to the believer and an outrage to the religious ethical values. On the contrary, the scientific or popular discussion of religious issues and the (even lively) criticism of religious ideas, as well as the expression of radical dissent, are not considered to constitute vilification³⁵⁹.

Similarly, when asked to interpret the application of national legislation with regard to blasphemy and religious insult, the Finnish Supreme Court stated that freedom of expression allows for sharp criticism of religions. However, it also highlighted that such freedom of expression might be limited in case of inappropriate attacks on religion³⁶⁰. Inappropriate attack on religion may consist of the use of derogatory language against the entire religion aimed to offend and to denigrate the religion as such. However, such limitation must always be duly justified.

Second criterion- Quantitative data on the use of legal provision(s) in practice.

Based on the information collected to date, it seems that all Member States taken into account in this Section of this study collect **data on cases of blasphemy and religious insult** to some extent. However, due to the inconsistent data on adjudicated cases, it is difficult to carry out a meaningful comparative analysis of the effectiveness of the relevant legislation in practice.

In Ireland and Denmark, no cases have been investigated, prosecuted or adjudicated. The lack of cases in these two Member States is an interesting element when assessing the necessity of maintaining the existing blasphemy/religious insult' rules in these countries. This is especially so when considering that according to their respective Constitutions, Denmark and Ireland are not secular States and the Evangelical Lutheran Church in Denmark is a national State church³⁶¹ while the Catholic Church is the State church in Ireland³⁶².

On the other hand, in Germany an average of 60 cases were investigated each year between 2010 and 2014 with the highest peak of 79 cases in 2010 and the lowest peak of 49 cases in 2014. The number of cases prosecuted between 2012 and 2014 were on average 21 (no data are available for 2010 and 2011). However it is not possible to know how many cases were adjudicated in the same period as data on court judgments are not available.

In Poland the number of cases investigated gradually increased from 48 in 2010 to 55 in 2014. This trend is not confirmed by the number of cases adjudicated as they varied greatly between 2010 and 2014 with the lowest number in 2011 with only two cases adjudicated and the highest peak in 2012 with 11 cases adjudicated. Data on the number of cases prosecuted are not available³⁶³.

³⁵⁸ Decision of the Court of Cassation n. 10535 of 11 December 2000.

³⁵⁹ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

³⁶⁰ Supreme Court (KKO), KKO:2012:58, paragraph 18.

³⁶¹ Section 4 of the Constitution: 'The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State'.

³⁶² History: Repeal the Irish Blasphemy law by Atheist Ireland', Atheist Ireland website (2015), available at <http://www.blasphemy.ie/history-of-irish-blasphemy-law/>.

³⁶³ Data of the Police, available at:

<http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63492,Obraza-uczuc-religijnych-art-196.html>.

The lack of consistent data on investigated, prosecuted and adjudicated cases in Germany and Poland makes it challenging to verify the common feeling identified among stakeholders about an existing overlap in the respective countries between blasphemy/religious insult' legislation and hate speech legislation. In Germany, for example, it was proposed several times (especially after the attacks at Charlie Hebdo in France) to abolish the legislation on blasphemy/religious insult as such offences would already fall under the scope of the legislation on hate speech³⁶⁴.

No figures are available for the number of cases investigated in Finland. Figures are only available for the number of cases reported to the police. It can however be assumed that the police investigated all reported cases, unless the report was manifestly unfounded. The number of cases reported to the police were on average five per year between 2010 and 2014 with the lowest peak in 2014 (two cases) and the highest peak in 2011 (nine cases). This trend is confirmed for the number of cases prosecuted that registered its highest peak in 2011 with six cases prosecuted. However, besides this constant trend in investigation and prosecution, no cases were adjudicated with a sentence of guilt between 2010 and 2014.

Data on the number of cases investigated, prosecuted and adjudicated in Italy and Greece are not publicly available. This lack of data impedes a meaningful analysis of the necessity and effectiveness of blasphemy legislation, especially with regard to Greece.

While Italy is in fact described as a secular State in its Constitution stating that the State and the Catholic Church are independent and sovereign, each within its own sphere³⁶⁵ and all religious denominations are equally free before the law³⁶⁶, the Church and State in Greece are not separated. The Greek Constitution in fact already declares in its title that the Constitution itself is proclaimed '[i]n the name of the Holy and Consubstantial and Indivisible Trinity'. The Constitution also recognises the Eastern Orthodox Church of Christ as the 'prevailing religion'³⁶⁷. According to literature, the term 'prevailing religion' has the declaratory meaning that almost all Greeks are Orthodox and it does not mean that the Eastern Orthodox Church prevails over others³⁶⁸. The Orthodox religion is therefore both a State Church which was created by the State and organised as a legal entity with specific public power privileges and a 'national' Church as the Church of the Nation³⁶⁹.

³⁶⁴ Zeit-Online, Blasphemy. Is blasphemy a necessary crime? (*Blasphemie. Ist Gotteslästerung ein notwendiger Straftatbestand?*), August 2015, available at: <http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/blasphemie-gotteslaesterung-straftatbestand-religion/seite-4>.

³⁶⁵ Article 7, Constitution of the Italian Republic of 1 January 1948.

³⁶⁶ Article 8, Constitution of the Italian Republic of 1 January 1948.

³⁶⁷ Article 3 of the Greek Constitution stipulates:

Relations between Church and State: 1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928. 2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph. 3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited.

³⁶⁸ Spyropoulos, P.C., Fortsakis T.P., *Constitutional Law in Greece*, 2nd ed., 2013, Wolters Kluwer Law & Business, p.239.

³⁶⁹ Manitakis A., 'The distinction between believer and citizen' (*Η διάκριση του πιστού από τον πολίτη*), (2007) available at: <http://www.metanastefsi.net/uploads/7/6/8/3/7683554/ppol.pdf>.

Third criterion-Factors hindering the effective application of the current legal framework

This part assesses any **inefficiency linked to the existing legal framework**, which hinders practical application. To ensure a certain level of comparability, the national studies, which serve as the main source of information for this study, assessed the inefficiencies from five different angles. The three most relevant elements that were analysed are: **clarity** of the applicable offence provision(s), the suitability of the offence provision(s) to address **online crime**, the suitability of the offence provision(s) to **ensure freedom of expression and/or freedom of thought, conscience and religion**. The national studies also contain information on any other inefficiency identified.

The table below summarises the information gathered to date; 'ticks' (✓) are used to highlight where existing inefficiencies were identified; whereas empty cells indicate the lack of inefficiencies.

Table 17 : Factors hindering the effective application of the provisions on blasphemy and religious insult

Clarity of offence provision							
AT	FI	DE	DK	EL	IE	IT	PL
✓			✓	✓	✓	✓	✓
Suitability of offence provisions to cover online crime							
AT	FI	DE	DK	EL	IE	IT	PL
		✓					
Suitability of offence provisions to ensure freedom of expression and / or freedom of thought, conscience and religion							
AT	FI	DE	DK	EL	IE	IT	PL
✓	✓	✓		✓	✓	✓	✓

The information gathered to date showed a lack of **clarity** in the national provision in Austria, Denmark, Greece, Ireland, Italy and Poland. This lack of clarity was not identified in Germany and Finland.

The main reason for lack of clarity relates to the **absence of a clear definition** of one or more crucial elements of the national provisions such as **religious feelings** (Poland and Denmark), **religion or religious denominations** (Ireland and Italy) or the use of vague concepts such as a **lack of respect, disparagement or malice** (Greece and Austria).

In Poland, the lack of clarity relates to the fact that the concept of **religious feelings** mentioned in the national provision on blasphemy is not properly defined. On the other hand, in Denmark, the lack of clarity arises from the fact that the Criminal Code protects the religious feelings connected with the doctrines and worship of different religions. This means that, to be enforced, the provision on blasphemy needs to be interpreted in light of the religious texts, practices and perceptions of the allegedly offended religion. The court must therefore assess a theological discussion and eventually apply a sanction related to it. This combination of religious concepts and criminal provisions' interpretation causes a lack of clarity and challenges the fundamental principle of the rule of law and legal certainty³⁷⁰.

Several concerns with regard to the clarity of the provision on blasphemy were raised in Ireland. Some of these relate to the fact that national legislation seems to be deliberately

³⁷⁰ Institute for Human Rights (*Menneskerettigheder*), Freedom of Speech- Status 2013, (*Ytringsfrihed - Status 2013*) (2013), page 24ff.

designed to be too narrow to be easily enforced³⁷¹. Another unclear aspect is the lack of definition of **religion**³⁷². The Defamation Act 2009 does not clarify what is a religion and what is considered a religion, moreover the nature of the offence is too broad and anyone could be offended³⁷³. Similar concerns exist in Italy where the criminal provision protects **religious denomination**. However, the concept of religious denomination is not defined in legislation. It is in fact not clear whether any religious group may fall under such a category (institutionalised religions and organised communities as well as not organised and not institutionalised ones). The lack of a definition raises problems when trying to identify who are the members of such denominations. Moreover, the use of such terminology seems to suggest that a believer is protected only insofar as he or she belongs to a religious denomination³⁷⁴.

In Greece and Austria the lack of clarity in the relevant provisions relates to the vagueness of the terminology used. For example, in Greece the need for precision to safeguard legal certainty is challenged by the use of value expressions and vague concepts (e.g. **maliciously** or **lack of respect**)³⁷⁵, while in Austria the terms **disparagement** or **degrading** imply a broad scope for interpretation which may lead to a too broad understanding of the terms³⁷⁶.

The relevant criminal law provisions assessed are suitable to cover **online crime** in all Member States analysed. However, the research carried out showed that in Germany such provisions are not suitable to cover blasphemy committed online as such crimes would be better covered by other pieces of national legislation that specifically deal with online crime. Issues might also arise in case the service providers of websites accessible on the national territory are registered in another Member State.

Possible **clashes between national legislation and freedom of expression and freedom of thought, conscience and religion** were identified in all Member States analysed in this Section of the study, except for Denmark.

The research carried out highlighted some common arguments explaining the identified clashes between the relevant national provisions and freedom of expression. Such clashes relate to **a severe limitation of freedom of expression and freedom of thought, conscience and religion** (Greece and Finland) that could possibly be avoided by reinforcing the existing rules on hate speech (Austria, Denmark, Germany and Italy); the fact that the protection is only guaranteed to **theistic beliefs** (Italy and Greece); the existence of a possible **auto-censorship and 'chilling effect'** especially in the field of art, media and advertisement (Germany, Ireland, Italy and Poland).

The risk that the implementation of blasphemy/religious insult rules would **severely impact on freedom of expression and freedom of religion, conscience and thought** is considered relevant in Greece where, despite the limited convictions on the basis of such provisions, it is argued that maintaining criminal reprimand of blasphemy/religious insult means enforcing respect towards theistic religion therefore violating the negative aspect of

³⁷¹The Convention on the Constitution, 'Sixth Report on the Constitution-The removal of the offence of blasphemy from the Constitution' (2014), available at:

<https://www.constitution.ie/AttachmentDownload.ashx?mid=b96d3466-4987-e311-877e-005056a32ee4>.

³⁷² Information collected in May 2015 through consultation with national stakeholders (NGO).

³⁷³ Ibid.

³⁷⁴ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

³⁷⁵ Information collected in August 2015 through consultation with national stakeholder (Lawyer).

³⁷⁶ Information collected in August 2015 through consultation with national stakeholders (academic/criminal law expert).

freedom of religion, namely the right to be atheistic, agnostic or non-religious³⁷⁷. Similarly, in Italy, blasphemy/religious insult' provisions seem to be drafted on the basis of theistic beliefs. The national research showed that this approach is not suitable to cover the protection of freedom of religion as pluralist societies require coexistence among different religions and respect for the freedom to profess any kind of theistic or non-theistic beliefs³⁷⁸.

In Germany, the evidence gathered shows that freedom of expression (especially with regard to artists) may be limited through strict blasphemy laws. While German authorities very rarely use blasphemy laws against artists, there have still been examples of art pieces that were subjected to censorship because they were considered blasphemous³⁷⁹. A similar problem was also identified in Poland where the provision criminalising blasphemy had a '**chilling effect**' in public debates and art performance. This is confirmed by the several cases of censorship and **self-censorship** of artists³⁸⁰. The 'chilling effect' of blasphemy law upon normal freedom of expression that could possibly lead to self-censorship, especially in the field of art, media and advertisement was also highlighted by the stakeholders interviewed in Ireland³⁸¹, Italy³⁸² and in Finland³⁸³.

In some Member States (Austria³⁸⁴, Denmark³⁸⁵, Germany³⁸⁶ and Italy³⁸⁷), stakeholders also underlined that in practice there is an overlap between blasphemy/religious insult' provisions and hate speech provisions as the need to protect individuals and groups belonging to minority religions (and therefore public order - argument usually put forward to justify the criminalisation of blasphemy/religious insult provisions) could actually be better protected by reinforcing or duly implementing the existing national legislation on **incitement to hatred**.

³⁷⁷ Information collected in August 2015 through consultation with national stakeholder (Lawyer).

³⁷⁸ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182–197.

³⁷⁹ Xindex – the voice of free expression 'Germany: A positive environment for free expression clouded by surveillance' (2015), available at <https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/>.

³⁸⁰ Information collected in June 2015 through consultation with national stakeholder (NGO).

³⁸¹ Ibid.

³⁸² Information collected in August 2015 through consultation with national stakeholder (Lawyer).

³⁸³ Information collected in August 2015 through consultation with national stakeholders (NGO).

³⁸⁴ Information collected in July 2015 through consultation with national stakeholder (legal expert/NGO).

³⁸⁵ Documentation and Advisory Centre on Racial Discrimination, Comments to the 20th and 21st Periodic Reports of DENMARK on the Elimination of Racial Discrimination to the Committee on the Elimination of Racial Discrimination at its 86th Session (27 Apr 2015 - 15 May 2015), Report of 9 April 2015, page 13.

³⁸⁶ Zeit-Online, Blasphemy. Is blasphemy a necessary crime? (*Blasphemie. Ist Gotteslästerung ein notwendiger Straftatbestand?*), (2015) available at: <http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/blasphemie-gotteslaesterung-straftatbestand-religion/seite-4>.

³⁸⁷ Information collected in June 2015 through consultation with national stakeholders (Academic).

Fourth criterion-Drivers behind any recent or planned legislative amendments

This part provides an overview of any **recent legislative changes, or legislative changes planned** in light of the recent terrorist attacks in France and Denmark in 2015. The assessment focuses, in particular, on legislative changes resulting from the inefficiencies of previously existing legislation.

The table below highlights those Member States in which the legislation on blasphemy and religious insult was recently amended, or is planned to be amended. In the table, 'ticks' (✓) indicate cases where such amendments exist; whereas empty cells refer to cases where no relevant amendments are foreseen or have taken place recently.

Table 18 : Recent or planned amendment to national legislation

AT	FI	DE	DK	EL	IE	IT	PL
				✓			

Out of the eight Member States assessed, legislative amendments were adopted only in Greece where in March 2012, Law 4055/2012³⁸⁸ it introduced an amendment only as regards non-malicious blasphemy which was downgraded from a misdemeanour to the less serious classification of an infringement. On the basis of the national research carried out, this change could be interpreted as a preliminary response in favour of the abolition of the criminalisation of blasphemy. However, the national research also shows that the issue of penal reprimand remains.

It is interesting to note that in Poland there were some attempts to amend the blasphemy provision of the Criminal Code. One of the proposals aimed to better balance the protection of religious sensitivities with the fundamental values of freedom of thought, religion and expression. It was argued that, due to the lack of clarity of its current wording, the blasphemy provision could be misused by individuals and groups to eliminate artistic performances and products that are not consistent with their beliefs and would therefore risk becoming a tool of censorship. The blasphemy provision was also considered too vague. The proposed new provision would respect individual freedoms and would respect the principle of legal clarity defining the religious feelings protected by the Criminal Code in a precise way. The proposal was rejected by the Polish Parliament³⁸⁹.

5.3. Publishers' responsibility for blasphemy and/or religious insult

5.3.1. Rules on publishers' responsibility for blasphemy and/or religious insult

As described in Section 4.4.1 on hate speech, blasphemy and religious insult published by the media might reach a wide audience or could target a large number of people. In all Member States assessed, legal consequences are attached to the publication of blasphemy and religious insult by the media.

The Section describes the **legal framework applicable to blasphemy and religious insult committed through the media** that may include provisions set out in the Constitution, in applicable criminal legislation, in specific media law and in self-governing rules of professional associations. The research carried out did not identify any specific civil law rules applying to blasphemy and religious insult. It is therefore assumed that the

³⁸⁸ Law 4055/2012 Fair trial and its reasonable duration, Government Gazette A'51/2012.

³⁸⁹ Parliamentary proposal No 383 of 22 February 2012.

general regime concerning compensation for damages would also apply with regard to the commission of such offences.

Table 19 : Existence of rules on publishers' responsibility for blasphemy and religious insult

	AT	DE	DK	FI	EL	IE	IT	PL
Constitution								
Criminal	✓							✓
Specific media law								✓
Self-regulation	✓							✓

In Ireland and Greece, the regulatory framework applicable to blasphemy and/or religious insult committed by or through the media is provided for in the **Constitution**. The Irish Constitution states that the State guarantees the media freedom of expression. However, it also clarifies that publication or utterance of blasphemous, seditious, or indecent matter is an offence that must be punished in accordance with the law³⁹⁰. The Greek Constitution establishes freedom of the press and prohibits censorship. Freedom of the press includes freedom to print and produce, freedom to publish as well as freedom to distribute³⁹¹. However, the Constitution³⁹² also sets very specific exceptional restrictions to this freedom. One of these exceptional restrictions relates to offences against the Christian or any other known religion, where the public prosecutor could order seizure after circulation³⁹³.

In all Member States analysed, the **general criminal law provisions** also cover blasphemy and religious insult committed through the media. As mentioned in Section 5.2.1, all national provisions in fact have in common the element of publicity and to be considered an offence the behaviour needs to take place in public or it must be likely to reach an indefinite number of persons.

General criminal law provisions therefore apply to anyone committing the offence also through the media. However, some Member States (e.g. Finland and Denmark) apply

³⁹⁰ 'The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law' Article 40(6)(1)(i) of the Constitution of Ireland, 1937, available at: http://www.irishstatutebook.ie/en/constitution/index.html#article40_6_1.

³⁹¹ Spyropoulos, P.C., Fortsakis T.P., Constitutional Law in Greece, 2nd ed., 2013, Wolters Kluwer Law & Business, p.207.

³⁹² Article 14(2) of the Greek Constitution stipulates '2. The press is free. Censorship and all other preventive measures are prohibited' and Article 14(3) foresees that '3. The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of: a) an offence against the Christian or any other known religion. b) an insult against the person of the President of the Republic. c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State. d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.'

³⁹³ Rammos C. N., 'On the occasion of the Charlie Hebdo events. Considerations regarding freedom of expression and its limits in difficult situations on the basis of the jurisprudence of the ECtHR' (*Με αφορμή τα γεγονότα στο Charlie Hebdo. Προβληματισμοί γύρω από την ελευθερία έκφρασης και τα όριά της στις δύσκολες περιπτώσεις με βάση τη νομολογία του ΕΔΔΑ*), Contribution to the conference on the ECHR, Hellenic Judges Academy, p.17, 24.02.2015, available at: <http://www.constitutionalism.gr/site/rammos-charlie-hebdo/>.

stricter rules in this regard. In fact, the **editor and the publisher** may also be held criminally liable for an offence committed through their media. In Denmark, the editor could be held liable in case the person who committed the offence is anonymous. The publisher could also be punished in place of the editor in case the latter cannot be identified or cannot be held criminally responsible³⁹⁴. In Finland, in addition to the person committing the offence³⁹⁵, the **editors-in-chief** (of print, broadcast or online media) may be punished with a fine, if materials that breach the criminal law provision are made available and they intentionally, or through negligence, failed to supervise the publication of such offensive or blasphemous material³⁹⁶. In Ireland the applicable criminal law provision is less specific with this regard as it states that '[a] person who publishes or utters blasphemous matter shall be guilty of an offence [...]'. The research carried out confirmed that this provision is applicable to the media although it is not clearly stated to what extent the publisher or editor would be liable.

In addition, **specific laws applying to the media** also exist in Denmark, Finland, Greece, Ireland, Italy and Poland. These rules are of a general nature and they provide for the respect of human dignity and fundamental rights through the media, including a general respect of religious feelings in some cases (e.g. Italy).

In Ireland and Poland such laws specifically address the issue of blasphemy/religious insult and provide for specific sanctions. In Ireland, the Censorship of Films Act in fact provides for the withholding of a certificate from a blasphemous film³⁹⁷. In Poland, an **administrative liability** scheme seems to apply to blasphemy and religious insult committed through all broadcasting media (public and private), regulated through the Broadcasting Act providing that broadcasts must respect religious beliefs of the public and especially the Christian system of values³⁹⁸. According to this Act, the Chairman of the Broadcasting Council³⁹⁹ may impose sanctions including revocation of the licence and fines⁴⁰⁰.

A similar situation exists in Greece. The Greek Constitution⁴⁰¹ in fact, states that the audiovisual media (including radio and television broadcasting) are subject to the control of the National Radio and Television Council (ESR) that is an independent authority in charge of controlling the content and the quality of the broadcasts⁴⁰². The ESR has issued decisions against insulting content of broadcasts towards the Greek Orthodox religion⁴⁰³. The approach taken by this authority has a particular relevance in this context especially considering that the legal framework applicable to the ESR does not include specific references to blasphemy and religious insult.

³⁹⁴ Section 15 of the Media Liability Act.

³⁹⁵ Act 460/2003, Law on the exercise of freedom of expression in mass media, Section 12.

³⁹⁶ Act 460/2003, Law on the exercise of freedom of expression in mass media.

³⁹⁷ Section 7.2 of the Censorship of Films Act, 1923 (No. 23), available at:

<http://www.irishstatutebook.ie/1923/en/act/pub/0023/>.

³⁹⁸ Article 18(2) Broadcasting Act.

³⁹⁹ Article 37 of the Press Law, Dz. U. 1984 Nr 5 poz. 24, available at:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

⁴⁰⁰ Article 31 of the Press Law Dz. U. 1984 Nr 5 poz. 24, available at:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19840050024>.

⁴⁰¹ Article 15(1) of the Constitution states that '1. The protective provisions for the press in the preceding article shall not be applicable to films, sound recordings, radio, television or any other similar medium for the transmission of speech or images'.

⁴⁰² National Radio and Television Council 'Annual Report 2014', p.6.

⁴⁰³ See for example Decisions 137/2003, 5/2005 and 219/2012.

Austria, Denmark, Finland, Germany, Greece, Italy, and Poland also prohibit blasphemy and religious insult in **media self-regulations**. On the other hand, such rules do not exist in Ireland.

The content of such media self-regulation varies greatly as these may apply to different media (e.g. audio-visual, press), according to their different entity (e.g. whether public or private), according to the different service provided (e.g. entertainment, sport, advertisement) and according to the possible sanctions that could be imposed (e.g. fine, public or non-public reprimand). It is therefore challenging to find common elements to provide a meaningful comparative analysis of the rules provided in such self-regulations. Moreover, one of the elements identified with regard to self-regulations relates to the fact that they do not have a generally binding character. In principle, self-regulations apply to the actors (e.g. editors, publishers, journalists) that commit themselves to respect them. Some examples of media self-regulation relevant in the context of blasphemy/religious insult are provided below.

One initiative specifically addressing blasphemy/religious insult is the Austrian Press Council' that in its effort to enhance the self-regulation of print media prohibits the disparagement and mockery of religious precepts or of legally recognised churches or religious communities in Austria⁴⁰⁴.

A similar system of a more general nature (i.e. not focusing on blasphemy/religious insult issues) is also used in Germany, Finland and Greece. In Germany, the media usually voluntarily commits to a Press Code⁴⁰⁵ which provides that the press should not insult religious, philosophical or moral beliefs⁴⁰⁶. The Press Council is in charge of dealing with complaints against the media⁴⁰⁷. In case of violation of the Press Code, the Press Council⁴⁰⁸ could impose sanctions such as public reprimand, non-public reprimand or disapproval. The voluntary attachment to a self-regulatory body or code is present also in Finland where the Council for Mass Media is tasked with interpreting good journalistic practice⁴⁰⁹. This body is not a court and does not exercise public powers on the media organisations affiliated to it, however, it can investigate alleged breaches of good professional practice⁴¹⁰. Similarly, but on a more local basis, the Journalists' Union of Athens Daily Newspapers has approved the 'Principles of Ethics of the Journalistic Profession'⁴¹¹ requiring that journalists avoid vulgarisms, vulgarity and linguistic barbarity, applying to all their products (including satire and caricature) the rules of professional ethics and social responsibility'.

The Italian media self-regulation framework is more fragmented as specific rules apply to entertainment programmes, to coverage of sports events through the media and to commercial advertisements. The National Communication Authority (AGCOM) approved an 'Act on the respect of fundamental rights, of the personal dignity and correct physical,

⁴⁰⁴ Austrian Press Council 'Principles of journalistic work' (*Grundsätze für die publizistische Arbeit*) (2013) available at: http://www.presserat.at/show_content.php?hid=2.

⁴⁰⁵ German Press Council, 'German Press Code', <http://www.presserat.de/pressekodex/pressekodex/>.

⁴⁰⁶ *ibid*.

⁴⁰⁷ German Press Council available at <http://www.presserat.de/>.

⁴⁰⁸ German Press Council 'Appeal Instructions', available at: https://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Beschwerdeanleitung.pdf.

⁴⁰⁹ 'The Council for Mass Media in Finland', The Council for Mass Media website (2015), available at http://www.jsn.fi/en/Council_for_Mass_Media/the-council-for-mass-media-in-finland.

⁴¹⁰ *ibid*.

⁴¹¹ Journalists' Union of Athens Daily Newspapers, General Assembly Decision of 19-20 May 1998, 'Principles of Ethics of the Journalistic Profession' (*Ενωση Συντακτών Ημερησίων Εφημερίδων Αθηνών, Απόφαση Γενικής Συνέλευσης της 19-20 Μαΐου 1998, 'Αρχές Δεοντολογίας του Δημοσιογραφικού Επαγγέλματος'*), available at: <http://www.esiea.gr/arxes-deontologias/>.

psychological and moral development of children in entertainment programmes⁴¹² stating that radio and television programmes must respect personal dignity and fundamental rights including the ones related to religious feelings⁴¹³ of the individual and of groups. Such an act seems to be a soft law instrument that serves as guidelines that are not enforced through penalties. The self-regulatory rules applying to sports' events through the media⁴¹⁴ provide similar provisions and for the possibility to impose specific sanctions (e.g. a fine or the suspension of the broadcasting licence) if such rules are violated.

Similarities were also found in Greece, Italy and Poland with regard to self-regulations applying to commercial advertisement.

The Greek Code for Advertising and Communication⁴¹⁵ is a self-regulatory instrument requiring that advertisements do not contain statements or representations that offend morals and decency. However, no direct reference to blasphemy or religious insult is made in this Code. Similarly, no specific reference to blasphemy/religious insult is made in Italy where the Institute for Commercial Advertisement (IAP) approved a 'Self-regulatory Code on the Commercial Communication'⁴¹⁶ (applying to actors such as advertisement agencies, advertisement and marketing consultants) stating that commercial communication has to respect personal dignity and cannot offend moral, civil and religious conviction⁴¹⁷. This Institute also set up an independent committee that is competent to decide with regard to violations⁴¹⁸ and possible sanctions to be applied (e.g. ceasing the broadcasting or publication of the advertisement)⁴¹⁹. Finally, in Poland the Commission for Ethics in Advertising hears complaints regarding alleged non-ethical advertising including complaints alleging offences to religious sensibilities.

5.3.2. Effectiveness of rules on publishers' responsibility for blasphemy and/or religious insult

This Section aims to assess the **effectiveness of rules on publishers' responsibility for blasphemy and/or religious insult**.

Blasphemy committed through the media might reach or target a larger number of people, and might therefore have a significant social impact. It seems to be common that very little information is available on the application of the specific media law or self-regulation rules in practice (with regard to the effectiveness of criminal law rules see Section 5.2.2). Therefore, none of the national studies, which serve as baselines for this study, provide a detailed assessment of the effectiveness of existing rules. Consequently, as opposed to

⁴¹² AGCOM Decision n. 165/06/CSP 'Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes' (*Atto di indirizzo sul rispetto dei diritti fondamentali della persona, della dignità personale e del corretto sviluppo fisico, psichico e morale dei minori nei programmi di intrattenimento*).

⁴¹³ Article 1, AGCOM Decision n. 165/06/CSP 'Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes' (*Atto di indirizzo sul rispetto dei diritti fondamentali della persona, della dignità personale e del corretto sviluppo fisico, psichico e morale dei minori nei programmi di intrattenimento*).

⁴¹⁴ Article 2(2), Decree of the Ministry of Communication n. 36 of 21 January 2008 'Code on the self-regulation of programmes commenting sport events' published on Official Journal n. 58 of 8 March 2008.

⁴¹⁵ The Association of Advertising Agencies of Greece (*Ένωση Εταιριών Διαφήμισης & Επικοινωνίας Ελλάδος - ΕΔΕΕ*) and the Hellenic Advertisers' Association (*Σύνδεσμος Διαφημιζομένων Ελλάδος - ΣΔΕ- SDE*) issued the 'Greek Code for Advertising and Communication' on the basis of the legal authorisation provided in Law 2863/2000 'National Council For Radio And Television And Relevant Authorities And Instruments of The Radio And Television Services Provision Sector', OJ A' 262/29.11.2000; 262/29.11.2000. The latest version (2007) is available for download at: http://www.see.gr/index.php?option=com_content&view=article&id=20&Itemid=22.

⁴¹⁶ IAP 'Self-regulatory Code on the Commercial Communication' 59th edition of 1 January 2015.

⁴¹⁷ Article 10, 'Self-regulatory Code on the Commercial Communication' 59th edition of 1 January 2015.

⁴¹⁸ Article 36, 'Self-regulatory Code on the Commercial Communication' 59th edition of 1 January.

⁴¹⁹ Article 39, 'Self-regulatory Code on the Commercial Communication' 59th edition of 1 January 2015.

other effectiveness related Sections of this study, the assessment below is not provided in the form of comparative tables, but as a narrative.

The assessment is structured around the following elements:

- First criterion: Interaction of national provisions with the freedom of expression;
- Second criterion: Quantitative data on the use of applicable provision(s) in practice;
- Third criterion: Factors hindering the effective application of the applicable provisions; and
- Fourth criterion: Drivers behind any recent or planned legislative amendments.

First criterion: Interaction of national provisions with the freedom of expression

Higher court decisions assessing the **relationship of existing rules with the freedom of expression and freedom of thought, conscience and religion** were not identified in any of the Member States covered.

Second criterion: Quantitative data on the use of applicable provision(s) in practice.

Quantitative data on the number of judicial decisions taken on blasphemy committed through the media are not available in any of the Member States assessed. This is mainly due to the fact that no court central databases exist for the collection of such data. However, some relevant data on complaints to self-regulatory bodies are available in Poland, Germany and Greece.

The German Press Council holds a database for complaints showing that between 2010 and 2014 there were 12 complaints related to religion, ideology/worldview and morals. In Poland, no complaint database exists. However, there were four cases between 2010 and 2014 related to media service providers where publishers were sanctioned or received a remark from the Chairman of the Broadcasting Council⁴²⁰.

In Greece, the ESR took a total of five decisions relating to religious insult or degrading behaviour towards religion. Three⁴²¹ decisions related to insults against the Greek Orthodox religion, one⁴²² related to the degrading behaviour of a journalist against representatives of the Dodecatheon and one⁴²³ related to disparaging references of a TV presenter against the Muslim minority in Greece.

Third criterion: Factors hindering the effective application of the applicable provisions

With regard to the **factors hindering the application of existing rules** in practice, the evidence gathered makes it challenging to assess the overall effectiveness of the national legislation. However, the elements described below were identified for some of the Member States analysed.

NGO representatives in Poland flagged that the relevant provisions of the Broadcasting Act should be amended because **they are not precise enough** and they underlined that this lack of precision could limit freedom of expression⁴²⁴. Moreover, the Broadcasting Council is

⁴²⁰ All statistics are included in the annual reports of the Broadcasting Council, available at <http://www.krrit.gov.pl/krrit/sprawozdania/>.

⁴²¹ Decisions 137/2003, 5/2005 and 219/2012, available upon search on the National Radio and Television Council website, available at: <http://www.esr.gr/arxeion-xml/pages/esr/esrSite/get-index>.

⁴²² Decision 244/2004 available upon search on the National Radio and Television Council website, available at: <http://www.esr.gr/arxeion-xml/pages/esr/esrSite/get-index>.

⁴²³ Decision 38/2014 available upon search on the National Radio and Television Council website, available at: <http://www.esr.gr/arxeion-xml/pages/esr/esrSite/get-index>.

⁴²⁴ Information collected in June 2015 through consultation with national stakeholder (Academic).

a political body - its members are elected by political parties in power. This could, in their view, lead to the abuse of blasphemy and religious insult' provision for political reasons⁴²⁵. The evidence gathered in Finland showed some concerns about the way blasphemy and religious insult' cases are prosecuted. In fact, the Prosecutor General and not any State prosecutor (as normally foreseen in other cases) is in charge of deciding on prosecutions concerning blasphemy or religious insult⁴²⁶. The process for a case to be initiated by the Prosecutor General might be very bureaucratic and this might mean that in some cases the **prosecution would not start due to the extra bureaucratic efforts required**⁴²⁷.

In Germany, the evidence gathered showed that the main aspects hindering the application in practice of the provision regulating the media's responsibility is the fact that the relevant actors involved (e.g. editors and publishers) need to **voluntarily commit** to the Press Code which is therefore not generally binding. Similarly, in Denmark, online news agencies are covered by the competence of the Press Council if the agency itself is registered at the Press Council.

According to the research carried out in Italy, **media self-regulations would be able to better protect religious feelings** as they do not touch upon the legal guarantees that the penal system needs to protect. In fact, stakeholders interviewed confirmed that in practice, such rules are more often applied than the criminal law provisions, meaning that for the same case it is more likely to get to disciplinary sanctions following disciplinary proceedings than to criminal sanctions following criminal proceedings⁴²⁸. However, the application of such rules can still be challenging especially when they imply limitation of fundamental freedoms such as freedom of expression or freedom of religion, conscience and thought⁴²⁹. This is confirmed by the fact that, although in principle media self-regulation or individual contract for the participation to specific programmes could extend the promotion of such freedoms to atheist or agnostic groups, they fail to do so⁴³⁰.

Fourth criterion: Drivers behind any recent or planned legislative amendments

As a general rule, none of the Member States assessed have recently introduced, or plan to introduce, **changes to the regulatory framework** on the responsibility of publishers.

However in Ireland, the abolition of blasphemy law has been put on the agenda by the attack on Charlie Hebdo⁴³¹. Moreover, the Constitutional Convention debate held in November 2013 was followed by a vote in which the Convention recommended the removal of blasphemy from the Irish Constitution. This was followed by a question asking whether the Convention should recommend the retention of a 'legislative provision for the offence of blasphemy'. The Department of Justice's work on this is still ongoing. According to the information gathered, the main driver behind the request for these legislative changes is due to the vague, unclear and unused blasphemy provisions and to the fact that they are no longer appropriate in modern multicultural and multi-religious society⁴³².

⁴²⁵ Information collected in June 2015 through consultation with national stakeholder (Academic).

⁴²⁶ Act 460/2003, Law on the exercise of freedom of expression in mass media, 24§.

⁴²⁷ Information collected in June 2015 through consultation with national stakeholder (Prosecutor).

⁴²⁸ Information collected in July 2015 through consultation with national stakeholders (Academic and representative of NGO).

⁴²⁹ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

⁴³⁰ Information collected in July 2015 through consultation with national stakeholder (NGO).

⁴³¹ Adam Taylor 'After Paris shooting, Irish say it's time to finally ditch their blasphemy law' (August 2015), available at <http://www.washingtonpost.com/blogs/worldviews/wp/2015/01/13/after-paris-shooting-irish-say-its-time-to-finally-ditch-their-blasphemy-law/>.

⁴³² Information collected in May 2015 through consultation with national stakeholder (Academic).

5.4. Concluding remarks and recommendations related to blasphemy and/or religious insult

This study contains some recommendations, which have been developed on the basis of the assessment provided under Sections 5.1-5.3.

- **Recommendation related to the possible de-penalisation of blasphemy and religious insult:** blasphemy laws are rarely used and blasphemy is rarely prosecuted in EU Member States. However, the existence of these laws may still have a negative effect on freedom of expression. In view of the greater diversity of religious beliefs in Europe and of the democratic principle of the separation of state and religion, blasphemy, as an insult to a religion, should not be considered a criminal offence.
- **Recommendation related to the possible overlap between blasphemy/religious insult' provisions and hate speech provisions:** in some Member States, an overlap between blasphemy/religious insult' provisions and hate speech provisions was identified. The research carried out highlighted that the Member States should assess whether the need to protect public order by protecting individuals and groups belonging to minority religions could actually be better satisfied by reinforcing or duly implementing the existing national legislation on incitement to hatred.
- **Recommendation related to the need for better definitions concerning blasphemy and religious insult:** national authorities encounter problems in balancing the interests of individuals as members of a religious community. National law on blasphemy/religious insult should be better defined and differentiated from legislation on hate speech and should aim at only sanctioning expressions about religious matters that do not involve a threat to public order.
- **Recommendation related to the adoption and better implementation of media self-regulation:** the research highlighted that self-regulations would be able to better protect religious feelings as they do not touch upon the legal guarantees that the penal system needs to protect. The use of media self-regulations should therefore be promoted at EU and national level as they could better protect freedom of expression and freedom of religion, conscience and thought by extending the promotion of such freedoms to atheist or agnostic groups.
- **Recommendation related to the setting up of self-regulatory bodies:** press complaints bodies, media ombudspersons or other self-regulatory bodies dealing with blasphemy and or religious insult are not present in all Member States. Such bodies should be created, where they do not yet exist, and should discuss possible remedies for offences to religion.

6. GUIDELINES ON ADDRESSING HATE SPEECH WITHIN THE EU INSTITUTIONS

KEY FINDINGS

- This Section maps and analyses the rules, procedures and mechanisms applicable to hate speech within EU institutions.
- None of the analysed rules address hate speech. However, the use of offensive language by officials and Members of the European Parliament and Commission is prohibited by general rules banning the use of insulting remarks.
- In the absence of rules specific to hate speech, the rules on discrimination and harassment may be applied to officials and Members of the European Parliament and Commission committing hate speech offences.
- Hate speech offences committed within EU institutions give rise to different liability regimes and disciplinary proceedings depending on whether the offence is perpetrated by officials or Members of the Parliament and Commission.
- The case law of the Court of Justice of the EU clarifies when a statement made by Members of the European Parliament falls within the scope of absolute immunity referred to in Article 8 of the Protocol on the Privileges and Immunities of the European Union. The Parliament acts a scrutiniser of other EU institutions by conducting investigations and putting questions to the Commission and the Council also in relation to the conduct of their members.
- A range of issues emerge in relation to the legal standards applicable to hate speech. These include: the absence of rules, procedures and mechanisms specifically targeting hate speech; a broad discretionary power of the Appointing Authority regulated by Annex IX of the Staff Regulations in deciding the applicable disciplinary measures; low sanctions applied in practice to hate speech incidents etc.
- Tackling hate speech within the EU institutions requires urgent actions by the EU institutions. Among others, this study suggests the adoption of the following measures: include an explicit reference to hate speech in all pertinent legal standards applicable to EU institutions and ensure that effective and dissuasive sanctions punish hate speech offences.
- There is a need to balance the freedom of expression and independence of Members of the European Parliament (guaranteed by Article 8 of the Protocol on the Privileges and Immunities of the European Union) with the fundamental rights of citizens such as the right to access to justice and the rule of law.

The following **Guidelines** aim to map the current legal standards on hate speech within all EU institutions, to detect any gaps and inefficiencies of those standards and to put forward recommendations on how to best deal with incidents of hate speech.

Different rules, procedures and mechanisms apply to hate speech within EU institutions depending on who commits such an offence. Detailed information on the applicable standards is presented in Section 6.1.1. This information is complemented by an analysis of the rules on immunities (Section 6.1.2). The Parliament has a scrutinising duty over EU institutions, which includes oversight of the conduct of Members of the Commission who may be liable for hate speech. This role is briefly discussed in Section 6.1.3.

To facilitate the reading of the Guidelines, tables on legal standards relevant to hate speech have been inserted. Detailed information on the rules applicable to officials of EU

institutions and Members of the European Parliament and Commission, including main provisions, associated procedures and sanctions, is provided in Table 1, whereas a broader overview of the rules applicable to **all** EU institutions, is contained in Annex I.

6.1. Rules, procedures and mechanisms applicable within the EU institutions

6.1.1. Description of applicable rules, procedures and mechanisms

The table below illustrates the rules, procedures and mechanisms applicable to hate speech offences within all EU institutions. An assessment of the applicable rules is provided under the table.

For each of the rules listed below, the following aspects are analysed: personal scope, relevance to hate speech offences, main provisions, procedures and sanctions applicable to hate speech and/or related offences.

Table 20 : Rules, procedures and mechanisms applicable to hate speech offences within all EU institutions

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
I. RULES APPLICABLE TO ALL EU OFFICIALS					
Staff Regulations of Officials of the European Union and Annex IX on Disciplinary Proceedings⁴³³	Officials of all EU institutions	<ul style="list-style-type: none"> - No explicit reference to hate speech. - General standards of conducts extend to hate speech. 	<p>Document containing rules, principles and working conditions, going beyond the performance of duties.</p> <p><u>Main provisions:</u></p> <ul style="list-style-type: none"> - Art. 12: requiring officials to refrain from actions or behaviours reflecting adversely on their position; - Art. 86: stating that officials violating the obligations of the Regulations (both intentionally and negligently) are subject to disciplinary actions. <p><u>Other important provisions:</u></p> <ul style="list-style-type: none"> - Art. 17a: on officials' right to freedom of expression; - Art. 12a: on refraining from harassment; - Art. 22: on the obligation of reporting misconducts; - Art. 24: on the EU's obligations of supporting staff in proceedings against any person pertaining to threats, insulting or defamatory acts 	<p><u>Name of proceeding:</u> Disciplinary proceedings.</p> <p><u>Ground of proceeding:</u> failure of officials to comply with obligations.</p> <p><u>Main features of proceeding:</u></p> <ul style="list-style-type: none"> - Applicable rules set out in Annex IX of the Regulations; - Two step proceeding: <u>First step:</u> administrative investigation followed by the Appointing Authority's (AA) decision (Art. 3). The AA may decide that: <ul style="list-style-type: none"> • No case can be made against the official; • No disciplinary measure should be taken, despite breach of obligation; • Disciplinary proceeding is necessary, with or without the involvement of the Disciplinary Board (DB). <u>Second step:</u> Disciplinary proceeding: <ul style="list-style-type: none"> • With the involvement of 	<p><u>Type of disciplinary measures</u> (Art. 9 of Annex IX):</p> <ul style="list-style-type: none"> (a) written warning; (b) reprimand; (c) deferment of advancement to a higher step for a period of between one and twenty-three months; (d) relegation in step; (e) temporary downgrading for a period of between fifteen days and one year; (f) downgrading in the same function group; (g) classification in a lower function group, with or without downgrading; (h) removal from post and, where appropriate, reduction <i>pro tempore</i> of a pension or withholding, for a fixed period, of an amount from an invalidity allowance. <p><u>Considerations:</u></p> <ul style="list-style-type: none"> - one disciplinary penalty for a single case of misconduct (Art. 9(3)); - Proportionality to seriousness of misconduct (Art. 10); Seriousness to be determined on the basis of: nature and circumstances of the offence, intentional or

⁴³³ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (Staff Regulations of Officials), OJ L 56, 4.3.1968, p. 1-7, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429099392490&uri=CELEX:31968R0259\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429099392490&uri=CELEX:31968R0259(01)). It was last amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ L 287, 29.10.2013, p. 15-62, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429098882261&uri=CELEX:32013R1023>.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
			or utterances and of providing compensation to victims under certain conditions.	DB: AA submits a report to DB on facts and circumstances of the case (Art. 12) • Without the involvement of DB: AA on its own initiative may issue written warning or reprimand (Art.11).	negligent conduct, motives of official, conduct of official throughout his/her career.
Protocol on the Privileges and Immunities of the European Union ⁴³⁴	Officials of all EU institutions	- No explicit reference to hate speech. - Immunity granted to officials and members of EU institutions.	<u>Immunity of officials:</u> - Art. 11 (a): granting immunity with regard to acts performed by officials in official capacity, including spoken or written remarks, subject to the rules on liability of officials towards the Union and to the jurisdiction of the CJEU in disputes between the Union and its officials Immunity lasts after the end of the mandate. - Art. 17: stating that immunity is accorded in the interests of the Union. Immunity may be waived by the EU institutions in those cases in which the waiver is not contrary to the interests of the Union.	No specific procedure.	Please, see Section 5.1.2
European Code of Good Administrative Behaviour ⁴³⁵	Officials of all EU Institutions when dealing with citizens	- No explicit reference to hate speech. - General standards of conducts extend to hate speech.	<u>Main principles:</u> - Principle of integrity on officials' duty to be guided by a sense of propriety; - Principle of non-discrimina-	- No specific procedure. - Application of the Code by the European Ombudsman in cases of maladministration.	The code is not legally binding nor does the Ombudsman have the power to make legally binding decisions.

⁴³⁴ Protocol on the Privileges and Immunities of the European Union, available at https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en_protocol_7.pdf.

⁴³⁵ The European Ombudsman, European Code of Good Administrative Behaviour, available at: <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
			tion on officials' obligation not to discriminate (Art. 5); - Principle of Lawfulness on officials' obligation to comply with the EU legislation (Art.4).		
II. RULES APPLICABLE TO OFFICIALS OF THE COMMISSION					
Commission decision C(2004) 1588 of 28 April 2004 laying down general executive measures relating to inquiries and disciplinary procedures⁴³⁶	Officials of the European Commission	- No explicit reference to hate speech. -Procedures for administrative enquiries and disciplinary proceedings extend to hate speech	Art. 4 on the opening of an administrative inquiry at the request of a Director-General (DG) or Head of Department, or on its own initiative, by the DG for Personnel and Administration in agreement with the Secretary-General in case of failure of officials to comply with obligations.	Investigation and Disciplinary Office (IDOC) shall: - gather evidence both in favour and against the alleged offender; - conduct hearings with witnesses; - hear the official concerned; - send a report on the facts to the DG for Personnel and Administration; - suggest: <ul style="list-style-type: none"> • the opening of disciplinary proceedings or • the closure of the case without further action: <ol style="list-style-type: none"> 1) if the facts which form the basis of the enquiry are not established; 2) the facts are established but they do not constitute a breach of the rules or the opening of disciplinary proceedings. Consultation of the DB by IDOC:	No sanctions foreseen.

⁴³⁶ European Commission, Decision Implementing Provisions on the Conduct of Administrative Inquiries and Disciplinary Procedures C(2004)1588, 28.4.2994, Brussels, available at: <http://www.transparencyinternational.eu/wp-content/uploads/2014/08/Decision.pdf>.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
Commission Decision of 26th April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment ⁴³⁷	Officials of the European Commission	- No explicit reference to hate speech. - Framework for harassment may extend to hate speech.	All staff is required to refrain from harassment. <i>Main provision:</i> Art. 2.1 on different forms of psychological harassment including offensive or degrading comments and insulting or threatening oral and written remarks.	- when financial sanctions are taken into consideration; - in cases of deviation from the opinion of the DB. Three pillar procedure based on: - prevention measures such as training activities; - formal procedure (Art. 24 and Art. 90 of the Staff Regulations); - informal procedure: aiming to provide psychological assistance to the alleged victim and resolve disputes in a non-bureaucratic manner respectively through confidential counsellors and the Commission mediator.	Imposition of sanctions only within the formal procedure.
Code of good administrative behaviour ⁴³⁸	Officials of the European Commission only with regard to relations with the public	- No explicit reference to hate speech. - General standards of conduct extend to hate speech.	<i>Main principles:</i> - Lawfulness: requiring the Commission to comply with the EU legislation; - Non-discrimination: requiring officials not to discriminate against citizens.	Possibility to lodge complaints concerning a possible breach of the Code with the European Ombudsman and/or directly with the Secretariat General of the European Commission by the general public (Section 6).	No specific measure foreseen.
The Practical Guide to Staff	Officials of the European	- No explicit reference to hate speech	Clarification of Art. 12 of the Staff Regulations:	No reference to any specific procedure relevant to hate	Breach of the Guide by officials may lead to the opening of disciplinary

⁴³⁷ EC, Commission Decision of 26th April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment, available at: http://ec.europa.eu/civil_service/docs/equal_opp/comm_native_c_2006_1624_3_acte_en.pdf.

⁴³⁸ EC, Code Of Good Administrative Behaviour Relations with the public, (published in the Official Journal of the European Communities: OJ L 267, 20.10.2000), available at: http://ec.europa.eu/transparency/code/docs/code_en.pdf.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
Ethics and Conduct ⁴³⁹	Commission	- Clarification of the rights and obligations of the Staff Regulations.	<ul style="list-style-type: none"> - officials whose acts or behaviour risk damaging the reputation of the Commission could be subject to disciplinary proceedings; - Defamatory or insulting written and/or oral remarks such as speeches and any other form of public or private communication expose the author to personal liability. <p>Clarification of Art. 17 (a) of the Staff Regulations:</p> <ul style="list-style-type: none"> - Caution and moderation shall be paid by officials in expressing opinions which may diverge from the policies of the institution; - officials are required to refrain from statements which might reflect adversely upon their position in the social media. 	speech.	proceedings (Annex IX of the Staff Regulations).
Guidelines for All Staff on the Use Of Social Media ⁴⁴⁰	Officials of the Commission	<ul style="list-style-type: none"> - No explicit reference to hate speech. - Prohibition of offensive language when using the social media. 	<p><u>Main principles:</u></p> <ul style="list-style-type: none"> - Circumspection; - Impartiality; - Objectivity. <p>Staff members using social media are required to use appropriate, inoffensive language and show respect for the opinion of others.</p>	No reference to any specific procedure relevant to hate speech.	Breach of the Guidelines by officials may lead to the opening of disciplinary proceedings (Annex IX of the Staff Regulations).
The Commission	Officials of the Commission	- No explicit reference to hate speech.	The tone of email messages shall be polite. Expressions	No reference to any specific procedure relevant to hate	No specific measure foreseen.

⁴³⁹ EC, Practical Guide on Staff Ethics and Conduct, (1.01.2014).

⁴⁴⁰ EC, Guidelines for All Staff on the Use of Social Media, available at: http://ec.europa.eu/ipg/docs/guidelines_social_media_en.pdf.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
policy on the internal use of email ⁴⁴¹		- Prohibition of offensive language in emails.	that might be perceived as offensive or insulting by recipients shall be avoided.	speech.	
III. RULES APPLICABLE TO COMMISSIONERS					
Code of Conduct for Commissioners ⁴⁴²	Members of the Commission	- No explicit reference to hate speech. - Sanction for serious misconduct may extend to hate speech.	Please, see column to the right on applicable sanctions.	No reference to any specific procedure relevant to hate speech.	Compulsory retirement or deprivation of pension rights or other benefits of any Commissioner guilty of serious misconduct by the CJEU on application by the Council acting by a simple majority or by the Commission (Art. 2.2)
Protocol on the Privileges and Immunities of the European Union ⁴⁴³	Members of the Commission	- No explicit reference to hate speech.	<i>Immunity of Commissioners:</i> - Art. 19: granting the immunity laid down in Art. 11 (immunity is subject to the rules on liability of officials towards the Union and to the jurisdiction of the CJEU. Immunity lasts after the end of the mandate) and - Art. 17 (immunity is accorded in the interests of the Union) to Members of the Commission.	No specific procedure.	Please, see Section 6.1.2
IV. RULES APPLICABLE TO OFFICIALS OF THE PARLIAMENT					
The European Parliament's Guide to the obligations of officials and other servants	Officials of the Parliament	- No explicit reference to hate speech. - General obligations on circumspection extend to hate speech.	<i>Main provisions:</i> - Section B (2) on officials' obligation to conduct themselves with a due sense of proportion and propriety; - Section D on the prohibition	No reference to any specific procedure relevant to hate speech.	Breach of the Guide by officials may lead to the opening of disciplinary proceedings (Annex IX of the Staff Regulations).

⁴⁴¹ Communication From The President, In Agreement With Vice-President S. Kallas Commission policy on the internal use of email, Brussels, 26.10.2009 SEC(2009) 1412 final.

⁴⁴² EC, Code of Conduct for Commissioners C(2011)2904, available at: http://ec.europa.eu/commission_2010-2014/pdf/code_conduct_en.pdf.

⁴⁴³ Protocol on the Privileges and Immunities of the European Union, (26.10.2012), available at: https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en_protocol_7.pdf.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
of the European Parliament ⁴⁴⁴			of insults of colleagues' dignity; - Section III on officials' obligation not to discriminate in their relations with citizens.		
Guidelines for the personal use of social media for staff working within the General Secretariat of the European Parliament ⁴⁴⁵	Officials of the Parliament	- No explicit reference to hate speech. - Prohibition of offensive language.	Obligations of objectivity, discretion and circumspection in using the social media.	No reference to any specific procedure relevant to hate speech.	Breach of the Guidelines by officials may lead to the opening of disciplinary proceedings (Annex IX of the Staff Regulations).
V. RULES APPLICABLE TO MEMBERS OF THE EUROPEAN PARLIAMENTS					
The Statute of Members of the European Parliament ⁴⁴⁶	Members of the European Parliaments	- No explicit reference to hate speech. - Reference to Article 8 of the Protocol on the privileges and immunities of the European Union on absolute immunity of Members of the European Parliament. - Reference to Article 9 of the Protocol on the privileges and immunities of the European Communities on relative immunity of	<i>Main provisions:</i> - Art. 4: stating that a member may at no time be the subject of legal proceedings or otherwise be held to account extra judicially for any statement made in the exercise of his/her mandate; - Art. 5: stating that except in cases in which the member is caught in the act of committing the offence, any restriction of a member's personal freedom shall be permitted only with the	The Rules of Procedure (RoP) of the European Parliament, the case-law of the Court of Justice of the EU and the practice of the Committee on Legal Affairs clarify how cases of immunity are dealt with.	Applicability of the rules on immunities (please, see Protocol No.7). The liability of members who commit hate speech offences depends on whether the offence was committed during the performance of parliamentary duties or not.

⁴⁴⁴ Guide to the Obligations of Officials and Other Servants of the European Parliament, Code of Conduct adopted by the Bureau, 7 July 2008, available at: http://www.europarl.europa.eu/RegData/PDF/406411_EN.pdf

⁴⁴⁵ EP, Guidelines for the Personal Use of Social Media for Staff Working within the General Secretariat of the European Parliament, 12.06.2013.

⁴⁴⁶ EP, Resolution on the amendment of the decision of 4 June 2003 on the adoption of the Statute for Members of the European Parliament (2005/2124(INI)), available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0236\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003D0236(01)&from=EN).

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
Protocol on the Privileges and Immunities of the European Union ⁴⁴⁷	Members of the European Parliament	<p>Members of the European Parliament.</p> <ul style="list-style-type: none"> - Rules on absolute immunity apply to statements made by Members within the precincts of the European Parliament and outside the Parliament's premises under the condition that they are assertions amounting to subjective appraisals which present a direct and obvious link with a general interest of concern to citizens⁴⁴⁸ - No explicit reference to hate speech. 	<p>consent of Parliament.</p> <p>Art. 8 on absolute immunity for opinions expressed or votes cast in the performance of their parliamentary duties.</p> <p>Art. 9 on relative immunity.</p>	<p>No specific procedure laid down in the Protocol. the procedure is laid down in the RoP of the EP.</p>	<p>Please, see Section 5.1.2</p>
European Parliament's Rules of Procedure ⁴⁴⁹	Members of the European Parliament	<ul style="list-style-type: none"> - No explicit reference to hate speech. - Standards of conduct and procedural rules to deal with immunity cases apply to members committing hate speech. 	<p><i>Main provisions:</i></p> <ul style="list-style-type: none"> - Rule 5 (2) stating that Parliamentary immunity is not a member's personal privilege but a guarantee of the independence of Parliament as a whole and of its members; - Rule 7 regulating the procedure to request defence of immunity from a member; - Rule 8 setting out the procedure for urgent matters; 	<ul style="list-style-type: none"> - Possibility of lodging an internal appeal against the measures foreseen by Rule 165 and Rule 166 by the member concerned within two weeks of notification of the penalty imposed (Rule 167). - Examination of immunity cases concerning Members Of The European Parliament allegedly committing an offence by the Committee on 	<p>Measures applicable in the event of breach of Rule 11 or in case of disturbances to the Parliamentary sitting (Rule 165):</p> <ul style="list-style-type: none"> - call to order the member; - call the member again if the offence is repeated; - deny the member the right to speak and exclude him/her from the Chamber for the remainder of the sitting; - exclude him/her from the Chamber in serious cases without a second

⁴⁴⁷Protocol on the Privileges and Immunities of the European Union, available at: https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en_protocol_7.pdf.

⁴⁴⁸ CJEU, Patriciello, C-163/10, EU:C:2011:543 : The CJEU ruled that Article 8 of the Protocol on the Privileges and Immunities of the European Union must be interpreted to the effect that a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties. It is for the court making the reference to determine whether those conditions have been satisfied in the case in the main proceedings.

⁴⁴⁹ European Parliament Rules of Procedure, 8th parliamentary team, available at: <http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8-EN.pdf>.

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
			<ul style="list-style-type: none"> - Rule 9 laying down the procedure to decide on requests for the waiver of immunity put forward by the national competent authority; - Rule 11 requiring members to adopt a conduct characterised by mutual respect and based on the values and principles laid down in EU Treaties. 	<p>Legal Affairs (Annex VI to the RoP, Section XVI):</p> <ul style="list-style-type: none"> - Request sent to the Parliament by the national authorities of a Member State asking for the waiver of the immunity of the member concerned or request made by a member that his or her immunity be defended in respect of legal proceedings being brought against him/her; - Examination of the case by JURI on the basis of documentary evidence sent by the national authority and/or the member concerned; - Hearing of the member - Drafting of a report containing recommendations on whether or not to waive or to defend the immunity by the Rapporteur; - Submission of the report to the Parliament's plenary where a final decision is voted; - Notification of the decision to the national authority and to the member concerned. 	<p>call;</p> <ul style="list-style-type: none"> - close or suspend the sitting for a specific period in case the business of the house is obstructed. <p>Penalties applicable in exceptionally serious cases of disorder or disruption of Parliament (Rule 166):</p> <ul style="list-style-type: none"> - reprimand; - forfeiture of entitlement to the daily subsistence allowance for a period of between two and ten days; - temporary suspension from participation in all or some of the activities of Parliament for a period of between two and ten consecutive days without prejudice to the right to vote in plenary; - submission to the Conference of Presidents of a proposal for the member's suspension or removal from one or more of the offices held by the member in Parliament. - Early termination of an office foreseen for cases of serious misconduct (Rule 21).
<p>Internal rules for the Advisory Committee (AC) dealing with harassment complaints between</p>	<ul style="list-style-type: none"> - Members of the European Parliament; - APAs. 	<p>- No explicit reference to hate speech.</p>	<p>- Art.7 stating that any APA who is experiencing harassment, as defined in Art. 3, committed by a Member of the European Parliament may report the matter to the Advisory</p>	<p>- Harassment cases are dealt with by an Advisory Committee (AC) which has a role of mediation (Art. 4).</p> <p><u>Procedure:</u></p> <ul style="list-style-type: none"> - Hearing of the APA concerned and, possibly, 	<p>No reference to a specific sanction.</p>

Title of document	Scope of application	Coverage of hate speech	Main provisions	Associated procedures	Applicable sanctions
accredited parliamentary assistants (APAs) and members of the European parliament and its prevention at the workplace⁴⁵⁰			Committee.	other staff members or members by the AC; - A confidential report with proposals on actions to be taken is forwarded by the AC to the College of Quaestors (Art. 10); - Notification of the AC by the College of Quaestors of the measures to take (Art. 12).	

⁴⁵⁰ Internal rules for the Advisory Committee dealing with harassment complaints between accredited parliamentary assistants (APAs) and Members of the European Parliament and its prevention at the workplace, available at http://www.europarl.europa.eu/RegData/publications/divers/2014/0004/EP-PE_DV%282014%290004_XL.pdf.

As illustrated in the table above, rules covering hate speech can be divided into the following categories depending on whom they are addressed to:

- rules applicable to all EU officials;
- rules applicable to officials of the Commission;
- rules applicable to Commissioners;
- rules applicable to officials of the Parliament;
- rules applicable to Members of the European Parliament.

The liability of EU officials is mainly regulated under the Staff Regulations of Officials of the European Union and Annex IX of the Regulations on Disciplinary Proceedings, whereas the liability of Members of the European Parliament falls within the framework of the immunity regime and the European Parliament's RoP. The Code of Conduct for Commissioners provides for the liability of members of the Commission.

None of the analysed rules make an **explicit reference to hate speech** offences. However, some general rules prohibit the use of offensive language and call on officials and/or members to refrain from uttering insulting remarks. These rules are provided in:

- The Commission Decision of 26th April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment;
- The Guidelines for All Staff on the Use Of Social Media;
- The Commission policy on the internal use of email;
- The Guidelines for the personal use of social media for staff working within the General Secretariat of the European Parliament.
-

In the absence of an explicit reference to hate speech in the applicable rules, incidents of hate speech involving EU officials, Members of the European Parliament and Commissioners may fall within the framework applicable to **discrimination and harassment**. Some overlaps between the offence of hate speech and discrimination and psychological harassment may arise. In the jurisprudence of the ECtHR⁴⁵¹ hate speech has been found to be in breach of the underlying value of non-discrimination of the European Convention on Human Rights⁴⁵². It has been understood as covering 'all forms of expression which spread, incite, promote or justify various forms of hatred based on intolerance'. Similarly to psychological harassment, hate speech undermines the dignity of the person⁴⁵³. Moreover, similarly to harassment which may be committed through intentional spoken or written language harmful to the personality of the victim, hate speech may take various forms such as any form of expression regarded as offensive to racial, ethnic, religious groups and minorities. Finally, hate speech may consist of comments which are directed against a particular group of persons or a single individual as in the case of harassment.

No definition of hate speech is provided by the Court of Justice of the European Union.

With regard to hate speech offences committed within EU institutions, different liability regimes and disciplinary proceedings may apply depending on whether the offence is perpetrated by officials or Members of the Parliament and Commission.

⁴⁵¹ ECtHR Fact Sheet- Hate Speech http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

⁴⁵² ECHR, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴⁵³ ECtHR Fact Sheet- Hate Speech http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

Any **official** who would commit hate speech would be sanctioned under the Staff Regulations of Officials of the European Union and Annex IX of the Regulations on Disciplinary Proceedings. These, as described in detail in Table 1, provide a general framework in the event of failure by officials to comply with general obligations of conduct laid down in the Regulations and any other documents which explicitly or implicitly refer to them (e.g. Code of European Code of Good Administrative Behaviour). On the basis of these standards, an official who makes offensive statements may be punished under Article 9 of Annex IX according to which a range of disciplinary measures from reprimand to removal from post can be imposed.

Different rules apply to **Members of the European Parliament** and **the Commission**.

Immunity regime of Members of the European Parliament

Members of the European Parliament (MEPs) enjoy absolute immunity (or non-liability) for votes cast and opinions expressed in the performance of their duties, which is granted by Article 8 of the Protocol on the Privileges and Immunities of the European Union (hereinafter: the Protocol), and relative immunity (or inviolability) from prosecutions and restrictions of their personal freedom during the sessions of the European Parliament (relative immunity or inviolability), which is granted by Article 9 of the Protocol.

Absolute immunity aims to protect the freedom of expression and independence of MEPs. This immunity prevents any type of judicial proceedings being brought against MEPs for votes and opinions expressed in the exercise of their functions. It applies even after the end of the parliamentary mandate and may not be waived nor renounced. Relative immunity, on the other hand, applies only for the duration of the mandate, is excluded when MEPs are caught *in flagrante delicto* and may be waived by the European Parliament.

While the scope of absolute immunity is established by EU law, the scope of relative immunity is partly determined by national law as MEPs keep enjoying the immunities accorded to members of their national parliaments when they are in the territory of their home State.

It is therefore important to establish if statements made by MEPs, which may amount to hate speech offences (depending on how they are qualified by national law), fall within the scope of Article 8 or 9 of the Protocol, as the legal consequences will differ. If the statements in question have been made by MEPs in the performance of their duties, they are covered by absolute immunity. In this case, MEPs may not be prosecuted for hate speech offences. If the statements in question have not been made in the exercise of parliamentary duties and thus fall outside the scope of absolute immunity, they might still be covered by relative immunity (Article 9 of the Protocol), if the applicable national rules on relative immunity so provide. However, relative immunity granted by Article 9 of the Protocol may be waived by the European Parliament at the request of the competent national authority.

The case law of the CJEU clarified when opinions expressed by MEPs are linked to the performance of their duties and thus covered by absolute immunity as referred to in Article 8 of the Protocol.

Parliamentary immunity includes not only rights but also responsibilities⁴⁵⁴. While Members benefit, in the exercise of their duties, from immunity, they are still subject to the

⁴⁵⁴ Opinion of Advocate General Jääskinen in the Patriciello case, 9 June 2011, para. 57-59.

disciplinary measures foreseen by the RoP. Thus, when hate speech is committed by Members of the European Parliament during its sittings immediate measures (rule 165 of the RoP⁴⁵⁵) and penalties (rule 166 of the RoP⁴⁵⁶) may be applied.

Interpretations by the CJEU

The case-law of the CJEU⁴⁵⁷ complements the legal framework on immunity by clarifying the scope of the immunity granted by Article 8 of the Protocol on the Privileges and Immunities of the European Union.

With regard to statements made by Members of the European Parliament, which may cover hate speech⁴⁵⁸, the CJEU draws a distinction as to whether the opinion is expressed in the exercise of parliamentary duties or not. Only in the first case, the Member benefits from absolute immunity for the opinions expressed. It is, therefore, necessary to understand what amounts to an exercise of a Member's duties. In this respect, the CJEU has clarified that opinions expressed in the performance of duties include statements made by Members within the precincts of the Parliament. However, statements made by those Members outside the premises of the Parliament may also amount to an opinion expressed in the performance of their duties within the meaning of Article 8 of the Protocol insofar as they are assertions amounting to subjective appraisal which present a direct and obvious link with a general interest of concern to citizens.

If these criteria are satisfied, the opinions/statements of the Member are covered by absolute immunity.

Interpretations by the European Parliament and its Committee on Legal Affairs

As explained by the JURI Committee, in relation to the request for waiver of immunity for allegedly defamatory statements of a Croatian Member of the European Parliament, even opinions which may be regarded as 'offensive, excessive and annoying' may be covered by absolute immunity if directly and obviously linked to the exercise of duties⁴⁵⁹. Opinions are defined 'in a wide sense so as to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal'⁴⁶⁰. However, the JURI Committee has also clarified that statements contrary to Article 21 on Non-discrimination of the EU Charter of Fundamental Rights do not fall within the immunity regime. In this respect, the Committee emphasised that immunity is intended to guarantee members'

⁴⁵⁵ Rule 165 of the Parliament's RoP foresees the following immediate measures: call to order the member; call the member again if the offence is repeated; deny the member the right to speak and exclude him/her from the Chamber for the remainder of the sitting; exclude him/her from the Chamber in serious cases without a second call; close or suspend the sitting for a specific period in case the business of the house is obstructed.

⁴⁵⁶ Rule 166 of the Parliament's RoP foresees the following penalties: reprimand; forfeiture of entitlement to the daily subsistence allowance for a period of between two and ten days; temporary suspension from participation in all or some of the activities of Parliament for a period of between two and ten consecutive days without prejudice to the right to vote in plenary; submission to the Conference of Presidents of a proposal for the member's suspension or removal from one or more of the offices held by the member in Parliament.

⁴⁵⁷ CJEU, *Patriciello*, C-163/10, EU:C:2011:543 ; Opinion of Advocate General Poiares Maduro in the *Marra* case, 26 June 2008.

⁴⁵⁸ Statements may amount to hate speech and trigger judicial proceedings depending on how the statement is qualified by national law.

⁴⁵⁹ EP, Committee on Legal Affairs, Report A8-0059/2015 of 24 March 2015 on the request for waiver of the immunity of Ivan Jakovčić (2014/2169(IMM)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0059+0+DOC+XML+V0//EN>.

⁴⁶⁰ EP, Committee on Legal Affairs, Report A6-0286/2009 of 30 April 2009 on the request for defence of the immunity and privileges of Aldo Patriciello (2009/2021(IMM)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2009-0286&language=EN>.

freedom of speech, but this freedom does not authorise slander, libel, incitement to hatred, questioning the honour of others, or any violation of Article 21 of the Charter⁴⁶¹.

Another case examined by the JURI Committee concerned the request by an Italian Member of the European Parliament for the defence of his immunity in connection with investigations against him by the Court of Milan. The member in question had made statements on supposed characteristics of the Roma ethnic group during a radio interview on 8 April 2013. According to the Italian Prosecutor's Office, these statements were punishable as public defamation and spreading of discriminatory ideas founded on superiority or racial hatred under the Italian Criminal Code⁴⁶². In light of Article 8 of the Protocol No 7, the Parliament's decision not to defend the Member's immunity was based on the fact that his statements had no direct and obvious connection with his parliamentary activities. Moreover, statements exceeded the tone generally encountered in political debate and were deemed contrary to Article 21 of the Charter of Fundamental Rights⁴⁶³.

Similarly, the Parliament waived the immunity of a French Member of the European Parliament⁴⁶⁴ who was accused of incitement to hatred, discrimination or violence against a group of persons on the ground of their religious affiliation, an offence provided for in French law⁴⁶⁵. The alleged offence occurred during the Member's campaign to be elected as President of a French political party. Pursuant to a complaint with suit for damages brought by the *Association de défense des droits de l'homme*, a judicial investigation was opened by the French Public Prosecutor in January 2012. Based on the investigations' conclusions, French authorities asked for the waiver of the Member's immunity. The Parliament held that the case did not fall within the scope of the Member's political activities as Member of the European Parliament since it concerned activities of a purely regional nature and, therefore, the alleged action did not have a direct or obvious connection with the performance of parliamentary duties.

Immunity regime of Members of the European Commission

Specific rules apply to Members of the European Commission. The immunity regime applicable to Commissioners is limited to the territory of EU Member States with regard to the acts performed within their mandates. An aspect in common to the two regimes is that commissioners' immunities last even after the end of the mandate as is the case for absolute immunity of Members of the European Parliament. Members of the Commission who commit hate speech could be subject to compulsory retirement or deprived of their rights to a pension or other benefits by the CJEU on application by the Council acting by a simple majority or by the Commission (Article 2.2 of the Code of Conduct for Commissioners).

⁴⁶¹ EP, Committee on Legal Affairs, Report A7-0245/2014 of 24 March 2014 on the request for defence of the immunity and privileges of Mario Borghezio (2013/2279(IMM)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0245+0+DOC+XML+V0//EN>.

⁴⁶² Articles 81(1) and 595(1) of the Italian Criminal Code, Article 3(1) of Law No 205/1993 and Article 3(1)(a) of Law No 654/197.

⁴⁶³ European Parliament decision of 2 April 2014 on the request for defence of the immunity and privileges of Mario Borghezio (2013/2279(IMM)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0257>.

⁴⁶⁴ European Parliament decision of 2 July 2013 on the request for waiver of the immunity of Marine Le Pen (2012/2325(IMM)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-292>.

⁴⁶⁵ Offence provided for in Article 24, paragraph 8, Article 23, paragraph 1 and Article 42 of the Act of 29 July 1881 and Article 93-3 of Act 82-652 of 29 July 1982, the penalties for which are laid down in Article 24, paragraphs 8, 10, 11 and 12 of the Act of 29 July 1881 and Article 131-26(2) and (3) of the French Criminal Code.

6.1.2. The Role of the Parliament in scrutinising other EU institutions

The European Parliament exercises democratic supervision over all the EU institutions, particularly the Commission. It has the power to approve or reject the nomination of Commissioners and the right to remove from office the Commission as a whole (Article 234 Treaty on the Functioning of the European Union (TFEU))⁴⁶⁶. The Parliament can conduct hearings and investigations and may put questions to the Commission and the Council. Annex XIII of the Staff Regulations⁴⁶⁷ provides that the Parliament can ask the President of the Commission to withdraw confidence in an individual Member of the Commission. This provision could apply to a Commissioner liable for misconduct such as hate speech. In this case, the President of the Commission will either require the resignation of that member or explain his/her refusal to do so before Parliament in the following part-session (Section II, 5). The Parliament's opinion is also required for the replacement of the Member of the Commission concerned as well as for the revision of the Code of Conduct for Commissioners relating to ethical behaviour (Section II, 6). The Parliament can also investigate potential Commission misconduct through committees of enquiries (Article 226 TFEU)⁴⁶⁸.

6.2. Effectiveness of applicable rules, procedures and mechanisms

A number of shortcomings with regard to the rules, procedures and mechanisms applicable to hate speech are outlined below.

- **Absence of rules, procedures and mechanisms specifically targeting hate speech**

Although there are rules, procedures and mechanisms applicable to misconduct in general there are no provisions explicitly addressing hate speech. Most of the rules analysed during the course of this study do not specifically target hate speech. Article 12 of the Staff Regulations requiring officials to refrain from any action which might reflect adversely on their position and Rule 11 of the RoP requiring Members of the European Parliament to adopt a conduct characterised by mutual respect are general provisions not specific to hate speech. Moreover, Article 24 of the Staff Regulations provides for assistance in proceedings against any person perpetrating insulting or defamatory acts but does not specify of what this assistance should consist. Similarly, Article 12a of the Staff Regulations on the protection of victims of harassment does not clarify how prejudicial effects can be prevented or limited. Moreover, victims of hate speech offences cannot lodge complaints through a mechanism that is specific to hate speech.

Many of the stakeholders consulted during the preparation of these guidelines did not feel the need for specific provisions on hate speech, since Article 12 of the Staff Regulations is sufficiently broad to cover all kinds of conduct related to the dignity of EU officials, including hate speech. Hate speech incidents are indeed not frequently reported among EU

⁴⁶⁶ Consolidated version of the Treaty on the Functioning of the European Union, available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>.

⁴⁶⁷ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (Staff Regulations of Officials), OJ L 56, 4.3.1968, p. 1-7, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429099392490&uri=CELEX:31968R0259\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429099392490&uri=CELEX:31968R0259(01)). It was last amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ L 287, 29.10.2013, p. 15-62, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429098882261&uri=CELEX:32013R1023>.

⁴⁶⁸ Consolidated version of the Treaty on the Functioning of the European Union, available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>.

officials. However, the limited number of complaints on hate speech may also stem from staff members not being sufficiently aware of the offence and as a result not reporting incidents. The lack of specific reporting mechanisms and procedures may also result in the reluctance of victims to report offences of hate speech. Difficulties in proving hate speech incidents could be another reason why these offences go unreported. The lack of rules explicitly referring to hate speech is an issue given that this type of offence can be difficult to detect⁴⁶⁹.

Moreover, there have been offences committed by Members of the European Parliament. The Results of monitoring by ENAR and the European office of International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) on discriminatory and/or intolerant remarks made by politicians indicate that 42 hate speech incidents occurred during the 2014 European Parliament election campaign⁴⁷⁰. Five of these incidents were committed by Members of the European Parliament.

- **Broad discretionary power of the Appointing Authority (AA)**

The disciplinary procedure, regulated by Annex IX of the Staff Regulations, is within the remit of the Appointing Authority. The latter may, on the basis of the investigation report, decide:

- not to apply disciplinary measures even in cases where there has been a failure to comply with obligations (Article 3);
- to involve or not the Disciplinary Board (DB) for cases falling under Article 86 of the Staff Regulations (Article 3);
- to impose a penalty (Article 9).

The Appointing Authority can also appoint members of the Disciplinary Board (Article 6). It has broad discretionary power with regard to both disciplinary measures, procedures and, penalties. Moreover, according to stakeholders interviewed for this study, there is no external monitoring of the decisions of the Appointing Authority.

- **No consideration for the particular vulnerability of the victim**

Article 10 of Annex IX of the Staff Regulations lists a range of factors to be taken into account in determining the severity of the penalty and the seriousness of the misconduct. Among these, no reference is made to the particular vulnerability of the victim. Certain persons may be particularly vulnerable to hate speech on the basis of their religion, race, colour, ethnic or social origin etc. and may, thus, need more protection than others.

- **No power to act on its own initiative**

As explained above, immunities apply to EU officials only when the offence was committed during the execution of their duties in their capacity as officials of the EU. If the prosecution of a Member State decides to open an investigation against an official, it submits a request for the waiver of the immunity to the EU institution. In practice, such requests are never refused according to the consulted stakeholders⁴⁷¹. However, it is not clear what would happen when the Member State concerned does not request the waiver of immunity. In this case no procedure is opened.

⁴⁶⁹ CoE, Manual on Hate Speech, (2009) available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf.

⁴⁷⁰ ENAR and ILGA Europe (2014) Reporting hate speech in the #EP2014 campaign, available at http://www.enar-eu.org/IMG/pdf/nohateep2014_report_-_3_july.pdf.

⁴⁷¹ Information collected in June 2015 through consultation with stakeholder (official of the European Commission (DG HR Unit HR.IDOC.1)).

The same issue emerges in relation to the immunities of Members of the European Parliament. When hate speech offences are committed by Members in the territory of a Member State, a request for the waiver of the immunity is usually made by the national authority of the Member State concerned. However, not all national authorities would initiate proceedings in case of hate speech incidents and would request the waiver of immunities. In the absence of such a request, the European Parliament cannot act on its own initiative with respect to immunities. Only when the incident occurs within the precincts of the Parliament, the President may act by imposing sanctions on the member who committed hate speech.

- **Lack of enforceability of soft law instruments**

The European Code of Good Administrative Behaviour promotes important principles, such as integrity and non-discrimination. In case of a breach of the obligations set out in this Code, officials can be subject to disciplinary proceedings.

The Code should be regarded as a development of the principles and obligations enshrined in the Staff Regulations. However, the Code is not legally binding on EU institutions.

- **Low sanctions applied in practice**

Various sanctions can be applied in disciplinary proceedings from warning to dismissal. The criteria used in the selection of the sanctions are the seriousness of the facts, the context, the circumstances and whether the offence was carried out repeatedly. If the conduct in question is not serious, financial sanctions or measures that can affect officials' careers are not imposed. In some cases, the willingness of the offender to reach an amicable solution of the situation could be regarded as a mitigating circumstance.

The results of monitoring by ENAR and ILGA-Europe reveal that reactions to hate speech offences committed during the 2014 European Parliament election campaign are disproportionately weak⁴⁷². For example, there were no direct reactions to offensive statements against Russian speaking people made by a Latvian candidate, Member of the European Parliament. Stakeholders reported three cases concerning hate speech: two involving officials of the Commission and one involving a Polish Member of the European Parliament⁴⁷³. In the former cases, sanctions in the form of reprimand were imposed. In the latter case, the member committing hate speech was fined by the Parliament with a fine of EUR 3040, which is low in proportion to the offence.

- **Limited scope of the disciplinary measures regulated by the Rules of Procedure of the Parliament**

Currently, the RoP are under the scrutiny of the Committee on Constitutional Affairs which is entrusted with analysing the rules with a view to identifying possible shortcomings and suggest improvements. From the analysis of these rules some shortcomings have emerged, in particular, the limited applicability of immediate measures (rule 165) and penalties (rule 166), which can be adopted only when the conduct of the Member of the Parliament causes disruption or disturbance to the sessions of the Parliament. As a consequence, the European Parliament is not entitled to apply these measures to hate speech incidents occurring outside the context of Parliament's sittings.

⁴⁷² ENAR and ILGA Europe (2014) Reporting hate speech in the #EP2014 campaign, available at http://www.enar-eu.org/IMG/pdf/nohateep2014_report_-_3_july.pdf

⁴⁷³ Information collected in June 2015 through consultation with stakeholders (official of the European Commission (DG HR Unit HR.IDOC.1) and representative of ENAR).

- **Lack of monitoring of the compliance with the Charter of Fundamental Rights**

There is no monitoring mechanism in place to ensure the respect of the Charter of Fundamental Rights by officials and Members of the European Parliament and Commission.

It is the task of the Heads of Unit to monitor compliance with the Charter by the officials within their units and act on complaints. However, conformity with the Charter is guaranteed in elaborating rules and procedures.

- **Lack of political mechanisms within EU Parliament's political groups to sanction hate speech**

The European Parliament's political groups do not have political mechanisms to sanction hate speech incidents committed by their members. These mechanisms would ensure political accountability and have a dissuasive effect on politicians using offensive language. **Such mechanisms do exist and are effective in the national Parliaments of a minority of Member States.**

6.3. Concluding remarks and recommendations on addressing hate speech within the EU institutions

Recent times have seen an increase in online racism and xenophobia and an escalation in the negative sentiments against certain groups in the EU. In particular, recent incidents of hate speech by Members of the European Parliament have been highlighted for example through the ILGA/ENAR monitoring of the 2014 European Parliament election campaign. Therefore, the following recommendations are being put forward to bolster the framework for tackling hate speech within the European Parliament:

- Include an explicit reference to hate speech in the Staff Regulations and Annex IX of the Regulations as well in all pertinent legal standards applicable to EU institutions. This reference should be accompanied by a clear definition of hate speech in line with the provisions of the CFD⁴⁷⁴.
- Reform the applicable rules with regard to sanctions to ensure that they are sufficiently effective, dissuasive and proportionate to tackle hate speech offences. Qualify hate speech offences as 'serious' cases of misconduct in the Staff Regulations and Annex IX of the Regulations.
- Adopt guidelines establishing detailed standards of conduct of officials of EU institutions and Members of the Commission and Parliament, including in relation to the use of language.
- Adopt guidelines defining clear criteria on how to differentiate between statements made during a political discussion and statements amounting to hate speech.
- In interpreting the scope of absolute immunity of Members of the European Parliament, ensure a balance between the freedom of expression of Members which is essential for their ability to perform their duties, as guaranteed by Article 8 of the Protocol on the Privileges and Immunities of the European Union, and the right of citizens to access to justice when they become victims of insulting and/or defamatory statements made by Members of the European Parliament.
- Assess on a large scale how hate speech and related offences are sanctioned in practice within EU institutions and make data available to the public. This data

⁴⁷⁴ Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

availability would enhance transparency of EU institutions and public confidence on the institutions' capacity to address hate speech effectively.

- Ensure an external monitoring of the activities and decisions of the Appointing authority in disciplinary matters.
- Establish criteria for limiting the exercise of the discretionary power of the Appointing Authority.
- Consider the particular vulnerability of the victim of hate speech in providing the necessary assistance. Assistance through confidential counsellors and/or mediators provided to victims of harassment could be extended to victims of hate speech.
- Provide EU institutions, in general, and the European Parliament, in particular, with the power to act on their own initiative to sanction hate speech offences committed by EU officials as well as with regard to members who benefit from immunity, including where requests for the waiver are not made at national level.
- Expand the scope of Rules 165 (immediate measures) and 166 (penalties) of the RoP to ensure that these measures can be applied outside the context of Parliamentary sittings.
- Introduce specific provisions on hate speech in all the rules regulating the use of social media by officials of EU institutions and Members of the Commission and Parliament.
- Introduce and/or strengthen prevention measures such as training specifically targeting hate speech and promote a culture in which hate speech and other forms of violence in the workplace are considered unacceptable.
- Introduce within the European Parliament's political groups political mechanisms to sanction hate speech incidents committed by their members.

Annex I - List of information sources

Case-law

EU case-law

- CJEU, Judgment of the Court (Grand Chamber) of 6 September 2011, Patriciello, C-163/10, EU:C:2011:543, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-163/10>

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List of stakeholders referred to in the final report

- Academic from Austria
- Academic from Finland
- Academic from Germany
- Academic from Ireland
- Academic from Italy
- Academic from Poland
- Academic from Greece
- German lawyer
- Greek human rights lawyer
- Greek prosecutor
- Lawyer of Hungarian NGO (Hungarian Civil Liberties Union)
- Lawyer of Hungarian Self-regulatory body (Hungarian Publishers' Association)
- Official of Belgian Centre for Equal Opportunities and Opposition of Racism
- Official of Belgian Federal Police
- Official of Belgian Public Prosecution Service
- Official of Danish Ombudsman
- Official of Hungarian General Prosecutor's Office
- Official of Hungarian Media Council
- Official of Swedish Ministry of Justice
- Official of Swedish Public Prosecution Service
- Official of the European Commission (DG HR Unit HR.IDOC.1)

Annex II – Table on legal standards relevant to hate speech applicable to EU institutions⁴⁷⁵

The table indicates the substantive and procedural rules applicable within the EU institutions which have relevance for hate speech offences. There are four categories of rules:

- The first group is relevant to all the EU institutions and to the people working therein, regardless of their status (both officials and Members of the European Parliaments or Commissioners are covered). This is the case of the provisions of the TFEU and Protocol No 7 on the privileges and immunities of the EU;
- The second group of documents applies to all the officials/servants of the EU, such as the Staff Regulations and the Conditions of Employment, as well as the European Code of Good Administrative Behaviour;
- The third group consists of legal documents addressing the specific rules and procedures applicable to the officials of the separate EU institutions in compliance with the Staff Regulations;
- The fourth group covers rules relating to the behaviour of people with a special status, who cannot qualify as officials of the EU, such as Members of the European Parliament, Commissioners, judges in the CJEU.

⁴⁷⁵ Notes: ✓ = the provision applies; empty cell = the provision does not apply

	European Parliament		European Commission		Council of the EU	European Council	CJEU	Court of Auditors	European central bank (ECB)
	MEMBERS OF THE EUROPEAN PARLIAMENT	Officials	Commissioners	Officials					
TFEU	✓	✓	✓	✓	✓	✓	✓	✓	✓
Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union		✓		✓	✓		✓	✓	✓
European Code of Good Administrative Behaviour		✓		✓	✓		✓	✓	
Protocol No 7 on the privileges and immunities of the EU	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rules of Procedure of the EP	✓								
Statute of the Members of the European Parliament	✓								
Internal rules for the Advisory Committee dealing with harassment complaints between accredited parliamentary assistants (APAs) and	✓								

members of the European parliament									
The European Parliament's Guide to the obligations of officials and other servants of the European Parliament		✓							
General Implementing provisions governing disciplinary proceedings and administrative investigations Article 86 of and Annex IX to the Staff Regulations		✓							
Guidelines for the Personal Use of Social Media for Staff Working Within the General Secretariat of the European Parliament		✓							
Code of Conduct for Commissioners			✓						
Commission decision C(2004) 1588 of 28 April 2004 laying down general executive measures relating to inquiries and disciplinary procedures				✓					
European Commission Social Media Guidelines				✓					
Practical Guide to Staff Ethics and Conduct				✓					
Code of Good				✓					

Administrative Behaviour Relations									
Staff Note CP 113/06, 27 June 2006 of the General Secretariat of the Council, Decision No 73/2006 on the conduct of and procedure for administrative investigations and the Disciplinary Board within the General Secretariat of the Council					✓				
Statute of the Court of Justice of the European Union							✓		
Code of Conduct for Members of the Court of Justice, the General Court and the Civil Service Tribunal							✓		
Code of Conduct for Members of the Court								✓	
Ethical guidelines for the European Court of Auditors containing Code of Ethics								✓	
Conditions of Employment for Staff of the European Central Bank									✓
Conditions of Short-Term Employment of the ECB									✓
European Central Bank Staff Rules as regards the ethics framework									✓

Codes of conduct for the members of the Governing Council, the Supervisory Board of the ECB									✓
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Annex III – National studies hate speech and hate crime

BELGIUM

1 National context

In Belgium, the number of hate speech and hate crime incidents is increasing. In 2014, the Interfederal Centre for Equal Opportunities (*Centre interfédéral pour l'égalité des chances/Interfederaal Gelijkekansen centrum*, (the Centre), responsible for the promotion of equal opportunities and for combating discrimination based on all grounds protected under the legislation (with the exception of the ground of language), registered a higher number of complaints related to hate speech. 2014 saw 936 complaints, compared to 708 in 2013. Complaints relating to anti-Semitism and negationism (historical revisionism) increased from 85 in 2013 to 130 in 2014⁴⁷⁶. In three cases the Centre has filed complaints before the crown prosecutor (one regarding hate crime and two for hate speech related to anti-Semitism/negationism)⁴⁷⁷. The same year, the Centre received 297 complaints related to discrimination based on religion. The vast majority (90%) of these complaints concerned islamophobia, many of which related to the media. In terms of discriminatory statements (included hatred) based on racism in the media, the Centre received 214 complaints. The majority of hate speech complaints were cyberhate cases, often committed through social media⁴⁷⁸. The most frequently targeted groups by hate speech and/or hate crime in Belgium are people of Muslim or Jewish faith, Roma, people of African descent, LGBTI, asylum seekers and, more generally, non-nationals⁴⁷⁹.

In the aftermath of January's terrorist attacks, hate speech and hate crime incidents (mostly anti-Semitism and islamophobia) appear to have increased⁴⁸⁰. However, the police have not witnessed an increase of incidents reported to their services⁴⁸¹.

Protection against hate speech and hate crime is regulated by criminal law, and not by administrative law. The legal framework is composed of the Anti-racism Act⁴⁸², the Anti-discrimination Act⁴⁸³, the Act punishing the denial, minimisation, justification or approval of the genocide committed by the German National Socialist regime during the Second

⁴⁷⁶ Interfederal Centre for Equal Opportunities, 'Anti-semitism: the latest data confirm a net increase' (*Antisémitisme: les derniers chiffres confirment une nette augmentation*), available at <http://www.diversite.be/antisemitisme-les-derniers-chiffres-confirment-une-nette-augmentation>.

⁴⁷⁷ Interfederal Centre for Equal Opportunities, 'Annual Report 2014', available at: http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf, p. 26.

⁴⁷⁸ Interfederal Centre for Equal Opportunities, 'Annual Report 2014', available at: http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf.

⁴⁷⁹ Ibid and Interfederal Centre for Equal Opportunities, 'Annual Report 2013', available at: http://www.diversite.be/sites/default/files/documents/publication/cgkr_00668_01_jvs_discdiv_fr.pdf, pp. 32-39.

⁴⁸⁰ FRA, 'Reactions to the Paris attacks in the EU: fundamental rights considerations' (2015), available at http://fra.europa.eu/sites/default/files/fra-2015-paper-01-2015-post-paris-attacks-fundamental-rights-considerations-0_en.pdf, p. 3.

⁴⁸¹ Conclusion based on stakeholder interview in June 2015 (Police – Head of the Diversity Department).

⁴⁸² Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia (*Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie/ Wet tot bestraffing van bepaalde door racisme of xenophobie ingegeven daden*), available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1981073035&table_name=wet.

⁴⁸³ Act of 10 May 2007 aiming at combating certain forms of discrimination (*Wet ter bestrijding van bepaalde vormen van discriminatie/Loi tendant à lutter contre certaines formes de discrimination*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2007051035&table_name=wet.

World War⁴⁸⁴ and the Criminal Code. Incitement to hatred, violence and discrimination, as well as negationist behaviours, are criminal offences that can lead to a prison sentence and/or a fine. The punishment of negationist behaviours is limited to those cases concerning the genocide which took place in the Second World War. While the Criminal Code does not contain a general provision on aggravating circumstances, several provisions provide the possibility for judges to give higher sentences in cases where the offence is deemed to have been committed with the bias motivation of hatred, contempt or hostility based on one of the protected criteria.

In the Anti-racism Act, the protected criteria are nationality, so-called race, skin colour, descent or national or ethnic origin⁴⁸⁵, while the Anti-discrimination Act - the scope of which is broader - covers age, sexual orientation, marital status, birth, wealth, religion or belief, political opinions, union opinion, language, current or future health condition, disability, physical or genetic characteristic or social origin⁴⁸⁶. The legislation was last amended in 2014, to reflect the new competences of the Interfederal Centre for Equal Opportunities. In terms of substantial amendment, the Anti-racism Act was last amended in 2007, to extend the criminal liability to all protected criteria.

Freedom of expression and freedom of the press are both guaranteed in the Constitution⁴⁸⁷. Limits to the freedom of the press and freedom of expression must be set by law. The Anti-racism Act, the Non-discrimination Act, the Act on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War, and the Criminal Code, rather than the Constitution itself, provide for criminal penalties for the dissemination of ideas based on racial hatred and superiority, as well as for the publication of incitement to hatred based on racism and xenophobia, including that published by the press. The Constitution was amended in 1999 so that press offences inspired by racism and xenophobia are no longer judged by Assize Courts, but Criminal Courts, in order to ensure that those offences are prosecuted. However, press offences inspired by religious hatred remained under the competence of the Assize Courts, thereby raising concerns about the impunity of perpetrators.

As regards the interaction between hate speech and hate crime legislation and freedom of expression, several actions seeking annulment of the legislation mentioned above have been brought before the Constitutional Court⁴⁸⁸. In each case, the Constitutional Court has ruled that freedom of expression is not an absolute right and, thus, can be limited under conditions prescribed by law. Relying on the case law of the European Court of Human Rights and on international legislation, the Constitutional Court has not yet found an infringement of the right to freedom of expression by the legislation regulating hate crime and hate speech.

⁴⁸⁴ Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War (*Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale/Wet tot bestraffing van het ontkennen, [minimaliseren], rechtvaardigen of goedkeuren van de genocide die tijdens de tweede wereldoorlog door het Duitse nationaal-socialistische regime is gepleegd*), available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1995032331&table_name=wet.

⁴⁸⁵ Article 4 of Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

⁴⁸⁶ Article 4 of Act of 10 May 2007 aiming at combating certain forms of discrimination.

⁴⁸⁷ Articles 19 and 25 of the Constitution, available at http://www.const-court.be/en/basic_text/belgian_constitution.pdf.

⁴⁸⁸ Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, available at: <http://www.const-court.be/fr/common/home.html>; Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>; Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

2 Legal framework

2.1 General description of the legislation applicable to hate crime and hate speech

Belgian legislation prohibits hate speech and hate crime under four main acts: the Anti-racism Act⁴⁸⁹, Non-discrimination Act⁴⁹⁰, the Criminal Code⁴⁹¹ and the Act on condoning, denying or grossly trivialising the crime of genocide⁴⁹². The Anti-racism Act focuses on discrimination and incitement to hatred and violence on the grounds of racism and xenophobia, more specifically nationality, so-called race, skin colour, descent or national or ethnic origin, while the Non-discrimination Act deals with discrimination and incitement to hatred and violence on many other grounds, including those of religion or belief. The wording of the Belgian legislation refers to 'so-called race' rather than 'race' as it presumes that there is only one race – the human race – and that skin colour or ethnicity are not markers of another 'race'.

Belgian legislation does not define or use the terms 'hate speech' or 'hate crime', as such. Hate speech and hate crime are understood to be covered by the following offences: 'discrimination', 'diffusion of ideas based on racial superiority', 'insult' or as 'incitement to hatred and violence'. The circumstances of the crime and the nature of the speech or act determine the choice of the offence provision to be used.

'**Discrimination**' is understood as a distinction based on a protected criterion, and which cannot be justified by the legislation. Both direct and indirect discrimination based on so-called race, skin colour, descent or national or ethnic origin, as well as religion or belief, are prohibited under the legislation. A distinction is a situation where a person is treated less favourably than another in a comparable situation. A wide range of acts and opinions motivated by racism and xenophobia can fall within this definition, depending on the nature of the act and its circumstances. Discrimination is not punished by criminal law, but incitement to discrimination is⁴⁹³. Indeed, according to the Court of Cassation, hate or violence based on a protected criterion constitutes a form of discrimination or segregation⁴⁹⁴.

'**Incitement to hatred**' is understood as incitement to hatred, segregation or violence towards a person, a group, a community or their members, on the basis of a protected ground and under one of the following circumstances:

- in meetings or public places;
- in the presence of several individuals in a non-public place, but open to a number of people having the right to assembly or association there;
- in any place in the presence of the offended person and before witnesses;
- in writing, printed or not, through images or emblems displayed, distributed or sold, offered for sale or exhibited to public view;
- in writings not available to the public but sent or communicated to several people⁴⁹⁵.

⁴⁸⁹ Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

⁴⁹⁰ Act of 10 May 2007 aiming at combating certain forms of discrimination. The 2007 Anti-Discrimination Act is broader than the 1981 Anti-racism Law.

⁴⁹¹ Criminal Code (*Strafwetboek/ Code pénal*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet.

⁴⁹² Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

⁴⁹³ Article 20 of the Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

⁴⁹⁴ Court of Cassation, Decision No P.04.0849.N/1 of 9 November 2001, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20041109-13.

⁴⁹⁵ Article 444 of the Criminal Code.

The circumstances all require the publicity of the act/speech, i.e. there must be an intention to make it public⁴⁹⁶.

The term 'incitement' differs from 'hate speech', as it requires more than expressing a hate-motivated opinion. Rather, incitement to hatred implies acts, behaviours and the use of language that provokes or pushes someone to commit hatred, violent or discriminatory behaviour, or to use discriminatory language⁴⁹⁷.

The term 'hate' has been defined by courts as 'the intolerance expressed in the form of aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and persons of migrant background'⁴⁹⁸.

'**Diffusion of ideas based on racial hate or superiority**' under the same circumstances as for incitement to hatred is specifically prohibited by the legislation⁴⁹⁹. Similarly to the 'incitement' offence, there must be a specific intention to publicly spread ideas with the objective of promoting hatred⁵⁰⁰. This offence is often prosecuted in combination with other offences, such as discrimination or incitement to hatred.

Certain forms of hate speech could also fall within the concept of '**insult**' as set out in Article 448 of the Criminal Code. An insult may be committed through acts, writings, images or emblems or any of the same circumstances as for 'incitement to hatred'. The offence of 'insult' is not linked specifically to a protected ground; however, if the insult is given based on a protected ground (i.e. hatred, contempt or hostility based on so-called race, skin colour, descent or national or ethnic origin, religious belief, etc.) this will be considered an aggravating circumstance.

Another offence to consider in relation to hate speech and hate crime is the offence of '**membership to a group or association which promotes discrimination or segregation**' based on the protected grounds⁵⁰¹. The group must promote, in an obvious and repeated manner, discrimination or segregation (under the same circumstances as for 'incitement to hatred'). Again, this offence may be prosecuted in combination with others. For example, the members of the group 'Blood and Honour' have been prosecuted for having organised concerts where they incited the crowds with racist slogans and gestures. Another example is the case of the prosecution of three associations which supported a nationalist political party (*Vlaams Block*) and which

⁴⁹⁶ Discrimination terminology guide on prosecution of discriminations and hate offences, including regarding sex and hate crimes, annexed to the Joint Circular COL 13/2013 of the Ministry of Justice, Ministry of Interior and the College of General Prosecutors of 17 June 2013 (*Circulaire commune du Ministre de la Justice, du Ministre de l'Intérieur et du Collège des Procureurs généraux relative à la politique de recherche et de poursuite en matière de discriminations et de délits de haine (en ce compris les discriminations fondées sur le sexe)/ Gemeenschappelijke omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken en het College van Procureurs-generaal betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht)*), as updated in March 2015, available at http://www.om-mp.be/extern/getfile.php?p_name=4499884.PDF&pid=5198967, p.25.

⁴⁹⁷ Ibid. See also case law such as First Instance Tribunal of Brussels Decision No 10/4530/A of 10 February 2012, available at http://www.diversiteit.be/diversiteit/files/File//Rechtspraak_jurisdiction/discriminatie_discrimination/2012/2012_02_10%20Trib%20%20Bruxelles.pdf.

⁴⁹⁸ Court of Cassation, Decision No P.06.0759.F of 4 October 2006, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20061004-2.

⁴⁹⁹ Article 21 of the Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

⁵⁰⁰ First Instance Tribunal of Brussels Decision No 10/4530/A of 10 February 2012, available at http://www.diversiteit.be/diversiteit/files/File//Rechtspraak_jurisdiction/discriminatie_discrimination/2012/2012_02_10%20Trib%20%20Bruxelles.pdf.

⁵⁰¹ Article 22 of the Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

promoted discrimination in a repeated and obvious manner⁵⁰².

Finally, the legislation includes the offence of '**condoning, denying or grossly trivialising the crime of genocide**'⁵⁰³, which applies only to the genocide committed during the Second World War.

In cases where hate speech is published on the Internet and does not fall under the scope of press offence, Article 39bis of the Criminal Procedure Code allows the crown prosecutor to use all appropriate technical means to make these data inaccessible, i.e. to have the website blocked. Crown prosecutors may thus require that Internet service providers block a particular website.

Hate crime and hate speech are regulated under non-discrimination legislation, which has both civil and criminal law components.

The acts of 'incitement to hatred and violence', 'insult', 'diffusion of ideas based on racial hate or superiority' and 'membership to a group or association which promotes discrimination or segregation' are **criminal offences**. As a result, the intent of hatred, discrimination or incitement to hatred must be present in order to prosecute.

Discrimination can lead to **civil liability** based on general civil liability rules. The non-discrimination legislation adds additional guarantees, such as the ability of interest groups or the Interfederal Centre for Equal Opportunities to file an action⁵⁰⁴. Any victim can file a claim for compensation for moral and material damages as a result of discrimination. The moral damages are set by the non-discrimination legislation at EUR 650, or EUR 1,300 if the defendant cannot demonstrate that the unfavourable treatment would have occurred even without the discriminatory act⁵⁰⁵.

⁵⁰² Discrimination terminology guide on prosecution of discriminations and hate offences, including regarding sex and hate crimes, annexed to the Joint Circular COL 13/2013 of the Ministry of Justice, Ministry of Interior and the College of General Prosecutors of 17 June 2013 (*Circulaire commune du Ministre de la Justice, du Ministre de l'Intérieur et du Collège des Procureurs généraux relative à la politique de recherche et de poursuite en matière de discriminations et de délits de haine (en ce compris les discriminations fondées sur le sexe)/ Gemeenschappelijke omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken en het College van Procureurs-generaal betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht)*), as updated in March 2015, available at http://www.om-mp.be/extern/getfile.php?p_name=4499884.PDF&pid=5198967, p.30.

⁵⁰³ Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

⁵⁰⁴ Articles 13 to 18 of the Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia; And article 15 to 20 of Act of 10 May 2007 aiming at combating certain forms of discrimination.

⁵⁰⁵ Ibid.

2.2 Transposition of Council Framework Decision 2008/913/JHA

Note that none of the provisions referred to in the table below are transposing provisions *stricto sensu*, as they were in place prior to the adoption of the CFD. None of the provisions have been amended as a result of the adoption of the CFD.

	Offence provision 1 Incitement to hatred and violence - nationality, so-called race, skin colour, descent or national or ethnic origin
Transposes Art. 1(a) of CFD	Yes
Transposes Art. 1(b) of CFD	Yes
Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Incitement to hatred and violence - nationality, so-called race, skin colour, descent or national or ethnic origin: Articles 3 and 20 of the Anti-racism Act ⁵⁰⁶ and Article 444 of the Criminal Code ⁵⁰⁷
Definition of offence	Whoever, in one of the circumstances described in Article 444 of the Criminal Code, incites to hatred or violence against a person on account of one of the protected criteria, [...]; Whoever, in one of the circumstances described in Article 444 of the Criminal Code, incites to hatred or violence against a group, a community or its members, on account of one of the protected criteria [...]. The circumstances foreseen in Article 444 of the Criminal Code are: <ul style="list-style-type: none"> • in meetings or public places; • in the presence of several individuals in a non-public place, but open to a number of people having the right to assembly or association there; • in any place in the presence of the offended person and before witnesses; • in writing, printed or not, images or emblems displayed, distributed or sold, offered for sale or exhibited to public view; • in writings not available to the public but sent or communicated to several people. No aggravating circumstances are established by the law for this offence.
Penalties foreseen	Imprisonment from one month to one year and with a fine of EUR 50 to EUR 1,000 ⁵⁰⁸ , or one of these penalties. If committed by a civil servant or public official, the imprisonment can be from two months to two years. Lastly, the offender can have some of his/her civil and political rights suspended for a number of years.
Protected characteristic(s)	The protected criteria are: nationality, so-called race, skin colour, descent or national or ethnic origin.
Online crime	The legislation is silent on whether it applies to offences committed on the Internet. The Criminal Code provides the circumstances under

⁵⁰⁶ Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia.

⁵⁰⁷ Criminal Code (*Strafwetboek/ Code pénal*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet.

⁵⁰⁸ In Belgium, criminal fines in the legislation must be adapted to the growth in consumer prices via a system of coefficient. The current coefficient is six (50 decimals). Therefore, the fines must be multiplied by six. Act of 5 March 1952 concerning surcharges on criminal fines (*Loi relative aux décimes additionnels sur les amendes pénales/ Wet betreffende de opdécimes op de strafrechtelijke geldboeten*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1952030530&table_name=wet.

which such offences can occur. The medium for distributing or displaying incitement to hatred or violence is not mentioned by the Code, whose language is technology neutral⁵⁰⁹. Considering the neutral nature of the applicable provisions, it could be argued that online commission is also covered.

Regarding the press, the Court of Cassation in two judgments of 6 March 2012, ruled that a press offence (as a result of the publication of defamation, but also racism and xenophobia) can be committed via the Internet⁵¹⁰. The Court's decision comes after the European Court on Human Rights condemned Belgium as a result of the restrictive interpretation of Article 25 of the Belgian Constitution, according to which the prohibition of censorship applies only to print media and not to broadcasters⁵¹¹.

The Criminal Court of Antwerp in its judgment of 30 March 2012, had given a narrow interpretation to this case law, and judged that criminal *audiovisual or verbal* expressions or opinions on the Internet or weblogs do not qualify as press offences. The case concerned a video posted on YouTube by Fouad Belkacem, the defendant, who praised a woman in niqab and called to defend the honour of Muslims⁵¹².

In 2013, the Court of Cassation confirmed that press offences required the expression of an opinion in a written text reproduced by means of printing or a similar process, such as digital publishing. Opinion disseminated orally or by audiovisual means, do not constitute press offences because there are not written texts⁵¹³. In other words, press offences can be committed via the Internet in the same conditions as for printed media, provided that written words are published on a website that is accessible to everyone⁵¹⁴. A proposed amendment was recently introduced aiming at Articles 25 and 150 of the Constitution by extending the guaranteed of freedom of press to new communication media⁵¹⁵.

Offence provision 2

⁵⁰⁹ Poulet, Y., 'La lutte contre le racisme et la xénophobie sur Internet' [2006] Journal des Tribunaux, pp. 1-12, cited by DE HERT, P. & VAN LEEUW, F., 'Cybercrime Legislation in Belgium', in E. DIRIX & Y.H. LELEU (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law* (Brussels, Bruylant, 2011) 867-956, <http://www.vub.ac.be/LSTS/pub/Dehert/389.pdf>, p. 904.

⁵¹⁰ Court of Cassation, 6 March 2012, No. P.11.1374.N/1 and No. P.11.0855.N/1, available at <http://jure.juridat.just.fgov.be>; 2012/2-3, 253-254, note Dirk Voorhoof, 'The notion of press crime from the 19th to the 21st century: internet media, weblogs and website are also press (*De notie drukpersmisdrijf van de 19de naar de 21ste eeuw : internetmedia, weblogs en websites zijn ook drukpers*)'; See also Dirk Voorhoof, 'Henceforth, weblogs and websites are press (*Weblogs en websites zijn voortaan ook 'drukkers'*)', [2012/246] De Juristenkrant, pp. 4-5; See also P. Lemmens, 'Abuses of the freedom of expression via the internet: is the law 2.0-compatible? Plea for a technology-neutral protection of the freedom of expression' (*Misbruiken van de meningsvrijheid via internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid*), [2010, Vol. 49] Orde van de dag, pp. 15-22.

⁵¹¹ ECtHR, RTBF v Belgium (no. 50084/06), 29 March 2011.

⁵¹² Criminal Court of Antwerp, 30 November 2012, not published, description of the facts available at: http://www.diversiteit.be/index.php?action=artikel_detail&artikel=829; Dirk Voorhoof, 'Criminal expressions on the internet, the qualification of press crime and the crime of stalking' (*Strafbare uitingen op internet, de kwalificatie drukpersmisdrijf en het misdrijf belaging*), [2012/5] Auteurs & Media, 484-486, available at http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/AM%202012%205%20Sharia4Belgium%20NOOT%20DV.final.pdf.

⁵¹³ Court of Cassation, 29 October 2013, No P.13.1270.N/1, available at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20131029-6.

⁵¹⁴ Joint Circular COL 13/2013 of the Ministry of Justice, Ministry of Interior and the College of General Prosecutors of 17 June 2013 on the research and prosecution policy for discriminations and hate offences (including discrimination based on sex) (*Circulaire commune du Ministre de la Justice, du Ministre de l'Intérieur et du Collège des Procureurs généraux relative à la politique de recherche et de poursuite en matière de discriminations et de délits de haine (en ce compris les discriminations fondées sur le sexe)/ Gemeenschappelijke omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken en het College van Procureurs-generaal betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht)*), p. 23.

⁵¹⁵ Draft declaration of revision of the Constitution, 24 April 2014, available at: <https://www.dekamer.be/flwb/pdf/53/3567/53K3567003.pdf>.

	Incitement to hatred and violence based on religion
Transposes Art. 1(a) of CFD	Yes
Transposes Art. 1(b) of CFD	Yes
Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Incitement to hatred and violence based on religion: Articles 3 and 22 of the Non-discrimination Act ⁵¹⁶ and Article 444 of the Criminal Code ⁵¹⁷
Definition of offence	<p>Whoever, in one of the circumstances described in Article 444 of the Criminal Code, incites to hatred or violence against a person on account of one of the protected criteria, [...];</p> <p>Whoever, in one of the circumstances described in Article 444 of the Criminal Code, incites to hatred or violence against a group, a community or its members, on account of one of the protected criteria [...].</p> <p>The circumstances foreseen in Article 444 of the Criminal Code are:</p> <ul style="list-style-type: none"> • in meetings or public places; • in the presence of several individuals in a non-public place, but open to a number of people having the right to assembly or association there; • in any place in the presence of the offended person and before witnesses; • in writing, printed or not, images or emblems displayed, distributed or sold, offered for sale or exhibited to public view; • in writings not available to the public but sent or communicated to several people. <p>No aggravating circumstances are established by the law for this offence.</p>
Penalties foreseen	Imprisonment from one month to one year and with a fine of EUR 50 to EUR 1,000 ⁵¹⁸ , or one of these penalties. If committed by a civil servant or public official, the imprisonment can be from two months to two years. Lastly, the offender can have some of his/her civil and political rights suspended for a number of years.
Protected characteristic(s)	The protected criteria are: age, sexual orientation, marital status, birth, wealth, religion or belief, political opinions, union opinion, language, current or future health condition, disability, physical or genetic characteristic or social origin.
Online crime	As per the first table.

	Offence provision 3 Condoning, denying or grossly trivialising the crime of genocide
Transposes Art. 1(a) of CFD	No
Transposes Art. 1(b) of CFD	No
Transposes Art. 1(c) of CFD	No

⁵¹⁶ Act of 10 May 2007 aiming at combating certain forms of discrimination. The 2007 Anti-discrimination Act is broader than the 1981 Anti-racism Law.

⁵¹⁷ Criminal Code.

⁵¹⁸ In Belgium, criminal fines in the legislation must be adapted to the growth in consumer prices via a system of coefficient. The current coefficient is six (50 decimals). Therefore, the fines must be multiplied by six. Act of 5 March 1952 concerning surcharges on criminal fines (*Loi relative aux décimes additionnels sur les amendes pénales/Wet betreffende de opdécimes op de strafrechtelijke geldboeten*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1952030530&table_name=wet.

Transposes Art. 1(d) of CFD	Partly – as the law dates back to 1995, and has not been introduced or amended as a result of the adoption of the CFD. The provision only penalises the denial, minimisation, justification or approval of genocide committed by the German Socialist Regime during the Second World War
Transposes Art. 4 of CFD	No
Legal reference to provision	Condoning, denying or grossly trivialising the crime of genocide: Article 1 of the Act on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War ⁵¹⁹ and Article 444 of the Criminal Code ⁵²⁰
Definition of offence	<p>Whoever, in the circumstances described in Article 444 of the Criminal Code, denies, grossly minimises, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War. The term genocide is understood within the meaning of Article 2 of the International Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide.</p> <p>The circumstances foreseen in Article 444 of the Criminal Code are:</p> <ul style="list-style-type: none"> • in meetings or public places; • in the presence of several individuals in a non-public place, but open to a number of people having the right to assembly or association there; • in any place in the presence of the offended person and before witnesses; • in writing, printed or not, images or emblems displayed, distributed or sold, offered for sale or exhibited to public view; • in writings not available to the public but sent or communicated to several people. <p>No aggravating circumstances are established by the law for this offence.</p> <p>A Bill is currently under discussion in the Parliament to amend the Act to bring it in line with the CFD and extend the offence to other crimes of genocide, including those recognised by a decision of an international tribunal recognised by Belgium⁵²¹.</p>
Penalties foreseen	Imprisonment from eight days to one year and with a fine of EUR 26 to EUR 5,000 ⁵²² , or one of these penalties. The offender can have some of his/her civil and political rights suspended for a number of years.
Protected characteristic(s)	The offence solely pertains to condoning, denying or grossly trivialising the genocide committed during the Second World War, it does not relate to any particular protected criteria.
Online crime	As per the first table.

⁵¹⁹ Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

⁵²⁰ Criminal Code.

⁵²¹ Bill of 17 June 2015 (DOC 54 1182/001) aiming at amending Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War (*Proposition de loi modifiant la loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la Seconde Guerre mondiale/Wetsvoorstel tot wijziging van de wet van 23 maart 1995 tot bestraffing van het ontkennen, minimaliseren, rechtvaardigen of goedkeuren van de genocide die tijdens de Tweede Wereldoorlog door het Duitse nationaal-socialistische regime is gepleegd*), available at <http://www.dekamer.be/FLWB/PDF/54/1182/54K1182001.pdf>.

⁵²² In Belgium, criminal fines in the legislation must be adapted to the growth in consumer prices via a system of coefficient. The current coefficient is six (50 decimals). Therefore, the fines must be multiplied by six. Act of 5 March 1952 concerning surcharges on criminal fines (*Loi relative aux décimes additionnels sur les amendes pénales/Wet betreffende de opdécimes op de strafrechtelijke geldboeten*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1952030530&table_name=wet.

Explanation on the transposition of Article 4 of Council Framework Decision 2008/913/JHA

- **First option provided by Article 4 (i.e. racist and xenophobic motivation to be considered as an aggravating circumstance)**

The Criminal Code does not contain a general provision stating that racist and xenophobic motivation should be considered as an aggravating circumstance by the courts. Several specific offence provisions define the motivation of hatred, contempt or hostility, based on a number of criteria as aggravating circumstances. The criteria for such motivations are aligned with the protected non-discrimination criteria and are: 'so-called race, skin colour, descent, national or ethnic origin, nationality, gender, sexual orientation, marital status, birth, age, wealth, religion or belief, current or future health condition, disability, language, political opinions, union opinion, physical or genetic characteristic, or social origin'⁵²³.

The motivation of hatred, contempt or hostility based on protected criteria is referred to as aggravating circumstances in relation to the following offences:

- Article 377bis: With respect to indecent assault and rape, 'the minimum of the penalties provided can be doubled in the case of imprisonment and increased by two years in case of reclusion [for crimes] when one of the motives of the crime or misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin'.
- Article 405quater: For the offences of manslaughter and intentional infliction of personal injury, 'the minimum of the penalties provided are doubled in the case of criminal penalties and increased by two years in the case of imprisonment, when one of the motives of the crime or misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin'.
- Article 422quater: For the offences of non-assistance to a person in danger, 'the minimum of the correctional penalties provided are doubled when one of the motives of the crime or misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin'.
- Article 438bis: For the offences of deprivation of liberty, torture & trespassing by particular persons, 'the minimum of the penalties provided are doubled in the case of criminal penalties and increased by two years in the case of imprisonment, when one of the motives of the crime or misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin'.
- Article 442ter: For the offence of stalking, 'the minimum of the correctional penalties provided can be doubled when one of the motives of the misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin'.
- Article 453bis: For the offence of insult, slander, defamation and desecration of a grave, the minimum of the correctional penalties provided can be doubled, 'when one of the motives of the misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual

⁵²³ Articles 377bis, 405quater, 422quater, 438bis, 442ter, 453bis, 514bis, 525bis, 532bis and 534quater of the Criminal Code.

- orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin’.
- Article 514bis: For the offence of arson, the minimum of the penalties provided can be doubled, ‘in the case of correctional penalties and increased by two years in the case of imprisonment when one of the motives of the crime or misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin’.
 - Article 525bis: For the offence of destruction of buildings or engines, ‘the minimum of the penalties provided can be doubled in the case of correctional penalties and increased by two years in the case of imprisonment when one of the motives of the misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin’.
 - Article 532bis: For the offence of damage to personal property, ‘the minimum of the penalties provided can be doubled in the case of correctional penalties and increased by two years in the case of imprisonment when one of the motives of the crime or the misdemeanour consists in the hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin’.
 - Article 534quater: For the offence of graffiti and damage to real estate, ‘the minimum of the penalties specified in those articles are doubled in case of correctional penalties and increased by two years in case of imprisonment, where one of the motives of the offense consists of hatred, the contempt or hostility against a person because of his[/her] supposed race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, civil status, birth, age, wealth, religion or belief, present or future health status, disability, language, political opinion, trade union beliefs, a physical or genetic characteristic, or social origin’.

- **Second option provided by Article 4 (i.e. racist or xenophobic motivation considered by courts in the determination of penalties)**

In Belgium, the increased penalties in case of aggravating circumstances are not automatically applied but may be applied by the judge when adjudicating. Therefore, it can be considered that the aggravating circumstances established in the legislation fall also under the second option.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

Legal definition of provision transposing Article 6 of AMSD	
Transposing provisions – general prohibition	<p>In Belgium, culture and media fall within the competence of the Communities (Flemish Community, German-speaking Community and French-speaking Community). All three Communities have transposed Article 6 of the Directive. The provisions outlined below relate to a general prohibition of incitement to hatred in audiovisual media.</p> <ul style="list-style-type: none"> • Flemish Community: Article 38 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009⁵²⁴: Broadcasting activities cannot incite to hatred and violence. • German-speaking Community: Article 4 of the Government of the German-speaking Community Decree of 27 June 2005 on Radio Broadcasting and Cinema⁵²⁵: The audiovisual media service providers are not allowed to provide media services that incite to discrimination, hatred or violence based on race, gender, religion or beliefs, ethnic origin or nationality, disability, age or sexual orientation or that tend to the denial, trivialisation, justification or consent of the acts of genocide by the Nazi regime committed during World War II. • French-speaking Community: Article 9 of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services⁵²⁶: The RTBF and editors of services subject to this Decree cannot edit: 1° programmes contrary to law or to the public interest, affecting the human dignity or containing incitements to discrimination, hatred or violence, especially for reasons of alleged race, ethnicity, gender, nationality, religion or philosophical thoughts, disability, age or sexual orientation, or tending to the denial, minimisation, justification, approval of the genocide committed by the Nazi regime during the Second World War, as well as any other form of genocide; [...]
Transposing provisions - measures	<p>The provisions outlined concern measures that can be taken in cases where an audiovisual media infringes this prohibition.</p> <ul style="list-style-type: none"> • Flemish Community: Article 44 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009: The Flemish Regulator for the Media (<i>Vlaamse Regulator voor de Media</i>) can oblige the service provider or network operator to temporarily suspend the transmission of a programme of a linear television broadcast organisation, if this constitutes a manifestly serious and grave infringement of the provisions of Art. 38 and Art. 42, first and second paragraph, and if the Flemish Regulator for the Media has ruled on a violation of the same provisions by the same linear television broadcast organisation during the previous 12 months.

⁵²⁴ Decree of 27 March 2009 of the Flemish Government on radio and television broadcasting (*Decreet betreffende radio-omroep en televisie, houdende invoering van een stimuleringsregeling voor de audiovisuele sector*), available at: http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=09-04-30&numac=2009035356

⁵²⁵ Decree of 27 June 2005 of the German-speaking Community on Radio Broadcasting and Cinema (*Dekret über die audiovisuellen mediendienste und die kinovorstellungen*), available at: http://medienrat.be/files/Dekret_27_Juni_2005_Stand_25_Maerz_2013.pdf

⁵²⁶ Decree of 26 March 2009 of Government of the French-speaking Community on audiovisual media services (*Arrêté du Gouvernement de la Communauté française portant coordination du décret sur les services de médias audiovisuels*), available at http://www.csa.be/system/documents_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%202012%20mars%202015.pdf?1431957507

	<p>Article 218§3 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009: The Chamber for impartiality and the protection of minors shall rule on disputes that have arisen as a result of the application of Art. 38 [...]</p> <ul style="list-style-type: none"> • German-speaking Community: Article 80.1 of the Government of the German-speaking Community Decree of 27 June 2005 on Radio Broadcasting and Cinema: The decision-making chamber can take measures against anybody who deviates from the basic principle of free proliferation of non-linear audiovisual media services, on the basis of the following conditions. The measures: <ol style="list-style-type: none"> 1. are necessary for one of the following reasons: <ol style="list-style-type: none"> a) The protection of public order, in particular, the prevention, investigation, solving and prosecution of crimes, including the protection of minors and combating agitation on grounds of race, gender, sexual orientation, religion or nationality, as well as the violation of the human dignity of individuals; [...] • French-speaking Community: Article 159 §4 of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services: The College of Authorisation and Control (<i>Collège d'autorisation et de contrôle</i>) may suspend [...] the distribution of television services [...] in cases where they violate in a serious and grave way the following objectives: <ol style="list-style-type: none"> 1. public order, in particular the prevention, investigation and prosecution of criminal offences, including the protection of minors and the fight against incitement to hatred based on race, gender, religion or nationality, and against violations of human dignity [...];
Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
Transposing provision 1	<p>Article 3(2) and 3(4)(a)(i) is transposed in the legislation as follows: Article XII.5 of the Economic Law Code⁵²⁷: 'The King determines [...] the modalities according to which the designated authorities can take measures to restrict the free movement of an information society service provided by a service provider that is established in another Member State of the European Union.</p> <p>§ 2. The measures mentioned in §§ 1 and 6 must be :</p> <p>1° necessary for one of the following objectives:</p> <ul style="list-style-type: none"> - Public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, gender, religion or nationality, and violations against human dignity [...]' <p>In addition, in cases of hate speech leading to criminal liability published on the Internet, and which does not fall under the scope of press offences, Article 39bis of the Criminal Procedure Code allows the crown prosecutor to use all appropriate technical means to make these data inaccessible, i.e. to have the website blocked. Crown prosecutors may thus require that Internet service providers block a particular website.</p>

⁵²⁷ The Economic Law Code of 28 February 2013 (*Code de droit économique/ Wetboek van economisch recht*), available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013022819&table_name=loi.

2.4 Responsibility for publishing hate speech

Freedom of the press is guaranteed in the Constitution. The legislation establishes some limits for the freedom of the press, which leads, for the most part, to criminal liability, as well as to civil liability and, to a certain extent, administrative liability. In addition, one self-regulatory body has adopted an ethical code for journalists, which includes rules on non-discrimination.

- Criminal liability

Freedom of the press can only be limited by law. When someone commits the following offences by means of press, they are considered press offences: calumny, insult, defamation, calumnious denunciation or malicious disclosure⁵²⁸. In addition, press offences include offences mentioned in Section 2.2, such as the publication of incitement to hatred based on racism and xenophobia, if published by the press. The penalties are those mentioned above and range from imprisonment from eight days to one year and/or a fine of up to EUR 5,000⁵²⁹.

The Constitution establishes a cascade system of criminal/civil liability. In accordance with Article 25, 'when the author is known and resident in Belgium, neither the publisher, nor the printer or the distributor can be prosecuted'. The author is held liable in the first instance, and, if unknown, then the publisher is liable, and so on. The journalist or content author is first responsible for content he/she creates. Under this system, only one person is prosecuted, except where they are co-offenders. Courts apply this cascade system of liability to authors of Internet fora in circumstances in which they can be considered editors⁵³⁰.

the Court of Cassation ruled that a press offence (as a result of the publication of defamation, but also racism and xenophobia) can be committed via the Internet⁵³¹. The Court's decision followed the condemnation of Belgium by the European Court on Human Rights as a result of the restrictive interpretation of Article 25 of the Belgian Constitution, according to which the prohibition of censorship applies only to print media and not to broadcasters⁵³². However, the Criminal Court of Antwerp in the judgment of 30 March 2012 has given a narrow interpretation to this case law, and judged that *audiovisual or verbal* expressions or opinions on the Internet or weblogs do not qualify as press offences⁵³³. In 2013, the Court of Cassation confirmed that press offenses require the

⁵²⁸ Articles 443 and 444 of Criminal Code and the Decree of 20 July 1981 on press, available at http://www.ejustice.just.fgov.be/cgi_loi/loi_l1.pl?language=fr&caller=list&la=f&fromtab=loi&tri=dd+as+rank&ql=dd+=+date%271831-07-20%27.

⁵²⁹ In Belgium, criminal fines in the legislation must be adapted to the growth in consumer prices via a system of coefficient. The current coefficient is six (50 decimals). Therefore, the fines must be multiplied by six. Act of 5 March 1952 concerning surcharges on criminal fines (*Loi relative aux décimes additionnels sur les amendes pénales/ Wet betreffende de opdécimes op de strafrechtelijke geldboeten*), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1952030530&table_name=wet.

⁵³⁰ Information gathered through stakeholder consultation.

⁵³¹ Court of Cassation, 6 March 2012, No. P.11.1374.N/1 and No. P.11.0855.N/1, available at <http://jure.juridat.just.fgov.be; 2012/2-3, 253-254>, note Dirk Voorhoof, 'The notion of press crime from the 19th to the 21st century: internet media, weblogs and website are also press (*De notie drukpersmisdrijf van de 19de naar de 21ste eeuw : internetmedia, weblogs en websites zijn ook drukpers*)'; See also Dirk Voorhoof, 'Henceforth, weblogs and websites are press (*Weblogs en websites zijn voortaan ook 'drukkers'*)', [2012/246] *De Juristenkrant*, pp. 4-5; See also P. Lemmens, 'Abuses of the freedom of expression via internet: is the law 2.0-compatible? Plea for a technology-neutral protection of the freedom of expression (*Misbruiken van de meningsvrijheid via internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid*)', [2010, Vol. 49] *Orde van de dag*, pp. 15-22.

⁵³² ECtHR, RTBF v Belgium (no. 50084/06), 29 March 2011.

⁵³³ Criminal Court of Antwerp, 30 November 2012, not published, description of the facts available at: http://www.diversiteit.be/index.php?action=artikel_detail&artikel=829; Dirk Voorhoof, 'Criminal expressions on the internet, the qualification of press crime and the crime stalking' (*Strafbare uitingen op internet, de*

expression of an opinion in a written text, reproduced by means of printing or a similar process, such as digital publishing. Opinions disseminated orally or by audiovisual means are not press offences because there are not written texts⁵³⁴. In other words, press offences can be committed via the Internet in the same conditions as for printed media, if written words are published on a website that is accessible to everyone⁵³⁵. A proposed amendment was recently introduced aiming at Articles 25 and 150 of the Constitution by extending the guaranteed of freedom of press to new communication media⁵³⁶.

Press offences are judged by Assize Courts (jury) in accordance with the Constitution⁵³⁷. An Assize Court is a temporary court composed of a jury and its organisation is labour-intensive and costly, making prosecutors reluctant to prosecute press offences. As a result, most offences of this type have been dealt by civil courts, where victims could claim for the compensation of their damages in accordance with general civil liability rules. The Constitution was amended in 1999 to allow for the judgment of press offences inspired by racism and xenophobia by the criminal courts instead of the Assize Courts, in order to ensure that those offences are prosecuted⁵³⁸. This distinction between press offences based on racism and xenophobia, and press offences based on other motives allows for easier prosecution of hate speech by the press based on racism and xenophobia. However, as the Centre pointed out, hate speech by means of the press based on religious or sexual orientation hatred (such as islamophobic and homophobic speech) are at risk of impunity, since they still fall under the competence of Assize Courts. The Centre therefore calls for the amendment of the Constitution to include hate speech by means of the press, based on other protected criteria within the competence of the criminal courts⁵³⁹.

- Civil liability

In addition to criminal liability, authors of press offences can be held liable for any damages (moral or material) caused by the acts. In such cases, general civil liability rules apply. The interest groups or the Centre can file a civil action or constitute themselves as civil party in a criminal proceeding⁵⁴⁰. The same cascade system applies here as for criminal liability.

kwalificatie drukpersmisdrijf en het misdrijf belaging), [2012/5] Auteurs & Media, 484-486, available at http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/AM%202012%205%20Sharia4Belgium%20NOOT%20DV.final.pdf.

⁵³⁴ Court of Cassation, 29 October 2013, No P.13.1270.N/1, available at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20131029-6.

⁵³⁵ Joint Circular COL 13/2013 of the Ministry of Justice, Ministry of Interior and the College of General Prosecutors of 17 June 2013 on the research and prosecution policy for discriminations and hate offences (including discrimination based on sex) (*Circulaire commune du Ministre de la Justice, du Ministre de l'Intérieur et du Collège des Procureurs généraux relative à la politique de recherche et de poursuite en matière de discriminations et de délits de haine (en ce compris les discriminations fondées sur le sexe)/ Gemeenschappelijke omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken en het College van Procureurs-generaal betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht)*), p. 23.

⁵³⁶ Draft declaration of revision of the Constitution, 24 April 2014, available at: <https://www.dekamer.be/flwb/pdf/53/3567/53K3567003.pdf>.

⁵³⁷ Article 150 of the Constitution.

⁵³⁸ See Presse & Justice, Legal norms web page available at http://www.presse-justice.be/document.php?document_id=47&lang=fr.

⁵³⁹ Interfederal Centre for Equal Opportunities, 'Annual Report 2014' available at http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf, pp. 44-45.

⁵⁴⁰ Articles 13 to 18 of the Act of 30 July 1981 aiming at punishing certain acts inspired by racism and xenophobia ; And article 15 to 20 of the Act of 10 May 2007 aiming at combating certain forms of discrimination.

- Administrative liability
 - Audiovisual media

The High Council for Audiovisual Media (*Conseil Supérieur de l'audio-visuel*) of the Wallonia-Brussels Federation, the Flemish Regulator for the Media (*Vlaamse regulator voor de media*) and the Media Council (*Medienrat*) for the German Community are competent to monitor the compliance of editorial services, distribution services and operators with the law. These bodies can impose administrative sanctions on audiovisual service providers that fail to comply with the applicable legislation. Although promoting equality and diversity in the media, they are not competent in relation to offences and discrimination cases.

- Internet

A Bill is currently being discussed in the Parliament, aiming at facilitating the blocking of hate content linked to terrorism or racism, which is not the object of a judicial proceeding (because it does not fall within the scope of a criminal offence)⁵⁴¹. The Bill, if passed, would allow administrative authorities to require that Internet service providers block such content. Requests to block Internet content would be reviewed by the competent administrative authority and the Observatory for Internet Rights (*Observatoire des droits de l'Internet/Observatorium van de Rechten op het Internet*) would check the legality of the request. The Bill would also introduce associated additional criminal penalties.

- Self-regulation
 - Journalists

The ethical code of journalists in Belgium requires journalists to respect fundamental rights, in particular, not to incite directly or indirectly to discrimination⁵⁴². The Code discusses the use of social media and web fora by journalists, and recommends that the media avoids publishing content that could lead to reactions which go against the dignity of people, or which could incite to hatred, violence, discrimination or racism⁵⁴³. The Code does not contain reference to the liability of publishers, therefore it is not of direct relevance for the purpose of this study. A complaint against a publication can be submitted to one of the Councils of Deontology (for the Flemish press) or the [Conseil de Déontologie journalistique \(for the French-speaking and German-speaking press\)](#), which are independent self-regulatory authorities.

In 2014, the Council for journalist deontology (*Conseil de Déontologie journalistique*) received six complaints in relation to racism or hatred, one of which was declared admissible⁵⁴⁴. The Council for journalists (*Raad voor de journalistiek*) received five

⁵⁴¹ Bill of 17 July 2015 (DOC 54 1279/001) amending the Act of 13 June 2005 on electronic communications, organising a content removal procedure glorifying terrorism on the Internet (*Proposition de loi modifiant la loi du 13 juin 2005 relative aux communications électroniques, organisant une procédure de retrait des contenus faisant l'apologie du terrorisme sur Internet/Wetsvoorstel tot wijziging van de wet van 13 juni 2005 betreffende de elektronische communicatie, teneinde een procedure in te stellen ter verwijdering van internetinhoud die terrorisme verheerlijkt*), available at: <http://www.dekamer.be/FLWB/PDF/54/1279/54K1279001.pdf>.

⁵⁴² Article 28 of the Code of Journalistic Deontology, adopted by the Council of Journalistic Deontology on 16 October 2013, available at: <http://www.deontologiejournalistique.be/telechargements/codedeontologie2013coverpdf.pdf> and [Article 27 of the Code of the Council for journalists, adopted by the Council for journalists on 20 September 2010, available at: http://www.rvdj.be/sites/default/files/pdf/journalistieke-code.pdf](#).

⁵⁴³ *Ibid.*, p. 18.

⁵⁴⁴ Council for journalist deontology, 'Annual Report 2014' available at: <http://lecdj.be/telechargements/Rapport-annuel-2014-HD.pdf>, p.19.

complaints in relation to stereotypes and discriminations during the same reporting period⁵⁴⁵.

According to our research, self-regulatory codes from publishers' associations do not include provisions in relation to hate speech. No online media service providers association or electronic content providers association having similar provisions, have been identified.

⁵⁴⁵ Council for journalist (*Raad voor de journalistiek*), 'Annual Report 2014' available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2014.pdf>, p.8.

3 Effectiveness of the legal framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate crime/hate speech vs. freedom of expression	
<p style="text-align: center;">Transposing provision 1</p> <p style="text-align: center;">Incitement to hatred and violence – nationality, so-called race, skin colour, descent or national or ethnic origin</p>	<p>In general, the legislation is deemed effective in providing a sufficient balance between hate speech and hate crime and freedom of expression. The right to freedom of expression is largely protected and limited only by criminal law. This provision on incitement to hatred and violence is a criminal offence and, therefore, is not considered as falling within the scope of freedom of expression⁵⁴⁶.</p> <p>The Constitutional Court has twice had the occasion to assess the relationship between the offence of incitement to hatred and violence with freedom of expression. In both cases, the Court confirmed that freedom of expression can suffer limitation as established by law, including in cases of incitement to hatred and violence. The Court also confirmed that the offence provision is sufficiently clearly defined by the legislation.</p> <ul style="list-style-type: none"> - In 2009, an action seeking the annulment of the Anti-racism Act and several provisions of the Non-discrimination Act⁵⁴⁷ was brought before the Constitutional Court. It discussed the interpretation of incitement in Article 20, 2° & 4° of the Anti-racism Act, and in Article 22, 2° & 4° of the Non-discrimination Act. A hundred individuals alleged <i>inter alia</i> that these provisions violate freedom of expression because the preparatory works did not assess the necessity to criminalise incitement to hatred and incitement to discrimination⁵⁴⁸. They also considered that the definition of "incitement to hatred and violence" was excessively wide, leading to an infringement of freedom of expression. A broad definition can indeed deprive individuals of their right to share opinions with others⁵⁴⁹. <p>The Court acknowledged that making incitement to hatred an offence might have infringed the right to freedom of expression guaranteed by Article 19 of the Constitution and Article 10 of the European Convention of Human Rights (ECHR). However, the Court, relying on the case law of the European Court of Human Rights and on several provisions from international conventions⁵⁵⁰, held that the interference was prescribed by law and that the lack of justification in the preparatory works did not make the interference unnecessary in a democratic society⁵⁵¹. The Court ruled that there was no disproportion in the interference with freedom of expression either. Thus, this offence provision does not infringe freedom of expression.</p> <p>The Constitutional Court also confirmed that with respect to incitement to hatred or violence, the requirement of a</p>

⁵⁴⁶ Information from stakeholder consultation in August 2015 (Lecturer of University of Namur) and Interfederal Centre for Equal Opportunities, 'Annual Report 2014' available at: http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf, p. 44.

⁵⁴⁷ Act of 10 May 2007 aiming at combating certain forms of discrimination.

⁵⁴⁸ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §B.59, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

⁵⁴⁹ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §A.45.1, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

⁵⁵⁰ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §B.60-66, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

⁵⁵¹ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §B.67.5, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

	<p>'special intent' applies, i.e. that the conduct must be carried out with the special intent to incite to discrimination, hatred or violence⁵⁵².</p> <p>A summary of this judgment is available on the general website of the Constitutional Court⁵⁵³.</p> <ul style="list-style-type: none"> - Later in 2009, another action seeking annulment of Article 20 of the Anti-racism Act was brought before the Constitutional Court. Several Flemish political representatives complained about a restriction of their freedom of expression due to the vagueness of the wording 'incitement to discrimination, hatred or violence'. According to them, any published opinion of their political party about immigration or asylum seekers is often deemed to be an incitement to violence⁵⁵⁴. In a previous judgment of the Constitutional Court⁵⁵⁵, the Court had already defined 'incitement to discrimination, hatred and violence' as requiring a specific intention (under the circumstances listed in Article 444 of the Criminal Code), which goes beyond mere information, ideas or criticism⁵⁵⁶. The Court held that the exercise of freedom of expression guaranteed by international and national provisions entails the duty to not overstep boundaries about the protection of reputation and rights of others. Under specific conditions prescribed by law, the right to freedom of expression can be limited in order to respect such protection⁵⁵⁷. The Court, relying on the case law of the European Court of Human Rights, then ruled that certain types of speeches do not fall under the protection of freedom of expression. Restrictions on the freedom of expression are, therefore, admissible under certain conditions. In addition, the Court found the provision on incitement to hatred sufficiently clear⁵⁵⁸.
<p>Transposing provision 2</p> <p>Incitement to hatred and violence – religion</p>	<p>The above comment applies here. See judgment of the Constitutional Court of 12 February 2009⁵⁵⁹ described in the first table.</p>
<p>Transposing provision 3</p> <p>Condoning, denying or grossly trivialising the crime of genocide</p>	<p>An action was brought before the Constitutional Court in 1996 to annul the Act on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War⁵⁶⁰. The applicant, a founding member of a non-profit organisation undertaking historical research about the 20th century, including the publication of such information, complained about a restriction of freedom of expression limiting his right to express an opinion. He acknowledged that freedom of expression is not an absolute right, and it can, therefore, be subject to limitations prescribed by law. Such a limitation, however, must respect the principle of equal treatment and non-discrimination provided</p>

⁵⁵² Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, §B.67.3, <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

⁵⁵³ Summary of Judgment No.17/2009 of 12 February 2009, available at: http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=2683.

⁵⁵⁴ Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, §A.32, available at: <http://www.const-court.be/fr/common/home.html>.

⁵⁵⁵ Constitutional Court, Judgment No 157/2004 of 6 October 2004, B.49, available at: <http://www.const-court.be/public/n/2004/2004-157n.pdf>.

⁵⁵⁶ Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, §B.57, available at: <http://www.const-court.be/public/f/2009/2009-040f.pdf>.

⁵⁵⁷ Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, §B.49.1 and 49.2, available at: <http://www.const-court.be/public/f/2009/2009-040f.pdf>.

⁵⁵⁸ Constitutional Court, Judgment No. 40/2009 of 11 March 2009, No. 4312 and 4355, §B.50, available at: <http://www.const-court.be/public/f/2009/2009-040f.pdf>.

⁵⁵⁹ Constitutional Court, Judgment No. 17/2009 of 12 February 2009, No. 4359, available at: <http://www.const-court.be/public/f/2009/2009-017f.pdf>.

⁵⁶⁰ Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

	<p>by Articles 10 and 11 of the Constitution, i.e. using an objective and reasonable criterion which is proportionate to the aim pursued. The criterion used by the Act is the fact of denying, minimising, justifying or approving⁵⁶¹. According to the applicant, the Act infringes the principle of equal treatment because of the lack of objectivity and the vagueness of the criterion⁵⁶².</p> <p>The Court first held that freedom of expression is not absolute, and can be limited in accordance with conditions prescribed by Article 10.2 ECHR and Article 19.3 of the International Covenant on Civil and Political Rights⁵⁶³. When assessing the conformity with the principles of equal treatment and non-discrimination, an important tool to look at is the preparatory works. The Court then ruled that the legislator was fully aware of the significant importance of the right to freedom of expression. It is proved by the restrictive and unequivocal definition chosen for the scope definition of this Act⁵⁶⁴. According to the Court, this Act can be regarded as answering a pressing social need and is necessary in a democratic society⁵⁶⁵. Without such an Act, the basic principles of a democratic society would be threatened and Belgium would become 'a shelter for negationism'⁵⁶⁶. The Court then ruled that this Act does not limit freedom of expression in a discriminatory way, and it dismissed the action⁵⁶⁷.</p> <p>The border between freedom of expression and the offence is, therefore, confirmed by the Court to be sufficiently clear.</p>
Indicator 2 - Quantitative evidence	
<p>Transposing provision 1</p> <p>Incitement to hatred and violence – nationality, so-called race, skin colour, descent or national or ethnic origin</p>	<p>Data are collected by different bodies, i.e. the Federal police and Prosecution service, the Centre and NGOs. This can lead to disparities in the way data are collected, since categories are not always classified in the same manner. For example, the Federal police and the Prosecution service do not record hate speech as a specific offence, but instead include it in the category of 'racism, xenophobia, other discrimination and homophobia'⁵⁶⁸, while the Centre has specific data on the condoning, denying or grossly trivialising the crime of genocide (see below). In addition, the Circulars No COL 6/2006 and COL 13/2013, which explain the procedure to register offences motivated by racism and xenophobia, are not always well-known and applied correctly by the relevant services. The Centre considers the data available unreliable, and the latest ECRI report considered the data available too fragmented to provide a precise overview of hate speech in Belgium⁵⁶⁹. No evidence could be identified that such offences suffer from under-reporting. The ECRI report mentions that under-reporting issues exist mostly in relation to homophobia/ violence against LGBTI.</p> <p>In the light of the above, the data below are collected by the prosecution services and include acts of racism and xenophobia in the broad sense.</p> <p>Number of cases investigated: by the police⁵⁷⁰:</p> <p style="margin-left: 40px;">- 2010: 930</p>

⁵⁶¹ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, A.4.5, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶² Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, A.4.3, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶³ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.6, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶⁴ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.8, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶⁵ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.13, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶⁶ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.15, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶⁷ Constitutional Court, Judgment No. 45/96 of 12 July 1996, No. 858 and 892, B.7.18, available at: <http://www.const-court.be/public/f/1996/1996-045f.pdf>

⁵⁶⁸ European Commission against Racism and Intolerance, "ECRI report on Belgium (fifth monitoring cycle), Adopted on 4 December 2013, Published on 25 February 2014, CRI(2014)1, p. 17, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-ENG.pdf>.

⁵⁶⁹ Ibid, p. 20.

⁵⁷⁰ Conclusion based on stakeholder interview in June 2015 (Federal police – Head of the Diversity Department).

	<ul style="list-style-type: none"> - 2011: 998 - 2012: 1017 - 2013: 819 - 2014: 801 (data available for the three first quarters of 2014 only) <p>Number of cases investigated by the Public Prosecutor⁵⁷¹:</p> <ul style="list-style-type: none"> - 2010: 767 - 2011: 750 - 2012: 765 - 2013: 655 - 2014: 861 <p>Number of cases prosecuted:</p> <ul style="list-style-type: none"> - 2010: 68 - 2011: 38 - 2012: 49 - 2013: 18 - 2014: 22 <p>Number of cases adjudicated⁵⁷²:</p> <ul style="list-style-type: none"> - 2010: 79 (52 condemnation judgments; 9 judicial suspensions, 16 acquittals and 2 others) - 2011: 65 (48 condemnation judgments; 6 judicial suspensions, 9 acquittals and 2 others)2012: 62 (47condemnation judgments; 8 judicial suspensions, 4 acquittals and 3 others) - 2013: 42 (27 condemnation judgments; 6 judicial suspensions, 8 acquittals and 1 other) - 2014: 24 (16 condemnation judgments; 4 judicial suspensions, 2 acquittals and 2 others)
<p>Transposing provision 2 Incitement to hatred and violence – religion</p>	<p>The Federal police and the Prosecution service do not record data on this specific offence, but include data under the category of 'racism, xenophobia, other discrimination and homophobia'. This offence would therefore fall under 'other discrimination' and the data available would not be able to accurately provide information on this offence.</p> <p>The same concerns on data collection mentioned for provision 1 apply for this offence.</p>
<p>Transposing provision 3 Condoning, denying or grossly trivialising the crime of genocide</p>	<p>The same issues regarding data collection mentioned above also apply to this offence.</p> <p>The data below are provided based on stakeholder input rather than official statistics from the Federal Police and the Prosecution Service:</p> <p>Number of cases investigated⁵⁷³:</p> <ul style="list-style-type: none"> - 2010: 2

⁵⁷¹ Conclusion based on stakeholder interview in June 2015 (Public Prosecutor).

⁵⁷² Conclusion based on stakeholder interview in June 2015 (Public Prosecutor).

⁵⁷³ Conclusion based on stakeholder interview in June 2015 (Centre for Equal Opportunities and Opposition to Racism).

	<ul style="list-style-type: none"> - 2011: 2 - 2012: 7 - 2013: 8 - 2014: 4 (data for the three first quarters of 2014 only) <p>Number of cases prosecuted⁵⁷⁴:</p> <ul style="list-style-type: none"> - 2010: 1 - 2011: 1 - 2012: 0 - 2013: 1 - 2014: 3 <p>Number of cases adjudicated⁵⁷⁵:</p> <ul style="list-style-type: none"> - 2010: 1 - 2011: 1 - 2012: 0 - 2013: 1 - 2014: 3
Indicator 3 - Bottlenecks of practical implementation	
<p>Transposing provision 1</p> <p>Incitement to hatred and violence – nationality, so-called race, skin colour, descent or national or ethnic origin</p>	<p>Clarity of offence provision:</p> <p>This offense provision is clear. No issue of interpretation affecting the use of the offence provision in practice has been identified, nor have such issues been revealed by relevant case law (see above mentioned Constitutional Court's case law). The only controversial element concerns the commission of press offences via the Internet (see below).</p> <p>Suitability of offence provision to cover online crime:</p> <p>The legislation is silent about whether or not it applies to offences committed on the Internet. The medium for distributing or displaying incitement to hatred or violence is not mentioned by the Code, whose language is technology neutral⁵⁷⁶. Considering the neutral nature of the provision, it could be argued that online commission is implicitly covered.</p> <p>When the offence is committed online, the question of whether it can be considered as a press offence has been debated by courts for several years. The Court of Cassation in two decisions of 6 March 2012, judged that a press offence (as a result of the publication of defamation, but also racism and xenophobia) can be committed via the Internet⁵⁷⁷. The Court's decision</p>

⁵⁷⁴ Conclusion based on stakeholder interview in June 2015 (Centre for Equal Opportunities and Opposition to Racism).

⁵⁷⁵ Conclusion based on stakeholder interview in June 2015 (Centre for Equal Opportunities and Opposition to Racism).

⁵⁷⁶ Poulet, Y., 'La lutte contre le racisme et la xénophobie sur Internet', [2006] Journal des Tribunaux, pp. 1-12, cited by DE HERT, P. & VAN LEEUW, F., 'Cybercrime Legislation in Belgium', in E. DIRIX & Y.H. LELEU (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law* (Brussels, Bruylant, 2011) 867-956, <http://www.vub.ac.be/LSTS/pub/Dehert/389.pdf>, p. 904.

⁵⁷⁷ Court of Cassation, 6 March 2012, No. P.11.1374.N/1 and No. P.11.0855.N/1, via <http://jure.juridat.just.fgov.be>; &M 2012/2-3, 253-254, note Dirk Voorhoof, 'The notion of press crime from the 19th to the 21st century: internet media, weblogs and website are also press' (*De notie drukpersmisdrijf van de 19de naar de 21ste eeuw : internetmedia, weblogs en websites zijn ook drukpers*); See also Dirk Voorhoof, 'Henceforth, weblogs and websites are press'(Weblogs en websites zijn voortaan ook

	<p>comes after the European Court on Human Rights condemned Belgium for its restrictive interpretation of Article 25 of the Belgian Constitution, according to which the prohibition of censorship applies only to print media and not to broadcasters⁵⁷⁸. The Criminal Court of Antwerp in the judgment of 30 March 2012, gave a narrow interpretation to this case law, judging that criminal <i>audiovisual or verbal</i> expressions or opinions on the Internet or weblogs do not qualify as press offences⁵⁷⁹. This interpretation has been confirmed by the Court of Cassation in 2013⁵⁸⁰.</p> <p>Hate speech is a growing issue of concern in Belgium. The number of complaints received by the Centre has been increasing in recent years. In 2014, the Centre received 936 complaints about hate speech, a number of which related to the same event. As a result of the complaints, the Centre compiled 339 files for follow-up. Nine files out of 10 concerned online hate speech (with a third of these incidents taking place on social media). Most of the hate speech complaints related to racism or hate based on religion⁵⁸¹.</p> <p>The ECRI report notes a number of issues in relation to the suitability of the legislation to cover online hate speech. It recommends that Belgium amend its legislation to establish a clear system of liability of the online service providers and fora, blogs and websites managers. It also recommends that Belgium ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems⁵⁸².</p>
	<p>Suitability of offence provision to ensure freedom of expression:</p> <p>This offence provision is suitable to ensure freedom of expression. Excessive penalties could potentially lead to the unnecessary limitation of freedom of expression but it is not the case, as no excessive penalties have been set out in the Criminal Code.</p>
	<p>Suitability of offence provision to protect vulnerable groups:</p> <p>This offence provision protects vulnerable groups such as minorities. It seems that the legislation is quite efficient in practice.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>This offence provision appears to be in line with the current national context as it is quite efficient in practice.</p>
	<p>Other shortcomings of applicable offence provision:</p>

'drukkers), [2012/246] De Juristenkrant, pp. 4-5; See also P. Lemmens, 'Abuses of the freedom of expression via the Internet: is the law 2.0-compatible? Plea for a technology-neutral protection of the freedom of expression' (*Misbruiken van de meningsvrijheid via internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid*), [2010, Vol. 49] Orde van de dag, pp. 15-22.

⁵⁷⁸ ECtHR, RTBF v Belgium (no. 50084/06), 29 March 2011.

⁵⁷⁹ Dirk Voorhoof, 'Criminal expressions on the Internet, the qualification of press crime and the crime of stalking' (*Strafbare uitingen op internet, de kwalificatie drukpersmisdrijf en het misdrijf belaging*), [2012/5] Auteurs & Media, 484-486, http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/AM%202012%205%20Sharia4Belgium%20NOOT%20DV.final.pdf.

⁵⁸⁰ Court of Cassation, 29 October 2013, No P.13.1270.N/1, available at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20131029-6.

⁵⁸¹ Interfederal Centre for Equal Opportunities, 'Annual report 2014' available at: http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf, p.44.

⁵⁸² European Commission against Racism and Intolerance, "ECRI report on Belgium (fifth monitoring cycle), Adopted on 4 December 2013, Published on 25 February 2014, CRI(2014)1, p. 25, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-ENG.pdf>.

	No other shortcomings have been identified.
<p>Transposing provision 2</p> <p>Incitement to hatred and violence – religion</p>	<p>Clarity of offence provision:</p> <p>This offence provision is clear. No issue of interpretation has arisen in practice or in the relevant case law.</p> <p>The description of the term 'religion', as referred to the recitals and Article 1.3 of the Framework Decision 2008/913/JHA, is lacking from both the Non-discrimination Act and the Anti-racism Act. The Centre recommends the insertion of this description, or to its referral in the Explanatory Memorandum of the Anti-racism Act. According to the Centre, the preparatory works of the Anti-racism Act, case law and doctrine show that the Act is applicable where religious elements are directed at an ethno-cultural group⁵⁸³.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>See the first offence provision.</p>
	<p>Suitability of offence provision to ensure freedom of expression:</p> <p>As mentioned in Section 2.4, hate speech by means of press based on religious or sexual orientation (such as islamophobic and homophobic speech) remains at risk of impunity since they still fall under the competence of Assize Courts. The Centre has called for the amendment of the Constitution to include hate speech by means of press, based on other protected criteria within the competence of the criminal courts⁵⁸⁴.</p>
	<p>Suitability of offence provision to protect vulnerable groups:</p> <p>See the first offence provision.</p>
<p>Transposing provision 3</p> <p>Condoning, denying or grossly trivialising the crime of genocide</p>	<p>Clarity of offence provision:</p> <p>This offence provision is clear and easily workable in practice. No issue of interpretation has arisen in the relevant case law.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>See the first offence provision.</p>
	<p>Suitability of offence provision to ensure freedom of expression:</p> <p>This offence provision is suitable to ensure freedom of expression. Excessive penalties could lead to an infringement of the freedom of expression but it is not the case, as non-excessive penalties have been set out in the Criminal Code.</p>
	<p>Suitability of offence provision to protect vulnerable groups:</p> <p>The Act of 23 March 1995 only covers the genocide perpetrated by the German National Socialist Regime, i.e. the genocide perpetrated against Jewish people. Other genocides, such as those in Rwanda or in Armenia, are not protected by this Act.</p>

⁵⁸³ Conclusion based on stakeholder interview in June 2015 (Centre for Equal Opportunities and Opposition to Racism).

⁵⁸⁴ Interfederal Centre for Equal Opportunities, 'Annual Report 2014' available at http://www.diversite.be/sites/default/files/documents/publication/rapport_annuel_2014-fr-web_ascorr_0.pdf, pp. 44-45.

	<p>There is a will for extending its scope in order to increase protection of other vulnerable groups, with several legal practitioners calling for an extension of the 1995 Act to any crime of genocide⁵⁸⁵. A Bill is currently under discussion in the Parliament in order to amend the Act to bring it in line with the CFD and extend the offence to other crimes of genocide, including those recognised by a decision of an international tribunal recognised by Belgium⁵⁸⁶.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>As mentioned above, except the genocide perpetrated in 1945 against Jewish people, other genocides are not protected by this offence provision. A general provision thus appears more convenient to ensure equal treatment to all groups that suffered for such a crime.</p> <p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings have been identified.</p>
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing provision 1</p> <p>Incitement to hatred and violence – nationality, so-called race, skin colour, descent or national or ethnic origin</p>	<p>No legislative change has been adopted since 2012. Various proposed amendments have been introduced to amend the Anti-racism Act in its entirety. In 2011, a proposed amendment to repeal the 1981 Act in its entirety (including incitement to hatred and violence provisions on the grounds mentioned above) was introduced by members of the Vlaams Belang (right-wing political party) on the basis that the Act restricts freedom of expression and positively discriminates against Belgian autochthones⁵⁸⁷. According to them, hatred (in Articles 20 and 21 of the Anti-racism Act) is such a subjective concept that any statement about ethnic group or nationality could lead to a complaint. The proposed amendment is still under discussion.</p> <p>In 2012, another proposed amendment to the 1981 Act was introduced to add a new offence prohibiting racist and neo-Nazi group meetings⁵⁸⁸.</p> <p>Articles 25 and 150 of the Constitution have remained almost unchanged since 1831. Prior to the last legislative elections in 2014, several constitutional provisions were under the process of revision. As regards Articles 25 and 150 of the Constitution, a proposed amendment aiming at extending press guarantees to new communication media was introduced⁵⁸⁹. It has not yet been adopted, as the proposed amendment is still pending. This would be the opportunity to comply with the two judgments of the Court of Cassation ruling that a press offence can be committed via the Internet⁵⁹⁰.</p>

⁵⁸⁵ Recommendations on freedom of expression and information medias (*Etats généraux des medias d'information, atelier "La liberté d'expression"*), available at: <http://egmedia.pcf.be/wp-content/uploads/2011/03/EGMI-Atelier-3-rapport-recommandations-de%CC%81f-2013-05-21.pdf>, pp. 30-33.

⁵⁸⁶ Bill of 17 June 2015 (DOC 54 1182/001) aiming at amending Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

⁵⁸⁷ Proposed amendment 1956/001 of 14 December 2011 to repeal Act of 30 July 1981 aiming at punishing certain acts based on racism and xenophobia, available at: <http://www.lachambre.be/FLWB/PDF/53/1956/53K1956001.pdf>.

⁵⁸⁸ Proposed amendment 2160/001 of 20 April 2012 to amend the legislation combating racism and aiming at prohibiting racist and neo-Nazi group meetings, available at: <http://www.dekamer.be/flwb/pdf/53/2160/53k2160001.pdf>.

⁵⁸⁹ Draft declaration of revision of the Constitution, 24 April 2014, available at: <https://www.dekamer.be/flwb/pdf/53/3567/53K3567003.pdf>

⁵⁹⁰ Court of Cassation, 6 March 2012, No. P.11.1374.N/1 and No. P.11.0855.N/1, via <http://jure.juridat.just.fgov.be>; &M 2012/2-3, 253-254, note Dirk Voorhoof, 'The notion of press crime from the 19th to the 21st century: Internet media, weblogs and website are also press' (*De notie drukpersmisdrijf van de 19de naar de 21ste eeuw : internetmedia, weblogs en websites zijn ook drukpers*); See also Dirk Voorhoof, 'Henceforth, weblogs and websites are press' (*Weblogs en websites zijn voortaan ook*

Transposing provision 2	
Incitement to hatred and violence – religion	
Transposing provision 3	
Condoning, denying or grossly trivialising the crime of genocide	

No legislative change has been adopted since 2012.

No legislative change has been adopted since 2012. A bill is currently under discussion in the Parliament in order to amend the Act to bring it in line with the CFD and extend the offence to other crimes of genocide, including those recognised by a decision of an international tribunal recognised by Belgium⁵⁹¹. The bill has not yet been adopted.

3.2 Effectiveness of the legislation Transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
Transposing Provision 1	
General prohibition of incitement to hatred in audiovisual media	
Transposing Provision 2	
Provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
Indicator 2 - Quantitative evidence	
Transposing Provision 1	
General prohibition of incitement to hatred in audiovisual media	

Culture and media fall within the legislative competence of the Communities (Flemish Community, German-speaking Community and French-speaking Community). No case law on the interaction of these transposing provisions with freedom of expression has been identified.

No case law on the interaction of the transposing provision with freedom of expression has been identified. The consequences of the Delfi case of the European Court of Human Rights⁵⁹² are difficult to predict as yet.

Number of decisions condemning service providers:

- **Flemish Community⁵⁹³:**
 - 2010: 0
 - 2011: 0
 - 2012: 0
 - 2013: No information available
 - 2014: No information available

'druipers), [2012/246] De Juristenkrant, pp. 4-5; See also P. Lemmens, 'Abuses of the freedom of expression via the Internet: is the law 2.0-compatible? Plea for a technology-neutral protection of the freedom of expression' (*Misbruiken van de meningsvrijheid via internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid*), [2010, Vol. 49] Orde van de dag, pp. 15-22.

⁵⁹¹ Bill of 17 June 2015 (DOC 54 1182/001) aiming at amending Act of 23 March 1995 on the denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War.

⁵⁹² ECHR Delfi As v Estonia of 16 June 2015.

⁵⁹³ Information based on stakeholder consultation in June 2015 (Flemish Community media authority - Vlaamse Regulator voor de Media).

	<ul style="list-style-type: none"> • German-speaking Community⁵⁹⁴: <ul style="list-style-type: none"> - 2010: 0 - 2011: 0 - 2012: 0 - 2013: 0 - 2014: 0 • French-speaking Community: No information available
<p>Transposing Provision 2</p> <p>Provision transposing Articles 3(2) and 3(4)(a)(i) of ECD</p>	<p>Number of decisions condemning service providers:</p> <p>No information available.</p>
Indicator 3 -Bottlenecks of practical implementation	
<p>Transposing Provision 1</p> <p>General prohibition of incitement to hatred in audiovisual media</p>	<p>Clarity of the transposing provision:</p> <p>Provisions for each Community are clear enough to ensure efficiency of the legislation.</p>
	<p>Suitability of offence provision to protect vulnerable groups:</p> <p>Provisions for each Community are efficiently applicable, and are sufficient to prevent any incitement to hatred. This safeguard mechanism thus protects vulnerable and targeted groups in an efficient way.</p>
	<p>Suitability of offence provision to ensure freedom of expression:</p> <p>If this safeguard mechanism is used correctly, there should not be any infringement of freedom of expression.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings have been identified.</p>
<p>Transposing Provision 2</p> <p>Provision transposing Articles 3(2) and 3(4)(a)(i) of ECD</p>	<p>Clarity of the transposing provision:</p> <p>See the first transposing provision.</p>
	<p>Suitability of offence provision to protect vulnerable groups:</p> <p>See the first transposing provision.</p>
	<p>Suitability of offence provision to ensure freedom of expression:</p> <p>See the first transposing provision.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings have been identified.</p>
Indicator 4 -Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing Provision 1</p> <p>General prohibition of incitement to hatred in audiovisual media.</p>	<ul style="list-style-type: none"> • Flemish Community: Article 38 of the Flemish Government Decree on radio and television broadcasting of 27 March 2009⁵⁹⁵ has not been amended since 2012. • German-speaking Community: Article 4 of the Government of the German-speaking Community Decree of 27 June 2005 on Radio Broadcasting and Cinema⁵⁹⁶ has not been amended since 2012.

⁵⁹⁴ Information based on stakeholder consultation in June 2015 (German-speaking Community media authority – Medienrat).

⁵⁹⁵ Decree of 27 March 2009 of the Flemish Government on radio and television broadcasting.

	<ul style="list-style-type: none"> • French-speaking Community: Article 9 of the Government of the French-speaking Community Decree of 26 March 2009 on audiovisual media services⁵⁹⁷ was amended in 2013 in order to adapt legislation to the protection of minors regarding some inappropriate content⁵⁹⁸.
<p>Transposing Provision 2</p> <p>Provision transposing Articles 3(2) and 3(4)(a)(i) of ECD</p>	<p>The Act of 11 March 2003 on certain legal aspects of information society services, was abrogated by the Act of 15 December 2013⁵⁹⁹. The same provision was, however, reintroduced in Book XII of the Economic Code (Article 1 of the Act of 15 December 2013). This is therefore a technical amendment, as the content of the provision has not been amended.</p> <p>A Bill is currently under discussion in the Parliament aiming at facilitating the blocking of hate content linked to terrorism or racism, which is not the object of a judicial proceeding (because it does not fall within the scope of a criminal offence)⁶⁰⁰. The Bill, if passed, would allow administrative authorities to request Internet service providers to block such content. Requests to block internet content would be reviewed by the competent administrative authority and the Observatory for Internet Rights (<i>Observatoire des droits de l'internet/Observatorium van de Rechten op het Internet</i>) would check the legality of the request. The Bill would also introduce additional criminal penalties.</p>

3.3 Effectiveness of the rules regulating publishers' responsibility

Regarding criminal liability, the most important rules are described in detail under Section 3.1, thus criminal liability is not referred to in the table below. A similar remark applies to administrative liability, which is largely covered by Section 3.2. The effectiveness of civil liability rules is not assessed in this table, as Belgian law has not established a specific civil liability scheme for the compensation of damages for hate speech. The table below, therefore, only assesses the effectiveness of rules developed by self-regulatory bodies.

Indicator 1 - National case law on the interaction of provision with freedom of expression

⁵⁹⁶ Decree of 27 June 2005 of the German-speaking Community on Radio Broadcasting and Cinema.

⁵⁹⁷ Decree of 26 March 2009 of Government of the French-speaking Community on audiovisual media services.

⁵⁹⁸ Decree of 7 February 2013 providing for adaptations on the protection of minors to the Decree of 26 March 2009 on audiovisual media services (*Décret portant certaines adaptations relatives à la protection des mineurs au décret, coordonné du 26 mars 2009 sur les services de médias audiovisuels*), available at: http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=13-03-18&numac=2013029222

⁵⁹⁹ Act inserting Book XII "Electronic economy Law" in the Economic Code and inserting definitions and implementing measures to Book XII in Books I and XV of this Code (*Loi portant insertion du Livre XII, "Droit de l'économie électronique" dans le Code de droit économique, portant insertion des définitions propres au Livre XII et des dispositions d'application de la loi propres au Livre XII, dans les Livres I et XV du Code de droit économique/ Wet houdende invoeging van Boek XII, "Recht van de elektronische economie", in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan Boek XII en van de rechtshandhavingsbepalingen eigen aan Boek XII, in de Boeken I en XV van het Wetboek van economisch recht*), available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013121551&table_name=loi

⁶⁰⁰ Bill of 17 July 2015 (DOC 54 1279/001) amending the Act of 13 June 2005 on electronic communications, organising a content removal procedure glorifying terrorism on the Internet (*Proposition de loi modifiant la loi du 13 juin 2005 relative aux communications électroniques, organisant une procédure de retrait des contenus faisant l'apologie du terrorisme sur Internet/Wetsvoorstel tot wijziging van de wet van 13 juni 2005 betreffende de elektronische communicatie, teneinde een procedure in te stellen ter verwijdering van internetinhoud die terrorisme verheerlijkt*), available at: <http://www.dekamer.be/FLWB/PDF/54/1279/54K1279001.pdf>.

Self-regulating rules	No higher court decisions assessing the relationship of the applicable self-regulatory rules with freedom of expression, have been identified. Existing self-regulatory rules in Belgium regulate the liability of journalists and not of publishers. This implies that the applicable self-regulatory rules are not of direct relevance for the purpose of this study.
Indicator 2 - Quantitative evidence	
Self-regulating rules	<p>Number of decisions condemning publishers:</p> <ul style="list-style-type: none"> • Council for journalist deontology (<i>Conseil de Déontologie journalistique</i>): <ul style="list-style-type: none"> - 2014: 6 complaints received and one considered admissible⁶⁰¹ - 2013: 8 complaints in relation to hatred and racism⁶⁰² - 2012: 21 complaints in relation to hatred and racism⁶⁰³ - 2011: 12 complaints in relation to hatred and racism⁶⁰⁴ - 2010: 13 complaints in relation to hatred and racism⁶⁰⁵ • Council for journalist (<i>Raad voor de journalistiek</i>): <ul style="list-style-type: none"> - 2014: 5 complaints in relation to stereotypes and discriminations⁶⁰⁶ - 2013: 1 complaint in relation to discrimination⁶⁰⁷ - 2012: 2 complaints in relation to discrimination⁶⁰⁸ - 2011: 3 complaints in relation to discrimination⁶⁰⁹ - 2010: 3 complaints in relation to discrimination⁶¹⁰
Indicator 3 - Bottlenecks of practical implementation	
Self-regulating rules	The ethical code of journalists in Belgium requires journalists to respect fundamental rights, in particular, not to incite directly or indirectly to discrimination ⁶¹¹ . A complaint against a publication can be submitted to one of the Councils of Deontology Raad voor de journalistiek (for the Flemish press) or the Conseil de Déontologie journalistique (for the French-speaking and German-speaking press), which are independent self-regulatory authorities. If the complaint falls within one of the offence provisions, the self-regulatory authorities do not have competence (instead authorities responsible for the investigation, prosecution and adjudication of offences would proceed). No practical implementation issues have been identified.

⁶⁰¹ Council for journalist deontology, Annual Report 2014, p.19, available at: <http://lecdj.be/telechargements/Rapport-annuel-2014-HD.pdf>.

⁶⁰² Council for journalist deontology, Annual Report 2013, p.19, available at: <http://www.deontologiejournalistique.be/telechargements/CDJ-Rapport-annuel-2013-pressquality.pdf>.

⁶⁰³ Council for journalist deontology, Annual Report 2012, p.20, available at: http://www.deontologiejournalistique.be/telechargements/CDJ_Rapport_annuel_2012_avec_cover_HQ.pdf.

⁶⁰⁴ Council for journalist deontology, Annual Report 2011, p.20, available at: <http://www.deontologiejournalistique.be/telechargements/rapportCDJ2010.pdf>.

⁶⁰⁵ Council for journalist deontology, Annual Report 2010, p.17, available at: <http://www.deontologiejournalistique.be/telechargements/rapportCDJ2010.pdf>.

⁶⁰⁶ Council for journalist (*Raad voor de journalistiek*), Annual Report 2014, p.8, available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2014.pdf>.

⁶⁰⁷ Council for journalist (*Raad voor de journalistiek*), Annual Report 2013, p.7, available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2013.pdf>.

⁶⁰⁸ Council for journalist (*Raad voor de journalistiek*), Annual Report 2012, p.10, available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2012.pdf>.

⁶⁰⁹ Council for journalist (*Raad voor de journalistiek*), Annual Report 2011, p.10, available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2011.pdf>.

⁶¹⁰ Council for journalist (*Raad voor de journalistiek*), Annual Report 2010, p.8, available at: <http://www.rvdj.be/sites/default/files/pdf/jaarverslag2010.pdf>.

⁶¹¹ Article 28 of the Code of Journalistic Deontology, adopted by the Council of Journalistic Deontology on 16 October 2013, available at: <http://www.deontologiejournalistique.be/telechargements/codedeontologie2013coverpdf.pdf> and Article 27 of the Code of the Council for journalists, adopted by the Council for journalists on 20 September 2010, available at: <http://www.rvdj.be/sites/default/files/pdf/journalistieke-code.pdf>.

	<p>The self-regulation is not of direct relevance for the purpose of this study, as they fail to regulate the liability of publishers, their rules apply only to the liability of journalists.</p>
<p>Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation</p>	
<p>Self-regulating rules</p>	<p>No recent changes have been made to the ethical codes.</p> <p>The self-regulation described here is not of direct relevance for the purpose of this study, as they fail to regulate the liability of publishers, but only concern the liability of journalists.</p>

GERMANY

1 National context

Legislative framework

German legislation does not explicitly refer to the term hate speech or hate crime. Instead, it penalises so-called 'racist/violent crimes'. The relevant offence provisions penalising racist/violent crimes are set out in various laws including the Criminal Code and the Protection of Young Persons Act. The main criminal law provision penalising hate speech is called 'agitation against people' (*Volksverhetzung*), and is set out under Section 130 of the Criminal Code. The main protected groups under this provision are "national, racial, religious groups or a group defined by their ethnic origins".

In relation to online hate speech, the main pieces of transposing legislation of the Audiovisual Media Services Directive (AMSD) are:

- the 13th Amendment to the Inter-State Broadcasting Agreement (*Rundfunkänderungsstaatsvertrag*),
- the Interstate Agreement on the protection of minors (*JMStV - Jugendmedienschutz-Staatsvertrag*),
- the Criminal Code under Section 130(2) penalising the distribution of the content via radio broadcasting and telemedia.

The Electronic Commerce Directive (ECD) has been transposed into German legislation by the Telemedia Act (TMA).

In addition to criminal and administrative liabilities, civil (Section 823 Para. 1 and 2, German Civil Code: Liability in damages) and disciplinary liability schemes (German Press Council, as a self-regulating body, deals with complaints against the media) are also applicable to those publishing hate speech.

Article 4 of Council Framework Decision 2008/913/JHA⁶¹² (CFD), regarding hate crime, was just recently transposed into German legislation. Previously, judges, during sentencing, could take into consideration the circumstances set out in Article 46 of the Criminal Code, as, before 1 August 2015, Section 46⁶¹³ did not make explicit reference to hate or bias motives. This has been addressed by means of a legislative amendment referencing, 'especially racist, xenophobic and other inhuman motives and aims', to the provision.

Understanding the German context

In the German context, racist/violent crimes - which encompasses both hate crime and hate speech - are understood as 'politically motivated crimes', meaning that such crimes are seen as extreme right "xenophobic" and "anti-Semitic" offences, which are to be reported to the local police departments⁶¹⁴. Similarly, the Federal Government has also defined 'hate crime' as a politically motivated crime. Hate crime refers, in this instance, to crimes in which the offender insults or attacks the victim because of a 'political

⁶¹² Council Framework Decision 2008/913/JHA, of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, [available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF).

⁶¹³ The previous version of Section 46 German Criminal Code set out the following: Principles of sentencing

(1) [...]

(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to the motives and aims of the offender; [...]

(3) [...].

⁶¹⁴ Federal Ministry of the Interior, First periodic security report (*Erster Periodischer Sicherheitsbericht*), Chapter 2.10, politically motivated crime, (2001), available at: http://www.uni-konstanz.de/rtf/ki/psb1-2_10.pdf.

opinion, nationality, ethnicity, race, skin colour, religion, belief, origin, sexual orientation, disability, appearance or social status⁶¹⁵. Another interpretation of the term 'hate crime' is provided in a study by criminology researcher Alke Glet, 'in Germany, the very specific historical experiences with regard to bias motivated violence resulted in a radically different content and understanding of the term hate crime. Still, the adaptation of the hate crime concept is closely inspired by the American definition of this phenomenon. German police agencies now keep statistics on the prevalence of so-called 'hate-motivated incidences' and hate crime has become a common description for predominantly right-wing offences against people with migrant backgrounds. The definition of hate crime is, however, a rather complex issue that shows very broad characteristics. This makes it a difficult subject in practical terms for criminal justice practitioners and legislators as to which forms of criminal behaviour should be embraced by the term and how to identify bias motivated offences'⁶¹⁶.

Section 130 was originally introduced into the Criminal Code of the German Empire in 1871. The original version of the provision referred to 'classes of the population'. The section was rephrased in 1959, after the historical experience of the Holocaust, for which the acceptance of hate speech⁶¹⁷ was believed to be a factor. For any hate speech to be punishable as agitation against people (*Volksverhetzung*), a speech needs to be 'qualified as disturbing public peace', either by inciting 'hatred against parts of the population', or calling for 'acts of violence or despotism against them', or by attacking 'the human dignity of others by reviling, maliciously making contemptible or slandering parts of the populace'. Since 1994 the 'denial of the Holocaust' is explicitly referenced under Section 130, having previously been punishable as normal insult⁶¹⁸.

After the unification in 1990, Germany was confronted with a significant increase in racist speech, incidents, pogroms and arsons. At the end of the 1990's, a series of discussions on the development of a strategy for dealing with this rise of racist crimes, resulted in the establishment, in 2001, of a new system for registering right-wing and racist crimes. This system, called 'Criminal Investigation Registration Service - Politically Motivated Criminality' (*Kriminalpolizeilicher Meldedienst – Politisch Motivierte Kriminalität – KPMD - PMK*) deals with right-wing extremism, racial violence, hate crime and hate speech (although the concepts of hate crimes and hate speech are not formally defined in the legislation⁶¹⁹)⁶²⁰. This allowed for clear categorisation of such crimes, as well as more effective registration of the characteristics of perpetrators, crimes and victims⁶²¹.

The new registration system has not, however, resolved the problem of the difficulties experienced by the police in classifying crimes as right-wing crimes⁶²². In practice, the

⁶¹⁵ Parliamentary Publication (*Bundestagsdrucksache*) 16. Election period, Printed matter No. 13035 – BT-Drs. 16/13035.

⁶¹⁶ Glet, Alke, 2009, The German hate crime concept. An account of the classification and registration of bias-motivated offences and the implementation of the Hate Crime Model into Germany's law enforcement system, Internet Journal of Criminology, available at: http://www.internetjournalofcriminology.com/Glet_German_Hate_Crime_Concept_Nov_09.pdf.

⁶¹⁷ Reichel, Peter, 2001, Work of truth and reconciliation in Germany. The confrontation with the Nazi dictatorship in politics and the judiciary (*Vergangenheitsbewältigung in Deutschland. Die Auseinandersetzung mit der NS-Diktatur in Politik und Justiz*). Beck, Munich, p. 144 ff.

⁶¹⁸ *ibid.*

⁶¹⁹ Muigai, Githu, 2010, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance', available at: http://www.ecoi.net/file_upload/470_1277470440_a-hrc-14-43-add-2-en.pdf.

⁶²⁰ Standing Committee of Ministers and Senators of the Interior for the Federal Government and States, Resolution (*Ständige Konferenz der Innenminister und -senatoren des Bundes und der Länder*) (9./10.5.2001).

⁶²¹ RAXEN, 2004, National Report, Data Collection, p.41, available at: www.efms.uni-bamberg.de/pdf/NAR_2004_DE.pdf.

⁶²² Singer, J.P., 2004, Recording of politically motivated crime (*Erfassung der politisch motivierten Kriminalität*), in: *Kriminalistik*, H. 1, S. 32-37 (34).

registration and investigation of crimes as hate crimes or hate speech is hindered by the conflation of such crimes with politically motivated crimes. Often it is difficult to prove the ideological motivation of the perpetrator, or his/her links with the extreme right. Therefore hate speech or hate crimes may not be recorded or investigated as such⁶²³. ECRI, in making this claim, also states that the system creates a significant degree of impunity in Germany⁶²⁴.

Between 1990, the year of unification of East and West Germany, and the end of 2013, 184 people were killed as a result of right-wing and racist violence. Often, the perpetrators belonged to right-wing extremist groups, with their violent acts motivated by racist, homophobic and/or hostile attitudes. In other cases, although the perpetrators had no obvious right-wing background, they were found to have acted on the basis of an underlying right-wing worldview⁶²⁵.

Although no official criminal statistics are yet available from the police for 2015, nonetheless, indications suggest an increase in racist violence, hate crime and hate speech since the Charlie Hebdo attacks in Paris at the beginning of the year⁶²⁶. Currently, homes and camps for asylum seekers and refugees constitute the main targets of hate crime and hate speech⁶²⁷. In response to a parliamentary question raised by the Green party, which was published on 18 August 2015, the Government confirmed an increase of racially-motivated crime and hate speech towards refugees, particularly in the East of Germany, (the former German Democratic Republic)⁶²⁸.

Understanding the context of transposition

Since the adoption of the CFD in 2008, there have been several attempts to amend the German Criminal Code. The transposition of the CFD was eventually completed in 2015 with a legislative amendment made to Section 46 of the Criminal Code.

The discovery of the National Socialist Underground (NSU) in November 2011 increased the urgency of the discussion on hate crime. The NSU was made responsible for the murder of nine immigrants and a German policewoman, as well as bombings and a series of 14 bank robberies between 2000 and 2006⁶²⁹. The German Parliament (*Bundestag*) established the NSU investigation committee, which ended its mandate with a set of recommendations⁶³⁰. On 19 March 2015 the Parliament approved the Law implementing the committee's recommendations. This legislative amendment *inter alia* focused on Section 46 of the Criminal Code, echoing the provision of Section 4 of the CFD⁶³¹. With

⁶²³ *ibid.*

⁶²⁴ ECRI, 2014, Report on Germany (fifth evaluation), CRI(2014)2, available at: http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Europarat_Dokumente/ECRI_Bericht_Deutschland_5_2014_de.pdf.

⁶²⁵ Numbers based on the NGO register of MUT and CURA (Courage against right-wing violence), available at: www.mut-gegen-rechte-gewalt.de, <http://www.opferfonds-cura.de>.

⁶²⁶ Ministry of the Interior, Press release: police crime statistic and politically motivated crime (*Polizeiliche Kriminalstatistik und Politisch Motivierte Kriminalität*), (06/05/2015), available at: <http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2015/05/pks-und-pmk-2014.html>.

⁶²⁷ Parliamentary inquiry from 5 February 2015, available at: http://www.ulla-jelpke.de/wp-content/uploads/2015/02/KA-18_3802_%C3%9Cbergriffe-Fl%C3%BCchtlingsheime-IV-2014.pdf.

⁶²⁸ TAZ, Racist violence almost every second assault in the east (*Rassistische Gewalttaten Fast jeder zweite Übergriff im Osten*), (TAZ 18 August 2015), available at: <http://www.taz.de/!5224856/>.

⁶²⁹ Spiegel, 'Website dedicated to the activities of the national Socialist Underground' (no date as it is a webpage dedicated to the NSU's activities), available at: [http://www.spiegel.de/international/topic/national-socialist-underground/..](http://www.spiegel.de/international/topic/national-socialist-underground/)

⁶³⁰ Federal Parliament of Germany (Bundestag), 2013, Recommendations of the NSU inquiry commission (*Empfehlungen des NSU-Ausschusses*), available at: https://www.bundestag.de/dokumente/textarchiv/2014/49561254_kw08_sp_nsu/215776.

⁶³¹ Federal Ministry for Justice and Consumer Protection, 2015, Law on the implementation of the recommendation of the NSU inquiry commission has been passed by the German Federal Parliament (*Gesetz*

respect to the motive of the perpetrator, the wording 'especially racist, xenophobic or other inhuman motives and aims' was added to the provision, thereby allowing for the imposition of more severe sanctions⁶³². This latest amendment is described in detail under Section 2.2.

Freedom of expression and hate crime/hate speech provisions

Legal discussions on hate speech and hate crimes in Germany take into consideration the needs of law enforcement, on the one hand, and, on the other, the importance of democratic and pluralistic values, such as freedom of expression, as protected in Section 5(1) of the German Basic Law (*Grundgesetz*, GG)⁶³³.

When it comes to hate speech, the wide-ranging freedom of expression, as in the United States, for example, does not exist in Germany, where the protection of human dignity is prioritised over freedom of expression.⁶³⁴

2 Legal framework

2.1 General description of legislation applicable to hate crime and hate speech

German legislation does not explicitly refer to the terms 'hate speech' or 'hate crime'. Instead, it penalises racist/violent crimes. The relevant offence provisions for racist/violent crimes are set out in various laws, including the General Criminal Code (CC) and the Code of Crimes Against International Law (CCAIL). The most relevant provisions penalising hate crime and hate speech are:

- Section 130 CC: Agitation against people⁶³⁵.
- Section 86 CC: Dissemination of Means of Propaganda of Unconstitutional Organisations⁶³⁶.
- Section 86a CC: Use of Symbols of Unconstitutional Organisations⁶³⁷.
- Section 6 CCAIL: Genocide according to International Criminal Code⁶³⁸.
- Section 7 CCAIL: Crime against humanity according to International Criminal Code.
- Various sections of Regulation on the Protection of Young Persons Act (e.g. Section 18 List of Media Harmful to Young Persons)⁶³⁹.
- Act to regulate the dissemination of writings and media contents harmful to young persons⁶⁴⁰ (Section 1 on entering harmful writings on a list).

zur Umsetzung der Empfehlungen des NSU-Untersuchungsausschusses vom Bundestag verabschiedet), available at: http://www.bmfv.de/SharedDocs/Kurzmeldungen/DE/2015/20150319_NSU_Gesetz.html.

⁶³² Federal Parliament of Germany, Draft of a Law implementing the recommendations of the NSU inquiry commission of the Federal Parliament of Germany (Entwurf eines Gesetzes zur Umsetzung von Empfehlungen des NSU-Untersuchungsausschusses des Deutschen Bundestages), Printed Matter 18/3007, 18. Election period, (30.10.2014), available at: <http://dip21.bundestag.de/dip21/btd/18/030/1803007.pdf>.

⁶³³ Kugelmann, Dieter, 2015, Possibilities of an effective prosecution of hate crime, a legal expert opinion (*Möglichkeiten effektiver Strafverfolgung bei Hasskriminalität – Rechtsgutachten*), available at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/aktuelles/20150407_Rechtsgutachten_Hasskriminalitaet.pdf?__blob=publicationFile.

⁶³⁴ Coester, Marc, 2008, The Hate Crime Concept of the USA with a specific focus on Right-wing Extremism in Germany (*Das Konzept der Hate Crimes aus den USA unter besonderer Berücksichtigung des Rechtsextremismus in Deutschland*), Peter Lang Verlag.

⁶³⁵ Ibid.

⁶³⁶ Criminal Code (*Strafgesetzbuch*, StGB), as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322), available at: <http://www.iuscomp.org/gla/statutes/StGB.htm>.

⁶³⁷ Ibid.

⁶³⁸ Code of Crimes Against International Law (*Völkerstrafgesetzbuch*), available at: <http://www.gesetze-im-internet.de/vstgb/index.html>.

⁶³⁹ Protection of Young Persons Act, Published on July 23, 2002 [Federal Law Gazette I, p. 2730, 2003 I, p. 476], available at <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/jschg-englisch,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

⁶⁴⁰ Act to regulate the dissemination of writings and media contents harmful to young persons (*Gesetz über die Verbreitung jugendgefährdender Schriften und Medieninhalte*, GjSM), as promulgated on 12 July 1985 (Federal

Hate speech and hate crimes are viewed in the context of politically motivated crimes, which is important in terms of data collection mechanisms. An FRA report⁶⁴¹ from 2012 explains that current data collection efforts focus on 'the incidence of politically motivated crimes inspired by left-wing considerations (*Politisch motivierte Kriminalität – links*), right-wing considerations (*Politisch motivierte Kriminalität – rechts*), or committed by foreigners (*Politisch motivierte Ausländerkriminalität*). The Ministry of Interior (*Bundesministerium des Innern*) publishes information on these crimes in its annual report on the protection of the Constitution (*Verfassungsschutzbericht*), which also provides detailed breakdowns of extremist crimes (*Extremistische Straftaten*) committed by left- and right-wing sympathisers and by foreigners. The FRA report further explains that 'Germany's official data collection system also distinguishes between violent and non-violent crimes, with both further categorised according to the nature of the crime committed, such as attempted murder, arson or bodily harm. Violent crimes with an extremist background (*Gewalttaten mit extremistischem Hintergrund*) are further broken down into: xenophobic violence, anti-Semitic violence, violence against (presumed) left-wing youth (this category covers *inter alia* punks), and violence against other political opponents. The breakdowns also detail the provinces (*Länder*) where extremist violent crimes are committed, although this level of detail is not provided for non-violent crimes. Data on other forms of hate crime, such as those motivated by a person's homelessness, sexual orientation or disability, were published as a stand-alone report in April 2009, in response to a parliamentary question about German police recording of crimes motivated by hate in the period 2001–2008 (*Polizeiliche Erfassung hassmotivierter Delikte seit 2001*)⁶⁴².

During sentencing, judges may take into consideration certain circumstances set out in legislation. Section 46 of the German Criminal Code⁶⁴³ (Principles for Determining Punishment) states that 'the motives and aims of the perpetrator, the state of mind reflected in the act and the wilfulness involved in its commission, can be taken into consideration when determining the punishment'⁶⁴⁴. Until recently Section 46 had not provided explicit reference to hate or bias motives, however, a recent legislative amendment has added the following wording to the provision, 'especially racist, xenophobic and other inhuman motives and aims'. These motives should, therefore, be

Law Gazette I, p. 1502), last amended by Section 6 of the Information and Communication Services Act of 22.7.1997 (Federal Law Gazette I, p. 1870), available at: <http://www.iuscomp.org/gla/statutes/GjSM.htm>.

⁶⁴¹ European Union Agency for Fundamental Rights (FRA), 2012, 'Making hate crime visible in the European Union – acknowledging victims' rights', p.39, available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

⁶⁴² FRA, 2012, 'Making hate crime visible in the European Union: acknowledging victims' rights', p.39 available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

⁶⁴³ Section 46 German Criminal Code: Principles of sentencing⁶⁴³.

(1) The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account.

(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to:

- the motives and aims of the offender;
- the attitude reflected in the offence and the degree of force of will involved in its commission;
- the degree of the violation of the offender's duties;
- the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them;
- the offender's prior history, his personal and financial circumstances;
- his conduct after the offence, particularly his efforts to make restitution for the harm caused, as well as the offender's efforts at reconciliation with the victim.

(3) Circumstances which are already statutory elements of the offence must not be considered.

⁶⁴⁴ German Criminal Code (Strafgesetzbuch, StGB), available at: <http://www.iuscomp.org/gla/statutes/StGB.htm#46>.

taken into consideration by the courts while sentencing⁶⁴⁵. The amendment extends the list of protected characteristics and increases the level of penalty to be imposed. Critics claim that the language used in the amendment to describe 'xenophobia' is outdated⁶⁴⁶. In addition, the German Bar Association (DAV) claimed that the amendment introduces only symbolic changes, and does not address the real issue of insufficient investigation of cases. The DAV claims that changing the attitude of the investigative authorities is necessary, in addition to legislative changes⁶⁴⁷.

One stakeholder highlighted Germany's lack of appropriate laws against violent hate crimes⁶⁴⁸. Bodily harm, regardless of the hate motive, is considered as a bodily harm and is punished with up to five years of imprisonment, or a fine. Although, in accordance with Section 46 of the Criminal Code, judges can take bias motivation into consideration while sentencing and impose a higher punishment against perpetrators, the maximum penalty cannot, in any case, exceed this five-year limit. This situation remains unchanged by the amendment of Section 46 of the Criminal Code. By contrast, hate crime legislation in the UK⁶⁴⁹ or in Alabama in the US⁶⁵⁰, for example, crimes (violence, arson, insult, etc.) committed with prejudice or bias motivation, are more severely punished. The stakeholder noted the suggestion by the Organization for Security and Co-operation in Europe⁶⁵¹, that specific hate crime legislation might enable judges to impose higher sentences in cases where a crime is committed by bias motivation, and might also have the effect of providing a symbolic value to these crimes.

As mentioned in Section 1, a person committing hate speech can also be made liable under administrative or civil law, or can be subject to disciplinary proceedings. Detailed rules for these liabilities are provided under Sections 2.3 and 2.4.

2.2 Transposition of Council Framework Decision 2008/913/JHA

Several amendments were made to the Criminal Code in Germany since 2008, in order to ensure compliance with the CFD.

Section 1(1)(a)-(c) of the CFD was transposed into German legislation in 2011, by changing the wording of Section 130 of the Criminal Code regulating hate speech (*Volksverhetzung*). The original version of Section 130(1), required hate speech to be directed against 'parts of the population'. Since 2011, however, the CFD also requires the application of the offence provision to individuals⁶⁵². A subsequent amendment to Section

⁶⁴⁵ Printed matter 17/14754, 17th electoral term, (16/09/2013), available at: <http://dip21.bundestag.de/dip21/btd/17/147/1714754.pdf>.

⁶⁴⁶ Lobby e.V., 2014, Changes in legislation is only legislative cosmetics: No improvement in the situation of those suffering from right-wing violence (*Gesetzesänderungen nur gesetzgeberische Kosmetik: Keine Verbesserung der Situation von Betroffenen rechter Gewalt*), Press release, available at: <http://www.lobbi-mv.de/nachrichten/gesetzesaenderungen-nur-gesetzgeberische-kosmetik-keine-verbesserung-der-situation-von-betroffenen-rechter-gewalt/>.

⁶⁴⁷ Beck aktuell, 2015, DAV criticises the plan law on Hate Crime as Symbolic legislation (*DAV kritisiert geplantes Gesetz gegen Hasskriminalität als Symbolgesetzgebung*), legal online portal, available at: <http://beck-aktuell.beck.de/news/dav-kritisiert-geplantes-gesetz-gegen-hasskriminalit-t-als-symbolgesetzgebung>.

⁶⁴⁸ Information collected through consultation with national stakeholder (academic; University of Economics and Law Berlin, 3 July 2015).

⁶⁴⁹ National Archives, 2000, Powers of Criminal Courts (Sentencing) Act 2000, available at: <http://www.legislation.gov.uk/ukpga/2000/6/section/153>.

⁶⁵⁰ FindLaw, 1994, Crimes motivated by victim's race, colour, religion, national origin, ethnicity or physical or mental disability, ALA CODE § 13A-5-13: Alabama Code, Section 13A-5-13, available at: <http://codes.lp.findlaw.com/alcode/13A/5/1/13A-5-13>.

⁶⁵¹ OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2009, Hate Crime Laws, A Practical Guide, available at: <http://www.osce.org/odihr/36426?download=true>.

⁶⁵² BUG e.V., 2011, The amendment of Section 130 of the Criminal Code due to the EU Framework Decision (*Die Novellierung von § 130 StGB aufgrund des EU-Rahmenbeschlusses*), available at: [http://www.bug-](http://www.bug-185)

130 of the Criminal Code took place on 27 January 2015, as a result of Germany's obligation to transpose the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA⁶⁵³.

Since 2010 the question has been debated as to whether or not racist and other inhuman motivations should be included in Section 46 of the Criminal Code, in order to increase the level of the penalty. An attempt by the Federal Council of the German States (*Bundesrat*) to amend Section 46 to allow courts to take into consideration the motivation of perpetrators in determining the penalties and also amending the level of penalties to be imposed⁶⁵⁴, was rejected by the German Parliament. They took the view that such an amendment was unnecessary because the relevant judgments and the legal practice already took hate motivation into account⁶⁵⁵. On 1 August 2015, Section 46 was finally amended, and now makes reference to 'racist, xenophobic and other inhuman motives and aims', thereby transposing Article 4 of the CFD.

[ev.org/themen/schwerpunkte/dossiers/hasskriminalitaet/gesetzgebung-gegen-hasskriminalitaet/die-novellierung-von-130-stgb-aufgrund-des-eu-rahmenbeschlusses.html](http://www.bug-ev.org/themen/schwerpunkte/dossiers/hasskriminalitaet/gesetzgebung-gegen-hasskriminalitaet/die-novellierung-von-130-stgb-aufgrund-des-eu-rahmenbeschlusses.html).

⁶⁵³ Federal Law Gazette, Fortynineth law amending the Criminal Code implementation of European standards for Criminal Code of Sexual Offenses (*Bundesgesetzblatt Teil I 2015Nr. 2 vom 26.01.2015, Neunundvierzigstes Gesetz zur Änderung des Strafgesetzbuches Umsetzung europäischer Vorgaben zum Sexualstrafrecht*), Part I 2015 No. 2, (26.01.2015), available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//%5b@attr_id=%2527bgbl115s0010.pdf%2527%5d#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl115s0010.pdf%27%5D_143783480_9150.

⁶⁵⁴ Blech, Norbert, 2012, Federal Parliament: No Laws against Hate Crimes (*Bundestag: Keine Gesetze gegen Hassverbrechen*), Queer.de, available at: http://www.queer.de/detail.php?article_id=17658.

⁶⁵⁵ BUG e.V., 2014, Dossier "Hate Crime and its legal frame", (*Dossier "Hasskriminalität und ihre rechtlichen Rahmenbedingungen"*), available at: <http://www.bug-ev.org/themen/schwerpunkte/dossiers/hasskriminalitaet/gesetzgebung-gegen-hasskriminalitaet/aenderung-46-stgb/einschaetzungen-zur-gesetzesanderung-des-46-stgb.html>.

Section 130 German Criminal Code: Incitement to hatred ⁶⁵⁶	
Transposes Art. 1(1)(a) of CFD	Yes, except colour and descent
Transposes Art. 1(1)(b) of CFD	Yes
Transposes Art. 1(1)(c) of CFD	No, but according to German case law the provision on Holocaust denial applies ⁶⁵⁷
Transposes Art. 1(1)(d) of CFD	Yes, but restricted to crimes of National-socialism
Transposes Art. 4 of CFD	No
Legal reference to provision	Section 130 German Criminal Code: Incitement to hatred ⁶⁵⁸
Definition of offence	<ul style="list-style-type: none"> • <u>Transposition of Article 1(1)(a) of the CFD:</u> (1) Whosoever, in a manner capable of disturbing the public peace, <ol style="list-style-type: none"> 1. incites to hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years. • <u>Transposition of Article 1(1)(b) of the CFD:</u> (2) Whosoever <ol style="list-style-type: none"> 1. with respect to written materials (section 11(3)) which incite to hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them, <ol style="list-style-type: none"> (a) disseminates such written materials; (b) publicly displays, posts, presents, or otherwise makes them accessible; (c) offers, supplies or makes them accessible to a person under 18 years; or (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of points (a) to (c) or facilitate such use by another; or 2. disseminates a presentation of the content indicated in subsection (1) above by radio, media services, or telecommunication services shall be liable to imprisonment not exceeding three years, or a fine.

⁶⁵⁶ Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander. The translation includes the amendment(s) to the Act by Section 6(18) of the Law of 10.10.2013 (Federal Law Gazette I p 3799), available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1241.

⁶⁵⁷ Report from the commission to the European parliament and the council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law{SWD(2014) 27 final}, (2014), available at http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

⁶⁵⁸ Ibid.

	<ul style="list-style-type: none"> • <u>Transposition of Article 1(1)(c) of the CFD:</u> There was no transposition of Section 1(1)(c) of the CFD with this provision, but German case law on Holocaust denial and its trivialisation, also applies to conduct covered by this Article⁶⁵⁹. • <u>Transposition of Article 1(1)(d) of the CFD:</u> (3) Whosoever, publicly or in a meeting, approves, denies or downplays an act committed under the rule of National Socialism of the kind indicated in Section 6(1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years, or a fine. (4) Whosoever, publicly or in a meeting, disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years, or a fine. (5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above. (6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply mutatis mutandis.
Penalties foreseen	<ul style="list-style-type: none"> • Transposition of Art. 1(1)(a) of CFD⁶⁶⁰ Imprisonment from three months to five years. • Transposition of Art. 1(1)(b) of CFD Imprisonment not exceeding three years, or a fine. • Transposition of Art. 1(1)(d) of CFD Imprisonment not exceeding five years, or a fine.
Protected characteristic(s)	<ul style="list-style-type: none"> • Transposition of Art. 1(1)(a) of CFD⁶⁶¹ National, racial, religious group or a group defined by their ethnic origins, individuals because of their belonging to one of the aforementioned groups. • Transposition of Art. 1(1)(b) of CFD Aforementioned group, segments of the population or individuals, because of their belonging to one of the aforementioned groups or segments of the population. • Transposition of Art. 1(1)(d) of CFD No reference to protected characteristics is provided in the transposing provision of Art.1(1)(d) of CFD.
Online crime	<ul style="list-style-type: none"> • Transposition of Art. 1(1)(a) of CFD No specific material is mentioned in section 130(1), therefore the crime could also be committed both through online materials. • Transposition of Art. 1(1)(b) of CFD Section 130(2) refers to "written material", the definition of which is set out in Section 11(3) Criminal Code, which includes 'audiovisual

⁶⁵⁹ Ibid.

⁶⁶⁰ Dejure.org, German Criminal Code, <https://dejure.org/gesetze/StGB/130.html>.

⁶⁶¹ Ibid.

	<p>media, data storage media, illustrations and other depictions” and “shall be equivalent to written material in the provisions which refer to this subsection’. Section 130(6) refers to Section 86(3) of the Criminal Code, which defines exceptions for the use of propaganda material. It ‘shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes’.</p> <ul style="list-style-type: none"> • Transposition of Art. 1(1)(d) of CFD <p>The reference to the definition of ‘written material’ as set out in in Section 11(3) Criminal Code, means that the crime could be committed through ‘audiovisual media, data storage media, illustrations and other depictions’. Section 130(6) refers to Section 86(3) of the Criminal Code, which defines exceptions for the use of propaganda material. It ‘shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes’.</p>
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Section 46 Criminal Code	
Transposes Art. 1(1)(a) of CFD	No
Transposes Art. 1(1)(b) of CFD	No
Transposes Art. 1(1)(c) of CFD	No
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	Yes
Legal reference to provision	Section 46 Criminal Code
Definition of offence	<p>First option - Considering racist and xenophobic motivation as aggravating circumstance: This has not been transposed into German legislation to date.</p> <p>Second option - Ensure that courts take such motivations into account in the determination of penalties: The second option was transposed into German legislation by mean of the 1 August 2015 amendment to Section 46 of the Criminal Code. The amendment added the following wording, ‘especially racist, xenophobic and other inhuman motives and aims’⁶⁶².</p> <p>Section 46 (2) In its determination the court shall counterbalance the circumstances which speak for and against the perpetrator. In doing so consideration shall be given in particular to: the motives and aims of the perpetrator especially racist, xenophobic and other inhuman motives and aims. [...] (3) Circumstances which are already statutory elements of the offense may not be considered.</p>
Penalties foreseen	The transposing provision of Article 4 does not specify the penalty to be imposed.

⁶⁶² Dejure.org, German Criminal Code, available at <https://dejure.org/gesetze/StGB/46.html>, amended version from 1 August 2015 implementing the recommendations of the NSU enquiry commission of 12 June 2015. English version of the German Criminal Code, available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0229 has not been updated for those changes yet (14 August 2015).

	Article 4 of the CFD does not contain reference to penalty.
Protected characteristic(s)	Article 4 of the CFD does not contain reference to protected characteristics.
Online crime	This is not relevant in the context of transposition of Article 4 of the CFD.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

The Audiovisual Media Services Directive (AMSD)⁶⁶³ has been transposed into German legislation by means of the 13th Amendment to the Inter-State Broadcasting Agreement (*Rundfunkänderungsstaatsvertrag*⁶⁶⁴), in force since 1st of April 2010. The Interstate Broadcasting Agreement is the nationwide law for radio and television licensing and broadcasting in the Federal Republic of Germany. While not a federal law, these rules were adopted as a treaty passed by all states (*Länder*), as radio and television broadcasting are considered cultural matters, which fall under the legislative competences of states.

Together with the amendment to the Inter-State Broadcasting Agreement, the Interstate Agreement on the protection of human dignity and the protection of minors in broadcasting and telemedia (*Jugendmedienschutz-Staatsvertrag*, JMStV) was also amended in order to transpose the AMSD⁶⁶⁵. The JMStV is also a treaty passed by all states.

Section 130(2) of the Criminal Code also reflects the behaviours set out in Article 6 of the AMSD. The 27 January 2015 amendment saw the distribution of the content defined in Section 130(2)(1a-c) via radio broadcasting and telemedia, added to Section 130(2)(2) of the Criminal Code⁶⁶⁶. The protected groups are defined by Section 130 (2)(1) as 'national, racial, religious group or a group defined by their ethnic origins'. Sex is not referenced as a protected characteristic under the provision. Section 130(2) cross-references the definition of the term 'written material', as set out in Section 11(3) of the Criminal Code, as including 'audiovisual media, data storage media, illustrations and other depictions', thereby ensuring that the crime is also punishable when committed through online materials.

⁶⁶³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

⁶⁶⁴ Commission for Youth Media Protection (KJM), Interstate Treaty for Broadcasting and Telemedia (*Rundfunkstaatsvertrag - RStV*) in the version of the 13th Amendment to the Inter-State Broadcasting Agreement (*Rundfunkänderungsstaatsvertrag 13. RÄStV*) (30.10. / 04.11. / 20.11.2009), [available at: http://www.telemedicus.info/uploads/Dokumente/RStV_13-RAeStV_hervorgehoben_Lesefassung.pdf](http://www.telemedicus.info/uploads/Dokumente/RStV_13-RAeStV_hervorgehoben_Lesefassung.pdf).

⁶⁶⁵ Interstate Treaty on the protection of human dignity and the protection of minors in broadcasting and in telemedia (Interstate Treaty on the protection of minors – JMStV), (2010), [available at: http://www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_english.pdf](http://www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_english.pdf).

⁶⁶⁶ Lexetius.com, 2015, Criminal Code for the German Reich from May 15, 1871. Special Section: Section VII. Offenses against public order. Section 130 (*Strafgesetzbuch für das Deutsche Reich vom 15. Mai 1871. Besonderer Teil: Siebenter Abschnitt. Straftaten gegen die öffentliche Ordnung. Paragraf 130. Volksverhetzung*), available at: <http://lexetius.com/StGB/130,2>.

The Electronic Commerce Directive (ECD)⁶⁶⁷ was transposed into German legislation by the Telemedia Act (TMA) of 26 February 2007⁶⁶⁸. The term 'telemedia' covers the Internet, online shops, online auction houses, search engines, webmail services, information services (e.g. weather, traffic reports), podcasts, chat rooms, dating communities and web portals. Even private websites and blogs are considered as telemedia⁶⁶⁹. They are distinguished from broadcasting. When a telemedia site interferes with broadcasting, a recognition of such by the broadcasting law is necessary (Sections 1, para. 1, 20 para. 2 Interstate Treaty for Broadcasting and Telemedia (RStV))⁶⁷⁰. State media authorities (*Landesmedienanstalten*) are responsible for the surveillance of the telemedia in this respect.

Legal expert Thomas Hoeren, in a legal opinion on the liability of online service providers, describes this liability of providers as uniformly regulated by the Telemedia Act (TMG): 'The TMG contains rules for criminal and civil law, which are to be considered as a filter prior to the application of specific rules on liability'⁶⁷¹.

Legal definition of provision transposing Article 6 of AMSD	
13th Amendment to the Inter-State Broadcasting Treaty Section 7 Advertising principles, mandatory labelling	Section 7 Advertising principles, mandatory labelling: (1) Advertising and teleshopping shall not 1. violate human dignity, 2. include or promote any discrimination based on gender, race or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.
Section 130(2) of the Criminal Code	(2) Whosoever, 1. with respect to written materials (Section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them, (a) disseminates such written materials; (b) publicly displays, posts, presents, or otherwise makes them accessible; (c) offers, supplies or makes them accessible to a person under 18 years; or (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of points (a) to (c) or facilitate such use by another; or 2. disseminates a presentation of the content indicated in subsection 1 above by radio, media services, or telecommunication services shall

⁶⁶⁷ 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'), OJ L 178, 17.7.2000, p. 1-16., available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031>.

⁶⁶⁸ Telemedia Act (TMA), Telemedia Act of 26 February 2007 (Federal Gazette I, p. 179) available at: http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TMA_.pdf.

⁶⁶⁹ Ibid.

⁶⁷⁰ Decision of the Directors' Conference of the State Media Authorities of 27 June of 2007, available at: http://www.alm.de/fileadmin/forschungsprojekte/GSPWM/Beschluss_IP-TV.pdf.

⁶⁷¹ Hoeren, Thomas: Liability for Online Services in Germany, German Law Journal (Vol. 10 No. 05), available at: https://www.germanlawjournal.com/pdfs/Vol10No05/PDF_Vol_10_No_05_561-584_Developments_Hoeren.pdf.

	be liable to imprisonment not exceeding three years, or a fine. Pursuant to Section 11(3), audiovisual media, data storage media, illustrations and other depictions are equivalent to written material in the provisions which refer to this subsection.
Interstate Treaty on the protection of minors – JMStV Section 4 Illegal Content	Section 4 Illegal Content: (1) Without prejudice to any liability under the German Criminal Code, content is illegal if it 3. incites to hatred against parts of the population or against a national, racial, religious or ethnic group, encourages violent or arbitrary action against such a group, or violates the human dignity of a person or group by insulting, maliciously degrading or defaming parts of the population or any of the aforementioned groups, 4. denies or plays down acts committed under the National Socialist regime as specified in Section 6(1) and Section 7(1) of the International Criminal Code in a manner suited to disturb public peace.
Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
Telemedia Act (TMA), Section 3, (5) 1 of 26 February 2007 (Federal Gazette I, p. 179)⁶⁷²	Section 3 Country-of-origin principle: (5) The offer and the provision of telemedia by a service provider who is established in another state, within the scope of Directive 2000/31/EC shall, in derogation of subsection 2, be subject to the restrictions of domestic law, to the extent that this serves to protect 1. public security and order, especially with regard to the prevention, investigation, detection, prosecution and punishment of crimes and administrative offences, including protection of young people and the fight against incitement to hatred on grounds of race, sex, religion or nationality, and of violations of human dignity concerning individual persons, and the safeguarding of national security and defence.

2.4 Responsibility for publishing hate speech

Introduction

In Germany, the liability of publishers is regulated both at the federal and state level, and in the form of various pieces of legislation. Some types of legislation, such as criminal law, are adopted at the federal level, while other areas of law might fall under the competence of states, or under the competence of both state and federal bodies.

Broadcasting, for example, generally falls under the competence of states. However, some rules, and in particular those deriving from EU law, are also regulated at the federal level, in the form of treaties. This creates a system where central rules, set out in treaties are complemented by state-specific rules. This makes the understanding of the applicable liability schemes difficult and renders any assessment of the effectiveness of rules regulating publishers' liability, complicated.

Publishers' responsibility is regulated by criminal law, administrative law, civil law and self-regulatory rules. These are described in detail below.

⁶⁷² Telemedia Act (TMA), Telemedia Act of 26 February 2007 (Federal Gazette I, p. 179) available at: http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TMA_.pdf.

1. Administrative liability:

Administrative liability arises in connection with the provision of audiovisual media services. The applicable provisions largely overlap with those transposing the AMSD and the ECD (see Section 2.3).

This area of law is regulated both at federal level and the level of states. Legislation adopted at the level of states is complemented by laws adopted at the national level which, typically derive from EU law, such as the AMSD. National level rules are set out in the treaties, including the Interstate Broadcasting Treaty, the 13th Amendment to the Inter-State Broadcasting Agreement and the Inter-State Agreement on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia.

Ensuring compliance with media laws (both at federal and state levels) fall under the remit of the German media authorities (*die Medienanstalten*)⁶⁷³.

The structure of the media authorities depends on the type of media concerned. Germany has a so-called 'dual system' of broadcasting, which includes both public and commercial broadcasters.

- Public broadcasting: There are two main public-service television broadcasters in Germany, namely ZDF ("the Second" German Television Channel-*Zweites Deutsches Fernsehen*) and ARD (Association of Public Broadcasting Corporations in the Federal Republic of Germany - *Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands*). The former was founded by all federal states of Germany⁶⁷⁴, whereas the latter is a joint corporation of Germany's regional public broadcasters. ARD has a nation-wide channel as well nine regional channels. Each regional broadcaster constitutes an independent organisation⁶⁷⁵. In Germany, each broadcasting corporation (including at the regional level) must have an independent supervisory body. For the ARD, these bodies are called broadcasting councils (*Rundfunkrat*), whereas for the supervisory body for the ZDF is called the television council (*Fernsehrat*). These bodies, which consist of representatives of all socially important groups, *inter alia* monitor the compliance of corporations with the legislative requirements⁶⁷⁶.
- Commercial broadcasting: Currently, 14 state-level media authorities, active in all 16 German states, are responsible for issuing licences and for ensuring the compliance of private broadcasters with the applicable rules. Many issues relating to broadcasting require rules which are applicable across Germany as a whole. To this end, the 14 media authorities cooperate through decision-making councils, conferences and commissions⁶⁷⁷. This mechanism allows for coordination and alignment of compliance matters at the national level. National level organisations include the Commission on Licensing and Supervision (ZAK), the Conference of Directors of the Media Authorities (DLM), the Conference of Chairpersons of the Decision-Taking Councils (GVK), the Commission for the Protection of Minors in

⁶⁷³ The media authorities, Legal Basis, available at: <http://www.die-medienanstalten.de/en/legal-basis.html>.

⁶⁷⁴ Kleinsteuber, Hans J. and Barbara Thomass, Media Landscapes Germany, in: The European Journalism Center, available at: http://ejc.net/media_landscapes/germany.

⁶⁷⁵ ARD, 'About us', available at: http://www.dra.de/publikationen/buecher/pdf/ard-infob_2014-engl.pdf.

⁶⁷⁶ Schulz W., Held T., Dreyer S. in cooperation with Wind T., 2008, 'Regulation of Broadcasting and Internet Services in Germany – a brief overview', available at: https://www.hans-bredow-institut.de/webfm_send/124.

⁶⁷⁷ The media authorities, Profile, available at: <http://www.die-medienanstalten.de/en/profile.html>.

the Media (KJM) and the Commission on Concentration in the Media (KEK)⁶⁷⁸.

2. Criminal liability:

Authors, publishers and distributors of published materials containing hate speech can be held liable under the following sections of the Criminal Code:

- Section 46(2) setting out circumstances to be considered by courts while sentencing;
- Section 130(2), regulating hate speech under the meaning of Article 1(1)(a) and (b) of the CFD;
- Section 185 regulating insults, to be sanctioned with imprisonment not exceeding two years, or a fine;
- Section 186 regulating defamation, to be sanctioned with imprisonment not exceeding five years, or a fine.
- Section 240 regulating the use of threats or force to cause a person to do, suffer or omit an act, to be sanctioned with imprisonment not exceeding three years, or a fine.

The police and the Prosecution Service are responsible for enforcing the provisions set out in the Criminal Code, and courts subsequently adjudicate on such cases.

3. Civil liability:

Under German law, general civil liability rules apply to those publishing hate speech. These general rules, which do not contain reference to the liability holder, are:

Section 823 Para. 1 and 2, German Civil Code: Liability for damages: (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. [...]

Section 249, German Civil Code: Nature and extent of damages: (1) A person who is liable for damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred. (2) Where damages are payable for injuring a person or damaging a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence one only includes value-added tax if, and to the extent that, it is actually incurred⁶⁷⁹.

Civil courts may hear claims for compensation of damages.

⁶⁷⁸ The media authorities, Organisation, available at: <http://www.die-medienanstalten.de/en/profile/organisation.html>.

⁶⁷⁹ German Civil Code, available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

4. Constitutional liability:

There is no constitutional liability foreseen for the publishers of hate speech.

5. Disciplinary liability (self-regulation)

The German Press Council (*Deutscher Presserat*) is a self-regulating body, responsible for dealing with complaints against the media⁶⁸⁰. The complaint system is based on the voluntary commitment of the German media to the Press Code⁶⁸¹. Section 12 of the German Press Code states that "No one shall be discriminated against on grounds of gender, disability or his belonging to an ethnic, religious, social or national group"⁶⁸². Section 12 is relevant in the context of discrimination, but there is no specific mention of hate speech or hate crime in the German Press Code itself.

The German Press Council (*Deutscher Presserat*) is responsible for handling complaints against the press, including online journalism⁶⁸³. Authors, publishers and distributors of published materials can be held liable, if they have voluntarily committed to respect the (German) Press Code⁶⁸⁴. Anybody can file a complaint, which is then processed by the Complaints Commission (*Beschwerdeausschuss*). Final decisions on the complaint are taken in the plenary session of the German Press Council. If a complaint is justified, (1) a warning, (2) a disapproval, or (3) a reprimand can be issued. The Press Council can decide not to apply a sanction if the person or body liable for the behaviour has already taken steps to repair to the offence (e.g. by an editorial correction).

3 Effectiveness of the legal framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate crime/hate speech vs. freedom of expression	
Section 130(1) and (2) Criminal Code	<p>In a German legal database, 7,526 court decisions on Section 5 of the German Basic Law (GG), regulating the freedom of expression, are available⁶⁸⁵. 507 court decisions are related to Section 130 of the Criminal Code transposing Article 1(1) of the CFD. 128 of these decisions intersect with both provisions. 40 are higher court decisions, some of which are described below. The cases referred to here are those considered important by human rights associations in Germany.</p> <p>In an Amicus-Curiae letter attached to the complaint of the Turkish Association Berlin-Brandenburg (TBB) to the UN Committee on the Elimination of Racial Discrimination CERD⁶⁸⁶ - on the question of whether Thilo Sarrazin's thesis on Muslim</p>

⁶⁸⁰ German Press Council, available at: <http://www.presserat.de/>.

⁶⁸¹ German Press Council, German Press Code, available at: <http://www.presserat.de/pressekodex/pressekodex/>.

⁶⁸² German Press Council: Press Code, No. 10 & 12, available at: http://www.presserat.de/pressekodex/pressekodex/#panel-ziffer_12_diskriminierungen.

⁶⁸³ German Press Council, available at: <http://www.presserat.de/>.

⁶⁸⁴ German Press Council, *German Press Code*, available at: <http://www.presserat.de/pressekodex/pressekodex/>.

⁶⁸⁵ Basic Law for the Federal Republic of Germany, available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

⁶⁸⁶ Committee on the Elimination of Racial Discrimination, CERD, CERD/C/82/D/48/2010, Communication No. 48/2010, Opinion adopted by the Committee (11 February to 8 March 2013), available at <http://www2.ohchr.org/English/bodies/cerd/docs/CERD-C-82-D-48-2010-English.pdf>.

immigrants in Germany constituted a hate speech - the German Institute for Human Rights (DIMR) argued that the Federal Constitutional Court had repeatedly stressed that in the application of Section 130 of the Criminal Code, the balance between freedom of expression and the protection of dignity must be considered on a case-by-case basis. The Federal Constitutional Court also noted that freedom of expression must be limited in the event of an attack on human dignity. DIMR refers to two relevant decisions of the Federal Constitutional Court, which are described below.

- Decision of 12 November 2002, 1 BvR 232/97, is related to **Section 130(1) Criminal Code**⁶⁸⁷.

The complainant wrote a leaflet in 1995 with the title, "Do guests behave like that?". In the pamphlet he described details of a violent confrontation between a German and a Turkish family in an apartment building in Krefeld. The following terms were used in the headings of the leaflet, "Terror of Turks to Germans", "Ethnic cleansing of Germans in Germany?", "Raiding party comes with taxis" and "Are the police not allowed to help?". In the last section of the leaflet, he called on readers to form an opinion on what was happening and to report them to him.

On 26 August 1996, the District Court sentenced him to a total fine of 90 daily rates of DM 80 for incitement of hatred, in accordance with Section 130(1) of the Criminal Code. The court argued that the complainant was not unduly restricted in his freedom of expression, as it was limited only because this fundamental right conflicted with the necessity of defending public peace.

The Court decision was revised by the Federal Constitutional Court, which argued that the principal issues on the relationship between freedom of expression and their limitation for the benefit of colliding legal interests, have been clarified in the jurisprudence of the Federal Constitutional Court (see BVerfGE 61, 1 <7 ff.>; 90, 241 <246 ff.>; 93, 266 <288 ff.>). The statements concern the fundamental right to freedom of expression (Art. 5 para. 1 GG). This fundamental right guarantees everyone the right to express his/her opinion freely. The offensive nature of a statement does not necessarily mean that a person abuses his/her right to freedom of expression (see BVerfGE 61, 1 <7 f.>; 93, 266 <289>; stRspr). Statements of facts which, strictly speaking, do not form an expression of opinion, enjoy the protection of fundamental rights insofar as they are a prerequisite for the formation of opinions.

However, the fundamental right to freedom of expression does not apply unconditionally. It finds its limits in general laws, including in Section 130 Criminal Code. The interpretation and application of the criminal law is the duty of criminal courts, who must, if a law restricts freedom of expression, meet the constitutional requirements of Section 5 para 1 GG, so that the value-setting significance of the fundamental right is stressed (cf. . BVerfGE 7, 198 <208 f.>; stRspr)⁶⁸⁸.

- Decision of 4 February 2010 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04 is related to **Section 130(2) Criminal Code**⁶⁸⁹.

The complainants were members of the association "Augsburg Alliance - National Opposition". From 3 June to 17 June 2002 the association conducted a campaign, "Action for the repatriation of foreigners, for a life worthy German Augsburg. - Augsburg alliance - National Opposition", including the public display of large posters on 5 June 2002 in Augsburg. ". The campaign had been previously announced in the May issue of the magazine "new Swabia", along with a list of ten reasons against immigration and for repatriation.

On 20 January 2003, the District Court sentenced the perpetrators for incitement to hatred (Section 130(2) Criminal Code)

⁶⁸⁷ Dejurist.org database, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=1%20BvR%20232%2F97&Suche=1%20BvR%20232%2F97>.

⁶⁸⁸ Federal Constitutional Court, Decision 1 BvR 232/97 (12 November 2002), available at: <http://technolex.de/bverfg-volksverhetzung-durch-diskreditierende-auserungen-gegenuber-turken/>.

⁶⁸⁹ Dejurist.org database, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=1%20BvR%20370/04>.

	<p>and fined each of the three perpetrators 70 daily rates of EUR 25EUR 30 and EUR 60 respectively. The Court argued that they had attacked the human dignity of others by publicly posting the writings and by maliciously insulting parts of the population, namely the foreigners living there.</p> <p>The court decision was appealed before the Federal Constitutional Court, which stated in its decision that opinions enjoy the protection of freedom of expression, without depending on their merits, value or accuracy. This protection is not lost if they are made sharp and excessive (see BVerfGE 61, 1, 7;. 90, 241, 247). Even right-wing opinions are protected - within the limits of Section 5, paragraph 2 GG -, such as the "Campaign repatriation of foreigners - For a life worth German Augsburg".</p> <p>In the interpretation and application of penal provisions, such as Section 130(2) Criminal Code, the courts have to take into account the limited nature of the fundamental right of freedom of expression (see. BVerfGE 7, 198, 208 f. ; 94, 1, 8; stRspr). This requires, firstly, that the objective meaning of an expression of opinion has been correctly recognised. The interpretation of the objective meaning of an expression/opinion is to be determined by taking into account the circumstances of the case from the perspective of an unbiased and circumspect audience (see BVerfGE 93, 266, 295; 114, 339, 348). Here, the courts may not attach any importance to the expressed opinion, which they objectively do not have. Where ambiguous interpretations exist, they cannot accept the interpretation leading to condemnation before they have ruled out other possible interpretations with viable reasons.</p> <p>The freedom of expression should always be considered as limitable, where such expression touches upon the human dignity of another. Human dignity as the source of all fundamental rights cannot be balanced out with a single fundamental right (BVerfGE 93, 266, 293; 107, 275, 284). All fundamental rights are concretisations of human dignity, therefore it always requires careful reasoning if it shall be assumed that the use of a fundamental right affects the inviolable human dignity (see BVerfGE 93, 266, 293;. 107, 275, 284)⁶⁹⁰.</p>
<p>Section 130(3)-(6) of the Criminal Code.</p>	<p>The decision of 4 November 2009, 1 BvR 2150/08, of the Constitutional Court (BVerfG) is related to Section 130(4) Criminal Code⁶⁹¹.</p> <p>The complainant, Jürgen Rieger, a well-known right-wing activist and lawyer, registered from 2001 to 2010 to organise each year an open-air rally in "Memory of Rudolf Hess", the war criminal and successor of Adolf Hitler. In 2001, the march was banned in the first instance, but approved on appeal by the Bavarian Administrative Court. The judges saw no threat to public order and security by a commemorative march. In 2001, about 1,000 right-wing extremists marched in Wunsiedel, accompanied by about 200 protesters. In 2002, about 3,000 people marched, in 2003 about 4,000 people came to the rally, which reached its heights in 2004, with nearly 5,000 far-right demonstrators from Germany and Europe. In March 2005 the German Parliament adopted an amendment to Article 130 of the Criminal Code⁶⁹² and paragraph 4 was added to Section 130.</p> <p>The Constitutional Court had to decide if banning the march was in conflict with Section 5 of the German Constitution (freedom of expression). In 1991 and 1994 the Constitutional Court decided that a lie, especially so-called 'Holocaust denial', is not covered by freedom of expression, because conscious lying about established historical facts does not fall under Section 5⁶⁹³.</p> <p>The Constitutional Court noted, however, that freedom of expression could normally only be limited by general laws, and not by special ones, such as that containing Section 130(4). The court nevertheless allowed the intervening law, by constructing an immediate constitutional element of crime relating to Section 5(2) GG. Only intervention laws with the purpose of</p>

⁶⁹⁰ Federal Constitutional Court, Decision BVerfG 1 BvR 369/04 (4 February 2010), available at: <http://www.hrr-strafrecht.de/hrr/bverfg/04/1-bvr-369-04.php>.

⁶⁹¹ Dejurist.org database, available at: <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=04.11.2009&AktENZEICHEN=1%20BvR%202150/08>.

⁶⁹² German Parliament (*Deutscher Bundestag*), Printed Matter 15/5051, 15. Election Period, 9 March 2005, available at: <http://dip21.bundestag.de/dip21/btd/15/050/1505051.pdf>.

⁶⁹³ Dirk Wüstenberg (2010): Stört die Äußerung den öffentlichen Frieden? Konsequenzen der Wunsiedel-Entscheidung des BVerfG für die Strafverteidigung, in HRRS Oktober 2010, <https://www.hrr-strafrecht.de/hrr/archiv/10-10/index.php?sz=7>.

	<p>protecting the anti-Nazi values of the Basic Law (German Constitution) - and which, therefore, prohibit certain statements relating to certain committed actions under the rule of National Socialism - are acceptable special laws⁶⁹⁴.</p> <p>The possibility of restricting the right to freedom of expression by special laws was also confirmed by an Order of the First Senate of the Constitutional Court of 4 November 2009 (1 BvR 2150/08)⁶⁹⁵: 'Even though it is not a general law, Section 130(4) of the Criminal Code is compatible with Article 5(1) and 5(2) of the Basic Law. In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on special legislation for opinion-related laws is inherent in Section 5.1 and 5.2 of the Basic Law (GG) for provisions which impose boundaries on the propagandistic condoning of the National Socialist rule of arbitrary force. The amenability of Section 5.1 and 5.2 of the Basic Law (GG) to such special provisions does not rescind the substantive content of freedom of expression. The Basic Law does not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas already with regard to the intellectual impact of its content'⁶⁹⁶.</p>
<p>Section 46 of the Criminal Code</p>	<p>Section 46 was only amended on 1 August 2015, therefore no cases of relevance are available.</p>
<p>Indicator 2 - Quantitative evidence</p>	
<p>Section 130 Criminal Code (all provisions transposing Article 1(1)(a)-(d) of the CFD)</p>	<p>The Police Crime Statistics (PKS) for the Federal Republic of Germany is created by the Federal Criminal Police on the basis of data provided by the 16 State Criminal Police Offices. The data are published annually in the form of Yearbooks, which contain tables on data sets. The Yearbooks contain data on the number of cases investigated and prosecuted under Section 130 of the Criminal Code. Existing data are not broken down per subsections of Section 130.</p> <p>Number of cases investigated:</p> <ul style="list-style-type: none"> • 2014⁶⁹⁷: 2,670 • 2013⁶⁹⁸: 2,404 • 2012⁶⁹⁹: 2,506 • 2011⁷⁰⁰: 2,272 • 2010⁷⁰¹: 2,886 <p>Number of cases prosecuted:</p> <ul style="list-style-type: none"> • 2014⁷⁰²: 1,836

⁶⁹⁴ *ibid.*

⁶⁹⁵ Order of the First Senate of the Constitutional Court of 4 November 2009 - 1 BvR 2150/08, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html.

⁶⁹⁶ Order of the First Senate of the Constitutional Court of 4 November 2009 - 1 BvR 2150/08, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html.

⁶⁹⁷ All numbers from Crime Statistics 2014, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

⁶⁹⁸ All numbers from Crime Statistics 2013, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/PKS2013.pdf?__blob=publicationFile.

⁶⁹⁹ All numbers from Crime Statistics 2012, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2013/PKS2012.pdf?__blob=publicationFile.

⁷⁰⁰ All numbers from Crime Statistics 2011, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publicationFile.

⁷⁰¹ All numbers from Crime Statistics 2010, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2011/PKS2010.pdf?__blob=publicationFile.

	<ul style="list-style-type: none"> • 2013⁷⁰³: 1,563 • 2012⁷⁰⁴: 1,599* • 2011⁷⁰⁵: 1,470* • 2010⁷⁰⁶: 1,919* <p>* numbers calculated by author, as only percentage of prosecution was reported prior to 2012.</p> <p>Number of cases adjudicated:</p> <ul style="list-style-type: none"> • not publically available for criminal statistics. <p>The fact that criminal statistics are not broken down per offence provision is one of the factors hindering the full understanding of the extent of the problem in Germany. Other significant issues include:</p> <ol style="list-style-type: none"> 1. Under-reporting resulting from the lack of trust of victims in the National Police. 2. Data on the number of hate speech and hate crime incidents are collected by three types of organisations, law enforcement bodies, NGOs and victim support organisations. Data collected by these bodies differ considerably. <p>- Law Enforcement Agencies: See above.</p> <p>- Victim-support organisations: numbers of incidents and short descriptions of individual incidents are recorded. Incidents, circumstances, and reports by victims are labelled as borderline cases where they refer to experiences with multidimensional forms of victimisation, discrimination and legal problems. Police abuse and ill-treatment as particular forms of hate crime are included in the records of one organisation (ReachOut in Berlin), addressing the problem of police violence and ill-treatment, and particularly targeting people with different skin colour, non-ethnic Germans, migrants and refugees⁷⁰⁷.</p> <p>- Anti-discrimination offices: numbers of incidents and descriptions of incidents for individual cases are recorded. Independent anti-discrimination offices in West Germany deal with problems of right-wing and related hate crimes, to a certain extent.. They are not specialised in the monitoring of hate crimes, but still serve as important regional or municipal contact points and information centres with respect to bias-motivated offences⁷⁰⁸.</p>
<p>Section 46 of the Criminal Code</p>	<p>No data are available, as the obligation for courts to take racist, xenophobic and other inhuman motives and aims into consideration during sentencing only came into force on 1 August 2015, and numbers of cases investigated, prosecuted or adjudicated under Section 46 are not, therefore, available.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Section 130 Criminal Code (all provisions transposing Article 1(1)(a)-(d) of the CFD)</p>	<p>Clarity of offence provision: Stakeholders believe the laws regulating propaganda crimes, such as those crimes covered by Section 130 of the Criminal Code, to be far-reaching and clear⁷⁰⁹.</p> <p>In practice, however, the social understanding of these crimes is an issue of concern. They are seen as politically motivated</p>

⁷⁰² All numbers from Crime Statistics 2014, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pks-broschuere-2014.pdf?__blob=publicationFile.

⁷⁰³ All numbers from Crime Statistics 2013, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/PKS2013.pdf?__blob=publicationFile.

⁷⁰⁴ All numbers from Crime Statistics 2012, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2013/PKS2012.pdf?__blob=publicationFile.

⁷⁰⁵ All numbers from Crime Statistics 2011, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publicationFile.

⁷⁰⁶ All numbers from Crime Statistics 2010, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2011/PKS2010.pdf?__blob=publicationFile.

⁷⁰⁷ *ibid.*

⁷⁰⁸ *ibid.*

⁷⁰⁹ Information collected through consultation with national stakeholders (academic, University of Economics and Law Berlin, 24 July 2015).

	<p>crimes, implying the existence of a link between the perpetrator and right-wing parties. Proving such a link becomes problematic in cases where the perpetrators' conduct targets LGBTI people or people with disabilities. Legislation uses terms such as 'national', 'racial', 'religious' or 'ethnic' groups in Section 130(1) and 'racist' and 'xenophobic' motivation in Section 46(2). Legal practitioners use these terms without a clear understanding of the underlying scientific reasons and social experiences and processes.</p> <p>Lawyers, judges, and journalists take part in the general public discourse on the meaning of 'foreigners' and 'immigrants'. They construct their identity ('us') by negatively defining migrants ('them') or certain religious groups (e.g. 'Muslim Orient')⁷¹⁰.</p> <p>To conclude, the meaning of the terms 'race' and 'ethnicity' is constantly redefined in Germany in the light of on-going social changes⁷¹¹. Lawyers, judges and journalists continuously contribute to discussions on the interpretation of these terms. Police officers on the ground, prosecutors and judges then have to interpret these concepts in their daily work, in line with the everyday understanding of the terminology⁷¹².</p> <p>Suitability of offence provision to cover online crime: Social dynamics also determine the understanding of the coverage of online crime by applicable legislation⁷¹³. One stakeholder sees limits for the application of the provision in practice. If hate content is saved on servers outside of Germany, in particular in countries without strict legislation in place, it might become problematic to duly investigate and prosecute cases⁷¹⁴.</p> <p>Suitability of offence provision to ensure freedom of expression: The wide-ranging freedom of expression in the United States (in relation to hate speech) is not mirrored in Germany, where the historical experience of national socialism and its propaganda has shaped a different understanding of freedom of expression. In the view of one stakeholder, the protection of human dignity is prioritised above that of freedom of expression.</p> <p>Suitability of offence provision to protect vulnerable groups: The offence provision seems to be clear in this respect.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): Victim counselling centres have concluded that legislative changes would not improve the situation of the most vulnerable groups. Legislative changes made in recent years are seen as 'cosmetic' / minor changes, which only cover up the shortcomings of the fight against right-wing extremism and racism.</p> <p>Other shortcomings of applicable offence provision: The shortcomings listed below relate to hate crimes in general, but they also highlight the shortcomings with respect to data collection and the training of legal practitioners, which are linked to the transposition of the CFD.</p> <p>Human Rights Watch concluded in its report - and this was confirmed by interviews with stakeholders carried out for this</p>
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⁷¹⁰ Ibid.

⁷¹¹ Ibid.

⁷¹² Ibid.

⁷¹³ Ibid.

⁷¹⁴ The project LIGHT ON has a database of examples of hate symbols and hate speech in different national contexts to help in identifying online hate speech and hate symbols, but Germany is not included. See <http://www.lighton-project.eu/site/main/glossary/index>.

research - that while police performance in responding to racist attacks and other hate crimes has improved, there are still concerns amongst victims and victim support organisations about the nature of the police's response⁷¹⁵. Victims of hate speech and victim support groups presented Human Rights Watch with examples of cases in which the police at a crime scene had focused their questions on the victim rather than alleged perpetrator, had sought to discourage victims from filing complaints (valid statement with respect to Section 130(1)-(3) Criminal Code), or had failed to take basic investigative steps based on the legal definitions in Section 130(1), all of which undermined confidence in the police. Victims are sometimes reluctant to report hate speech (valid statement with respect to Section 130 (1)-(3) Criminal Code) to the police, for example, because of negative prior experiences with the police in Germany, or elsewhere.

Specialised victim support organisations feel that further work is necessary to strengthen cooperation with the police, and to ensure, for instance, that they are systematically informed by the police when a hate crime and hate speech occurs, so that they can offer assistance to the victim(s).

The failure of the police to record or investigate a case as a 'politically motivated' hate crime or hate speech, results in the lack of prosecution of cases as hate speech and hate crime. In practice, this means that hate speech and hate crime are often indicted as crimes other than those set out in Section 130 of the Criminal Code. Where evidence of hate motivation, as defined in Section 130(1) Criminal Code, does not come into play during the investigation and the prosecution, it is unlikely that courts would then take this into account during sentencing in the event of a conviction⁷¹⁶.

The monitoring of the application of hate crime provisions is also problematic, and hinders the clear understanding of the extent of the issue.

The registration system is centred on specific crimes, and allows for one crime to be assigned to multiple motives (xenophobic, social status, racism, anti-Semitism, sexual orientation, religion, disability) within the statistical framework. The number of crimes does not necessarily reflect the number of actual incidents⁷¹⁷.

Data collected under the current system do not disaggregate per vulnerable group. Instead, data collection efforts focus on the motive of the perpetrator. NGOs, by contrast, collect more and different information, creating a discrepancy between data collected by NGOs and authorities.

Human Rights Watch has criticised the German monitoring system, claiming that it encourages under-reporting. More precisely, Human Rights Watch has claimed that the focus on the political motivation for such violence can lead to the under-inclusion of hate speech cases in criminal statistics (Section 130 (1)-(4) Criminal Code) in cases where the perpetrator lacks any identifiable political motivation or ties with an organised right-wing group. This can be particularly problematic when it comes to hate speech against LGBTI people or persons with disabilities, but also in some cases of racist violence where an

⁷¹⁵ Information collected through consultation with national stakeholders (police academy Schleswig-Holstein, 5 June 2015, NGO, BUG 3 June 2015 and academic, University of Economics and Law Berlin, 3 June 2015).

⁷¹⁶ Human Rights Watch, 2011, Briefing Paper: The State Response to "Hate Crimes" in Germany, available at: <http://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

⁷¹⁷ Glet, Alke, 2009, The German Hate Crime Concept. An account of the classification and registration of bias-motivated offences and the implementation of the Hate Crime Model into Germany's law enforcement system, Internet Journal of Criminology, p. 10.

	<p>ideological motivation may not be evident. This leads to under-recording of crimes that lack those features, and means that they may not be investigated, prosecuted or sentenced as hate speech⁷¹⁸.</p> <p>The German Institute for Human Rights (DIMR) reports that the NSU parliamentary inquiry commission has identified deficiencies in the collection and treatment of racist acts, such as hate speech (Section 130 (1)-(4) Criminal Code), not only within the police, but also within the prosecutors' services. Competence and awareness must be promoted among prosecutors and judges in order to identify racist motives and effectively punish hate speech. This includes the exchange of knowledge about the human rights obligations of Germany. Currently, there are not enough judicial academies with profound human rights programmes, with those which have such programmes, reaching only a small group. New content and methods of training and sensitisation of public prosecutors and judges must be conceptually developed and implemented. The recommendations of the NSU parliamentary inquiry commission, along with expert knowledge from academia and civil society, must be included in such a new approach. DIMR recommends that, 'to accompany the changes to statutory and legal level, the Federal Government should establish a model project for the training of prosecutors and criminal justice systems, to increase understanding of racism, intercultural competence and human rights'⁷¹⁹.</p>
<p>Section 46 of the Criminal Code</p>	<p>Clarity of offence provision: Stakeholders stated that the wording of the amendment ('especially racist, xenophobic and other inhuman motives and aims'), introduced to Section 46 of the Criminal Code, is too general. DIMR suggests the deletion of the term 'xenophobic' because it is misleading and misses the societal nature of the crime. Also, the term 'racist' is not further defined, and is, therefore, open to interpretation. They suggest adding an explanatory phrase, using some of the international definitions as set out in Section 4 of ICERD⁷²⁰.</p> <p>Suitability of offence provision to cover online crime: Article 4 of the CFD does not require the penalisation of online commission of crimes.</p> <p>Suitability of offence provision to ensure freedom of expression: The provision is recent, therefore there is no case law available to assess the relationship of the transposing provision with freedom of expression.</p> <p>Suitability of offence provision to protect vulnerable groups: Article 4 of the CFD does not make reference to protected vulnerable groups.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): See above, clarity of offence provision.</p> <p>Other shortcomings of applicable offence provision: No additional shortcomings have been identified.</p>

⁷¹⁸ Human Rights Watch, 2011, Briefing Paper: The State Response to "Hate Crimes" in Germany, available at: <http://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

⁷¹⁹ DIMR, 2014, Racist motivated Crime: Law enforcement must become more effective (*Rassistisch motivierte Straftaten: Strafverfolgung muss effektiver werden*), available at: http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/aktuell_3_2014_Strafverfolgung_muss_effektiver_werden.pdf.

⁷²⁰ Ibid.

Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Section 130 Criminal Code	None of the stakeholders were aware of any recent or upcoming legislative changes ⁷²¹ .
Section 46 of the Criminal Code	The latest amendment to Section 46 was adopted on 1 August 2015. The amendment was borne of the legal obligation to transpose Article 4 of the CFD, and the recommendation of a similar amendment by the NSU inquiry commission ⁷²² .

3.2 Effectiveness of the legislation Transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
13th Amendment to the Inter-State Broadcasting Treaty Section 7 Advertising principles, mandatory labelling	No cases exist assessing the relationship of the transposing provision with the freedom of expression.
Section 130(2) of the Criminal Code	See assessment provided under Section 3.1.
Interstate Treaty on the protection of minors – JMStV Section 4 Illegal Content	The Commission for Youth Media Protection (KJM) exists to examine and evaluate the compliance of private radio and telemedia services with the Interstate Treaty on the protection of minors. In recent years (March 2013 to February 2015), the courts dealt mainly with formal requirements of the processes of the KJM, and substantive issues rarely constituted the subject of legal proceedings. Existing cases do not assess the relationship of Section 4 of the Treaty with the freedom of expression ⁷²³ .
Telemedia Act (TMA), Section 3, (5) 1	No cases exist assessing the relationship of the transposing provision with the freedom of expression.
Indicator 2 - Quantitative evidence	
13th Amendment to the Inter-State Broadcasting Treaty Section 7 Advertising principles, mandatory labelling	No quantitative evidence found for this specific amendment.
Section 4 Illegal Content	
Section 130(2) of the Criminal Code	See assessment provided under Section 3.1.
Interstate Treaty on the protection of minors – JMStV	The numbers below give an indication of the scale of hate content appearing in the media. These numbers should be read with caution, as they are not necessarily linked to the provision transposing Article 6 of the AMSD, but to hate content in general.

⁷²¹ Information collected through consultation with national stakeholders (academic – 24 July 2015).

⁷²² Ibid.

⁷²³ Commission for Youth Media Protection, Sixth report of the Commission for Youth Media Protection (KJM) on the implementation of the provisions of the State Treaty on the protection of human dignity and the protection of minors in broadcasting and telemedia (Youth Media Protection State Treaty - JMStV) according to Section 17 para.3 JMStV, reporting period: March 2013 to February 2015, available at: http://www.kjm-online.de/fileadmin/Download_KJM/Service/Berichte/Sechster_Taetigkeitsbericht_der_KJM.pdf.

	<p>The Federal Review Board for Media Harmful to Minors (BPjM), an administrative authority of the German Government responsible for protecting minors against harmful media content, has an index for listing cases which might endanger children. Media content is considered as harmful to minors if it intends to endanger their development into a socially reliable person (Section 18 I Law for the protection of the youth-JuSchG). Potentially harmful content includes extremely violent, crime-inducing, anti-Semitic or racist content. The BPjM constantly updates the index on the basis of information received inter alia from the KJM⁷²⁴. The following types of media are monitored: films (DVD, BluRay, etc.), games (PC, Playstation, Xbox, Wii, etc.), music (audio CDs, etc.), printed media (books, comic books, magazines, brochures, etc.) and Internet sites. Such monitoring takes place after the publication of the content⁷²⁵.</p> <p>Approximately 1,000 indexing applications and indexing opinions have been received by the KJM itself since its foundation in 2003, with 106 between March 2013 and February 2015. Right-wing extremist and anti-Semitic content was referred to in 43 applications during this reporting period. Incidents included the use of signs and symbols of unconstitutional organisations, such as swastikas. The incidents were committed by right-wing and anti-Semitic extremists, and were mostly text-based. Much of this content made contemporary revisionist books, or historical documents from the Nazi era, accessible⁷²⁶.</p>
<p>Telemedia Act (TMA), Section 3, (5) 1</p>	<p>No relevant quantitative data have been identified.</p>
<p>Indicator 3 -Bottlenecks of practical implementation</p>	
<p>13th Amendment to the Inter-State Broadcasting Treaty Section 7 Advertising principles, mandatory labelling</p>	<p>Clarity of the transposing provision: The provision is clear and states that 'advertising and teleshopping shall not be based on discrimination on the grounds of sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation'.</p> <p>Suitability of offence provision to protect vulnerable groups: This provision includes all vulnerable groups with characteristics as defined in the Equal Treatment Act (AGG).</p> <p>Suitability of offence provision to ensure freedom of expression: The provision does not conflict with the freedom of expression.</p> <p>Other shortcoming: None identified.</p>
<p>Section 130(2) of the Criminal Code</p>	<p>See assessment provided under Section 3.1.</p>
<p>Interstate Treaty on the protection of minors – JMStV Section 4 Illegal Content</p>	<p>Clarity of the transposing provision: The provision clearly states that incitement 'to hatred against parts of the population or against a national, racial, religious or ethnic group, that encourages violent or arbitrary action against such a group or violates the human dignity of a person or group by insulting, maliciously degrading or defaming parts of the population or any of the aforementioned groups' is illegal.</p>

⁷²⁴ Commission for Youth Media Protection (KJM), Press Release 09/2015: Modern Youth Media protection needs practical rules. The Commission for Youth Media Protection (KJM) presents its sixth activity report (*Moderner Jugendmedienschutz braucht praxistaugliche Regelungen: KJM stellt ihren sechsten Tätigkeitsbericht vor*), (2015), available at: <http://www.kjm-online.de/service/pressemitteilungen/detailansicht/article/kjm-pressemitteilung-092015-moderner-jugendmedienschutz-braucht-praxistaugliche-regelungen-kjm-st.html>.

⁷²⁵ BPjM (Federal Review Board for Media Harmful to Minors), General information, available at: <http://www.bundespruefstelle.de/bpjm/Service/english.html>.

⁷²⁶ Commission for Youth Media Protection, Sixth report of the Commission for Youth Media Protection (KJM) on the implementation of the provisions of the State Treaty on the protection of human dignity and the protection of minors in broadcasting and telemedia (Youth Media Protection State Treaty - JMStV) according to Section 17 para.3 JMStV, reporting period: March 2013 to February 2015, available at: http://www.kjm-online.de/fileadmin/Download_KJM/Service/Berichte/Sechster_Taetigkeitsbericht_der_KJM.pdf.

	Suitability of offence provision to protect vulnerable groups: The provision has a different set of characteristics defined and, as already mentioned for the TMA, does not include characteristics like 'sexual orientation' and 'disability'. Alignment of the protected characteristics with those ones listed in the Equal Treatment Act (AGG) is recommended.
	Suitability of offence provision to ensure freedom of expression: The provision does not conflict with freedom of expression.
	Other shortcoming: None identified.
Telemedia Act (TMA), Section 3, (5) 1	Clarity of the transposing provision: The Provision is clear, but is restricted to 'public security and order' ⁷²⁷ .
	Suitability of offence provision to protect vulnerable groups: The provision does not include characteristics like 'sexual orientation' and 'disability'. Alignment of the protected characteristics with those listed in the Equal Treatment Act (AGG) is recommended ⁷²⁸ .
	Suitability of offence provision to ensure freedom of expression: The provision does not conflict with freedom of expression ⁷²⁹ .
	Other shortcomings of applicable offence provision: No further comments of stakeholders.
Indicator 4 -Drivers for the adoption of new legislation/amendment to existing legislation	
13th Amendment to the Inter-State Broadcasting Treaty Section 7 Advertising principles, mandatory labelling	The Inter –State Broadcasting Treaty is regularly amended, however, none of the amendments are of relevance in the context of this assessment. No plans for new legislation or amendments to the existing legislation are foreseen.
Section 130(2) of the Criminal Code	See assessment provided under Section 3.1.
Interstate Treaty on the protection of minors – JMStV Section 4 Illegal Content	No plans for new legislation or amendments to the existing legislation are foreseen.
Telemedia Act (TMA), Section 3, (5) 1	No plans for new legislation or amendments to the existing legislation are foreseen.

3.3 Effectiveness of the rules regulating publishers' responsibility

Due to the nature of the specific field (i.e. rules emerge from various areas of law and are developed both at federal and state levels – See Section 2.4) and given that there is no single provision regulating the liability of publishers for hate speech, a comprehensive assessment is difficult. Limited data are available, and little case law exists. Similarly, there is no available case law on the threshold between freedom of

⁷²⁷ Information collected through consultation with national stakeholders (academic, University of Economics and Law Berlin, 24 July 2015, lawyer, Hamburg 23 July 2015).

⁷²⁸ Ibid.

⁷²⁹ Ibid.

expression and rules regulating liability for publishing hate speech. Existing rules tend to focus on the liability of the author of hate speech, rather than that of the publisher. The limited data available are described in the table below, which provides the information gathered per existing liability scheme.

Indicator 1 - National case law on the interaction of provision with freedom of expression	
Criminal liability of publishers	<p>No court decision assessing the interaction between the provision and freedom of expression is available.</p> <p>In cases where the provision overlaps with those transposing the CFD, the relevant higher court decisions are described under Section 3.1. The decisions quoted above, however, are not specific to the liability of media content providers, but, rather concern the interpretation of Article 130 of the Criminal Code in general terms.</p>
Administrative Liability	<p>Only one case of potential relevance has been identified, which was a case before the Commission for Youth Media Protection (KJM) and derived from the breach of the Interstate Agreement on the protection of minors (JMStV) and of the German Press Code⁷³⁰.</p> <p>The case concerned the German "Big Brother" (BB) reality TV show, in which anti-Semitic remarks were broadcast on 3 October 2004. It was classified as a violation of Section 4 para. 1 sentence 1 no. 8 JMStV (human dignity) and of Section 4 para. 1 sentence 1 no. 3 JMStV (Agitation of the People/Hate speech). The decision did not contain reference to freedom of expression per se. The opinions expressed however were considered as unlawful, thus falling outside the scope of the fundamental right of freedom of expression⁷³¹.</p>
Civil liability	No higher court decision assessing the interaction between the provisions and the freedom of expression is available.
Disciplinary liability (self-regulation)	No higher court decision assessing the interaction between the provisions set out in self-regulation and freedom of expression is available.
Indicator 2 - Quantitative evidence	
Criminal liability of publishers	<p>Police statistics relating to Section 130 of the Criminal Code (See Section 3.1), do not make reference to publishers. Some evidence can be derived from the website of the Federal Review Board for Media Harmful to Minors (BPjM), which contains data on the number of seizures ordered against publishers on the grounds of Sections 86, 86a, 130 and 130a of the Criminal Code⁷³². Until 31 July 2015, 195 such seizures have been ordered.</p> <p>The annual reports of the Federal Review Board for Media Harmful to Minors (BPjM) show that law enforcement agencies are suggesting cases committed through print and telemedia be added to the indexing process (description see 3.2). No reference to the number of cases identified through the indexing has been found.</p>

⁷³⁰ Commission for Youth Media Protection (KJM), Test cases of the KJM: violations of the protection of human dignity (Prüffälle der KJM: Verstöße gegen den Schutz der Menschenwürde), available at: http://www.kjm-online.de/fileadmin/Download_KJM/Themen/Verste_Menschenwrde2.pdf.

⁷³¹ Ibid.

⁷³² Federal Review Board for Media Harmful to Minors, Statistics, available at: <http://www.bundespruefstelle.de/bpjm/Service/statistik.html>.

Administrative Liability	There are no quantitative data available. The annual report 2014/15 of the German media authorities (<i>die Medienanstalten</i>) indicates that 'there were a number of texts and blog posts which denied the Holocaust or disseminated ethnically offensive statements. Overall, these were characterised by various forms of falsification of history and a questionable view of the German past, but also by promoting a hostile attitude towards non-Germans'. The source does not provide quantitative data on the number of registered incidents ⁷³³ .
Civil liability	No quantitative data on the number of cases have been identified.
Disciplinary liability (self-regulation)	<p>Publishers' responsibility is based on the self-commitment of publishing houses to comply with the rules set out in the German Press Code. The German Press Council (<i>Deutscher Presserat</i>) is responsible for handling complaints against the press, including online journalism⁷³⁴. In its annual report it publishes quantitative information on the number of complaints received⁷³⁵. These numbers do not specify the numbers of complaints linked to hate speech, however, as the Press Code does not contain reference to hate speech, but, rather, penalises the publication of discriminatory media content (Section 12) and content which may insult religious, psychological or moral beliefs (Section 10).</p> <p>The data available regarding these provisions are not of direct relevance in the context of the study, for the reasons stated above.</p> <p>For 2015, eight reprimands had been applied, but none related to Nos. 10 and 12 of the German Press Code.</p> <p>For 2014, 27 reprimands had been applied, one relating to No. 10 and two to No. 12 of the German Press Code.</p> <p>For 2013, 31 reprimands had been applied, but none related to No. 10 and only one to No. 12 of the German Press Code.</p>
Indicator 3 - Bottlenecks of practical implementation	
Criminal liability of publishers	No aspects hinder the application of the provision. It is difficult to find reliable data and evidence on cases of hate crime and hate speech relating to online and print media. A single reference point listing all information on hate crime and hate speech incidents would be of considerable use.
Administrative Liability	No aspects hinder the application of the provision. Access to information and case law is extremely difficult.
Civil liability	No factors hindering the application of rules regulating civil liability were identified.
Disciplinary liability (self-regulation)	No aspects hinder the application of the provision.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Criminal liability of publishers	The most recent amendments to the applicable rules were adopted in 2010. No new amendments are planned, nor are there any ongoing discussions in this regard.
Administrative Liability	No specific discussion or drivers for legal changes or legal amendments were identified.
Civil liability	No specific discussion or drivers for legal changes or legal amendments were identified.
Disciplinary liability (self-regulation)	No specific discussion or drivers for legal changes or legal amendments were identified.

⁷³³ German media authorities (*die Medienanstalten*), Annual Report 2014/15, available at; http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/ALM-Jahrbuch/Jahrbuch_2015/ALM_Jahrbuch_2014_2015_finale_Fassung.pdf.

⁷³⁴ German Press Council, available at: <http://www.presserat.de/>.

⁷³⁵ German Press Council, Statistics 2014, available at: http://www.presserat.de/beschwerde/statistiken/#panel-uebersicht_sanktionen.

GREECE

1 National context

In recent years Greece has witnessed a steep increase in cases of racist discrimination and violence⁷³⁶. This increase is attributed to two interlinked factors: (1) the social and political impact of the economic crisis, and especially the dramatic increase in youth unemployment⁷³⁷, which has led to radicalisation; and (2) the very large number of third-country nationals, particularly asylum seekers and undocumented immigrants, many of whom live in the centre of Athens under conditions of severe poverty⁷³⁸, and who are the target of negative sentiment. Previous legal mechanisms did not offer sufficient protection against racism, xenophobia and related intolerance, either because they were rarely applied in practice⁷³⁹ or because they were not applied effectively (e.g. it was difficult to investigate bias as a motivation in order to use it as an aggravating circumstance). Intensive efforts to introduce new legislation to address issues of migration and racism have now led to the adoption of a new legal framework in September 2014. However, further protection is required for undocumented immigrants, who remain reluctant to report racist attacks suffered or witnessed by them, from fear of deportation. Victims of racist violence are mainly immigrants from Afghanistan, Pakistan, Algeria, Bangladesh, Egypt, Morocco, Somalia, Sudan, Guinea, Tunisia, Iraq, Iran, Mauritania, Syria, Eritrea, Congo, Senegal, Palestine, Comoros, the Ivory Coast, Albania, Georgia, Gambia and Ghana.

Hate speech is an ongoing problem in Greece. Racist stereotypes and hate speech are widespread in the media and in everyday life in Greek society⁷⁴⁰. The target groups of such racist stereotypes and hate speech are mainly immigrants, refugees and asylum seekers, Roma, Jews, LGBT and anyone of non-Greek origin, or who does not profess the dominant Greek Orthodox religion⁷⁴¹.

Law 927/1979 on racial discrimination⁷⁴², which forms part of criminal legislation, was

⁷³⁶ Concern about the rise of racist crimes has been expressed in the reports of various organisations: FRA, Thematic Situation Report, 'Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary', 2013, available at: http://fra.europa.eu/sites/default/files/fra-2013-thematic-situation-report-3_en_1.pdf, (hereinafter FRA 2013 Report on Greece); Greek Ombudsman, 'Special Report on Racist Violence' (Ειδική Έκθεση του Συνηγόρου του Πολίτη για το Φαινόμενο της Ρατσιστικής Βίας και την Αντιμετώπισή του), 2013, available at: <http://www.synigoros.gr/resources/docs/eidikiekthesiratsistikiviva.pdf>; GNCHR, 'Observations on the Draft of the Second Periodic Review of the Hellenic Republic for the International Covenant on Civil and Political Rights' (ΕΕΔΑ - Παρατηρήσεις επί του σχεδίου Δεύτερης Περιοδικής Έκθεσης της Ελληνικής Δημοκρατίας για το Διεθνές Σύμφωνο για τα Ατομικά και Πολιτικά Δικαιώματα (ΔΣΑΠΔ)), 2013, available at: http://www.nchr.gr/images/pdf/apofaseis/ellinikes_ektheseis_en_ell_org/OHE/dsapd.pdf; Antigone, '2014 Annual Report' (ΑΝΤΙΓΟΝΗ - Ετήσια Έκθεση 2014), 2014, available at: http://www.antigone.gr/files/gr/library/research-and-studies-specifically-for-greece/2014/Annual_Report_2014.pdf.

⁷³⁷ According to Eurostat, in June 2013 Greece's total unemployment rate stood at 27.3% (15–74 years of age), with youth unemployment at 58.2% (under 25 years of age); these rates represent unemployed persons as a percentage of the labour force based on the International Labour Office (ILO) definition.

⁷³⁸ Estimates of the number of irregular migrants, based on the interpretation of apprehension data, suggest a maximum of 390,000 migrants in 2011; Maroukis, T., *Update report Greece: The number of irregular migrants in Greece at the end of 2010 and 2011*, (Database on irregular migration, 2012). In 2012, foreign resident population in Greece, including EU and non-EU citizens, amounted to 975,374 people, representing 8.8% of total population. This rate is more than twice the EU average, but remains below the rate in Austria, Belgium, Cyprus, Estonia, Germany, Ireland, Latvia, Luxembourg and Spain. The respective figure for 2001 was 762,191 foreign resident persons, and for 2004 891,197 foreign resident persons (EUROSTAT).

⁷³⁹ FRA 2013 Report on Greece, *op. cit.*, p. 11.

⁷⁴⁰ ECRI, 'Report on Greece (Fifth Monitoring Cycle)', adopted on 10 December 2014, p. 21, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>, (hereinafter ECRI 2014 Report on Greece).

⁷⁴¹ FRA 2013 Report on Greece, *op. cit.*

⁷⁴² Law 927/1979 'on the condemnation of acts or actions with aim to racial discrimination' (Περί κολασμού πράξεων ή ενεργειών αποσκοπούσων εις φυλετικές διακρίσεις), Government Gazette A' 139/1979. (Hereinafter Law 927/1979 on racial discrimination).

recently amended to ensure full compliance with Framework Decision 2008/913/JHA of the EU Council of 28 November 2008⁷⁴³ on combating certain forms and expressions of racism and xenophobia by means of criminal law. Prior to this legislative amendment, Law 927/1979 on racial discrimination had been criticised by international organisations, who pointed out its ineffectiveness in combating racial discrimination and crimes with racial motives. In addition to being rarely applied in practice, it was difficult to investigate bias motivation as an aggravated circumstance, since authorities neglected to investigate or report any bias indicators. The 2013 murder of Pavlos Fyssas by Golden Dawn members⁷⁴⁴ mobilised the authorities to open an investigation into the racist practices of the Golden Dawn, the leadership of which was subsequently prosecuted and arrested⁷⁴⁵. This led to a more active attempt to achieve compliance with Council Framework Decision 2008/913/JHA. Thus, a new Bill amending this anti-racist legislation and providing tough penalties for racist behaviours and crimes was introduced to the Greek Parliament in 2013. This anti-racist Bill was a combination of proposals submitted by different parties. It was submitted to the Plenary of the Parliament for final approval, and finally adopted in September 2014 (Anti-racist Law 4285/2014⁷⁴⁶).

Under the current legal framework hate speech is regulated by Articles 1 and 2 of Law 4285/2014, whilst Article 10 amends and introduces Article 81^A to the Greek Criminal Code⁷⁴⁷, providing for stricter punishment of crimes motivated by bias (Racist Crime). Protected characteristics under the new legislation are race, colour, religion, descent, national or ethnic origin, disability, sexual orientation, and gender identity. Age is not, however, included. The legislation on hate speech has not been amended in the aftermath of this year's terrorist attacks related to the "Charlie Hebdo" case.

There has been criticism surrounding freedom of speech, itself constitutionally protected in Greece (Art. 14), and in relation to the limitations to such freedom that may result from the interpretations of the courts. The law is vague when it comes to balancing the freedom of speech and the need to condemn hate speech. In addition, some commentators mention the exclusion of age from the protected characteristics, proposing a harmonisation with Law 3304/2005 on equal treatment⁷⁴⁸. Finally, European and national stakeholders⁷⁴⁹ have

⁷⁴³ Council Framework Decision 2008/913/JHA, of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF>.

⁷⁴⁴ BBC News, "Neo-Nazi held over Greek musician Pavlos Fyssas death", 18 September 2014, available at: <http://www.bbc.com/news/world-europe-24141246>.

⁷⁴⁵ Gazakis, A., Syrri, D. and Takis, A., *Racism and Discrimination in Greece today (Ρατσισμός και Διακρίσεις στην Ελλάδα σήμερα)*, (HEINRICH BOLL STIFTUNG, 1st Edition, Thessaloniki, 2014), p. 7-8.

⁷⁴⁶ Law 4285/2014 'on the Amendment of Law 927/1979 (A' 139) and adjustment to the Framework Decision 2008/913/JHA of November 28, 2008, for combating certain forms and acts of racism and xenophobia through Criminal Law (L 383) and other' (*Τροποποίηση του ν. 927/1979 (Α' 139) και προσαρμογή του στην απόφαση - πλαίσιο 2008/913/ΔΕΥ της 28ης Νοεμβρίου 2008, για την καταπολέμηση ορισμένων μορφών και εκδηλώσεων ρατσισμού και ξενοφοβίας μέσω του ποινικού δικαίου (L 328) και άλλες διατάξεις*), Government Gazette A' 191/2014. (Hereinafter Anti-racist Law 4285/2014).

⁷⁴⁷ The text of the Criminal Code (in Greek) is available online via the Ministry of Justice portal at: <http://www.ministryofjustice.gr/site/kodikos/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CF%BF/%CE%A0%CE%9F%CE%99%CE%9D%CE%99%CE%9A%CE%9F%CE%A3%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3/tabid/432/language/el-GR/Default.aspx>.

⁷⁴⁸ Law 3304/2005 'on the Application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation' (*Εφαρμογή της αρχής της ίσης μεταχείρισης ανεξαρτήτως φυλετικής ή εθνοτικής καταγωγής, θρησκευτικών ή άλλων πεποιθήσεων, αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού*) Government Gazette A' 16/2005. (Hereinafter Law 3304/2005 on equal treatment).

⁷⁴⁹ ECRI, 2014 Report on Greece, *op. cit.*, p. 21; GNCHR, Observations on the Draft of the Second Periodic Review of the Hellenic Republic for the International Covenant on Civil and Political Rights, *op. cit.*; GNCHR, 'Observations on the Draft 20th and 21st Periodic Review of the Hellenic Republic for the Application of the International Convention on the Eradication of Racial Discrimination (ICERD)' (*ΕΕΔΑ - Παρατηρήσεις επί του σχεδίου της Εικοστής και Εικοστής πρώτης Περιοδικής Έκθεσης της Ελληνικής Δημοκρατίας για την εφαρμογή της Διεθνούς Σύμβασης για την Εξάλειψη κάθε Μορφής Φυλετικών Διακρίσεων (ICERD)*), 2015, available at: http://www.nchr.gr/images/pdf/apofaseis/diakriseis/EEDA_CERD_2015.pdf. Gazakis, Syrri and Takis, *Racism and*

recommended the application of Law 927/1979 on racial discrimination to cases of hate speech in the media. It has also been recommended that the authorities encourage, without encroaching on the independence of the media, the creation of an effective self-regulatory mechanism for the media industry to prevent racist comments in newspapers, on television and on the radio. This illustrates the current lack of a coherent and concise regulatory framework for publishers' responsibility. In summary, the effective regulation of hate speech in practice, the lack of a cohesive framework on the regulation of publishers' responsibility for hate speech, as well as the effective combating of racism by the State, are the main problems with the currently applicable legislation.

Finally, the difficulties in addressing the collection of data on case law for the sections on quantitative evidence must be highlighted. For hate speech, in particular, there are no detailed statistics on the few cases that reach the courts, since each court compiles its own data, without any standardised criteria. Very few decisions are available online (such as there are usually published by NGOs or legal practitioners linked to the cases) and this limits the effectiveness of desk research.

Discrimination in Greece today op. cit., p.37. The Greek Ombudsman has previously issued recommendations to Media Authorities for racist and intolerant media reports. See, for example,: To Vima, 'The Media reproduce stereotypes according to the Ombudsman' ('Το Βήμα - Τα ΜΜΕ αναπαράγουν στερεότυπα καταγγέλλει ο Συνήγορος του Πολίτη'), January, 30, 2014, available at <http://www.tovima.gr/media/article/?aid=562409>.

2 Legal Framework

2.1 General description of the legislation applicable to hate crime and hate speech

Definition of hate crime and hate speech in the national context

Hate crime is not defined in the national context. Instead, the term 'racist crime' (*ῥατσιστικό έγκλημα*) is used. Racist crime is defined under Article 81^A of the Criminal Code, as a crime committed due to hatred bias on the grounds of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability of the victim.

Hate speech is defined as the public expression of racist or xenophobic speech with the purpose of inciting to, causing, instigating or inducing discriminatory acts or hatred and violence based on race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability. The definition derives from Article 1 of Law 4285/2014 (amending Law 927/1979).

Applicable legislation

The principal legal instrument addressing hate crime and hate speech in Greece is Law 927/1979 on punishing acts or activities aiming at racial discrimination. Such acts and activities can be prosecuted *ex officio* since 2005 (Article 71, para. 4 of Law 3386/2005⁷⁵⁰). The law provides that anyone who publicly, orally or in writing, or through pictures or any other means, intentionally incites people to perform acts or carry out activities that may result in discrimination, hatred or violence against other persons or groups of persons, on the sole ground of the latter's racial or ethnic origin or religion⁷⁵¹ is punishable by a maximum imprisonment of two years and/or pecuniary penalty or both.

The notion of bias motivations based on ethnic, racial, religious or sexual orientation as aggravating circumstance was added in 2008 through Article 23 of Law 3719/2008⁷⁵² amending Article 79 of the Criminal Code (CC). The Article was further amended in 2013 through Article 66 of Law 4139/2013, which added genetic characteristics and gender identity as bias motivations, and also providing that sentences imposed may not be suspended⁷⁵³.

On 28 November 2013, Mr. Haralambos Athanassiou, the Greek Minister of Justice, submitted a Bill to the Greek Parliament, amending the current anti-racist legislation (Law 927/1979 on racial discrimination) and including tough penalties for racist behaviours and crimes. This anti-racist Bill was a combination of proposals submitted by different parties and was finally adopted in September 2014 (Anti-racist Law 4285/2014). In a short statement from the Ministry of Justice, the Minister stressed that the aim of the Bill was to combat racism and

⁷⁵⁰ Law 3386/2005 'on the entry, stay and social integration of third country nationals on Greek Territory' (*Είσοδος, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια*), Government Gazette A' 212/2005.

⁷⁵¹ The ground of religion was added in 1984 through Art. 24 of Law 1419/1984 'on sanctions for racial, religious discrimination' (*Κυρώσεις κατά φυλετικών, θρησκευτικών διακρίσεων*), Government Gazette A' 28/1984.

⁷⁵² Law 3719/2008 'on Reforms and regulations on family, child, society and other' (*Μεταρρυθμίσεις για την οικογένεια, το παιδί, την κοινωνία και άλλες διατάξεις*), Government Gazette A' 241/2008.

⁷⁵³ Law 4139/2013 'on Law concerning addictive substances and other' (*Νόμος περί εξαρτησιογόνων ουσιών και άλλες διατάξεις*), Government Gazette A' 74/2013.

xenophobia and to promote the harmonisation of the Greek legislation with Council Framework Decision 2008/913/JHA of 28th November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law (CFD)⁷⁵⁴. It took six years for the Greek Government to finally introduce the CFD into the Greek legal framework and, given that the law was only recently adopted, there are no data available on its implementation. The slowness of the justice system in Greece suggests that it is unlikely that case law on the application of Law 4285/2014 will be in place soon.

Administrative, civil or disciplinary measures

Article 1, paragraph 5 of Law 4285/2014 amending Law 927/1979 provides for aggravated penalties for public officials and servants. Other than this, there are no specific liability schemes with respect to civil liability. Instead, general civil liability schemes, i.e. compensation of damages, are available. For administrative schemes and disciplinary measures please refer to those examined in Section 2.4 below.

2.2 Transposition of Council Framework Decision 2008/913/JHA

	Offence provision 1 Public Incitement to violence or hatred (Δημόσια υποκίνηση βίας ή μίσους)
Transposes Art. 1(a) of CFD	Yes
Transposes Art. 1(b) of CFD	Yes
Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 1, Law 4285/2014 amending Law 927/1979
Definition of offence	<p>Paragraph 1: "Whoever intentionally, in public, by word of mouth, or through the press and the internet, or through any other means or manner, incites, causes, induces or instigates acts or actions that may lead to discrimination, hatred or violence against a person or a group of persons that are identified on the basis of race, colour, religion, descent, national or ethnic origin or disability, sexual orientation or gender identity, so as to endanger the public order or pose a threat to life, freedom or physical integrity of the above mentioned persons [...]"</p> <p>Paragraph 2: "Whoever intentionally, and with the same means and manners mentioned in paragraph 1, incites, causes, induces or instigates to the commission of damage or destruction of objects, if such objects are used by the aforementioned groups or persons, so as to endanger the public order [...]"</p> <p>Aggravated offences:</p> <p>Paragraph 3: "When the aforementioned incitement, causation, inducement or instigation of the aforementioned paragraphs leads to the commission of a crime [...]"</p> <p>Paragraph 5: "When the action of the aforementioned paragraphs was committed by a public official or servant during the exercise of his/her assigned tasks [...]"</p>

⁷⁵⁴ European Network of Legal Experts in the non-discrimination field, Theodoridis, A., 'Introduction of a New Anti-racist Bill in Greece', December 12, 2013, available at: http://www.non-discrimination.net/content/media/EL-56-EL_Anti-racist%20bill.pdf.

Penalties foreseen	For the offences of Paragraphs 1 and 2: three months to three years imprisonment and a fine of EUR 5,000-20,000. Aggravated cases: For the offence of Paragraph 3: six months minimum imprisonment and fine of EUR 15,000-30,000. (If the imprisonment exceeds the duration of one year, deprivation of political rights for one to five years) Public Officials and Servants: For the offences of Paragraphs 1 and 2: six months to three years imprisonment and a fine of EUR 10,000-25,000. For the offences of Paragraph 3: one year minimum imprisonment and fine of EUR 25,000-50,000.
Protected characteristic(s)	Race, Colour, Religion, Descent, National or Ethnic origin, Disability, Sexual Orientation, Gender Identity.
Online crime	Yes (included specifically within the definition of Paragraph 1).

	Offence provision 2 Public Condoning or Denial of Crimes (Δημόσια επιδοκιμασία ή άρνηση εγκλημάτων)
Transposes Art. 1(a) of CFD	No
Transposes Art. 1(b) of CFD	No
Transposes Art. 1(c) of CFD	Yes
Transposes Art. 1(d) of CFD	Yes
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 2, Law 4285/2014 amending Law 927/1979 Note: Article 2 introduced Public Condoning or Denial of Crimes as a new offence.
Definition of offence	Paragraph 1: "Whoever intentionally, in public, by word of mouth, or through the press and the internet, or through any other means or manner, condones, grossly trivialises or denies the existence or severity of crimes of genocide, war crimes and crimes against humanity, the Holocaust and Nazi crimes that have been recognised through the decisions of international courts or the Greek Parliament, 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, sexual orientation and gender identity when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group [...]" Aggravated offences: Paragraph 2: "When the aforementioned action was committed by a public official or servant during the exercise of his/her assigned tasks [...]"
Penalties foreseen	For the offence of Paragraph 1: three months to three years imprisonment and a fine of EUR 5,000-20,000. For the aggravated offence of Paragraph 2: six months to three years imprisonment and a fine of EUR 10,000-25,000.
Protected characteristic(s)	Race, Colour, Religion, Descent, National or Ethnic origin, Disability, Sexual Orientation, Gender Identity.
Online crime	Yes (included specifically within the definition of Paragraph 1).

	Offence provision 3 Racist Crime (Ρατσιστικό έγκλημα)
Transposes Art. 1(a) of CFD	No
Transposes Art. 1(b) of CFD	No

Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	No
Transposes Art. 4 of CFD	Yes
Legal reference to provision	Article 81 ^A , Greek Criminal Code (Amended through Article 10, Law 4285/2014).
Definition of offence	"If a crime is committed due to hatred bias on the grounds of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability of the victim, the minimum custodial sentence is increased [...]" (Note: the last sentence of Paragraph 3 of Article 79 of the Greek Criminal Code, which stipulated that bias on the grounds mentioned in the text constitutes an aggravating factor, was deleted and substituted by the Article 81 ^A which increases the minimum penalties for misdemeanours and felonies committed as a result of bias).
Penalties foreseen	In addition to an increase to the minimum penalties, the following sentences cannot be suspended: In case of <u>misdemeanour</u> , where the anticipated sentence is from 10 days to one year, the minimum custodial sentence is increased by six months and in other misdemeanour cases by one year. In case of <u>felony</u> , where the anticipated sentence is five to 10 years, the minimum custodial sentence is increased by two years and in other felony cases by three years. The anticipated minimum fine for any crime is doubled.
Protected characteristic(s)	Race, Colour, Religion, Descent, National or Ethnic origin, Disability, Sexual Orientation, Gender Identity.
Online crime	No.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

Legal definition of provision transposing Article 6 of AMSD	
Transposing provision 1 Article 7, PD 109/2010⁷⁵⁵	Article 7, PD 109/2010 "1. The media service providers shall take all the necessary measures in order to ensure that the services they provide do not cause hatred based on race, gender, religion, beliefs, nationality, disability, age and sexual orientation. Moreover, they shall not take advantage of superstition and the beliefs of people. 2. All types of programmes, including audiovisual commercial announcements, broadcast by public or private television organisations, shall respect the personality, value, reputation, the private and family life, professional, social, scientific, cultural, political and any other legal activity of every person whose image appears on screen, or whose name is mentioned or any other elements capable of defining him/her." (Note: Presidential Decrees are a source of administrative law and are characterised as regulatory when they contain legal rules ⁷⁵⁶ .)

⁷⁵⁵ P.D. 109/2010, 'Harmonisation of the Greek radio-television legislation to the provisions of Directive 2010/13 of the EP and EC *et al'* (Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 2010/13/ΕΕ (ΕΕ L 95 της 15.4.2010) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου, με την οποία κωδικοποιήθηκαν οι διατάξεις της Οδηγίας 89/552/ΕΟΚ (ΕΕ L 298 της 17.10.1989) του Συμβουλίου, όπως ίσχυε μετά την τελευταία τροποποίησή της από την Οδηγία 2007/65/ΕΚ (ΕΕ L 332 της 18.12.2007) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου για το συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων), Government Gazette Α' 190/2010.

⁷⁵⁶ Under article 43 of the Greek Constitution: "2. The issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature".

Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
<p>Transposing provision 1</p> <p style="text-align: center;"><i>Internal Market</i> Article 2, Paragraph 2 and Paragraph 4, PD 131/2003⁷⁵⁷</p>	<p>Article 2, Paragraph 2 and Paragraph 4, PD 131/2003</p> <p>"2. It is forbidden to restrict the freedom to provide information society services from another Member State for reasons concerning the coordinated sector".</p> <p>"4. By derogation of paragraph 2 of Article 2, the State may take restrictive measures against a specific information society service provider from another Member State, under the following circumstances: a) the measures should I) be necessary for reasons referring to</p> <ul style="list-style-type: none"> - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons [...]" <p>(Note: Presidential Decrees are a source of administrative law and are characterised as regulatory when they contain legal rules.)</p>

⁷⁵⁷ PD 131/2003 'on the adjustment to Directive 2000/31 of the EP and EC on certain legal aspects of services of the information society, especially of electronic commerce, in the internal market' (Προσαρμογή στην Οδηγία 2000/31 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου σχετικά με ορισμένες νομικές πτυχές των υπηρεσιών της κοινωνίας της πληροφορίας, ιδίως του ηλεκτρονικού εμπορίου, στην εσωτερική αγορά – Οδηγία για το ηλεκτρονικό εμπόριο), Government Gazette A' 116/2003.

2.4 Responsibility for publishing hate speech

The regulation of responsibility for publication of hate speech is not uniform and, in practice, remains ineffective⁷⁵⁸. Below are subsections which describe the regulatory framework related to hate speech and which demonstrate how liability is regulated in each field of law.

Criminal Liability

A violation of the previous anti-racism law, Law 927/1979, had been upheld in a final decision before a higher ranking court only once, with all other rulings overturned in the second decree (appeals phase). In 2008, the First Three-Member Appeals Court of Athens⁷⁵⁹ condemned the publisher and two columnists of the newspaper "Eleftheros Kosmos" for the violation of anti-racism Law 927/1979, and found them responsible for the incitement of hatred against the Jews and Roma. A sentence of seven months in prison was imposed on each person convicted. This demonstrates that under criminal law, the publisher holds the same responsibility as the author of hate speech. However, this was a result of the interpretation given by the specific court, as the law itself was vague concerning the responsibility of publishers (and in Greece there is no binding precedence of court decisions other than on the parties of the specific dispute). Therefore, apart from the responsibility of the author of hate speech (direct application of Article 1 of Law 927/1979), there are no specific regulations on the responsibility of publishers for the publication of hate speech. ECRI recommends the extension of the application of Law 927/1979 on racial discrimination (as it has been amended through Anti-racist Law 4285/2014) to media services providers⁷⁶⁰.

Civil Liability

Under Greek Civil Law (Law 1178/1981⁷⁶¹) the owner of the specific printed media bears objective responsibility (civil liability) for the publication of offensive material. Under Articles of the Civil Code on the Protection of Personality (Art. 57), Reputation (Art. 59) Liability (Arts. 914, 919) and Restitution (Arts. 920, 932), the editor bears responsibility. Given that hate speech targets characteristics linked to the personality of a person, *mutatis mutandi* one can apply these articles in cases of targeted publication of hate speech.

Administrative – Disciplinary Liability

Hate speech is widespread both in the media and the Internet and goes largely unpunished. The self-regulatory mechanisms are largely ineffective and usually consist of issuing public reprimands. For example, on March, 23 2015 the Appeals Disciplinary Board of the Journalists' Union of Athens Daily Newspapers adopted a unanimous decision⁷⁶² for the reprimand of a journalist who, during the broadcasting of a radio show, referred to a writer with vulgar and derogatory terms linked to his sexual orientation. He was found to be in violation of Article 7, paragraph 1(a) of the Union's Statute⁷⁶³ as well as of Articles 2 paragraph b and 7 paragraph 1 (b) of the Code of

⁷⁵⁸ Gazakis, Syrri and Takis, *Racism and Discrimination in Greece today*, *op. cit.*, p.37.

⁷⁵⁹ First Single-Member Court of Appeals of Athens, Decision 5919/18-9-2008 (Απόφαση Α' Μονομελούς Εφετείου Αθηνών υπ' αρ. 5919/18-9-2008).

⁷⁶⁰ ECRI 2014 Report on Greece, *op. cit.*, p. 21.

⁷⁶¹ Law 1178/1981 'on civil liability of the Media and other relevant provisions' (Περι αστικής ευθύνης του τύπου και άλλων πινών διατάξεων), Government Gazette Α' 181/1981.

⁷⁶² Decision 1/2015, available at: <http://www.esiea.gr/apofasi-yp-arithm-12015-toy-deyterovathmi/>.

⁷⁶³ The Union's Statute is available online: <http://www.esiea.gr/katastatiko/>.

Conduct of the Athens Journalists' Association. The penalty consisted of a public reprimand through the posting of the decision in all working areas. Such a punishment could not be capable of correcting and preventing hate speech in the media. The Athens Journalists' Union is one of the media bodies known for its Code of Conduct. The principal organisation for the regulation of all radio and television broadcasts is the National Council for Radio and Television, which is recognised as an independent authority by the Greek Constitution. It is competent for the application of any legal instruments on the regulation of public and private television and radio broadcasts, and it delivers decisions which can be challenged before Council of State. The Hellenic Data Protection Authority, constitutionally recognised as an independent authority, is also presented below.

Athens Journalists' Union (Disciplinary Liability)

The **Code of Conduct of the Athens Journalists' Union** does not provide reference to the liability of publishers. It contains provisions (Articles 1 and 2), which require journalists to impart information without any prejudice related to their own political, social, religious, racial or cultural views or beliefs, and to make no distinction on grounds of national origin, sex, race, religion, political beliefs, economic and social status⁷⁶⁴. In principle, journalists are held responsible for any violation of the Code of Conduct. Editors-in-chief, however, can also be held responsible for a journalist's conduct. Recently, and following the referendum held at the beginning of July 2015, the editor-in-chief of a news programme on the channel "Skai" is amongst a group of journalists who will undergo a disciplinary review by the Union's Disciplinary Board⁷⁶⁵. The specific case concerned the violation of the obligation of objectivity, yet the practice itself indicates the possibility of holding the editor-in-chief of a given news medium responsible for a journalist's misconduct.

National Council for Radio and Television (Administrative Liability)

According to **Law 2863/2000**⁷⁶⁶ establishing the National Council for Radio and Television, broadcasters are obliged to form self-regulatory ethics committees, which must enter into multi-party self-regulatory agreements that define and adopt rules of conduct and ethical standards as to media content. For this reason it issues regulations and codes of conduct for journalists, programmes and advertising, as well as directives and recommendations on the application of these principles. The most significant are: Regulation 1/1991 "Code of journalistic deontology", Regulation 2/1991 "Code of Radio and Television Programmes", and Regulation 3/1991 "Code of deontology for Radio and Television Advertising". Specific self-regulatory agreements are not available on the Council's official website. The self-regulatory framework provided through Law 2863/2000, requires each television station to set up Internal Ethics Committees. However, in practice, while the establishment of such committees has been completed, they are not effective⁷⁶⁷, and focus mainly on the age-appropriate symbols that should

⁷⁶⁴ The Deontology Principles were adopted by the General Assembly of the Journalists' Union of Athens Daily Newspapers (*Γενική Συνέλευση της ΕΣΗΕΑ*) on May 19-20, 1998 and are available on the Union's website at <http://www.esiea.gr/arxes-deontologias/>.

⁷⁶⁵ Proto Thema, 'Unprecedented disciplinary prosecution of journalists by ESHEA' (*Πρώτο Θέμα - Πρωτοφανής πειθαρχική δίωξη δημοσιογράφων από την ΕΣΗΕΑ*), 07/07/2015, available at: <http://www.protothema.gr/greece/article/491197/protofanis-peitharhiki-dioxi-dimosiografon-apo-tin-esiea/>.

⁷⁶⁶ Law 2863/2000 'on the National Radio and Television Council, Radio and Television Services, organs of voluntary commitment and self-monitoring mechanisms' (*Εθνικό Συμβούλιο Ραδιοτηλεόρασης, Ραδιοτηλεοπτικές υπηρεσίες, Όργανα αυτοδέσμευσης και αυτοελέγχου*), Government Gazette A' 262/2000.

⁷⁶⁷ National Council for Radio and Television, '2010 Activity Report' (*ΕΣΡ - Έκθεση Πεπραγμένων 2010*), available in Greek at: http://www.esr.gr/arxeion-xml/pages/esr/esrSite/list_docs?section=035516d6c0ab1e7683571826e98263e5&categ=716aa0d6d0861e7683571826e98263e5, p. 37.

accompany each programme upon broadcasting.

Furthermore, the National Council for Radio and Television is responsible for the application of two important Presidential Decrees: PD 77/2003⁷⁶⁸ which contains the codex of deontology for news and media broadcasts, and PD 109/2010 which introduced the Audiovisual Media Services Directive. The National Council for Radio and Television *ex officio*, or following a complaint(s) from individuals, decides to examine a specific case. The Plenary Body delivers decisions which can be challenged before the supreme administrative court in Greece, the Council of State. The companies which own the television or radio stations are held liable for any violations of radio and television legislation. The penalties vary from administrative recommendations to the requirement to undertake a specific action(s), to the imposition of pecuniary fines.

More specifically, Article 4 of **Presidential Decree (PD) 77/2003** regulating radio and television news and political broadcasts, prohibits the presentation of individuals in a way that, under specific conditions, could encourage their ridicule, social isolation or discrimination on grounds of racial or ethnic origin, nationality, religion and language, among others. It also prohibits broadcasting racist and xenophobic and intolerant views, in particular concerning ethnic or religious minorities and other vulnerable population groups.

Presidential Decree 109/2010 transposing the Audiovisual Media Services Directive, provides under Article 7 that audiovisual service providers must ensure that programmes do not cause hate due to race, sex, religion, beliefs, nationality, disability, age and sexual orientation, nor do they take advantage of people's superstitions and prejudices. The National Council for Radio and Television has issued one decision on the basis of this Article in 2011, concerning the broadcasting of a Turkish series which it found capable of inciting to hatred on grounds of ethnic origin⁷⁶⁹. The administrative sanction of a recommendation to refrain from broadcasting images that can cause ethnic hatred was imposed, with the possibility of a stricter penalty in case of non-compliance.

Representatives of civil society organisations, as well as some public officials, suggested to FRA⁷⁷⁰ that print and audiovisual media often do not follow these rules, which contributes to fostering a climate of intolerance, especially towards irregular migrants and asylum seekers. Members of the Management Board of the National Council for Radio and Television told FRA, for instance, that extremist views have, on occasion, been openly promoted by small private TV stations and, in some cases, xenophobic statements were aired by major television channels, but that the National Council for Radio and Television applied financial penalties only in a very small number of cases.

Hellenic Data Protection Authority (Administrative Liability)

Any information which may constitute diversity characteristics and therefore grounds for discrimination are protected under **Law 2472/1997**⁷⁷¹ as sensitive personal data, the collection and processing of which is not permitted (this prohibition also includes the

⁷⁶⁸ P.D. 77/2003, 'Codex of deontology of news and other media and political broadcasts' (Κώδικας Δεοντολογίας ειδησεογραφικών-δημοσιογραφικών-πολιτικών εκπομπών), Government Gazette, A' 75/2003.

⁷⁶⁹ National Council for Radio and Television, Decision No. 417/10.10.2011, (ΕΣΡ, Απόφαση Ολομελείας υπ' αρ. 417/10.10.2011), available at: http://www.esr.gr/arxeion-xml/pages/esrSite/listweb?last_clicked_id=link1&no_of_links=2&date_all=&date_from=&date_to=&meso=&velocity=&station=&ekpompes=&thema=%CE%A0%CE%A1%CE%9F%CE%9A%CE%9B%CE%97%CE%A3%CE%97+%CE%9C%CE%99%CE%A3%CE%9F%CE%A5%CE%A3&ste=&num_apof=&order=date_publ+desc.

⁷⁷⁰ FRA 2013 Report on Greece, *op. cit.*

⁷⁷¹ Law 2471/1997 'on the Protection of individuals from the processing of personal data' (Προστασία των ατόμων από την επεξεργασία δεδομένων προσωπικού χαρακτήρα), Government Gazette A' 50/1997.

publication of sensitive personal data). The Hellenic Data Protection Authority is the constitutional independent authority responsible for the regulation of personal data protection. It delivers decisions that impose penalties ranging from administrative recommendations to pecuniary fines. The Authority frequently delivers decisions concerning the unlawful processing of sensitive personal data by the media⁷⁷². The company that owns a specific media source, as well as the person responsible for editing news reports (editor-in-chief), are held liable.

Note: Out of the different liability schemes presented above, only the criminal and civil liability schemes can be applied jointly to publishers. More specifically, the victims of hate speech crime can participate in the criminal justice procedure by means of civil action (Articles 63-70 of the Code of Criminal Law Procedure⁷⁷³). In practice, civil action is preferred because the procedure before the criminal court is less time-consuming than that of the adjudication of cases before the civil courts. However, once a final decision has been made by the criminal court, a case cannot be brought before the civil courts unless it concerns the liquidation of the compensation set by the final decision. Nor, if a final decision has been delivered by the civil courts on the civil liability of the publisher, can the victim then participate in the criminal procedure by means of civil action.

⁷⁷² A list of such decisions is available online in Greek at: http://www.dpa.gr/portal/page?_pageid=33%2C15453&_dad=portal&_schema=PORTAL&_piref33_15473_33_15453_15453.etos=-1&_piref33_15473_33_15453_15453.arithmosApofasis=&_piref33_15473_33_15453_15453.thematikiEnotita=187&_piref33_15473_33_15453_15453.ananeosi=%CE%91%CE%BD%CE%B1%CE%BD%CE%AD%CF%89%CF%83%CE%B7.

⁷⁷³ The text of the Code of Criminal Law Procedure is available (in Greek) online via the Ministry of Justice portal: <http://www.ministryofjustice.gr/site/kodikis/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CE%BF/%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3%CE%A0%CE%9F%CE%99%CE%9D%CE%99%CE%9A%CE%97%CE%A3%CE%94%CE%99%CE%9A%CE%9F%CE%9D%CE%9F%CE%9C%CE%99%CE%91%CE%A3/tabid/345/language/el-GR/Default.aspx>.

3 Effectiveness of the Legal Framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 – National case law on hate crime/hate speech vs. freedom of expression	
<p>Transposing provision 1</p> <p>Public Incitement to violence or hatred (Δημόσια υποκίνηση βίας ή μίσους)</p>	<p>Law 927/1979 was recently amended through Law 4285/2014. Therefore, there are no decisions of the Supreme Court examining the relationship between freedom of expression and hate speech under the new legal framework. In addition, no specific threshold has ever been introduced for limiting the freedom of expression. However, under the previous legal framework of Law 927/1979, some relevant court decisions exist:</p> <p>Decision 3/2010 of the Supreme Court (Άρειος Πάγος) (Case concerning Anti-Semitism by Mr. Plevris): This case concerned the publication of an anti-Semitic book by Constantinos Plevris. In his 1,400-page book, Plevris glorifies Hitler and calls for the extermination of the Jews. He declares himself “a Nazi, a fascist, a racist, an anti-democrat, an anti-Semite. Jews are mortal enemies and deserve the firing squad”. He was initially convicted to a 14-month suspended sentence for inciting to hatred and racist violence. However, the sentence was overturned by the Supreme Court, which acquitted Plevris stating that Law 927/1979 has to be interpreted and applied strictly so as not to infringe upon the freedom of expression enshrined in the Greek Constitution (Arts. 14(1) and 16(1)) and the ECHR (Art. 10(1)). Apart from this vague reference to a strict interpretation, the Court did not examine or indicate a threshold for limiting the freedom of expression.</p> <p>Decision 65738/2014 Athens Single-Member Court of Misdemeanours: Alexandros Plomaritis, a Golden Dawn Member, was prosecuted and convicted for incitement to racial violence in a documentary aired on Channel 4. During this documentary he referred to migrants as “sub-human” and “taints”. Through Decision 65738/2014 of the Athens Single-Member Court of Misdemeanours, he was convicted to one year imprisonment and a three-year suspended sentence. This Decision was important, as it examined the crime of hate speech in light of the freedom of expression. The judge stipulated that Law 927/1979 has to be <i>stricto sensu</i> applied so as not to endanger the freedom of expression, yet the State must also always keep in mind its obligation to respect and protect human dignity, including race and nationality. Apart from this vague reference to a strict interpretation, the Court did not examine or indicate a threshold for limiting the freedom of expression.</p>
<p>Transposing provision 2</p> <p>Public Condonation or Denial of Crimes (Δημόσια επιδοκιμασία ή άρνηση εγκλημάτων)</p>	<p>Law 927/1979 was recently amended through Law 4285/2014. Therefore, there are no decisions of the Supreme Court examining the relationship between freedom of expression and hate speech under the new legal framework.</p> <p>In March 2015, Mr. Heinz Richter was prosecuted for denial of Nazi crimes against the Cretan people by using derogatory and insulting expressions in reference to them. The case is pending before the Court of Misdemeanours of Rethymno, Crete. The examination of the case is set to take place on September, 2, 2015⁷⁷⁴.</p>

⁷⁷⁴ Rethymniotika Nea, ‘H. Richter referred to court for violating the Anti-racist Law’ (‘ΡΕΘΥΜΝΙΩΤΙΚΑ ΝΕΑ - Για παράβαση του αντιρατσιστικού νόμου παραπέμπεται σε δίκη ο Χ. Ρίχτερ’), March 13, 2015, available at <http://www.rethnea.gr/article.aspx?id=23540>.

<p>Transposing provision 3</p> <p>Racist Crime (Ρατσιστικό έγκλημα)</p>	<p>Law 927/1979 was recently amended through Law 4285/2014. Therefore, there are no decisions of the Supreme Court examining the relationship between freedom of expression and hate speech under the new legal framework.</p> <p>No higher court decisions linked to the rules set out in the previous legal framework, assessing the relationship of racist crime with the freedom of expression, have been identified. Examples of cases where courts have condemned or are likely to condemn the perpetrator(s) for the commission of racist crimes are provided below.</p> <p>Shehzad Luqman Case: Shehzad Luqman, a 27-year old worker from Pakistan, was murdered at Petralona (Athens) on 17 January 2013, as he was going to work on his bicycle. The perpetrators were two men who were linked to the Golden Dawn party. The Mixed Jury Court of Athens, in a unanimous verdict, found Dionysis Liakopoulos, 26, and Christos Stergiopoulos, 30, guilty of his murder. They received an additional 32 months each for additional gun-related charges⁷⁷⁵. It was the first time a racist crime had been examined before a court in Greece⁷⁷⁶. The Court did not interpret any elements of the offence provision in connection with freedom of expression.</p> <p>Walid Talb Case: Walid Talb, an Egyptian national, was attacked in November 2012 and robbed, tortured and sexually assaulted. The group of perpetrators included his employer, along with his employer's and two other men. The racist nature of the crime was indicated by the constant verbal abuse against the victim referring to his religion and race. The case is pending before the Three Member Appeals Court of Athens⁷⁷⁷.</p> <p>A number of similar incidents are listed in Antigone's 2014 Annual Report⁷⁷⁸.</p>
<p>Indicator 2 – Quantitative evidence</p>	
<p>Transposing provision 1</p> <p>Public Incitement to violence or hatred (Δημόσια υποκίνηση βίας ή μίσους)</p>	<p>Since Law 4285/2014 was recently introduced, it is difficult to assess the quantitative evidence in this regard. There is also a recognised general absence of systemic data collection for incidents related to hate speech⁷⁷⁹. No detailed statistics are compiled on the few cases that reach the courts, since each court has to compile its own data, without standardised criteria.</p> <p>The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) received the last submission from the Greek Prosecutor's Office in 2013 covering the 2012 period. According to this submission, no new cases were reported in 2010 and 2011, one sentence was handed down for a racist crime in 2011, and only one racist crime – against persons of African origin – was prosecuted in 2012⁷⁸⁰.</p>

⁷⁷⁵ EnetEnglish.gr, 'Pair get life for Pakistani worker's murder', April 16, 2014, available at: <http://www.enetenglish.gr/?i=news.en.article&id=1860>.

⁷⁷⁶ VICE, M. Maragidou, 'The Luqman Case: A first sentence on Murder with Racist Violence' (Υπόθεση Λουκμάν: Η Πρώτη Καταδίκη για Δολοφονία με Ρατσιστικό Κίνητρο), April 23, 2014, available at: <http://www.vice.com/gr/read/ypothesi-loukman>.

⁷⁷⁷ Greek Branch of UNCHR, 'Press Release on the investigation of possible bias motive in the trial of Walid Talb' (Δελτίο Τύπου: Να διερευνηθεί πιθανό ρατσιστικό κίνητρο στη δίκη του Walid Talb), 26/03/2015, available at: <http://www.unhcr.gr/1againstracism/deltio-tipou-na-dierevnithi-pithano-ratsistiko-kinitro-sti-diki-tou-walid-talb/>.

⁷⁷⁸ Antigone 2014 Annual Report, *op. cit.*, Chapter 5 of the Report.

⁷⁷⁹ ECRI 2014 Report on Greece, *op. cit.*, p. 17-18.

⁷⁸⁰ OSCE-ODIHR, 'Hate Crimes in the OSCE Region', 2013, available at: http://tandis.odihr.pl/hcr2012/pdf/Hate_Crime_Report_full_version.pdf, p.27.

	<p>The Police and the Prosecution Service informed ECRI's delegation that 15 cases had been investigated and nine prosecutions initiated under law 927/1979 in 2013⁷⁸¹. In 2014, Plomaritis was convicted of public incitement to hatred during a documentary on Channel 4 (see above). However, no cases have been adjudicated under the new legal framework. This is due to the fact that the new legal framework was introduced in September 2014. This allows the drawing of two conclusions: - Both the Police and the Prosecution Service collect data, which they share upon request. - Considering the current situation in Greece concerning migrants and extreme right-wing parties, the numbers communicated by the Greek authorities to OECD and ECRI seem to be low. This is because most cases remain unreported by victims of racist violence, who prefer not to approach the competent authorities, from fear of being deported for not having official papers⁷⁸².</p>
<p>Transposing provision 2 Public Condonation or Denial of Crimes (Δημόσια επιδοκιμασία ή άρνηση εγκλημάτων)</p>	<p>Since Law 4285/2014 was recently introduced, it is difficult to assess the quantitative evidence in this regard. The only case to be investigated with relation to this offence provision is that of Mr. Heinz Richter. The case is set to be discussed before court in September 2015.</p>
<p>Transposing provision 3 Racist Crime (Ρατσιστικό έγκλημα)</p>	<p>Since Law 4285/2014 was recently introduced, it is difficult to assess the quantitative evidence in this regard. The Greek authorities do not compile full statistics about the extent of racist violence. In October 2011, a group of NGOs (currently 20 NGOs are members), together with the National Human Rights Commission and the UNHCR, set up the Racist Violence Recording Network (RVRN) to fill the data gap. The reports and conclusions of the network indicate an explosion of racist violence in Greece in recent years, coinciding with the unfolding of the country's financial and economic crisis. Already during the period November 2010 – June 2011, the polyclinic of the NGO "Praksis" in central Athens recorded 206 incidents of racist violence. Most victims were men aged 25-45 years. There were also 45 assaults against women and children. During the first half of 2011, Médecins du Monde, which also operates a polyclinic in central Athens, recorded that around 300 immigrants had been victims of physical assault. Victims mainly originate from Bangladesh and Afghanistan.⁷⁸³ In 2012, the RVRN registered two racially-motivated murders and 154 incidents⁷⁸⁴. In 2013, the number of incidents of racist violence again rose sharply compared with the previous year. The RVRN registered 320 victims of 166 separate attacks⁷⁸⁵. In 2014, the RVRN documented 81 incidents of racist violence with at least 100 victims⁷⁸⁶. Under-reporting is an issue in Greece, with victims of racist violence, fearful of being deported for not having official papers, prefer to not approach the competent authorities⁷⁸⁷.</p>

⁷⁸¹ ECRI 2014 Report on Greece, *op. cit.*, p.26.

⁷⁸² *Ibid.*

⁷⁸³ ENAR, 'Racism and related discriminatory practices in Greece'. ENAR Shadow Report 2011-2012, 2013, available at: [http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202011-12/shadowReport_EN_LR%20\(3\).pdf](http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202011-12/shadowReport_EN_LR%20(3).pdf), p.29.

⁷⁸⁴ RVRN, *2012 Annual Report*, available at: <http://rvrn.org/2013/04/2012-annual-report/>.

⁷⁸⁵ RVRN, *2013 Annual Report*, available at: http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf.

⁷⁸⁶ RVRN, *2014 Annual Report*, available at: http://rvrn.org/wp-content/uploads/2015/05/Report_2014eng.pdf.

⁷⁸⁷ *Ibid.*

Indicator 3 – Bottlenecks of practical implementation	
<p>Transposing provision 1</p> <p>Public incitement to violence or hatred (Δημόσια υποκίνηση βίας ή μίσους)</p>	<p>Clarity of offence provision: The provision is clear.</p> <p>Suitability of offence provision to cover online crime: The provision is suitable to cover online crime.</p> <p>Suitability of offence provision to ensure freedom of expression: The provision is able to ensure respect for freedom of expression.</p> <p>Suitability of offence provision to protect vulnerable groups: The provision is suitable for the protection of vulnerable groups. Note: Stakeholders⁷⁸⁸ have indicated that 'age' should be included as a protected characteristic, since it is not covered by the offence provision.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): The provision targets the right group of perpetrators.</p> <p>Other shortcomings of applicable offence provision: There is a need for the inclusion of provisions for the protection of witnesses. Criminal procedural rules should be adjusted so as to protect undocumented immigrants from detention or deportation. It is considered as a key reason for the under-reporting of racist crimes related to asylum seekers and immigrants.</p>
<p>Transposing provision 2</p> <p>Public Condonation or Denial of Crimes (Δημόσια επιδοκιμασία ή άρνηση εγκλημάτων)</p>	Refer to previous section.
<p>Transposing provision 3</p> <p>Racist Crime (Ρατσιστικό έγκλημα)</p>	Refer to previous section.
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing provision 1</p> <p>Public Incitement to violence or hatred (Δημόσια υποκίνηση βίας ή μίσους)</p>	<p>The criminal law provisions to fight racism and racial discrimination are contained in Law 927/1979, as amended by Laws 1419/1984, 2910/2001 and 4285/2014. Law 4285/2014 was enacted on 9 September 2014 with the purpose of adapting Law 927/1979 to the CFD. The new legal framework protects all characteristics except for that of "age". Therefore, the harmonisation to the CFD was one of the main reasons for adopting a new law. The murder of Pavlos Fyssas by Golden Dawn, and the prosecution of the Golden Dawn leadership, contributed to further motivating the Ministry of Public Order to introduce this new Bill to Parliament.</p>

⁷⁸⁸ Information collected through consultation with national stakeholders (police/prosecutor/academic/NGO). The specific information was provided by a human rights lawyer, well acquainted with ECtHR cases, previously a Citizen's Ombudsman for the Athens Municipality and currently, Citizen's Ombudsmen at a regional level (21 May 2015) and has also been proposed in the following NGO Reports: Greek Ombudsman, 'Special Report on Racist Violence', *op. cit.* and GNCHR, 'Observations on the Draft of the Second Periodic Review of the Hellenic Republic for the International Covenant on Civil and Political Rights', *op. cit.*

<p>Transposing provision 2</p> <p>Public Condonation or Denial of Crimes (Δημόσια επιδοκιμασία ή άρνηση εγκλημάτων)</p>	<p>Refer to previous section.</p>
<p>Transposing provision 3</p> <p>Racist Crime (Ρατσιστικό έγκλημα)</p>	<p>Article 79(3) of the Criminal Code made it an aggravating circumstance to commit an act out of hatred based on race, religion, national or ethnic origin, or because of the different sexual orientation or gender identity of the victim. The sentence could not be suspended. Law 4285/2014 introduced Article 81^A to the Criminal Code, rendering more severe the lowest sentences that can be imposed for hate motivated offences, and abolishing the part of Article 79(3) on aggravating circumstances. Colour and disability were added to the list of protected characteristics (but not age). Sentences still cannot be suspended. This particular amendment was necessary because it was difficult to investigate bias motive as an aggravated circumstance, which is examined during the sentencing process before the Court without the participation of the civil action lawyer. The Court could only consider bias motives, therefore, if they were included in the Prosecution file, and authorities frequently neglected to investigate bias motives during the prosecution.</p>

3.2 Effectiveness of the legislation transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

<p>Indicator 1 – National case law on the interaction of transposing provision with freedom of expression</p>	
<p>Transposing provision 1</p> <p>Article 6 of Directive 2010/13</p>	<p>There are no Supreme Court decisions on the specific provision and their relationship with freedom of expression.</p>
<p>Transposing provision 1</p> <p>Internal Market</p>	<p>There are no Supreme Court decisions on the specific provision and their relationship with freedom of expression.</p> <p>One of the stakeholders⁷⁸⁹ indicated the adjudication of a case which is pending before the Supreme Court (Άρειος Πάγος). It is scheduled to be discussed in court in September 2015. The stakeholder stated that he is representing a reporter who has been convicted for comments published by readers on his website, even though the main articles were considered legal. In all instances, the reporter claimed immunity provided under PD. 131/2003 (immunity of website owner for the comments published by third parties under Article 10 – simple transmission and Article 13 – Visitors). The first instance and appeals court did not accept this legal ground and convicted the reporter. It remains to be seen whether or not the Supreme Court will accept it.</p>
<p>Indicator 2 - Quantitative evidence</p>	
<p>Transposing provision 1</p> <p>Article 6 of Directive 2010/13</p>	<p>There are no available data due to a lack of uniform data collection system for court cases. Each court has to compile its own data without standardised criteria. Therefore, it is impossible to distinguish whether or not cases have been adjudicated. The response in this section is based solely on information collected through consultation with national stakeholders. Stakeholders responded that, according to their personal estimates, the number of cases must be very low.</p>

⁷⁸⁹ Information collected through consultation with national stakeholders (police/prosecutor/academic/NGO). The specific information was provided by a human rights lawyer, well acquainted with ECtHR cases, previously a Citizen’s Ombudsman for the Athens Municipality and currently, Citizen’s Ombudsmen at a regional level (21 May, 2015).

	As was stated in Section 2.4, the National Council for Radio and Television is competent for deciding on the violation of PD 109/2010, which transposes Directive 2010/13/EU. Its decisions can be challenged before the Council of State. So far the National Council for Radio and Television has delivered only one decision on incitement of hatred ⁷⁹⁰ . Civil courts can examine cases, the subject-matter of which is also covered by the PD 109/2010, and in light of the latter. However, the examination of the PD 109/2010 as a separate legal basis is not within the jurisdiction of civil courts.
Transposing provision 1 Internal Market	Refer to previous section.
Indicator 3 -Bottlenecks of practical implementation	
Transposing provision 1 Article 6 of Directive 2010/13	<p>Clarity of the transposing provision: Yes.</p> <p>Suitability of offence provision to protect vulnerable groups: Gender identity should be added to the protected characteristics. Greece does not have an effective policy for the protection of LGBT persons against discrimination, or a strategy to promote tolerance vis-à-vis this group. In recent years, increasing numbers of cases of discrimination against transgender people have been reported in the media and by NGOs. Repeated and consistent allegations have been brought to ECRI's attention concerning routine police harassment of transgender persons by fining them for solicitation and attempted prostitution merely based on their appearance and the discrepancy between their looks and the sex indicated on their identity cards⁷⁹¹. Therefore, it is important to also cover gender identity.</p> <p>Suitability of offence provision to ensure freedom of expression: Yes.</p> <p>Other shortcomings of applicable offence provision: No.</p>
Transposing provision 1 Internal Market	<p>Clarity of the transposing provision: Yes.</p> <p>Suitability of offence provision to protect vulnerable groups: Gender Identity, Sexual Orientation, Disability and Age should be added to the list of protected characteristics⁷⁹². These groups are vulnerable, often discriminated against and are protected under the equal treatment law, Law 3304/2005. In order to achieve cohesiveness within the Greek legal framework, these grounds should be added to the protected grounds of the Presidential Decree 131/2003.</p>

⁷⁹⁰ National Council for Radio and Television, Decision No. 417/10.10.2011, *op. cit.*

⁷⁹¹ ECRI 2014 Report on Greece, *op. cit.*, p. 27.

⁷⁹² Information collected through consultation with national stakeholders (police/prosecutor/academic/NGO). The specific information was provided by a human rights lawyer, well acquainted with ECtHR cases, previously a Citizen's Ombudsman for the Athens Municipality and currently, Citizen's Ombudsmen on a regional level, (21 May 2015) The following reports have proposed a harmonisation of the specific provisions to those of Law 3304/2005: Greek Ombudsman, 'Special Report on Racist Violence', *op. cit.* And GNCHR, 'Observations on the Draft of the Second Periodic Review of the Hellenic Republic for the International Covenant on Civil and Political Rights', *op. cit.*

	<p>Suitability of offence provision to ensure freedom of expression: Yes.</p> <p>Other shortcomings of applicable offence provision: Courts find it difficult to reach a final decision. This is due to the fact that judges are not well-acquainted with issues of information services, nor are they familiar with the implementation mechanism of the Directive (i.e. the Presidential Decree itself). The Directive should have been introduced into the Civil or Criminal Code instead.</p>
Indicator 4 -Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing provision 1 Article 6 of Directive 2010/13</p>	<p>There have been no efforts towards the adoption of new legislation or amendments to the existing legislation.</p>
<p>Transposing provision 1 Internal Market</p>	<p>Refer to previous section</p>

3.3 Effectiveness of the rules regulating publishers' responsibility

Due to the nature of the specific field, and given that there is no specific rule on publisher's responsibility, it is difficult to complete the table below. Publishers' responsibility is a highly fragmented area, with rules emerging from various areas of law. There is very limited case law and hardly any data are available. There is no available case law on the threshold between freedom of expression and rules regulating liability for publishing hate speech.

Apart from the responsibility of the author of hate speech, there are no specific regulations on the responsibility of publishers for the publication of hate speech. Liability has been recognised in the cases below:

Criminal Liability

Since the anti-racism legislation was recently amended, there are no available final cases capable of demonstrating how publishers' responsibility is regulated. However, there is one case of potential relevance under the previous legal regime. In 2008, the First Three-Member Appeals Court of Athens⁷⁹³ condemned the publisher and two columnists of the newspaper "Eleftheros Kosmos" for the violation of anti-racism Law 927/1979, and found them to be responsible for the incitement of hatred against the Jews and Roma. A sentence of seven months in prison was imposed on each person convicted. This demonstrates that under criminal law, the publisher holds the same responsibility as the author of hate speech.

Administrative Liability:

The National Council for Radio and Television has issued one decision on the basis of Article 7 of PD 109/2010 in 2011. The case concerned the broadcasting of a Turkish series which it found capable of inciting to hatred on the ground of ethnic origin⁷⁹⁴. The administrative sanction of a recommendation to refrain from broadcasting images that can cause ethnic hatred was imposed, with the possibility of a stricter penalty (fine) in case of non-compliance.

However, the National Council for Radio and Television has been heavily criticised for discriminatory practice, especially in connection to sexual orientation. The National Council frequently issues fines on broadcasters for depicting homosexual scenes by claiming a need to protect underage viewers. In 2003⁷⁹⁵, it imposed a fine of EUR 100,000 on a private television station for airing a series which portrayed two men sharing a kiss. The broadcaster challenged the decision before the Council of State which adjudicated in favour of the latter and annulled the National Council for Radio and Television decision⁷⁹⁶. According to the Council of State's reasoning, the depiction of an expression of love between same-sex couples constitutes the depiction of an existing social reality, connected to a specific social group, the sexual preferences of which are constitutionally protected. The National Council for Radio and Television still maintained a homophobic attitude in 2013 when it denied the authorisation of advertising for Athens Pride, by claiming that it does not constitute a "social message". In 2015 it finally granted authorisation for broadcasting the Athens Pride advert on all national television

⁷⁹³ First Single-Member Court of Appeals, Decision 5919/18-9-2008 (*Απόφαση Α' Μονομελούς Εφετείου Αθηνών υπ' αρ. 5919/18-9-2008*), *op. cit.*

⁷⁹⁴ National Council for Radio and Television, Decision No. 417/10.10.2011.

⁷⁹⁵ National Council for Radio and Television, Decision No. 371/11.11.2003.

⁷⁹⁶ Council of State, Decision No. 3490/2006. (*Απόφαση του Συμβουλίου του Κράτους, υπ' αρ. 3490/2006*) The Decisions of the Council of State are available online (in Greek) at: http://www.ste.gr/councilofstate/index_gr.jsp.

stations⁷⁹⁷.

Civil Liability

Civil liability for publishing hate speech can be regulated under Civil Law and data protection law (as was mentioned in section 2.4). However, due to the proliferation of civil law cases, it is nearly impossible to monitor or collect data on these cases.

Self-regulation

In Greece, existing self-regulation of the Athens Journalists' Union covers journalists only. There is no mention of the liability of publishers. No reference to cases spelling out the liability of publishers has been identified.

Potential drivers for existing inefficiencies

The main factor hindering the effectiveness of any schemes to uphold media deontology and ensure the respect towards vulnerable groups, is the unwillingness of the media itself to comply. Self-regulatory schemes exist, but are ineffective. Nor do such self-regulatory schemes provide explicit reference to the liability of publishers. Existing Internal Ethics Committees only focus on the age-appropriate symbols that should accompany each programme upon broadcasting⁷⁹⁸. In a time where racism and extremist behaviour is becoming more widespread, the media is considered as one of the main contributors to such phenomena. News reports fabricate a sense of danger connected to the large number of immigrants and asylum seekers residing in Greece, they frequently highlight the ethnic origin of perpetrators of crimes when they are non-Greek and would invite Golden Dawn members, prior to their prosecution, to make racist comments without presenting any form of counter-argument to their claims⁷⁹⁹. Authorities need to encourage - without encroaching on the independence of the media - the creation of an effective self-regulatory mechanism for the media industry to prevent racist comments in newspapers, on television and on the radio. The practice of the self-regulatory mechanism as it stands today provides for the prevalence of freedom of expression even in cases of hate speech⁸⁰⁰.

ECRI has indicated that the provisions of Law 927/1979 (as amended by Law 4285/2014) should be extended so as to include publishers' responsibility, with a cohesive and concise legal framework created for its regulation⁸⁰¹.

⁷⁹⁷ National Council for Radio and Television, Decision No. 167/03.06.2015. The announcement is available on the Athens Pride website at: <http://athenspride.eu/cms/1763>.

⁷⁹⁸ National Council for Radio and Television, 2010 Activity Report, *op. cit.*, p. 37.

⁷⁹⁹ Gazakis, Syrri and Takis, *Racism and Discrimination in Greece today*, *op. cit.*, 35-38.

⁸⁰⁰ *Ibid.*

⁸⁰¹ ECRI 2014 Report on Greece, *op. cit.*, p. 21.

Drivers for any recent legislative changes

The only recent change to legislation relating to the responsibility of publishers for hate speech, is the amendment of the criminal legislation on anti-racism. The criminal law provisions to fight racism and racial discrimination are contained in Law 927/1979, as amended by Laws 1419/1984, 2910/2001 and 4285/2014. Law 4285/2014 was enacted on 9 September 2014 with the purpose of adapting Law 927/1979 to the CFD. Therefore, the harmonisation to the CFD was one of the main reasons for adopting a new law. The murder of Pavlos Fyssas by Golden Dawn, and the prosecution of the Golden Dawn leadership, contributed to further motivating the Ministry of Public Order to introduce a new Bill to Parliament.

Indicator 1 - National case law on the interaction of provision with freedom of expression	
Provision 1	See assessment above.
Indicator 2 - Quantitative evidence	
Provision 1	See assessment above.
Indicator 3 - Bottlenecks of practical implementation	
Provision 1	See assessment above.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Provision 1	See assessment above.

FRANCE

1 National context

In France, the 'tolerance index', which measures French public opinion towards diversity, reached a stable level in 2014, after four years of continuous decreases. Furthermore, between November 2014 and March 2015, the index has increased by 2.3 percentage points, indicating that French people have become more tolerant, and suggesting that national opinion towards different groups has not been negatively affected by the terrorist attacks in January 2015⁸⁰².

By contrast, statistics show that the number of racist, xenophobic and anti-Semitic offences increased by 30% in 2014. The data published by the National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme*, CNCDH) - which reflect the figures collected by the French Ministry of Interior (*Ministère de l'Intérieur*) - saw a higher number of racist, anti-Semitic and Islamophobic offences in 2014 (1,662) when compared with 2013 (1,274). A sharp increase was observed in complaints relating to anti-Semitism, which recorded a 100% increase, from 423 complaints in 2013 to 851 in 2014⁸⁰³. France saw a sharp escalation in anti-Muslim acts immediately after the Paris attacks, with 199 anti-Muslim acts recorded in January alone, a greater number than reported in all of 2014⁸⁰⁴.

Hate speech incidents, especially those committed online, have increased since the advent of social media platforms like Facebook and Twitter. The number of online incidents has drastically increased since January's terrorist attacks⁸⁰⁵. As a result of this phenomenon, the Government has made the fight against online hate speech one of its priorities⁸⁰⁶.

The above numbers suggest that some communities remain victims of offences on the grounds of their membership of certain groups. Muslim communities and the Jewish population, as well as Roma people and asylum seekers in general, are frequently targeted by offending behaviours, often verbal violence⁸⁰⁷.

In France the legislation addressing hate speech and hate crime should be seen in a strong fundamental rights context, in particular, in the context of freedom of expression, which has been recognised as a fundamental right since the 18th century. It is acknowledged, however, that this freedom is not absolute. As enshrined in Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de*

⁸⁰² Report from the National Consultative Commission on Human Rights, (*La lutte contre le racisme, l'antisémitisme et la xénophobie*), (2014), available at: <http://www.cncdh.fr/fr/actualite/rapport-annuel-sur-le-racisme-lantisemitisme-et-la-xenophobie>.

⁸⁰³ Report from the National Consultative Commission on Human Rights, (*La lutte contre le racisme, l'antisémitisme et la xénophobie*), (2014), available at: <http://www.cncdh.fr/fr/actualite/rapport-annuel-sur-le-racisme-lantisemitisme-et-la-xenophobie>.

⁸⁰⁴ International News website, France 24, 'France prepares for war against online hate speech', (2015), available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

⁸⁰⁵ Conference on the fight against online hatred (*Les premières assises de la lutte contre la haine sur internet*), February 2015; available at: <http://respectzone.org/documents/AssisesUEJF.pdf>.

⁸⁰⁶ The Guardian newspaper, 'France launches major anti-racism and hate speech campaign', (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>.

⁸⁰⁷ Report from the National Consultative Commission on Human Rights, (*La lutte contre le racisme, l'antisémitisme et la xénophobie*), (2014), available at: <http://www.cncdh.fr/fr/actualite/rapport-annuel-sur-le-racisme-lantisemitisme-et-la-xenophobie>

l'Homme et du Citoyen)⁸⁰⁸, and in the Law of 29 July 1881 on the freedom of the press (*Loi du 29 Juillet 1881 sur la liberté de la presse*)⁸⁰⁹, the right to express opinion is limited by any actions that may offend others.

Hate speech and hate crime are offences which may breach the human dignity of others and, therefore, these offences constitute occasions of the limitation of freedom of expression. In addition to the protection provided by criminal law against hate speech and hate crime, such behaviours may also lead to administrative and civil liabilities. The legal framework applicable is primarily composed of the Law of 29 July 1881 on the freedom of the press, the Law of 30 September 1986 on freedom of communication (*Loi du 30 Septembre 1986 sur la Liberté de communication*)⁸¹⁰, the Law of 21 June 2004 for confidence in the digital economy (*Loi du 21 Juin 2004 pour la confiance dans l'économie numérique*)⁸¹¹ and provisions from the Criminal Code (*Code Pénal*)⁸¹².

While the offence provisions applicable to hate speech and/or hate crime are quite clear and seem suitable for the protection of vulnerable groups in France, the boundaries between freedom of expression and the provisions prohibiting hate speech remain unclear. Case law shows that the principal factor determining the borderline between freedom of expression and the offence provisions is the discretion of the individual judge.

The permissibility of certain expressions have been a subject of discussion in France for many years. Such discussion resulted from, among others, the frequent law suits against the satirical magazine, Charlie Hebdo. The magazine was brought before the courts 50 times between 1992 and 2014 by various associations, for alleged offences of which it was acquitted in 75% of these cases. As a general rule, the courts found that the caricatures published by the magazine, which often illustrated religious figures such as Mohammed or the Pope in a satirical way, did not constitute hate speech. While blasphemous in nature, this is no longer penalised in France. French courts, therefore, held that whilst mocking or criticising people on the basis of their religious beliefs could be considered hate speech, mocking or criticising the beliefs themselves was permissible⁸¹³. French courts seemed to be more stringent with respect to the behaviour of the French comedian Dieudonné, who was sentenced nine times between 2006 and 2014 for - among other things - hate speech and incitement to terrorism. Some opinions believed that the French courts in sentencing Dieudonné did not respect the right to freedom of expression⁸¹⁴. France has also been subject to criticism for its campaign against online hate speech, as it was argued that the campaign, *inter alia* allowing the

⁸⁰⁸ 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l'Homme et du Citoyen*), August 1789, Article 11, available at: <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>.

⁸⁰⁹ Law of 29 July 1881 on the freedom of the press (*Loi du 29 Juillet 1881 sur la liberté de la presse*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312>.

⁸¹⁰ Law No. 86-1067 of 1986 on the freedom of communication (*Loi du 30 Septembre 1986 sur la Liberté de communication*), available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930.

⁸¹¹ Law No. 2004-575 of 21 June 2004 for confidence in the digital economy (*Loi du 21 Juin 2004 pour la confiance dans l'économie numérique*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000801164&dateTexte=&categorieLien=id>.

⁸¹² French Criminal Code (*Code Pénal*), available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>.

⁸¹³ Le Monde, 'Charlie, Dieudonné: What limits to freedom of expression?' (*Charlie, Dieudonné: quelles limites à la liberté d'expression?*), 14 January 2015, available at: http://www.lemonde.fr/les-decodeurs/article/2015/01/14/de-charlie-a-dieudonne-jusqu-ou-va-la-liberte-d-expression-4555180_4355770.html.

⁸¹⁴ Amnesty International, 'France: freedom of expression to test' (*France: la liberté d'expression à l'épreuve*), (2015), available at: <http://www.amnesty.fr/Nos-campagnes/Liberte-expression/Actualites/France-la-liberte-expression-epreuve-13947>.

competent authorities to shut down offending websites, was too restrictive of the freedom of expression⁸¹⁵.

2 Legal framework

2.1 General description of legislation applicable to hate crime and hate speech

Freedom of expression/speech is a fundamental right in France. Initially enshrined in the 1789 French Declaration of the Rights of Man and of the Citizen, the right to freedom of expression can only be restricted under certain conditions, such as when the speech is defamatory, or is considered hate speech.

While defamation is defined in the offence provision as an intentional false communication aimed at damaging a person's reputation, hate speech has no corresponding universal definition. It is, however, commonly understood as a communication (in speech, gesture or conduct) intended to foster hatred towards an individual, or a group of individuals, because of their origin or membership of a specific group. More precisely, the term 'hate speech' encompasses any racist, anti-Semitic or homophobic behaviour and/or speech aimed at offending a person because of his/her origin or membership of an ethnic group, nation or religion, as well as any justification or denying of crimes against humanity, crimes of genocide and war crimes. Hate speech constitutes a criminal offence in France, and, while not all related provisions appear in the Criminal Code, they are provided for *inter alia* by the Law of 29 July 1881 on the freedom of the press.

Hate crime related provisions are mainly set out in the Criminal Code. The term 'hate crime' refers to a crime motivated by prejudice, where the perpetrator specifically targets a victim because of his/her membership of a certain social group. Hate crime does not constitute a specific offence provision, but, rather, 13 offence provisions include it as an aggravating circumstance if the crime is committed by a racist with xenophobic motivation. Of the 13 offence provisions, 12 are set out in the Criminal Code and one in the Sports Code (*Code des Sports*)⁸¹⁶. The currently applicable provisions, as explained in greater detail in Section 2.2, echo the provision set out in Article 4 of Council Framework Decision 2008/913/JHA (CFD).

Procedural rules regulating the French criminal justice system also contain some rules specific to hate speech and hate crime. These rules, as set out in the Code of Criminal Procedure (*Code de Procédure Pénale*)⁸¹⁷, concern the victims' legal standing, as well as the competent authorities to proceed. In accordance with these rules, any natural or legal person, as well as associations active in the field of hate speech, can report a crime. The Public Prosecutor can also trigger proceedings in the absence of a report filed by the victim⁸¹⁸. A hate speech/hate crime incident, in accordance with the general rules applicable to all crimes, may be reported to the Public Prosecutor or to officers of the

⁸¹⁵ The Guardian newspaper, 'France launches major anti-racism and hate speech campaign' (2015), available at: <http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign> and France 24, 'France prepares for war against online hate speech', (2015) available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

⁸¹⁶ Sports Code (*Code des Sports*), available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>.

⁸¹⁷ Code of Criminal Procedure (*Code de Procédure Pénale*), available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154>.

⁸¹⁸ Article 2, Article 2-1 to 2-5 of the Criminal Procedure Code, available at: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=D3362482E882BA684D9CD49757F4F69A.tpdila07v_1?cidTexte=LEGITEXT000006071154&dateTexte=20150706.

judicial police⁸¹⁹. As a general rule, bodies in charge of the investigation, prosecution and adjudication of hate speech and hate crime cases are the same as those for other criminal offences⁸²⁰. However, two specialised bodies may intervene during the criminal proceedings. The French Equality Body⁸²¹ (*Le Défenseur des Droits*, which is the successor of the HALDE, *High Authority against discrimination and for equality*) is competent in the field of discrimination. It can advise victims and help them collect proof, it can organise mediation between the victim and the offender, it can impose a fine on a person committing discrimination, and it can file a complaint. The Higher Audiovisual Council (*Conseil supérieur de l'audiovisuel*, CSA)⁸²² is in charge of guaranteeing the freedom of broadcasting communication in France. It is competent to impose administrative sanctions against public or private TV or radio programmes in case where they broadcast hate speech. The CSA can also involve the Public Prosecutor in cases where the hate speech constitutes a criminal offence.

The following is a comprehensive list of the laws that apply to hate speech and hate crime: Law of 29 July 1881 on the freedom of the press, Law of 30 September 1986 on freedom of communication, Law of 13 July 1990 aiming at sanctioning any racist, anti-Semitic and xenophobic act (*Loi du 13 Juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe*)⁸²³, Law of 3 February 2003 aiming at aggravating the sanctions for offences that have a racist, anti-Semite or xenophobic dimension (*Loi 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe*)⁸²⁴, Law of 9 March 2004 aiming at adapting justice to the evolution of criminality (*Loi 2004-204 du 9 Mars 2004 portant adaptation de la justice aux évolutions de la criminalité*)⁸²⁵, Law of 21 June 2004 for confidence in the digital economy (*Loi 2004-575 du 21 Juin 2004 pour la confiance dans l'économie numérique*)⁸²⁶, the Criminal Code, the Code of Criminal Procedure, and the Sports Code.

French law also provides for **civil liability** in this area. This implies that perpetrators of such crimes can also be subject to civil liability under a specific civil liability scheme. The Law of 29 July 1881 on the freedom of the press has established a specific civil liability scheme. French courts have confirmed on various occasions that abuses deriving from freedom of speech cannot be dealt with under the general civil liability scheme (as set out in Article 1382 of the Civil Code (*Code Civil*)⁸²⁷). This distinction between the general civil liability scheme and the civil liability as provided by the Law of 29 July 1881 on the

⁸¹⁹ Article 15-3 and 40 of the Criminal Procedure Code, available at:

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=D3362482E882BA684D9CD49757F4F69A.tpdila07v_1?cidTexte=LEGITEXT000006071154&dateTexte=20150706.

⁸²⁰ Article 75, Article 80, Article 1 of the Criminal Procedure Code, available at:

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=D3362482E882BA684D9CD49757F4F69A.tpdila07v_1?cidTexte=LEGITEXT000006071154&dateTexte=20150706

⁸²¹ 'French Equality Body' (*Le Défenseur des Droits*), <http://www.defenseurdesdroits.fr/>.

⁸²² 'Higher Audiovisual Council' (*Le Conseil Supérieur de l'Audiovisuel*, CSA), <http://www.csa.fr/>.

⁸²³ Law 90-615 of 13 July 1990 aiming at sanctioning any racist, anti-Semitic and xenophobic act (*Loi du 13 Juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe*), available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990.

⁸²⁴ Law 2003-88 of 3 February 2003 aiming at aggravating the sanctions for offences that have a racist, anti-Semitic or xenophobic dimension, (*Loi 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000781920>.

⁸²⁵ Law 2004-204 of 9 March 2004 aiming at adapting justice to the evolution of criminality, (*Loi 2004-204 du 9 Mars 2004 portant adaptation de la justice aux évolutions de la criminalité*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000249995>

⁸²⁶ Law 2004-575 of 21 June 2004 for confidence in the digital economy, (*Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*), available at:

<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&dateTexte=&categorieLien=id>.

⁸²⁷ Article 1382 of the Civil Code, available at: www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006438819&cidTexte=LEGITEXT000006070721.

freedom of the press, has always been strictly applied⁸²⁸.

In the audiovisual domain, publication of hate speech may lead to **administrative sanctions**, as described below.

2.2 Transposition of Council Framework Decision 2008/913/JHA

This section describes how the CFD and Articles 1(1) and 4, in particular, has been transposed into French legislation.

French legislation addressing hate speech/hate crime had been adopted and entered into force long before the adoption of the CFD, making it unnecessary to adopt transposing measures to ensure the compliance of French legislation with the requirements of the CFD.

French legislation makes specific reference to both violence and hatred, and contains provisions dealing with the criminal conduct of '**incitement to violence or hatred**'. The commission of public incitement to both violence and hatred is relevant in the context of the CFD, the objective of which is to harmonise the laws and regulations of EU Member States with respect to the most serious manifestations of racism and xenophobia.

In accordance with the relevant requirement of the CFD, the offence provision penalising 'incitement to violence or hatred' refers to both groups of persons and members of such groups, while defining the category of victims⁸²⁹. As opposed to the CFD, which defines victims of incitement by reference to their race, colour, religion, descent or national or ethnic origin, French legislation makes no reference to either colour or descent.

With respect to the **means of dissemination**, French legislation provides that acts of public incitement to violence or hatred are punishable if committed by public dissemination or distribution of tracts, pictures or other material. The criminal conduct can also be committed orally.

As per the CFD, Member States must criminalise the **public condoning, denial and gross trivialisation** of crimes defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court (ICC), given that they are directed against a group of persons or a member of such a group defined by reference to their race, colour, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group. France does not refer to all three types of conduct (i.e. condoning, denying or trivialising), nor does it require the conduct to be carried out in a manner likely to incite to violence and hatred.

The CFD also obliges the Member States to criminalise the public condoning, denial and gross trivialisation of crimes against peace, war crimes and crimes against humanity committed by major war criminals of the European Axis countries. Such conduct can be considered as a specific manifestation of anti-Semitism when it takes place in a way that is likely to incite to violence or hatred. Although this provision can be transposed without

⁸²⁸ High Court, 5 June 2008, N. 07-17.764. Available at: <http://www.jurilexblog.com/liberte-dexpression-et-responsabilite-civile-250660>.

⁸²⁹ European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law', (2014), available at: http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

specific reference to the Charter of the International Military Tribunal, France makes explicit reference to it. However, French law is currently limited to contesting crimes⁸³⁰.

⁸³⁰ European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law', (2014), available at: http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf.

The tables below provide details about the different provisions.

	Offence provision 1 - Art.24(7) of the Law of 29 July 1881 on the freedom of the press 'Crimes and offences committed through written press or any other publication means'
Transposes Art. 1(1)(a) of CFD	Yes
Transposes Art. 1(1)(b) of CFD	Yes
Transposes Art. 1(1)(c) of CFD	No
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Art. 24(7) of the Law of 29 July 1881 on the freedom of the press, modified by the Law of 13 November 2014 reinforcing the fight against terrorism
Definition of offence	Art. 24, (7): (...) Those who, by any means set out in Art. 23 (<i>a speech, threat or shouting in public places or meetings, writings, printed matter, drawing, engraving, painting, emblem, pictures or any other support to the writings, speech or picture sold or distributed, put on the market or exposed in public places or meetings, either by post or notice exposed to the public, or by any communication channel through electronic means</i>), have incited to discrimination, hatred or violence against a person or group of persons because of their origin or their membership or non-membership of an ethnic group, nation, race or religion, shall be punished by imprisonment of one year and a fine of EUR 45,000 or one of these penalties. (...)
Penalties foreseen	Imprisonment: 1 year and/or Fine: EUR 45,000
Protected characteristic(s)	Person/group of persons, defined on the basis of their origin, ethnicity, nation, race, religion.
Online crime	Yes- by means of cross-reference to Art. 23, which sets out the means of commission of the criminal conduct (and which mentions electronic channels).

	Offence provision 2 - Art.24(5) of the Law of 29 July 1881 on the freedom of the press 'Crimes and offences committed through written press or any other publication means'
Transposes Art. 1(1)(a) of CFD	No
Transposes Art. 1(1)(b) of CFD	No
Transposes Art. 1(1)(c) of CFD	Yes
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No

Legal reference to provision	Art. 24(5) of the Law of 29 July 1881 on the freedom of the press, modified by the Law of 13 November 2014 reinforcing the fight against terrorism.
Definition of offence	Art. 24(5): A higher sentence will apply to those who, by one of the means set forth in Art. 23, have glorified crimes referred to in the first paragraph, war crimes, crimes against humanity or crimes of collaboration with the enemy. (...)
Penalties foreseen	Imprisonment: 5 years and/or Fine: EUR 45,000
Protected characteristic(s)	Person/group of persons defined on the basis of origin, ethnic group, nation, race, religion.
Online crime	Yes- by means of cross-reference to Art. 23, which sets out the means of commission of the criminal conduct (and which mentions electronic channels)

	Provision 4 - Art.24 bis of the Law of 29 July 1881 on the freedom of the press 'Crimes and offences committed through written press or any other publication means'
Transposes Art. 1(a) of CFD	No
Transposes Art. 1(b) of CFD	No
Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	Yes
Transposes Art. 4 of CFD	No
Legal reference to provision	Art. 24bis of the Law of 29 July 1881 on the freedom of the press
Definition of offence	Art. 24bis: Those who have contested, by one of the means set forth in Art. 23, the existence of one or more crimes against humanity as defined by Art. 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945 that have been committed either by members of an organisation declared criminal pursuant to Art. 9 of the Statute, or by a person convicted of such crimes by a French or international court, shall be liable to penalties under paragraph six of Art. 24.
Penalties foreseen	Imprisonment : 5 years and/or Fine : EUR 45,000 Complementary Penalty : Public display or dissemination of the decision taken
Protected characteristic(s)	Not set out in legislation.
Online crime	Yes, indirectly - Art. 24bis cross-refers offences committed through means listed under Art. 23 (which mentions electronic channels)

Explanation on the transposition of Article 4 of Council Framework Decision 2008/913/JHA

Article 4 of the Framework Decision requires Member States to consider racist and xenophobic motivation as an aggravating circumstance, or to ensure that courts take such motivation into account in the determination of penalties. French legislation echoes the former provision and penalises racist and xenophobic motivation as an aggravating circumstance.

The relevant provisions are mainly set out in the Criminal Code and not in the Law of 29 July 1881 on the freedom of the press, which latter act incriminates the behaviours set out in Article 1(1) of the CFD. The Criminal Code stipulates that a racist or xenophobic motivation shall be considered an aggravating circumstance with regard to certain (often violent) crimes, such as murder, serious bodily harm and other violence against persons or property. More precisely, there are 13 different offence provisions that specify that it qualifies as an aggravating circumstance in cases where a crime is committed against a person belonging or not belonging to a specific ethnic group, race, nation or religion. Of these 13 provisions, 12 appear in the Criminal Code and one in the Sports Code. These offences are the following:

- **Article 132-76 - General rule reagravating circumstances because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.**

Where provided for by law, the penalties incurred for a crime or major offence are increased when the offence is committed because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature, which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

- **Article 221-4 - Wilful causing of death and assassination**

Murder is punished by criminal imprisonment for life where it is committed: (...) 6° because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion; (...)

- **Article 222-3 - Torture or acts of barbarity**

The offence defined in Article 222-1 is punishable by 20 years of criminal imprisonment where it is committed: (...) 5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

- **Article 222-8 - Acts of violence causing an unintended death**

The offence defined under Article 222-7 is punishable by 20 years of criminal imprisonment where it is committed: (...) 5°bis because of the victim's membership or non-membership of a given ethnic group, nation, race or religion; (...)

- **Article 222-10 - Acts of violence causing mutilation or permanent disability**

The offence defined under Article 222-9 is punishable by 15 years of criminal imprisonment where it is committed: (...) 5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

- **Article 222-13 - Acts of violence causing a total incapacity to work**

Acts of violence causing an incapacity to work of eight days or less or causing no incapacity to work, are punishable by three years of imprisonment and a fine of EUR 45,000 where they are committed: (...) 5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

(...) The penalty is also increased to five years of imprisonment and a fine of EUR 75,000 where the offence brings about a total incapacity to work for eight days or less, and is committed in two of the circumstances enumerated under 1° onwards of the present Article. The penalty is increased to seven years of imprisonment and a fine of EUR 100,000 where it is committed in three of these circumstances.

- **Article 225-18 - Violation of the physical integrity of a corpse**

Where the offences defined under the previous Article (*violation of the physical integrity of a corpse*) were committed by reason of the membership or non-membership, true or supposed, of the deceased persons of any given ethnic group, nation, race or religion, penalties are increased to three years of imprisonment and a fine of EUR 45,000 for the offences defined under the first two paragraphs of Article 225-17 and to five years' imprisonment and a fine of EUR 75,000 in relation to the offence defined by the last paragraph of that article.

- **Article 311-4 - Theft**

Theft is punished by five years of imprisonment and a fine of EUR 75,000: (...) 9° where it is committed because of the victim's membership or non-membership, true or supposed, of a given ethnic group, nation; (...)

- **Article 322-8 - Destroying, defacing or damaging property belonging to other persons by an explosive substance, a fire or any other means liable to create a danger to other persons**

The offence defined by Article 322-6 is punishable by 20 years of criminal imprisonment and a fine of EUR 150,000: (...) 3° where it is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion. Where the offence involves a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, the penalties are increased to 30 years of imprisonment and a fine of EUR 200,000. (...)

- **Article 312-2 - Extortion**

Extortion is punishable by 10 years' imprisonment and a fine of EUR 150,000: (...) 3° when it is committed because of the victim's membership or non-membership, true or supposed, to a given ethnic group, nation, race or religion, (...)

- **Article 222-18-1 - A threat to commit a crime or major offence against persons**

Where threats contrary to the first paragraph of Article 222-17 (*threat to commit a crime or major offence against persons*) are committed because of the victim's membership or non-membership, true or supposed, of any given ethnic group, nation, race or religion, they are punishable by two years of imprisonment and by a fine of EUR 30,000. Threats contrary to the second paragraph of that Article, or contrary to the first paragraph of Article 222-18, are punishable by five years of imprisonment and a fine of EUR 75,000, and those contrary to the second paragraph of Article 222-18 are punishable by seven years of imprisonment and a fine of EUR 100,000. (...)

- **Article 322-2 - Destroying, defacing or damaging property belonging to other persons**

(...) Where the offence defined in the first paragraph of Article 322-1 (*destroying, defacing or damaging property belonging to other persons*) is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, the penalties incurred are also increased to three years of imprisonment and a fine of EUR 45,000.

- **Article L332-7 of the Sports Code - Introducing, wearing or displaying in a sports arena, or in the conduct of public broadcasting in a sporting event, badges, signs or symbols reminiscent of a racist or xenophobic ideology**

The fact of introducing, wearing or displaying in a sports arena, or in the public broadcasting of a sporting event, badges, signs or symbols reminiscent of a racist or xenophobic ideology is punishable by one year of imprisonment and a fine of EUR 15,000.

The attempt of the offence under the first paragraph shall be punishable with the same penalties.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

The rules set out in both the Audiovisual Media Services Directive 2010/13/EU (AMSD) and the Electronic Commerce Directive 2000/31/EC (ECD), had, to a certain extent, already been provided for by the French national legislation prior to the entry into force of these Directives.

- **Audiovisual Media Services Directive 2010/13/EU**

As per Article 6 of the AMSD, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not incite to hatred based on race, sex, religion or nationality. Such protection has been in place in

France since the adoption, in 1986, of the Law of 30 September 1986 on the freedom of communication. This law set up a High Authority in charge of all audio-visual related matters (today called *Le Conseil Supérieur de l'Audiovisuel*).

Legal definition of provision transposing Article 6 of AMSD	
<p>Transposing provision 1</p> <p>Law of 30 September 1986 on freedom of communication</p> <p>Article 15</p>	<p>Article 6 of the AMSD is covered by Articles 15 of the Law of 30 September 1986 on the freedom of communication, modified several times in 2004, 2009 and, more recently, by the Law of 9 July 2010 related to violence against women, violence within couples and its implication for children (<i>Loi n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants</i>)⁸³¹ (Article 28). All these laws belong to the branch of communications laws and set out administrative provisions.</p> <p>Art. 15: The Higher Audiovisual Council ensures that the programmes do not contain any incitement to hatred or violence for reasons of race, sex, morality, religion or nationality.</p>

- **Electronic Commerce Directive 2000/31/EC**

Through this legal instrument, and more precisely on the basis of Article 3(2) and 3(4)(a)(i), 'Member States may restrict the freedom to provide information society services from another Member State if it is necessary for the purpose of public policy, in particular for the prevention, investigation, detection and prosecution of criminal offences, including (...) the fight against any incitement to hatred on the grounds of race, sex, religion or nationality (...)'⁸³². This restrictive measure has been foreseen in France since 1986, when Article 43-8 of the Law of 30 September 1986 on freedom of communication was adopted. However, the notion of audiovisual communication as defined in the text of the Law of 30 September 1986 on freedom of communication, did not cover information provided by electronic channels (the Internet) at that time. Such provision has been in place since 2004, when the Law of 21 June 2004 on confidence in the digital economy, in particular its Articles 1 and 6, was adopted. These provisions should be read in parallel with those set out in Article 43-8 of the Law of 30 September 1986 on freedom of communication.

Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
<p>Transposing provision 1</p> <p>Law of 30 September 1986 on the freedom of communication</p> <p>Article 43-8</p>	<p>Art. 43-8: The Higher Audiovisual Council may provisionally suspend the re-transmissions of television services under the jurisdiction of another Member State of the European Community or party to the Agreement on the European Economic Area, if the following conditions are met:</p> <p>1° The service has distributed more than twice during the previous 12 months broadcasts that may manifestly, seriously and gravely impair the physical, mental or moral development of minors, or which may incite to hatred on grounds of origin, sex, religion or nationality;</p> <p>2° After notification of grievances and proposed measures to the service and to the European Commission and consultation of the transmitting Member State and the European Commission, the alleged infringement persists.</p> <p>The Higher Audiovisual Council may provisionally suspend re-transmissions of television services under the jurisdiction of another State party</p>

⁸³¹ Law of 9 July 2010 related to violence against women, and violence within couples and its implication for children (*Loi n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants*, available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022454032&dateTexte.

⁸³² Article 3(2) and 3(4)(a)(i) of Directive 2000/31/EC.

	to the European Convention of 5 May 1989, cited in the conditions stipulated by the treaty. (...)
<p>Transposing provision 2</p> <p>Law of 21 June 2004 on confidence in the digital economy</p> <p>Article 6</p>	<p>Art. 1: (...) Communication to the public by electronic means refers to any provision to the public or sections of the public, by a method of electronic communication, signs or signals, writing, images, sounds or messages of any nature that do not have the character of a private correspondence.</p> <p>Communication to the public refers to any transmission line on individual demand, digital data having no character of private correspondence, by a process of electronic communication for a mutual exchange of information between the transmitter and the receiver. (...)</p> <p>Art.6: Considering the importance given to the repression of advocating crimes against humanity, incitement to the commission of acts of terrorism and their apology, incitation to hatred with regard to persons because of their gender, their sexual orientation or gender identity or disability, and child pornography, incitement to violence, including incitement to violence against women, as well as outrages upon personal dignity, the persons mentioned above must contribute to the fight against the spread of offences referred to in the fifth and eighth paragraphs of Article 24 of the Law of 29 July 1881 on freedom of the press and Articles 227 -23 and 227-24 and 421-2-5 of the Criminal Code.</p>

2.4 Responsibility for publishing hate speech

In a society where media have now become omnipresent and constitute a primary source of information, it is crucial to ensure the efficient regulation of its use. With respect to hate speech committed by or via the media, French legislation has implemented a cascade system of liability, whereby different persons can be held liable and different rules apply, depending on the type of media concerned.

Rules regulating liability for the publication of written press (including online communication, as the Law of 21 June 2004 for confidence in the digital economy clarified that online communication should be considered on an equal footing with written press) are set out in the Law of 29 July 1881 on freedom of the press, whereas liability for publication by means of audiovisual services is regulated by the Law of 29 July 1982 on mass media and by the Law of 30 September 1986 on freedom of communication. The law on freedom of the press does not apply exclusively to journalists/media, but also to any person using his/her freedom of expression.

Written press:

Criminal liability: The Law of 29 July 1881 on the freedom of the press constitutes one of France's foundational laws in matters of freedom of speech. It protects freedom of the press, while also setting limits as to what can legally be published. This law was amended in 1972 to prohibit hate speech aiming to 'provoke discrimination, hate or violence towards a person or a group of people because of their origin or because they belong or do not belong to a certain ethnic group, nation, race or religion'. It was again amended in 1990, so that denial of crimes against humanity, as defined in the Nuremberg Charter, became illegal. More recently, the law was again amended to prohibit speech advocating or justifying terrorism⁸³³. Publication of hate speech via any written means (including, since 2004, electronic

⁸³³ Law of 13 November 2014 strengthening provisions on the fight against terrorism, (*LOI n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme*), available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=2E480F17178BBAB9B6168635C3C3240C.tpdila15v_2?cidTexte=JORFTEXT000029754374&dateTexte=20141114.

communication) is punishable by one to five years of imprisonment and a fine of EUR 45,000.

Civil liability: As described under Section 2.2, the Law of 29 July 1881 on the freedom of the press sets out a specific civil liability scheme in accordance with which victims of hate speech/hate crime may request compensation for their damages.

Common rules applicable to civil and criminal liability:

Article 42 defines a cascade liability system, in accordance with which the following order applies: managers of publications or publishers; in the absence of this, authors; in the absence of authors, printers; and, in the absence of printers, vendors, distributors and displays.

Article 43 of the same law further explains that when managers or co-managers or publishers are involved, authors will be prosecuted as accomplices. Printers can also be prosecuted as accomplices if they knowingly facilitated the preparation or commission of the offence.

Audio-visual services:

Audio-visual communications are regulated by the Law of 29 July 1982 on mass media and by the Law of 30 September 1986 on freedom of communication. The latter Act was amended to transpose elements of the AMSD. The Freedom of Communication Act 1986 – which applies to all audiovisual media service providers - includes provisions on respecting human dignity, the pluralism of opinion, and regulations safeguarding ‘law and order’. It also includes provisions on the defence of the French language, requiring broadcasters to provide a certain proportion of French-language audiovisual material, as well as restrictions on content that could harm the physical, mental or moral development of minors, or materials that may cause ‘incitement to hatred or violence on the grounds of race, sex, morality, religion or nationality’.

Administrative liability: The Higher Audiovisual Council is the responsible body in the domain. It is *inter alia* in charge of ensuring that audiovisual programmes made available to the public do not contain any incitement to hatred or violence, and has the competence to restrict any broadcast infringing this rule. On the basis of Article 3(1) of the Law of 30 September 1986 on freedom of communication, the Council has the mandate to forbid some programmes. As a general rule, the Council will issue a first warning, then a second if the audiovisual provider does not comply, and then a third warning, after which it has the right to block the broadcast. As per Article 42 of the same law, the Council may call upon the Public Prosecutor to shut down the broadcaster.

As referred to below, criminal liability may also arise in connection with broadcasting.

Online services:

Administrative liability: As explained under Section 2.3, some provisions of the Freedom of Communication Act also apply to online service providers.

Criminal liability applicable to both audiovisual services and online publishing: Article 93-3 of the Law of 29 July 1982 states that when

offences listed under Chapter IV of the Law of 29 July 1881 on the freedom of the press are committed via electronic communication means, the publishing director or co-director will be held responsible. In the absence of such persons, the author may be held liable. However, if the offence is committed during a live broadcast, those people cannot be held responsible. Similarly, when a violation is caused by the message of an Internet user available to the public through an online communication service, the director or co-editor cannot be held liable provided that 'it is established that he had not actually read the message before its publication online, and that, from the moment he became aware, acted promptly to remove this message.'

Civil liability: On the basis of the same provisions as those ones applicable to written press, victims are entitled to file a request for the compensation of their damages as set out by the Law on freedom of the press.

The French Government is currently exploring the possibility of drafting a new 'digital Act', the objective of which is to reinforce the prosecution of online incitement to hatred. One of the main objectives is to remove the provisions applicable to online hate speech from the Law of 29 July 1881 on the freedom of the press, and replace them with a specific criminal scheme on the same model as the apology of terrorism acts⁸³⁴. Indeed, offence provisions applicable to the latter were, in 2014, moved from the Law of 29 July 1881 on the freedom of the press to the Criminal Code.

No self-regulation of professional associations is in place.

3 Effectiveness of the legal framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate speech vs. freedom of expression	
	<p>Freedom of expression is not an absolute right and may be subject to some restrictions. Hate speech is one such boundary for freedom of expression. Ensuring the right balance between protection against hate speech and freedom of expression is the main challenge faced by courts in this context.</p> <p>The following case law⁸³⁵ illustrates this search for balance between freedom of expression and its limits. A selection of cases is presented below, on the basis of which it can be concluded that the line between freedom of expression and the applicable provision is not definitively set, but, rather, the boundaries between the two are constantly assessed.</p> <p><u>High Court Decision n° 13-87922</u>⁸³⁶</p>

⁸³⁴ News Magazine article, Telerama, 'Online Hate speech – should we listen to François Hollande ?'(Discours de haine sur Internet: faut-il écouter François Hollande ?), (2015) available at : www.telerama.fr/medias/discours-de-haine-sur-internet-faut-il-ecouter-francois-hollande,123404.php

⁸³⁵ All case law referred to has been discussed with VIGO Law Firm, contributors to this study.

⁸³⁶ Criminal Chamber of the High Court (*Cour de cassation, criminelle, Chambre criminelle, 17 mars 2015, 13-87.922*), 17 March 2015, available at:

<p style="text-align: center;">Offence Provision 1</p> <p style="text-align: center;">Law of 29 July 1881 on freedom of the press</p> <p style="text-align: center;">Article 24 paragraph 7</p>	<p>Facts: During a French television show, a man argued that 'There is a prejudicial threat to see both hegemonies and in particular the Islamo-Arabic world which at present penetrates our country, and gradually colonises it. I feel pride and the National Front feels pride to have been the first political party to try, for the past 10 years, to warn the French people of this mortal danger, obviously much more felt in the popular circles than in the bourgeois circles, I grant you that'.</p> <p>Decision: This individual was prosecuted for incitement to racial hatred and violence.</p> <p>Reasoning: Since no reference was specifically made to a person or group of foreign populations, the Court decided that the speech did not incite the public to either hatred violence or racial discrimination, and did not go beyond the limits applicable to freedom of speech.</p> <p>High Court Decision n°06-84328⁸³⁷</p> <p>Facts: Two regional councillors issued a leaflet called "No cathedral in Mecca, no mosque in Strasbourg ", protesting against the provision by one of the Regional Councils (Alsace) of a subsidy for the construction of a mosque in Strasbourg.</p> <p>Decision: The two councillors were prosecuted for incitement to racial discrimination (as per Article 24(7) which also penalises incitement to discrimination) and were convicted by the court.</p> <p>At a later stage, the Court of Appeal reversed the judgment and pronounced the suspects' acquittal. This latter acquittal has been confirmed by the Supreme Court in a subsequent trial.</p> <p>Reasoning: The Court considered that the leaflet (and more particularly the drawing representing two peasants praying in a mosque) could not be seen as an offence towards either the religion of Islam, nor its followers, Muslims. The Supreme Court clearly confirmed that the leaflet did not constitute incitement to discrimination, as the statements in question do not exceed the permissible limits of freedom of expression as defined by Article 10 of the European Convention on Human Rights.</p> <p>High Court Decision n* 08-82.402 and 06-83.063⁸³⁸</p> <p>Facts: The defendant, the then-President of the French "National Front" party, was fined EUR 10,000 for 'incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion', on account of statements made about Muslims in France in an interview with Le Monde daily newspaper. He asserted, among other things, that 'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge'. The Paris Court of Appeal sentenced him to a further fine, in the same amount, in 2008, after he commented on the initial fine in the following terms: 'When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: 'But [...] that is already the case now!' – and they are right.' The Court of Appeal considered that the defendant's comments to the newspaper rejected the Muslim community. It held that the defendant's freedom of expression was no justification for his statements, which constituted incitement to discrimination, hatred or violence towards a group of people. The defendant lodged another appeal.</p> <p>Decision: In 2009 the Court of Cassation dismissed the appeal lodged by the defendant, in which he argued that his statements were not an explicit call for hatred or discrimination and did not single out Muslims because of their religion, and that the reference to Islam was aimed at a political doctrine and not a religious faith.</p>
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www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030381677&fastReqId=826186714&fastPos=1.

⁸³⁷ Criminal Chamber of the High Court (*Cour de cassation, criminelle, Chambre criminelle, 30 mai 2007, 06-84.328*), 30 May 2007, available at:

www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017832313&fastReqId=1019047706&fastPos=3.

⁸³⁸ Criminal Chamber of the High Court (*Cour de cassation, criminelle, Chambre criminelle, 3 février 2009, 06-83.063 08-82.402*), 3 February 2009, available at:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020221851&fastReqId=69872202&fastPos=1>.

	<p>Reasoning: The court acknowledged that while the defendant's statements had been made in the context of a general debate on the problems linked to the settlement and integration of immigrants in their host countries, they had nonetheless presented the Muslim community as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. He had set the French against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people. The reasons given by lower instance courts for convicting the defendant had thus been relevant and sufficient, and the fine imposed by them was proportionate. The Court concluded that the limitation of the defendant's right to freedom of expression was necessary in a democratic society.</p>
<p>Offence Provision 2</p> <p>Law of 29 July 1881 on freedom of the press</p> <p>Article 24 paragraph 5</p>	<p>Higher courts have ruled in connection with the transposing provision of Article 1(1)(c) of the CFD (see example below). Existing decisions have not, however, assessed the threshold between freedom of expression and the offence provision. An example of a recent case is provided below.</p> <p>High Court Decision n°03-87450⁸³⁹</p> <p>Facts: The mayor of the city of Seclin asked the city catering services to boycott products from Israel in protest against the Israeli Government's policy towards the Palestinian people. He was charged with incitement to hatred and acquitted at trial. The Court of Appeal reversed the acquittal and sentenced him. The court ruled that by announcing his intention to ask the catering services of the municipality to stop buying products from Israel, the mayor urged them to take account of the origin of products, thereby hampering the economic activity of Israeli producers. This boycott was initiated because they belonged to the Israeli nation.</p> <p>Decision: The court of Cassation upheld the decision of the Court of Appeal.</p> <p>Reasoning: The Court of Cassation considered that the publication on the web of the decision of the Mayor to boycott Israeli products, accompanied by a militant comment, multiplied the message recipients and constituted discriminatory behaviour.</p>
	<p>Based on a selection of court decisions described below it seems that the Courts have, on various occasions, interpreted the relationship of freedom of expression with the provision set out in Article 24bis. Regarding the boundary between freedom of expression and the offence provision, it seems that courts do not prohibit discussions that may occur between historians, politicians or citizens.</p> <p>High Court Decision n°08-82521⁸⁴⁰</p> <p>Facts: During a press conference, a historian stated that the findings of the Nuremberg trials and, in particular, the conclusions on the number of people killed, were questionable. Historians, according to the defendant, were free to discuss these issues.</p> <p>Decision: The Court of Appeal found the offender guilty of the offence set out in Article 24bis of the Law of 29 July 1881 on the freedom of the press. The High Court overturned the judgement of the Court of Appeal.</p> <p>Reasoning: The High Court declared that the defendant's controversial words were not 'characteristic of a contestation of one or more crimes against humanity as defined by Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of August 8, 1945 and committed or by members of an organisation declared criminal under Article 9 of that statute, or by a person convicted of such crimes by a French or International Court'.</p>

⁸³⁹ Criminal Chamber of the High Court (*Cour de Cassation, Chambre criminelle, du 28 septembre 2004, 03-87.450*), 28 September 2004, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007614359&dateTexte=>

⁸⁴⁰ Criminal Chamber of the High Court (*Cour de cassation, criminelle, Chambre criminelle, 23 juin 2009, 08-82.521*), 23 June 2009, available at: <http://legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020821426>.

Offence Provision 3

Law of 29 July 1881 on freedom of the press Article 24 bis

High Court Decision n°12-81505⁸⁴¹

Facts: In an article, a writer claimed that when a German officer wanted to kill an entire village, the Gestapo (the secret police of German-occupied Europe) intervened immediately to stop the massacre. The author went on to say that, in France, the Occupation had not been 'particularly inhuman', even if some 'accidents' happened.

Decision: The Court convicted the author.

Reasoning: The Court ruled that the defendant's words in the given context were intended to minimise the crimes committed by the German occupation and the Gestapo.

High Court Decision n° 01-88.461⁸⁴²

Facts, decision, reasoning: A man was convicted for sending messages to a website whose objective was the fight against revisionism, denying the reality of gas chambers. His defence was to argue that he did not intend to have those messages published. He was convicted by the High Court on the basis that, in sending messages to a website, he could not assume that they would not be published.

High Court Decision n° 00-85.102⁸⁴³

Facts, decision, reasoning: The director for publication of the Akribia magazine was convicted on the basis that number 4 of his magazine intended to demonstrate that Auschwitz and gas chambers were "myths".

High Court Decision n° 98-88.200⁸⁴⁴

In his book, a writer denied that a 'final solution' (extermination of people) was organised. The writer also denied the fact that people were killed and burned in gas chambers. The Court considered that there was a denial of crimes against humanity even if the denial was dressed, dubitative or insinuated.

High Court Decision n° 96-82.731⁸⁴⁵

Facts: In 1994, two writers published an article in the magazine called 'Am I a negationist?', in which they argued that the small number of documents and human testimonies do not allow us to say that gas chambers actually did exist.

Decision and reasoning: They have been convicted as author and accomplice. The Court considered that there was a denial of crimes against humanity even if the denial was dressed, dubitative or insinuated, and stated that a denial is also enacted when a person outrageously minimises the number of victims.

To conclude, the French High Court does not prohibit discussions which concern crimes against humanity as enacted by the

⁸⁴¹ Criminal Chamber of the High Court (*Cour de cassation, criminelle, Chambre criminelle, 10 octobre 2012, 12-81.505*), 10 October 2012, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000026485396.

⁸⁴² Criminal Chamber of the High Court (*Cour de Cassation, Chambre criminelle, du 5 novembre 2002, 01-88.461*) 5 November 2002, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007067367.

⁸⁴³ Criminal Chamber of the High Court (*Cour de Cassation, Chambre criminelle, du 13 mars 2001, 00-85.102*), 13 March 2001, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007585604.

⁸⁴⁴ Criminal Chamber of the High Court (*Cour de Cassation, Chambre criminelle, du 12 septembre 2000, 98-88.200*), 12 September 2000, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007584921.

⁸⁴⁵ Criminal Chamber of the high Court (*Cour de Cassation, Chambre criminelle, du 29 janvier 1998, 96-82.731*), 29 January 1998, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007557504.

	<p>Tribunal at Nuremberg. Nevertheless, the freedom of expression linked to these opinions is not absolute and the court seems to accept it as long as it stays 'contradictory' and 'not affirmative'. In order to be tolerated, the words have to allow the door to remain open to debate. Stating, for example, that chambers did not exist, constitutes an offence provision, while saying that nobody can ever know how many people died in the concentration camps, does not constitute a crime and could fall within the limits of exercising freedom of expression. Courts considered that historians or politicians can argue about the numbers of deaths, as long as it is not outrageous. After exceeding this limit, Courts evaluate whether or not an expression constitutes an offence.</p>
<p>Indicator 2 - Quantitative evidence</p>	
<p>Article 24 of the Law of 29 July 1881 on freedom of the press <i>(no specific date are available for this offence provision, therefore this table does not dedicate a separate row for each transposing provision)</i></p>	<p>The main authority responsible for the publication of criminal statistics in France is the National Consultative Commission for Human Rights. This organisation carries out data collection activities itself and also receives data from the Ministry of Justice, the Police (<i>Police nationale</i>) and the Gendarmerie (<i>branch of the French Armed Forces in charge of public safety</i>)⁸⁴⁶. The data collected give a general idea of the number of hate crime cases investigated, prosecuted and adjudicated. These data, however, are not broken down per applicable offence provision.</p> <p>Some offence provision-specific data could be derived from the central database of court cases, called "LexisNexis", although this database does not include references to all court cases. Decisions of lower instance courts, for example, are rarely accessible through the database. Available data should therefore be treated with caution.</p> <p>According to LexisNexis, between the period of 2010-2014, 35 and 33 higher court decisions were taken with respect to the provisions penalising the criminal conducts set out in Article 1(1)(a)-(b) and Article 1(1)(d) of the CFD. Data published by the National Consultative Commission for Human Rights show significantly higher numbers. Their numbers, however, capture all hate crimes. In accordance with a recent dataset, in 2013, 1,765 hate crime cases were registered by the Police, and 579 cases were prosecuted. No data are available from 2013 onwards regarding the number of cases heard by courts⁸⁴⁷.</p> <p>Data on the number of hate speech incidents are also collected by the Platform for the Harmonisation, Analysis, Overlap and Orientation of the Alerts (<i>Plateforme d' Harmonisation, d' Analyse, de Recoupement et d' Orientation des Signalements - PHAROS</i>) and the International League against Racism and Anti-Semitism (<i>Ligue Internationale Contre le Racisme et l' Anti-Semitism</i>). The former collect data <i>inter alia</i> on the number of reports filed for online messages and illegal behaviours which incite to hatred. The latter collect some data on hate speech, which is then transferred to the National Consultative Commission for Human Rights. In 2014, 15,000 cases of online hate speech were reported⁸⁴⁸. This number should be treated with caution, given that it covers all online hate speech incidents, not only those that are linked to the transposing provisions of the CFD.</p>

⁸⁴⁶ Office for Democratic Institutions and Human Rights (ODIHR) website dedicated to hate crime monitoring, available at: <http://hatecrime.osce.org/france?year=2013>.

⁸⁴⁷ Office for Democratic Institutions and Human Rights (ODIHR) website dedicated to hate crime monitoring, available at: <http://hatecrime.osce.org/france?year=2013>.

⁸⁴⁸ National Consultative Commission for Human Rights, Report – 'Opinion on the fight against online speech (*Avis sur la lutte contre les discours de haine sur internet*), (2015), available at: www.cncdh.fr/sites/default/files/15.02.12_avis_lutte_discours_de_haine_internet_en.pdf

Indicator 3 - Bottlenecks of practical implementation	
<p>Article 24 of the Law of 29 July 1881 on freedom of the press (The statements below are applicable to all provisions of relevance set out under Article 24)</p>	<p>Clarity of offence provision: No constraints regarding the clarity of the offence provision have been identified.</p>
	<p>Suitability of offence provision to cover online crime: The provision is suitable to cover online crime. Article 23 lists the ways in which the offence of Article 24 may be committed. The "communication to the public by electronic means" is expressly provided by Article 23. There are many examples in case law of convictions for incitement to hatred through the Internet or on social networks.</p>
	<p>Suitability of offence provision to ensure freedom of expression: As described above, the courts have, on various occasions, ruled on the relationship between freedom of expression and the offence provision of incitement to hatred. None of the court decisions suggest that the boundary between the two is unclear, although they constantly assess the relationship between the two interests.</p>
	<p>Suitability of offence provision to protect vulnerable groups: Article 24 seems to cover all groups who are in vulnerable situations.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): No evidence proving the unsuitability of the offence provision to the French context could be identified.</p>
	<p>Other shortcomings of applicable offence provision: No reference to other shortcomings has been identified.</p>
<p>Article 24bis of the Law of 29 July 1881 on freedom of the press</p>	<p>Clarity of offence provision: The offence is clear. Neither the case law identified nor the literature consulted revealed any such issues.</p>
	<p>Suitability of offence provision to cover online crime: The offence is suitable to online crimes since it expressly refers to Article 23, which stipulates the means of communications of the denial/contestation. Article 23 of the Law of 29 July 1881 on freedom of the press makes reference to all electronic means of communications.</p>
	<p>Suitability of offence provision to ensure freedom of expression: The Court of Cassation ruled that this article was not contrary to the principle of freedom of expression, since it punished a behaviour prejudicial to public order and to individual rights, and therefore fell under the scope of exceptions set out in Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸⁴⁹.</p>
	<p>Suitability of offence provision to protect vulnerable groups: The original version of the offence provision as set out in Article 24 of the Law of 29 July 1881 on the freedom of the press from 1881 was considered unsuitable to provide protection against certain forms of hate speech. The Gayssot Act was passed by the French Legislature on 13 July 1990, amending the law by adding an Article 24bis, which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 and on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-46.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): No evidence proving the unsuitability of the offence provision to the French context could be identified.</p>

⁸⁴⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms '10(2). The exercise of these freedoms carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime prevention, the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary.'

	Other shortcomings of applicable offence provision: No reference to other shortcomings has been identified.
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Article 24 of the Law of 29 July 1881 on freedom of the press (the different provisions of Article 24 are described in the column on the right)	Recent amendments have targeted Article 24. These amendments, however, concern incitement to terrorism, which does not fall within the scope of this study. While the provisions of Article 24, paragraph 5, have not changed in any meaningful way since its adoption in 1987, the sentences have gradually increased. Amid a recent rise in hate crimes in the country, the French Government is considering a tough new stance on online racism, anti-Semitism and other hate speech that would allow authorities to shut down offending websites. The declaration of war against online hate speech has raised questions about possible violations of civil liberties and the curtailing of due process, as France struggles to find a way forward after a wave of deadly violence and anti-Semitic hate crimes in the country ⁸⁵⁰ . No relevant legislative amendments have yet been discussed at the National Parliament.
Article 24bis of the Law of 29 July 1881 on freedom of the press	As above.

3.2 Effectiveness of the legislation Transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
Transposing Provision 1 Law of 30 September 1986 on freedom of communication Article 15	There are no relevant higher court decisions to report.

⁸⁵⁰ France 24, 'France prepares for war against online hate speech', (2015), available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

<p>Transposing Provision 2 Law of 21 June 2004 on confidence in the digital economy Article 6</p> <p>Law of 30 September 1986 on freedom of communication Article 43-8</p>	<p>There are no relevant higher court decisions to report.</p>
<p>Indicator 2 - Quantitative evidence</p>	
<p>Transposing Provision 1 Law of 30 September 1986 on freedom of communication Article 15</p>	<p>No data are available – the Higher Audiovisual Council, which obtains relevant data, was unable to contribute to the study.</p>
<p>Transposing Provision 2 Law of 21 June 2004 on confidence in the digital economy Article 6</p> <p>Law No. 86-1067 of 30 September 1986 on freedom of communication Article 43-8</p>	<p>No data are available.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Transposing Provision 1 Law of 30 September 1986 on freedom of communication Article 15</p>	<p>Clarity of the transposing provision: It seems that the provision is quite clear, as, based on available court decisions, there do not seem to be any contradictions regarding the interpretation of the offence provision.</p>
	<p>Suitability of offences provision to protect vulnerable groups: It seems that all vulnerable groups are well covered.</p>
	<p>Suitability of offence provision to ensure freedom of expression: No evidence suggesting the unsuitability of the offence provision to ensure freedom of expression could be identified.</p>
	<p>Other shortcomings of applicable offence provision: No reference to other shortcomings could be identified.</p>
<p>Transposing Provision 2 Law of 21 June 2004 on confidence in the digital economy Article 6</p>	<p>Clarity of the transposing provision: The provision is clear.</p>
	<p>Suitability of offences provision to protect vulnerable groups: The provision seems to cover all vulnerable groups</p>
	<p>Suitability of offence provision to ensure freedom of expression: It also ensures the freedom of expression.</p>

	<p>Other shortcomings of applicable offence provision: The provision does not guarantee a total protection. While the Law of 29 July 1881 on freedom of the press now applies to online hate speech, it does not apply to 'service providers', but only to web editors. For this reason the Government is currently looking at the possibility of amending the law so that offences published by service providers (hosting websites) are treated in a similar way to other websites.</p>
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing Provision 1</p> <p>Law of 30 September 1986 on freedom of communication Article 15</p>	No amendments have taken place, or are planned.
<p>Transposing Provision 2</p> <p>Law of 21 June 2004 on confidence in the digital economy Article 6</p> <p>Law of 30 September 1986 on freedom of communication Article 43-8</p>	Amid a recent rise in hate crimes, the French Government is currently examining the adoption of a tough new stance on online racism, anti-Semitism and other hate speech that would allow authorities to shut down offending websites. The Justice Minister has said she will encourage legal reforms that would help French authorities to crack down on racism and anti-Semitism online, in much the same way they do with paedophilia. The proposals include empowering French authorities to shut down websites hosting content that is deemed illicit without prior court approval ⁸⁵¹ .

3.3 Effectiveness of the rules regulating publishers' responsibility

Indicator 1 - National case law on the interaction of provision with freedom of expression	
<p>Law of 29 July 1881 on freedom of the press Article 42</p>	No national case law assessing the interaction between the rules applicable to publishers' responsibility and the freedom of expression could be identified.
<p>Law of 30 September 1986 on freedom of communication Article 15</p>	No national case law assessing the interaction between the rules applicable to publishers' responsibility and the freedom of expression could be identified.
Indicator 2 - Quantitative evidence	
<p>Law of 29 July 1881 on freedom of the press Article 42</p>	<p>No data are available.</p> <p>The Ministry of Interior took severe measures this year (2015), including the shutdown of five websites on the grounds of apology of terrorism.</p> <p>No more information could be obtained</p>

⁸⁵¹ France 24, 'France prepares for war against online hate speech', (2015), available at: <http://www.france24.com/en/20150224-france-online-hate-speech-internet-anti-semitic-racism-legal-reforms-taubira>.

<p>Law of 30 September 1986 on freedom of communication Article 15</p>	<p>The Higher Audiovisual Council often adopts decisions with regard to the responsibility of media for the publication of hate speech. However, it was not possible to obtain any details about decisions made after 2007. Six warnings were issued by the Higher Council in 2007 on the grounds of incitement to hatred and/or discrimination.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Law of 29 July 1881 on freedom of the press Article 42</p>	<p>The provisions set out in the Law of 29 July 1881 on freedom of the press are clear and can be applied to hate speech offences published in the written press. The application of these provisions becomes more complicated in cases where such offences are published online. While web editors have the obligation to appoint a responsible person (the same scheme as for written press), this person cannot be held responsible for the content published online by somebody else, unless the illegal/harmful content could have been identified by the person assigned by the web editor. Therefore, it makes it very difficult to monitor and regulate content published by service providers (such as You Tube, Facebook, etc.).</p>
<p>Law of 30 September 1986 on freedom of communication Article 15</p>	<p>No issues were identified in this respect.</p>
<p>Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation</p>	
<p>Law of 29 July 1881 on freedom of the press Article 42</p>	<p>The French Government is currently exploring the possibility of issuing a new 'digital Act' the objective of which is to reinforce the prosecution of online incitement to hatred. The aim of the Government is to adopt a specific scheme applicable to online hate speech, so that hate speech-related offences published via electronic means are not dealt with under the Law of 29 July 1881 on freedom of the press, but under the Criminal Code.</p>
<p>Law of 30 September 1986 on freedom of communication Article 15</p>	<p>No changes/ amendments are planned.</p>

HUNGARY

1 National context

Official statistical data⁸⁵² do not provide reference to the principal target groups for hate speech and/or hate crime. Such data can, however, be derived from unofficial sources. According to the Athena Institute, an independent research organisation running a database of hate crime incidents⁸⁵³, in 2012, 55% of hate crime incidents were driven by racism, 26% by anti-Semitism, 16% by homophobia and 3% by anti-Christian sentiments. A more recent report from 2014⁸⁵⁴ refers to the Roma, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, Jewish people, immigrants and/or asylum seekers, as groups which are typically subjected to hate speech and/or hate crime. No data assessing the situation of these groups in the aftermath of this year's terrorist events have been identified. One stakeholder noted that these terrorist attacks happened too far from Hungary, limiting their impact, if any, on the number of hate speech and/or hate crime incidents. The same stakeholder noted that, within Hungary, the increasing numbers of immigrants and/or asylum seekers is more of a factor, with the number of hate speech incidents, especially those committed online, increasing⁸⁵⁵.

Hate speech and/or hate crime incidents happen despite the existence of a robust legal framework. The Hungarian Criminal Code (*Büntető törvénykönyv*)⁸⁵⁶ provides legal protection against the most severe forms of hate speech and/or hate crime. The Criminal Code penalises *inter alia* the act of incitement against a community (*közösség elleni uszítás*) and the public denial of crimes committed by the Nazi or Communist regimes (*a nemzeti szocialista vagy kommunista rendszerek bűneinek nyilvános tagadása*). Only the offence provision of incitement against a community contains reference to protected characteristics, which are: the Hungarian nation, national, ethnic, racial, or religious group, and certain groups of a population. The penalisation of these acts is required by Article 1(1) of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law⁸⁵⁷ (CFD). In accordance with Article 4 of the CFD, the Criminal Code foresees more severe penalties in cases where certain crimes (e.g. homicide (*emberölés*), and bodily harm (*testisértés*)), as specified in the said law, are committed with a base motive or purpose (*aljas indokból, vagy célból*).

Under Hungarian law, legal protection against hate speech (not hate crime) is also provided by the Civil Code (*Polgári Törvénykönyv*)⁸⁵⁸. The Civil Code has established a specific liability scheme applicable to cases where a statement 'seriously offends and maliciously hurts' the Hungarian nation or any national, ethnic, racial or religious group⁸⁵⁹. Legislation

⁸⁵² See official statistical data in Section 3.1.

⁸⁵³ Athena Institute, 'Hate Crimes Database - Key Facts of 2012' (*Gyűlöletbűncselkmény Adatbázis - Kulcsstatisztikák, 2012*), (2012), available at: http://www.athenaintezet.hu/gyuloletbuncselekmény_adatbázis.

⁸⁵⁴ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary - Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon - Problémák, javaslatok, jó gyakorlatok*), p. 10, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

⁸⁵⁵ Interview conducted with an official of the Media Council on 4 September 2015.

⁸⁵⁶ Act C of 2012 on the Criminal Code (2012. Évi C. törvény a Büntető Törvénykönyvről), available at: njt.hu/cgi_bin/njt_doc.cgi?docid=152383.254720.

⁸⁵⁷ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55-58, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1442306610414&uri=CELEX:32008F0913>.

⁸⁵⁸ Act V of 2013 on the Civil Code (2013. Évi V. törvény a Polgári Törvénykönyvről), available at: njt.hu/cgi_bin/njt_doc.cgi?docid=159096.239298.

⁸⁵⁹ Article 2:54 (5) of the Civil Code.

regulating, among others, the liability of media⁸⁶⁰ and information society service providers⁸⁶¹ in Hungary also prohibits incitement to hatred. In addition to legislation, protection against hate speech is also included in the self-regulation of the professional associations of media content providers. None of these provisions are recent, with the exception of the Civil Code, which itself only entered into force on 15 March 2014. While there are no legislative amendments in the pipeline, the Hungarian General Prosecutor's Office (*Legfőbb Ügyészség*) has recently submitted an initiative to the Ministry of Justice (*Igazságügyi Minisztérium*), aiming at the adoption of a new offence provision banning unlawful differentiation⁸⁶². This initiative has not yet been discussed by the National Parliament (*Országgyűlés*).

Statistical data are available on the use of these provisions in practice, however, some may only be accessed upon request. Based on the information collected for the purpose of this study, it seems that provisions set out in self-regulation and in legislation regulating the liability of media and information society service providers are less frequently used than those set out in the Criminal Code. This does not necessarily mean that the protection granted by the former instruments is not as effective as that granted by the Criminal Code, as it could also show that the groups targeted by these provisions do not tend to breach the applicable rules⁸⁶³. Data on the use of the Civil Code's provision in practice could not be obtained. Existing official statistics on criminal law protection provide only a patchy picture of the hate speech and/or hate crime situation in Hungary. This is due to the fact that, in Hungary, a large majority of hate speech and/or hate crime incidents remain unreported⁸⁶⁴. In addition to under-reporting, concern exists about the restrictive interpretation of the provision called inciting against a community, by the competent authorities. This restrictive interpretation hinders due investigation, prosecution and adjudication⁸⁶⁵. Other issues relating to the application in practice of these provisions are mainly linked to their enforcement and, in particular, to the fact that practitioners involved in the enforcement of cases rarely receive the training necessary to identify the characteristics of hate speech and/or hate crime.

The right to freedom of expression is a factor shaping the legislation applicable to hate speech and/or hate crime. Higher courts in Hungary have, on numerous occasions, assessed the relationship of this right with the provisions regulating hate speech and/or hate crime, usually incitement against a community. More precisely, both the Constitutional Court and the Curia (previously called the Supreme Court) have assessed the meaning of the criminal conduct of incitement to hatred in a fundamental rights context. Whilst the current interpretation of the said conduct respects the right to freedom of expression, it puts the threshold for criminal liability too high.

⁸⁶⁰ Act CIV of 2010 on the freedom of the press and fundamental rules on media content (*2010. évi CIV. Törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól*), available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=132460.256038 and Act CLXXXV of 2010 on Media Services and Mass Media (*2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról*) is available at: http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=133252.231232.

⁸⁶¹ Act CVIII of 2001 on certain issues of electronic commerce services and information society services (*2001. évi CVIII. Törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről*), available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=57566.296201.

⁸⁶² Information received in form of a written communication from the General Prosecutor's Office on 3 August 2015.

⁸⁶³ Interview conducted with an official of the Media Council on 4 September 2015.

⁸⁶⁴ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary – Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), p. 10, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

⁸⁶⁵ ECRI, 'Report on Hungary – fifth monitoring report', (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf>.

2 Legal framework

2.1 General description of legislation applicable to hate crime and hate speech

Hungarian legislation does not use the terms 'hate crime' and/or 'hate speech'. These terms, however, are commonly used and are defined in existing literature. The term 'hate crime' is typically defined as a crime committed with a bias motive (*előítélet*) against a certain group⁸⁶⁶. The term 'hate speech' refers to a behaviour which may offend, harass or intimidate other people on the grounds of their protected characteristics, such as skin colour, ethnicity, nationality, sex, religion, etc⁸⁶⁷.

Under Hungarian law, hate crime constitutes a criminal offence. In Hungary, all criminal offence provisions are codified in the Criminal Code. Existing literature⁸⁶⁸, typically considers the following offence provisions as hate crimes: genocide (*népiirtás*), apartheid (*apartheid*), violence against a member of a community (*közösség tagja elleni erőszak*), incitement against a community (*közösség elleni uszítás*), public denial of the crimes committed by the Nazi or Communist regimes (*a nemzeti szocialista vagy kommunista rendszerek bűneinek nyilvános tagadása*), and using a totalitarian symbol (*önkénturalmi jelképhasználata*)⁸⁶⁹. Certain crimes, if committed with a base motive or purpose (*aljas indokból, vagy célból*), are also classified as hate crimes. These crimes are typically violent crimes (e.g. homicide (*emberölés*), and bodily harm (*testisértés*)⁸⁷⁰), and the offence provisions refer to base motive as an aggravating circumstance.

Hungarian legislation provides both criminal and civil law protection against those committing hate speech. Existing literature typically classifies the criminal offence provision of incitement against a community (*közösség elleni uszítás*), as hate speech⁸⁷¹. Persons committing hate speech may also be subject to civil liability, the applicable rules of which are set out in the Civil Code. Under the Civil Code the following conduct may give rise to civil liability: making a statement in public against a member of a community for being part of the Hungarian nation or of a national, ethnic, racial or religious group, if the link with these groups is recognised as an essential part of the individual's personality, and if such a statement seriously offends and maliciously hurts a community to which the individual belongs. These behaviours constitute the violation of an individual's personality rights (*személyiségi jogok*)⁸⁷².

⁸⁶⁶ Éva Henriett Diók, 'General questions on the regulation of hate crimes – pros and cons against providing criminal law protection' (*A gyűlöletbűncselekmények szabályozásának általános kérdései – A kiemelt büntetőjogi figyelem mellett és ellen szóló érvek*), (2014) available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2014_4/2014-4-beliv-DINOK.pdf.

⁸⁶⁷ Mediatorveny.hu, 2013, 'The presence of hate speech and offensive illustration of minority groups in the media' (*A gyűlöletbeszéd, valamint a kisebbségi csoportok sérelmes bemutatásának megjelenése a médiában*), available at: http://mediatorveny.hu/dokumentum/616/Gyuloletbeszed_korabbi_celvizsgalatok.pdf.

⁸⁶⁸ Example of existing literature describing the legislative framework applicable to hate crime includes, Dombos T., Otherness Foundation (*Másság Alapítvány*), Hate crimes in Hungary, Problems, Recommendations, Good practices – Summary Report (*Gyűlöletbűncselekmények Magyarországon*), (2014), Budapest, available at: dev.neki.hu/wp-content/uploads/2014/03/gybcs_B5-angol.pdf.

⁸⁶⁹ Articles 142, 144, 216, 332, 333, 335 of the Criminal Code.

⁸⁷⁰ Articles 160(2)(c) and 164(4)(a) and (6)(a) of the Criminal Code.

⁸⁷¹ György Bortha, The fundamental rights considerations for sanctioning hate speech by civil law means (*A gyűlöletbeszéd polgári jogi szankcionálásának alapjogi keretei*), PJK, 2008/1, pp.10-20, available at: <http://ptk2013.hu/polgari-jogi-kodifikacio/boyth-gyorgy-a-gyuloletbeszed-polgari-jogi-szankcionalasanak-alapjogi-keretei-pjk-20081-10-20-o/56>.

⁸⁷² Article 2:54 (5) of the Civil Code regulates such behaviours under the title called violation of personality rights. The term 'personality rights' is not defined *explicit verbis* in the Civil Code. It is, however, understood to cover the rights attached to one's personality. Examples of such rights is provided under Article 2:43 of the Civil Code and include: the right to be protected from any violation of life, bodily integrity or health; violation of personal liberty or privacy, including trespass; discrimination; breach of integrity; defamation; violation of the right to protection of privacy and personal data; violation of the right to a name; breach of the right to facial likeness and recorded voice.

Any member of a community (i.e. not only the person who was the addressee of the statement) whose personality rights have been breached by this conduct, is entitled to invoke all sanctions for violations of personality rights, with the exception of making a claim for the financial advantage achieved by the conduct. Under Hungarian legislation the following sanctions may be imposed in cases where personality rights have been breached: objective sanctions (i.e. sanctions independent of attributability - *felróhatóságtól független szankciók*)⁸⁷³, restitution (*sérelemdíj*)⁸⁷⁴, compensation for damages (*kártérítési felelősség*)⁸⁷⁵. There is a 30-day exhaustive period available for bringing legal actions⁸⁷⁶. If the violation infringes public interests, the public prosecutor may also bring action to invoke sanctions independent of attributability. Such legal action can also be brought before the court by the prosecutor without the victim's consent⁸⁷⁷.

These clauses of the Civil Code are often seen as controversial. The main controversy arises from the very nature of personality rights protection, namely that personality rights are closely linked to individuals, therefore only those whose personality rights are breached should be able to file a civil claim⁸⁷⁸. Against this logic, the Civil Code's provisions entitle the prosecutor to file a claim, even without the victim's consent⁸⁷⁹.

No data could be obtained on the number of cases in which these provisions of the Civil Code has been used. The official website⁸⁸⁰ through which court decisions may be accessed, does not allow for a search on the basis of specific Articles.

Hate speech is also punishable under administrative law. Although it is not specified in existing legislation, the administrative liability scheme set out in the Equality Act (*Egyenlő bánásmódról szóló törvény*)⁸⁸¹, is sometimes used against those inciting to hatred or exclusion, given that the speech could lead to a hostile or degrading environment. Originally, it was the Equality Act which provided legal protection against discrimination⁸⁸².

⁸⁷³ Objective sanctions are defined under Article 2:51 of the Civil Code. Objective sanctions are the following:

- a) a court ruling establishing that there has been an infringement of rights;
- b) to have the infringement discontinued and the perpetrator restrained from further infringement;
- c) that the perpetrator make appropriate restitution and that the perpetrator make an appropriate public disclosure for restitution at his own expense;
- d) the termination of the injurious situation and the restoration of the previous state, and to have the effects of the infringement nullified or deprived of their unlawful nature;
- e) that the perpetrator or his successor surrender the financial advantage acquired by the infringement according to the principle of unjust enrichment.

⁸⁷⁴ Rules applicable to restitution are set out in Article 2:52 of the Civil Code.

⁸⁷⁵ Rules applicable to liability for damages are set out in Article 2:53 of the Civil Code.

⁸⁷⁶ Article is: 2:54 of the Civil Code.

⁸⁷⁷ Article 2:54 (4) and (5) of the Civil Code sets out the following: (4) If the violation of personality rights infringes upon the public interest, the public prosecutor shall be entitled to bring action upon the victim's consent, and to invoke the sanctions independent of attributability. Pursuant to the public prosecutor's action, the financial advantage achieved shall be relinquished for public purposes. This Subsection shall apply to the infringement referred to in Subsection (5), with the exception that the public prosecutor shall be entitled to bring action without the victim's consent within the applicable limitation period.

⁸⁷⁸ Gardos, Orosz Fruzsina, *The new civil law regulation of hate speech (Az Új polgári jogi gyűlöletbeszéd-szabályozásáról)*, *Fundamentum*, 2013/3, p. 32, (2013), available at: www.fundamentum.hu/sites/default/files/13-4-4.pdf.

⁸⁷⁹ Gardos, Orosz Fruzsina, *The new civil law regulation of hate speech (Az Új polgári jogi gyűlöletbeszéd-szabályozásáról)*, *Fundamentum*, 2013/3, p. 32, (2013), available at: www.fundamentum.hu/sites/default/files/13-4-4.pdf.

⁸⁸⁰ Website 'Collection of Court Decisions' (*Bírósági Határozatok Gyűjteménye*) is available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>.

⁸⁸¹ Act CXXV of 2003 on equal treatment and on ensuring equal opportunities (2003. évi CXXV. Törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), available at: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

⁸⁸² *Fundamentum* 2012/4, Lídia Balogh, Henrietta Dinók, András László Pap, 'Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice' (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012), p. 97, available at:

Besides the liability schemes described above, the media and information society service providers committing hate speech or publishing hate speech can be held liable under administrative law. Professional associations of the media have developed self-regulatory documents setting out disciplinary procedures and measures against those committing ethics-related offences.

This report mainly focuses on liability schemes which have been developed in line with, or on the basis of, existing EU law (Sections 2.2 and 2.3). It also describes in detail the rules regulating the liability of publishers (Section 2.4).

1.2 Transposition of Council Framework Decision 2008/913/JHA

This Section describes those criminal offence provisions referred to under Section 2.1, which penalise the behaviours set out in Articles 1(1) and 4 of the CFD. A separate table is dedicated to each of the provisions transposing Article 1(1) of the CFD. These offence provisions had already been included in the Hungarian Criminal Code prior to the adoption of the CFD, thus they cannot be considered as transposing provisions *stricto sensu*. A description of provisions relating to Article 4 of the CFD is also provided.

	Offence provision 1 Incitement against a community (<i>Közösség elleni uszítás</i>)
Transposes Art. 1(1)(a) of CFD	Yes
Transposes Art. 1(1)(b) of CFD	Yes Note: The offence provision does not specify the manner in which incitement to hatred could be committed, which implies that any manner that realises hatred is punishable, including if the incitement to hatred is committed by the public dissemination or distribution of tracts, pictures or other materials.
Transposes Art. 1(1)(c) of CFD	No
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 332 of the Criminal Code
Definition of offence	<p>332.§ Any person, who, before the general public, incites to hatred:</p> <p>a.) against the Hungarian nation, b.) against any national, ethnic, racial, religious group, c.) or certain group of a population- and in particular against groups described by disability, sexual identity or sexual orientation, commits a felony [...].</p> <p>Note: The offence provision provides protection in cases when the incitement targets groups. Incitement to hatred against individuals is not covered by the offence provision.</p>
Penalties foreseen	<p>Type of penalty: imprisonment Level of penalty: up to three years</p> <p>Note: The Hungarian criminal law system is based on the dual system of sanctions, where courts may impose criminal sanctions (<i>büntetés</i>) and/or criminal measures (<i>intézkedés</i>). Pursuant to Article 33(1) of the Criminal Code, criminal sanctions are: imprisonment (<i>szabadságvesztés</i>), custodial arrest (<i>elzárás</i>), labour in public interest (<i>közérdekű munka</i>), fine (<i>pénzbüntetés</i>), suspension of licence to practice (<i>foglalkozástól eltiltás</i>), suspension of driving licence (<i>járművezetéstől eltiltás</i>), expulsion (<i>kitiltás</i>), banishment (<i>kiutasítás</i>), prohibition from public affairs (<i>közügyektől eltiltás</i>), and ban from visiting sport events (<i>sportrendezvények látogatásától való eltiltás</i>). As set out in Article 63 of the Criminal Code, criminal measures are: reprimand (<i>megrovás</i>), probation (<i>próbára bocsátás</i>), forced medical treatment (<i>kényszergyógykezelés</i>), seizure (<i>elkobzás</i>), seizure of property (<i>vagyonelkobzás</i>), supervision by probation officer (<i>pártfogó felügyelet</i>), criminal measures imposed against legal persons (<i>jogi személlyel szemben alkalmazható büntetőjogi intézkedésekről szóló törvény szerinti intézkedések</i>), work performed in amends (<i>jóvátételi munka</i>), and irreversibly rendering electronic information inaccessible (<i>elektronikus adat végleges hozzáférhetetlenné tétele</i>).</p> <p>Most of the offence provisions related to hate speech and hate crime, including Article 332, foresee imprisonment as a sanction that can be imposed against perpetrators. Instead of, or in addition to, imprisonment, the courts may impose other types of criminal sanctions or</p>

	<p>criminal measures in accordance with the following rules:</p> <p>Pursuant to Article 30(4) of the Criminal Code, if a specific offence provision foresees imprisonment as a sanction, the length of which does not exceed three years, the courts may impose, instead of imprisonment, custodial arrest, labour in public interest, fine, suspension of licence to practice, suspension of driving licence, expulsion, banishment, ban from visiting sport events, or more than one of these penalties at the same time.</p> <p>Pursuant to Article 63(2)-(4), criminal measures may replace criminal sanctions, or may be imposed in addition to criminal sanctions. The following measures could be imposed instead of criminal sanctions or as stand-alone penalties: reprimand, probation, work performed in amends. In addition to imposing a criminal sanction, the court may impose the criminal measure of supervision by a probation officer. The following criminal measures may be imposed in addition to criminal sanctions or as stand-alone penalties: seizure, seizure of property, and irreversibly rendering electronic information inaccessible.</p>
Protected characteristic(s)	The protected characteristics are: Hungarian nation (Article 332(a)), national, ethnic, racial, religious group (Article 332(b)), a certain group of a population (Article 332(c)). The wording of point c) (i.e. 'in particular') suggests that the list provided is not exhaustive. The offence provision contains explicit reference to disability, sexual identity and orientation among the grounds that may determine a group of people.
Online crime	<p>Yes. Pursuant to Article 459(22) of the Criminal Code, the term 'general public', which is an element of the offence provision in question, means the commission of crimes via press, media services, reproduction, or via electronic communication network.</p> <p>The meaning of the term 'general public' has also been interpreted by the Supreme Court (currently called the Curia) of Hungary, which found that a crime can be said to have been committed in front of the general public if, during its perpetration, a bigger group of people was present, or there is a chance that a group of a bigger number of people will learn about the result of the crime. In the meaning of the provision a group should contain a large number of people (where the number cannot be specified, it should be at least 20-30 people⁸⁸³).</p>

	Offence provision 2 Public denial of sins of national socialist or communist regimes (<i>A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása</i>)
Transposes Art. 1(a) of CFD	No
Transposes Art. 1(b) of CFD	No
Transposes Art. 1(c) of CFD	No
Transposes Art. 1(d) of CFD	Yes
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 333 of the Criminal Code
Definition of offence	<p>333.§ Any person who, in front of the general public, denies, doubts, trivialises, or tries to justify the commission of genocide, or other crimes against humanity by national socialist or communist regimes, commits a felony [...].</p> <p>Note: Under the offence provision set out in Article 333 of the Criminal Code, the criminal conducts are punishable if they concern crimes committed by the national socialist or communist regimes. The penalisation of crimes committed by the national socialist regimes is required by Article 1(1)(d) of the Framework Decision. Crimes committed by communist regimes are not covered by the Framework Decision, as such crimes - from a historical point of view - were committed against groups defined by their political orientation. Political orientation as a ground for determining a group of persons to be protected is not referred to in the Framework Decision.</p>

⁸⁸³ Supreme Court Decision no. 660 (*Legfelsőbb Bíróság BJD 660*) No reference to the decision was found on the website of the Curia.

<p>Penalties foreseen</p>	<p>Type of penalty: imprisonment. Level of penalty: up to three years.</p> <p>The Hungarian criminal law system is based on the dual system of sanctions, where courts may impose criminal sanctions (<i>büntetés</i>) and/or criminal measures (<i>intézkedés</i>). Pursuant to Article 33(1) of the Criminal Code, criminal sanctions are: imprisonment (<i>szabadságvesztés</i>), custodial arrest (<i>elzárás</i>), labour in public interest (<i>közérdekű munka</i>), fine (<i>pénzbüntetés</i>), suspension of licence to practice (<i>foglalkozástól eltiltás</i>), suspension of driving licence (<i>járművezetéstől eltiltás</i>), expulsion (<i>kitiltás</i>), banishment (<i>kiutasítás</i>), prohibition from public affairs (<i>közügyektől eltiltás</i>), and ban from visiting sport events (<i>sportrendezvények látogatásától való eltiltás</i>). As set out in Article 63 of the Criminal Code, criminal measures are: reprimand (<i>megrovás</i>), probation (<i>próbára bocsátás</i>), forced medical treatment (<i>kényszergyógykezelés</i>), seizure (<i>elkobzás</i>), seizure of property (<i>vagyonek kobzás</i>), supervision by probation officer (<i>pártfogó felügyelet</i>), criminal measures imposed against legal persons (<i>jogi személlyel szemben alkalmazható büntetőjogi intézkedésekről szóló törvény szerinti intézkedések</i>), work performed in amends (<i>jóvátételi munka</i>) and irreversibly rendering electronic information inaccessible (<i>elektronikus adat végleges hozzáférhetetlenné tétele</i>).</p> <p>Most of the offence provisions related to hate crime and hate speech, including Article 333, foresee imprisonment as a sanction that can be imposed against perpetrators. Instead of, or in addition to, imprisonment, the courts may impose other types of criminal sanctions or criminal measures in accordance with the following rules:</p> <p>Pursuant to Article 30(4) of the Criminal Code, if a specific offence provision foresees imprisonment as a sanction, the length of which does not exceed three years, the courts may impose, instead of imprisonment, custodial arrest, labour in public interest, fine, suspension of licence to practice, suspension of driving licence, expulsion, banishment, ban from visiting sport events, or one or more of these penalties at the same time.</p> <p>Pursuant to Article 63(2)-(4), criminal measures may replace criminal sanctions, or may be imposed in addition to criminal sanctions. The following measures could be imposed instead of criminal sanctions or as stand-alone penalties: reprimand, probation, and work performed in amends. In addition to imposing a criminal sanction, the court may impose the criminal measure of supervision by a probation officer. The following criminal measures may be imposed in addition to criminal sanctions or as stand-alone penalties: seizure, seizure of property, and irreversibly rendering electronic information inaccessible.</p>
<p>Protected characteristic(s)</p>	<p>The offence provision does not contain reference to any protected ground. This suggests that the crime is punishable irrespective of the group targeted by the criminal conduct.</p>
<p>Online crime</p>	<p>Yes. Pursuant to Article 459(22) of the Criminal Code, the term 'general public', which is an element of the offence provision in question, means the commission of crimes via press, media services, reproduction, or via electronic communication network.</p> <p>The meaning of the term 'general public' has also been interpreted by the Supreme Court (currently called the Curia) of Hungary, which found that a crime is committed in front of the general public if, during its perpetration, a bigger group of people was present, or there is a chance that a group of a bigger number of people will learn about the result of the crime. In the meaning of the provision a group should contain a large number of people (if this number cannot be specified, it should be at least 20-30 people)⁸⁸⁴.</p>

⁸⁸⁴ Supreme Court Decision no. 660 (*Legfelsőbb Bíróság BJD 660*). No reference to the decision was found on the website of the Curia.

Explanation on the transposition of Articles 1(1)(c) of Council Framework Decision 2008/913/JHA:

There is no offence provision in the Criminal Code that penalises the denial, condoning, or grossly trivialisation of crimes referred to under Article 1(1)(c) of the Framework Decision.

Explanation on the transposition of Article 4 of Council Framework Decision 2008/913/JHA

- **First option provided by Article 4 (i.e. racist and xenophobic motivation to be considered as an aggravating circumstance)**

The Hungarian Criminal Code has two parts, i.e. a General Part (*általános rész*), which contains the general principles of Hungarian criminal law, as well as general provisions that are applicable to all offence provisions; and a Specific Part (*különös rész*) that contains the specific offence provisions.

The General Part of the Criminal Code does not contain a general provision stating that racist and xenophobic motives should be considered as an aggravating circumstance by courts, nor is any reference to racist or xenophobic motive as an aggravating circumstance contained *per se* in any of the specific offence provisions.

The Criminal Code, however, contains offence provisions that more severely penalise crimes committed with base motive or purpose (*aljas indokból illetőleg célból*). The notion of the term 'base motive or purpose' is not spelled out in the Criminal Code. However, in accordance with the jurisprudence of courts, this term is understood to cover racist and xenophobic motives⁸⁸⁵.

Base motive and purpose is referred to as an aggravating circumstance in the following offence provisions:

- Homicide (*Emberölés*): Article 160(1) A person who kills another commits a felony and is punishable by imprisonment of between five and 15 years. (2) The penalty is between 10 and 20 years of imprisonment of life-long imprisonment if the homicide was committed [...] c) base motive or purpose [...].
- Bodily harm (*Testi sértés*): Article 164[...] (4) The penalty is up to three years of imprisonment if the light bodily harm was committed by (a) base motive or purpose. [...] (6) The penalty is between one and five years of imprisonment if the severe bodily harm was committed by (a) base motive or purpose [...].
- Limiting someone's personal liberty (*Személyi szabadság megsértése*): Article 194(1) Any person who deprives someone of his/her liberty commits a felony and is punishable by imprisonment of up to three years. (2) The penalty is between one and five years of imprisonment if the crime was committed by [...] b) base motive or purpose.
- Defamation (*Rágalmazás*): Article 226(1) Any person who, in front of others, states a fact or rumour that is defamatory, or uses an expression that refers to the defamatory fact, commits a misdemeanour and is punishable by imprisonment of up to one year. The penalty is up to two years of imprisonment if the crime was committed by a) base motive or purpose [...].
- Unlawful deprivation of liberty (*Jogellenes fogvatartás*): Article 304(1) Any public official, who, within his/her competence, unlawfully deprives someone's liberty

commits a felony and is punishable by imprisonment of between one and five years. (2) The penalty is between two and eight years of imprisonment if the unlawful deprivation of liberty was committed by: a) base motive or purpose. [...]

- Insulting a subordinate (*Alárendelt megsértése*): Article 449(1) Any person who insults his/her subordinate or his/her dignity in front of others, or in a conspicuously gross manner, commits a misdemeanour and is punishable by imprisonment of up to one year. (2) The penalty is up to three years of imprisonment if the crime was committed by (a) base motive or purpose.
- **Second option provided by Article 4 (i.e. racist or xenophobic motivation considered by courts in the determination of penalties)**

It is not specified in the Criminal Code that racist or xenophobic motivation should be considered by courts in the determination of penalties. It is a general obligation for Hungarian courts, however, to take into consideration the circumstances of the crime, while adjudicating. This is set out in Article 80(1) of the Criminal Code.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

This Section describes the rules regulating the liability of media, which derive from Article 6 of the Audiovisual Media Services Directive (AMSD) and Articles 3(2) and 3(4)(a)(i) of Electronic Commerce Directive (ECD).

Legal definition of provision transposing Article 6 of AMSD	
<p>Transposing provision 1 (the transposing provisions do not have titles)</p>	<p>Article 6 of the AMSD has been transposed into Hungarian legislation by:</p> <ul style="list-style-type: none"> • Articles 17(1)-(2) and 21(1) of Act CIV of 2010 on the freedom of press and fundamental rules on media content (<i>2010. évi CIV. Törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól</i>; Act CIV of 2010), regulating the liability of media content providers in general; • Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010 on Media Services and Mass Media (<i>2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról</i>; Act CLXXXV of 2010), regulating the liability of cross-border media content providers. <p>General rules:</p> <p>The transposing provisions as set out in Articles 17(1)-(2) and 21(1) of Act CIV of 2010 are:</p> <p>17§(1) The media content shall not be capable of generating hatred against any nations, communities, national, ethnic, linguistic and other minorities or any majority, or religious groups.</p> <p>17§(2) The media content shall not exclude any nations, communities, national, ethnic, linguistic and other minorities or any majority, or religious groups.</p> <p>21§(1) The media content provider shall exercise sole discretion in the publication of media content and shall be responsible for compliance with the provisions of this Act.</p> <p>The transposing provisions as set out in Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010 are:</p>

⁸⁸⁵ Ministry of Public Administration, 'Manual on human rights' (*Emberi Jogi Kézikönyv*), (2011-2012), p.7., available at: <http://emberijogok.kormany.hu/emberi-jogi-kezikonyv/download/e/7f/40000/4005-3-11%20Emberi%20jogi%20konyv%20HU%207.pdf>. The Manual was published when the previous Criminal Code was still in force. The New Criminal Code, which is referred to in this report did not introduce any changes regarding the way in which 'base motive or purpose' is interpreted and regulated.

176§(1) When the linear audiovisual media service of a media service provider established in another Member State is aimed at the territory of the Republic of Hungary, the Media Council shall have the right to apply the legal consequences defined in Article 187(3)(c)-(d) regarding the media services transmitted on the territory of the Republic of Hungary, for the period of the infringement, but up to 180 days at the most, provided that the following conditions are met:

(a) the media service clearly and materially violates Article 17(1) [...] of the Press Freedom Act [...],

(b) - (d) [...]

(a) 177§(1) When the on-demand audiovisual media service of a media service provider established in another Member State is aimed at, is broadcast or published, in the territory of the Republic of Hungary, the Media Council shall have the right to apply the legal consequences defined in Article 187(3)(c)-(d) regarding the media services transmitted on the territory of the Republic of Hungary, for the period of the infringement but up to 180 days at the most, provided that the following conditions are met: the measures are necessary for the [...] prohibition of generating hatred against communities [...];

It is noted that rules applicable to the type and level of sanctions that could be imposed against on-demand audiovisual service providers, are the same as those which apply to linear media service providers.

178§(1) When the radio broadcasting service or the press product of a media content provider established in another Member State is aimed at, distributed or published, in the territory of the Republic of Hungary, the Media Council shall have the right to apply the legal consequences as defined in Article 187(3)(c) against the media service provider under its decision for the period of the infringement, but up to 180 days at the most, when the following conditions are met:

(a) the measures are necessary for the [...] prohibition of generating hatred against communities [...];

Measures:

The Media Council (*Médiatanács*) and the Office (*Hivatal*) of the National Media and Infocommunications Authority (*Nemzeti Média- és Hírközlési Hatóság*) may impose administrative sanctions against media content providers that publish content which may generate hatred. Pursuant to Article 3(4) of Act CIV of 2010, rules applicable to imposing sanctions, as well as the list of sanctions that may be imposed against media content providers, are set out in Act CLXXXV of 2010.

Measures against media content providers:

Administrative sanctions which could be imposed against media content providers who incite to hatred (as provided by Articles 17(1)-(2) and 21(1) of Act CIV of 2010) are set out in Articles 186-189 of Act CLXXXV of 2010. Articles 186-189 refer to the following types of sanctions in particular: warning, requesting the infringer to discontinue its unlawful conduct, or to refrain from the infringement, imposing a fine, prohibiting the unlawful conduct, etc.

Measures against cross-border media content providers:

The sanctions provided by Article 187(3)(c)-(d) of Act CLXXXV of 2010 could be imposed in cases where the cross-border media content provider breaches its obligation set out in Article 176(1) of the said act:

- the provider could be obliged to publish a notice or authority's decision on the opening page of its website, in a press product, or in a specific programme. The manner and period during which this notice must be published by the media service provider is specified in the authority's decision;

- The right of the media service provider to exercise the provision of media services could be suspended for a specific period of time. The duration of the suspension of the provision of services could be (a) from 15 minutes to 24 hours; (b) from one hour to 48 hours, if the infringement was severe; (c) from three hours to one week, if the infringement was repeated and severe.

Rules applicable to the type and level of sanctions that may be imposed against radio service providers and media content providers are

	<p>similar to those applicable to linear service providers. The only difference is that the current legislation does not include suspension of the services of such providers as one of its penalties.</p> <p><i>Relationship between administrative liability and other liability schemes:</i></p> <p>There is no statutory provision regulating the relationship between administrative liability and other liability schemes. In principal, this may mean that the different liability schemes may co-exist. This potential co-existence has some limits, however, which have been highlighted by the stakeholders consulted:</p> <ul style="list-style-type: none"> - Administrative law does not provide for the protection of individuals' rights, instead it protects values, such as human dignity. Individuals whose rights have been breached, and who would like to be compensated, or would like the offender to be punished, can initiate criminal and/or civil procedures⁸⁸⁶. - Provisions regulating administrative and criminal liability schemes use different wording. Whereas the former uses the term 'generating hatred', the latter uses the term 'incitement to hatred'. Stakeholders seem to interpret these terms differently. According to one stakeholder, the threshold set by administrative law is lower than that provided by criminal law. More precisely, the stakeholder noted that administrative liability arises in cases where the media content might be capable of generating hatred against a certain community. By contrast, incitement to hatred occurs when the perpetrator's conduct is likely to lead to violence. The stakeholder noted that, in practice, it is therefore questionable whether or not the same behaviour of the same perpetrator could actually lead to both administrative and criminal liability⁸⁸⁷. Another stakeholder pointed out that courts have interpreted these two behaviours as identical despite the different wording used in the relevant provisions (relevant case is quoted under Section 3.2). The stakeholder noted that the Media Council, for example, follows this latter interpretation while deciding on the liability of media content providers⁸⁸⁸. - Administrative law provisions quoted in this table foresee sanctions against media content providers only. Criminal and civil liability schemes are not limited to media content providers, however. This implies that administrative authorities, such as the Media Council, are entitled to impose administrative sanctions against a limited group of persons⁸⁸⁹.
<p>Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD</p>	
<p>Transposing provision 1 (the transposing provision does not have a title)</p>	<p>Articles 3(2) and 3(4)(a)(i), first indent, have been transposed into Hungarian legislation by Article 3/A(1)(a)(aa) of Act CVIII of 2001 on certain issues of electronic commerce services and information society services (<i>2001. évi CVIII. Törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről</i>; Act CVIII of 2001).</p> <p>The provision goes as follows:</p> <p>3/A§(1) The service provided by a service provider established in the territory of other States Party to the Agreement on the European Economic Area targeting the territory of the Republic of Hungary, may not be restricted unless the relevant authority or court needs to take measure</p> <p>a) for protecting any of the following interests:</p> <p>aa) the public order, thus, in particular, the prevention, investigation and prosecution of criminal offences, including the protection of minors and actions against incitement based on race, sex, religion or nationality and the violation of the human dignity of individuals, [...]</p> <p><i>Note: Pursuant to Article 16/B of Act CVIII of 2001 the Office of the National Media and Infocommunications Authority is the first instance</i></p>

⁸⁸⁶ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

⁸⁸⁷ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

⁸⁸⁸ Interview conducted with an official of the Media Council on 4 September 2015.

⁸⁸⁹ Interview conducted with an official of the Media Council on 4 September 2015.

administrative authority. Decisions of the first instance authority can be appealed before the president of the National Media and Infocommunications Authority.

Administrative, criminal and civil liability:

The transposing provision specifically provides for a link between administrative and criminal liability. There is no statutory provision regulating the relationship between administrative liability and civil liability.

2.4 Responsibility for publishing hate speech

In Hungary, liability rules for publishing hate speech are set out in both legislation and in the codes of conduct/self-regulation of self-regulatory bodies.

Constitutional liability:

The Fundamental Law does not foresee sanctions against the publishers of hate speech, nor does it contain any explicit reference to hate speech. Despite this lack of explicit reference, Article IX(4) and (5) of the Fundamental Law⁸⁹⁰ (*Alaptörvény*) is of direct relevance. The provisions were introduced in 2013, through a legislative amendment to the Fundamental Law. This legislative amendment was necessary to ensure the compliance of the new Civil Code, and in particular its rules regulating hate speech, with the Fundamental Law. Article IX(4) and (5) of the Fundamental Law provides that freedom of expression is not an absolute right and should not be exercised with the aim of violating the human dignity of others, of the Hungarian nation or any national, ethnic, racial or religious community. It states that persons belonging to such communities are entitled to enforce their claims before courts against the expression of opinions which violate the community, invoking the violation of their human dignity. The relevant provisions also state that claims may be brought before the courts in accordance with the rules set out in legal acts. Although it is not specified in Article IX(4) and (5), it is understood that the legal acts in question are the Civil and Criminal Codes.

Criminal liability:

The Criminal Code, which penalises hate speech, defines the perpetrator of such crimes in general terms. The applicable offence provisions (see Sections 2.1 and 2.2) use the term 'any person', while referring to the perpetrator. The use of the term 'any person' allows for a broad interpretation, potentially covering publishers. Under Hungarian criminal law, both natural and legal persons may be held criminally liable. In case of legal persons, liability arises when certain conditions set out in applicable legislation are met⁸⁹¹.

Despite this theoretic option, a stakeholder noted that, in practice, publishers are unlikely to be subject to criminal liability. Rather, they may be subject to administrative and/or civil liability. Administrative liability arises in cases where the publication of the hate content takes place via media or information society services (See Section 2.3)⁸⁹². Liability rules differ when the hate content is published on a blog or social media, as these platforms are, as a general rule, not covered by the notion of media⁸⁹³/information society services⁸⁹⁴. In such cases the publisher (operator of the website) could be subject to general civil liability, while criminal liability will fall on the blogger him/herself. These people, however, often use pseudo names, or are, for other reasons, difficult to identify⁸⁹⁵.

⁸⁹⁰ Hungary's Fundamental Law (*Magyarország Alaptörvénye*), available at: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV.

⁸⁹¹ The relevant legal provisions are set out in Article 2 of Act CIV of 2001 on the criminal liability of legal persons (*2001. évi CIV. Törvény a jogi személlyel szemben alkalmazható büntetőjogi intézkedésekről*), available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=57521.255899.

⁸⁹² Interview conducted with an official of the Media Council on 4 September 2015.

⁸⁹³ They could potentially fall under the category of media content if they have been edited.

⁸⁹⁴ European Commission, 'Legal analysis of a Single Market for an Information Society', (2007), available at: <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037>.

⁸⁹⁵ Interview conducted with an official of the Media Council on 4 September 2015.

Civil liability:

Specific civil liability:

Under Hungarian law, there are specific civil law provisions regulating hate speech. According to the applicable provisions, which are quoted under Section 2.1, any person could commit the breach of personality rights and thus be subject to civil liability. This implies that publishers, editors, authors, etc. could be subject to civil liability.

It is important to establish the main difference between civil and criminal liability. Criminal liability arises in cases where the perpetrator incites to hatred, while civil liability arises in any case where a person, in front of the public, expresses a statement that seriously offends and maliciously hurts a community. Another difference derives from the fact that, under civil law, the behaviour targets individuals who belong to a certain community. Under criminal law, it is necessary that the perpetrator's act incites to hatred against a certain community. The above description implies that the two liability schemes are distinct. Therefore it is questionable whether or not they could run in parallel in practice. No reference to relevant cases has been identified.

General civil liability:

If the perpetrator's criminal conduct resulted in damage, the victim is entitled to ask for the compensation of the damages suffered, in accordance with the general rules of civil law. Victims may initiate civil claims (*polgári jogi igény*) as part of criminal judicial proceedings against the perpetrator in cases where the perpetrator's behaviour resulted in damages on the victim's side⁸⁹⁶.

Administrative liability:

The applicable rules are set out under Section 2.3.

Self-regulations applicable to the publication of hate speech

Hungarian publishers have four main self-regulatory bodies, namely the Hungarian Publishers' Association (*Magyar Lapkiadók Egyesülete*)⁸⁹⁷, the Hungarian Electronic Broadcasters (*Magyar Elektronikus Műsorszolgáltatók Egyesülete*)⁸⁹⁸, Association of Hungarian Content Providers (*Magyarországi Tartalomszolgáltatók Egyesület*)⁸⁹⁹ and the Advertising Self-regulatory Body (*Önszabályozó Reklám Testület*)⁹⁰⁰.

Each body has its own self-regulation/code of conduct on ethics. As a general rule, the self-regulation/codes of conduct developed by the above associations apply only to their members; and to media content providers that have agreed to be bound by the said rules.

Each body has concluded a so-called public administration agreement (*közigazgatási szerződés*)⁹⁰¹ with the Media Council. In accordance with these agreements, the self-regulatory associations are entitled to conduct proceedings before the Media Council with respect to breaches of rules set out in the self-regulation/codes of conduct of the self-regulatory associations, and in certain provisions of Act CLXXXV of 2010 and Act CIV of 2010. These specific provisions are listed in the public administration agreements. With

⁸⁹⁶ Rules applicable to civil claims are set out in Article 54(1) of the Criminal Procedure Code (Act XIX. of 1998 on rules of criminal judicial proceedings (*1998. évi XIX. Törvény a büntetőeljárásról*), available at: <http://net.jogtar.hu/jr/gen/getdoc2.cgi?docid=99800019.TV>.

⁸⁹⁷ Hungarian Publisher's Association: <http://mle.org.hu/>.

⁸⁹⁸ Hungarian Electronic Broadcasters: <http://www.memeinfo.hu/meme-kuldetese>.

⁸⁹⁹ Association of Hungarian Content Providers: <http://mte.hu/az-egyesuletrol/>.

⁹⁰⁰ Advertising Self-regulatory body: <http://www.ort.hu/hu/onszabalyozas/onszab>.

⁹⁰¹ All public agreements are available at: <http://merlin.obs.coe.int/iris/2011/9/article23.en.html>.

the exception of the public agreement between the Advertising Self-regulatory Body and the Media Council, all public agreements contain reference to provisions of Act CIV of 2010 transposing Article 6 of the AMD. This implies that, as a general rule, self-regulatory bodies are entitled to conduct hate speech-related disciplinary proceedings, even in cases where explicit reference to hate speech is not provided in the self-regulations.

The public administration agreements also contain detailed rules on the procedures of self-regulatory bodies. In accordance with these agreements, prior to initiating proceedings before the self-regulatory bodies, claimants are obliged to contact the media service providers with the aim of finding a solution. This could be, for example, an apology, a published correction or explanation. If a settlement is not possible, the official proceeding before the self-regulatory body may start, upon payment of the required procedural fees⁹⁰².

In each self-regulatory association there is a designated body responsible for conducting the disciplinary proceedings. The designated bodies only assess whether or not the media content provider has breached the rules set out in the self-regulations or in applicable legislation. Their competence does not extend to deciding whether or not such behaviours have breached an individual's rights. Individuals may initiate criminal and/or civil proceedings against those they believe to have breached their rights⁹⁰³.

As a general rule, these designated bodies have about 30 days to take a decision. Parties may appeal against the decisions of the designated bodies and appeals are heard by appeal committees. The parties may also request the review of the final resolution by the Media Council on the ground that the decision resulted from unlawful proceedings. The rules developed by the Hungarian Electronic Broadcasters do not allow for internal appeal mechanisms.

Relationship between proceedings of self-regulatory bodies and administrative/civil/criminal proceedings

Disciplinary liability does not exclude the application of other liability schemes. In particular those breaching the law/rules can also be held liable under administrative, criminal or civil law. Civil and criminal law, in particular, foresee sanctions for behaviours other than those regulated by self-regulation. Considering these differences, it is unlikely that for the same behaviour a perpetrator would be liable both under criminal/civil law and the rules set out in self-regulations.

Self-regulations contain procedural rules in order to avoid parallel proceedings. With respect to administrative proceedings, claims submitted to the Media Council are automatically/*ex officio* transferred to the self-regulatory bodies if two conditions are met:

1. The claims touch upon certain provisions of Act CIV of 2010, including those prohibiting the publication of content that could potentially generate hatred (See Section 2.3), or the corresponding provisions (i.e. provisions prohibiting the publication of content potentially capable of generating hatred) of the self-regulatory bodies' codes of conduct;
2. The alleged perpetrator is bound by the rules set out in the self-regulatory bodies' codes of conduct.

Due to these rules, in practice, there are no parallel proceedings before the Media Council

⁹⁰² Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

⁹⁰³ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

and the self-regulatory bodies⁹⁰⁴.

To avoid parallel proceedings, prior to the commencement of the disciplinary proceedings, the self-regulatory bodies ask the claimant about any ongoing court proceedings. Should the claimant assert that court proceedings are ongoing, the self-regulatory bodies may not start their own proceedings⁹⁰⁵.

The applicable rules of each self-regulatory association are described below:

- **Hungarian Publishers' Association**

The Hungarian Publishers' Association, representing the interests of owners and employers of the press industry (hereinafter referred to as publishers), has developed ethical rules in the form of a Code of Conduct (*Magatartási Kódex*)⁹⁰⁶. The Code of Conduct applies to those publishing online or written press products.

Pursuant to Article 10 of the Code of Conduct, the following constitutes an ethics offence:

- Publication of content which may generate hatred against a nation, community, national, ethnic, linguistic and other minority or any majority, church or religious group.
- Exclusion of any of the above referred groups.

Media content providers can be held liable for breaches of the rules. The term 'media content provider' is defined as follows: any natural or legal person or corporation without legal personality, which holds editorial responsibility over the composition of the media services and determines their contents. Editorial responsibility shall mean the responsibility for the actual control over the selection and composition of the media content, and shall not necessarily result in legal responsibility in connection with the media service.

Deriving from the above, any media content provider can be held liable. This implies that even the legal person publisher, or the natural person editor, or the author may be held liable. There is no ranking under the applicable rules between the liability of different entities/individuals⁹⁰⁷.

The Professional Association (*Szakmai Szervezet*) may impose the following sanctions:

- Obliging the infringer to change its behaviour breaching the Code of Conduct;
- Obliging the infringer to cease its behaviour breaching the Code of Conduct and, if possible, ordering the restoration of the original state of affairs;
- Obliging the infringer to compensate for the behaviour breaching the Code of Conduct. If necessary, the compensation should be given as much publicity as the breach itself;
- Obliging the infringer to compensate in some other non-financial way, and, if necessary, to cover the costs of the person initiating the procedure;
- The infringer's privilege of being only subject to disciplinary proceedings may be temporarily suspended, in which case the infringer concerned would automatically become subject to proceedings before the Media Council. These procedures are regulated by Act CLXXXV of 2010;

⁹⁰⁴ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

⁹⁰⁵ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

⁹⁰⁶ Code of Conduct available at: <http://tarsszabalyozas.hu/magatartasi-kodex/>.

⁹⁰⁷ Email exchange with lawyer representing the Hungarian Civil Liberties Union (TASZ), specialised in information-communication law. Relevant email received on 20 August 2015.

- The decision, containing the name of the infringer and reference to the infringement itself, could be published by the Association;
- Any circumstances hindering the enforcement of the disciplinary committee's decision could be published⁹⁰⁸.

- **Association of the Hungarian Electronic Broadcasters**

The Association of the Hungarian Electronic Broadcasters (the Association), representing the interests of audiovisual media content providers in Hungary, has also developed ethical rules in form of the Code of Conduct (*Magatartási Kódex*)⁹⁰⁹.

Pursuant to Article 9 of the Code of Conduct, the following constitutes an ethics offence:

- Publication of content which may generate hatred against a nation, community, national, ethnic, linguistic and other minority or any majority, church or religious group.
- Exclusion of any of the above groups.

Media content providers can be held liable for breaches of the rules. The definition of the term 'media content provider' is identical in the Codes of Conduct of the Association of the Hungarian Electronic Broadcasters and of the Hungarian Publishers' Association.

The Disciplinary Committee (*Bizottság*) may impose the same types of sanctions as the Disciplinary Committee of the Hungarian Publishers' Association.

- **Association of Hungarian Content Providers**

The Association of Hungarian Content Providers (the Association)⁹¹⁰, representing the interests of internet content providers, also developed ethical rules in the form of a document 'Regulations of operations, ethics and procedures with respect to content provision' (*A tartalomszolgáltatásra vonatkozó működési, etikai és eljárási szabályzat*)⁹¹¹.

In accordance with point 3.3 of these regulations, content providers may be held liable in accordance with the following rules:

- Content providers bear unlimited liability with respect to all edits and paid contents;
- Content providers bear limited liability with respect to so-called 'user generated contents', which term captures content produced exclusively by users on, for example, forums, free storage places or search engines.

The limited liability of content providers implies that they can be held liable only if they had a knowledge of the illicit nature of the content.

The scope of application of the Association's Regulations do not extend to bloggers or persons posting opinions on social media platforms. These persons could be held liable under criminal or civil law, should their behaviour meet the requirements set out in applicable legislation⁹¹².

The term 'content provider' is defined as follows: 'every legal or natural entity, or any

⁹⁰⁸ Article 29(1) of the Code of Conduct.

⁹⁰⁹ Code of Conduct is available at: http://mediajogfigyelo.hu/uploads/files/0_Magatartasi_kodex_MEME.pdf.

⁹¹⁰ Association of Hungarian Content Providers': <http://mte.hu/az-egyesuletrol/>.

⁹¹¹ Regulations of operations, ethics and procedures with respect to content providing: <http://mte.hu/etikai-kodex/>.

⁹¹² Email exchange with lawyer representing the Hungarian Civil Liberties Union (TASZ), specialised in information-communication law. Relevant email received on 20 August 2015.

groups thereof, publishing any type of (textual, numerical, visual, audio, or multimedia) information, restricted or unrestricted in time, and accessible by the collectivity, or any group, of Internet users in a way that this legal or natural entity can be definitely identified by those accessing such content, shall be qualified as Internet Content Provider⁹¹³.

Hate speech is not referred to as an ethical offence in the Code. It does refer, however, to the publication of any radical views, which arguably captures hate speech.

The Ad-hoc Committee (*Ad hoc Bizottság*) of the association may impose the following sanctions against the content providers:

- Changing the offensive conduct;
- Ceasing the offensive conduct and ordering the restoration of the original state of affairs;
- Paying satisfactory reparations or reimbursing the fee of the procedure paid by the claimant;
- Depending on the severity of the offence, banning the infringer from publishing its membership in the Association or using it as a reference;
- Depending on the severity of the offence, suspending for a certain period of time some other rights, such as voting rights, of the infringer originating from its membership in the Association;
- Depending on the severity of the offence, and in particular in cases of repeated offences, excluding the infringer from the association, publishing the decision on the homepage of the Association's website, and obliging the infringer to publish the decision on the homepage of its website.

- **Advertising Self-regulatory Board**

The Advertising Self-Regulatory Board, representing the interests of those engaged in advertising activities, has developed its own ethical rules in form of the Hungarian Code of Advertising Ethics (*Magyar Reklámetikai Kódex* – hereinafter referred to as the Code)⁹¹⁴. The Code in use since 2009 was repealed by a new Code, which was adopted on 17 February 2015. The new Code became operational on 29 June 2015. Existing rules do not extend to political advertisements⁹¹⁵.

The Code contains direct reference to the prohibition of hate speech under its Article 4(6), which goes as follows:

- An advertisement should not contain elements of adverse discrimination between nations, nationalities, ethnic groups, sexes, and age groups, and cannot discriminate on the grounds of sexual orientation, religious beliefs or disability. Similarly, an advertisement cannot support ideas that discriminate on any such grounds and or which could induce hatred.

The following persons can be held liable for breaches of the applicable rules:

- Advertisers;
- Advertising service provider (agency) and the media, if the failure originates from the 'creative solutions or from the way of publishing/broadcasting, except if breaking the rules [...] happened for the order of the advertiser, or the advertiser

⁹¹³ Article 3.1 of Regulations of operations, ethics and procedures with respect to content providing.

⁹¹⁴ Hungarian Code of Advertising Ethics: <http://www.ort.hu/en/code/foreword>.

⁹¹⁵ Information received via email (26 August 2015) from a representative of the Hungarian Advertising Self-regulatory body.

cannot be identified⁹¹⁶.

The experts of the Advertising Ethics Committee (*Reklámetikai bizottság*) may impose the following sanctions:

- Obliging the infringer to amend the advertisement;
- Obliging the infringer to withdraw the advertisement.

The Advertising Ethics Committee is not entitled to impose financial sanctions⁹¹⁷.

⁹¹⁶ Article 9 of the Hungarian Code of Advertising Ethics.

⁹¹⁷ Advertising Self-regulatory Board, Information page, available at: <http://www.ort.hu/hu/onszabalyozas/panasz>.

3 Effectiveness of the legal framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate crime/hate speech vs. freedom of expression	
<p>Incitement against a community (<i>Közösség elleni uszítás</i>)</p>	<p>Since the entry into force of the new Criminal Code on 1 July 2013, neither the Constitutional Court (<i>Alkotmánybíróság</i>), nor the Curia (<i>Kuria</i>) (previously called the Supreme Court) has ruled on the relationship between the offence provision of incitement against a community, as set out in Article 332 of the Criminal Code, and freedom of expression. Relevant court rulings concern the offence provision of provoking against a community (<i>közösség elleni izgatás</i>), as set out in Article 269 of the previous Criminal Code⁹¹⁸.</p> <p>The offence provision of incitement against a community, which is currently in force, reproduces almost verbatim the previously existing offence provision⁹¹⁹. The only difference lies in the list of protected grounds, which is more exhaustive and explicit in the current version than it was previously. Considering the similarity between the two offence provisions and the fact that no relevant higher court rulings have been issued since the entry into force of the new Criminal Code, court decisions linked to the previously existing offence provision are described below.</p> <p>The offence provision of provoking against a community was subject to numerous court rulings. The most controversial elements of the provision were the criminal conduct set out (i.e. inciting to hatred), and its relationship with the freedom of expression.</p> <p>The jurisdiction of the Constitutional Court could be summarised as follows: <u>1. Constitutional Court Decision 30/1992 (V.26)</u>⁹²⁰ <u>Facts of the case:</u> The petitioners <i>inter alia</i> asked for the declaration of the unconstitutionality, and for the subsequent annulment, of Article 269(1) of the Criminal Code. The petitioners claimed that the provision, penalising incitement to hatred was unconstitutional, as it ordered the punishment of types of conducts that fall within the scope of exercising the freedom of expression and the freedom of press, as set out in Article 61 of the Constitution⁹²¹. <u>Court decision:</u> The Constitutional Court ruled that Article 269(1) of the Criminal Code was in line with the Constitution. <u>Reasoning and importance of the decision:</u> The Constitutional Court's decision has two important elements, both of which</p>

⁹¹⁸ Act IV of 1978 of the Criminal Code (1978. évi IV. Törvény a Büntető Törvénykönyvről), available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=3356.237644.

⁹¹⁹ 269.§ Any person, who before the general public, incites to hatred: a.) against the Hungarian nation, b.) against any national, ethnic, racial, religious group or certain group of a population; commits a felony and shall be punishable for imprisonment of up to three years.

⁹²⁰ Constitutional Court Decision 30/1992 (V.26) (30/1992. (V. 26.) AB határozat), available at:

<http://www.mkab.hu/hatarozat->

[kereso?OpenAgent=&kereses=1&hatarozat_sorszam=&hatarozat_evszam=&ugyszam_sorszam=&ugyszam_evszam=&kelte=&rendelkezo_resz=&indoklas=k%C3%B6z%C3%B6ss%C3%A9g+elleni+usz%C3%ADt%C3%A1s+velemenyek=&alkotmanybiro=&inditvanyozo_tipusa=&eljaras_tipusa=&ugyallapot=&alkotpanasz_ugyall=&jogszabaly=&lenyeg=&feltetel1=2&targymutato%5B%5D=&feltetel2=2&alkotmany_hivatkozas_import%5B%5D=&befejezes_tipusa](http://www.mkab.hu/hatarozat-kereso?OpenAgent=&kereses=1&hatarozat_sorszam=&hatarozat_evszam=&ugyszam_sorszam=&ugyszam_evszam=&kelte=&rendelkezo_resz=&indoklas=k%C3%B6z%C3%B6ss%C3%A9g+elleni+usz%C3%ADt%C3%A1s+velemenyek=&alkotmanybiro=&inditvanyozo_tipusa=&eljaras_tipusa=&ugyallapot=&alkotpanasz_ugyall=&jogszabaly=&lenyeg=&feltetel1=2&targymutato%5B%5D=&feltetel2=2&alkotmany_hivatkozas_import%5B%5D=&befejezes_tipusa).

⁹²¹ Since the judgment, dated 1992, the Hungarian Parliament has adopted a new Constitution, which has repealed the previously existing one. The repealed Constitution is available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=222.207867. Article 61 of the Constitution set out the following: (1) In the Republic of Hungary everyone has the right to the free declaration of his views and opinions, and has the right of access to information of public interest, and also the freedom to disseminate such information. (2) The Republic of Hungary recognises and protects the freedom of the Press.

concern the boundaries between criminal liability and the protection of the fundamental right of freedom of expression.

The first element of the decision can be summarised as follows:

The Constitutional Court ruled that freedom of expression and freedom of the press were fundamental rights, therefore any legislation limiting these rights would need to meet certain conditions (i.e. necessity test):

- The legislation should be necessary to restrict the said freedoms;
- The legislation should comply with the requirement of proportionality, in accordance with which the legislation should be necessary and adequate for the aim to be achieved.

Regarding criterion 1, the Constitutional Court ruled that penalising incitement to hatred, as set out in Article 269(1) of the Criminal Code, was necessary. Such necessity was justified by:

- the historical evidence showing that raising hatred against certain groups of people might have severe social consequences;
- the existence of other fundamental rights, such as the democratic rule of law, the equality of human beings, human dignity and the protection of national and ethnic minorities, as recognised by the Constitution;
- the obligations of Hungary deriving from international law, as set out *inter alia* in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.

Regarding criterion 2, the Constitutional Court argued that the provision set out in Article 269(1) of the Criminal Code complied with the requirement of proportionality, as it covered only the most dangerous criminal conduct (i.e. incitement to hatred) and the different elements of the offence provision were precise enough to be unambiguously applied by the courts.

The second element of importance concerns the interpretation of the term 'incitement to hatred'. The court provided two different interpretations of the term⁹²², which has led to an ongoing controversy. Existing literature considers that these definitions have given rise to the following three interpretations: a) some believe that incitement to hatred is punishable, and thus freedom of expression can be restricted if the conduct created a clear and present danger, b) others consider the thresholds to be lower, arguing that incitement to hatred is committed when the danger becomes real and tangible, and c) finally, there are views noting that incitement to hatred is realised when the conduct is capable of generating hatred⁹²³.

⁹²² The first interpretation defined the term as: '[...]the behaviour criminally sanctioned in paragraph (1) poses a danger to individuals' rights, too, which gives such a weight to public peace that – in line with the argumentation in point IV – the restriction of the freedom of expression can be regarded as necessary and proportionate. Although the actual outcome of the examination is the same, this reasoning considers not only the intensity of the disruption of public peace which – above and beyond a certain threshold ("clear and present danger") – justifies the restriction of the right to the freedom of expression.' The second interpretation provided the following definition: 'According to law, "incitement" is not the expression of some unfavourable and offensive opinion, but such a virulent outburst which is capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace. This way, criticism, disapproval, objections or even offensive declarations do not constitute incitement; incitement occurs only when the expressions, comments etc. do not address reason, but seek to influence the world of emotions and are capable of arousing passion and hostile feelings. For the concept of incitement it is totally irrelevant whether or not the facts stated are true; what matters is whether the specific composition of data, no matter whether true or false, is capable of arousing hatred' Constitutional Court Decision 30/1992 (V.26) (30/1992. (V. 26.) AB határozat), available in English at: http://hunmedialaw.org/dokumentum/154/01_301992_Abh_final.pdf.

⁹²³ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (*A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöletre uszítás alkotmányos azonosítása felé*), (2013), available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

	<p><u>2. Constitutional Court Decision 12/1999⁹²⁴</u></p> <p><u>Facts of the case:</u> The petitioners claimed that the criminal conduct introduced by Article 5 of Act XVII of 1996, i.e. 'commits another act suitable for incitement to hatred', amending Article 269(1)(b) of the Criminal Code, was unconstitutional on various grounds, including the ground of limiting the exercise of freedom of expression.</p> <p><u>Court decision:</u> The Constitutional Court ruled that the amendment in question was unconstitutional and should be annulled.</p> <p><u>Reasoning and importance of the decision:</u> The court in its ruling used arguments which set boundaries regarding the interpretation of the criminal conduct of incitement to hatred. The Constitutional Court's main arguments could be summarised as follows: the decision of the Constitutional Court was founded on the test of necessity, which was used in decision 30/1992 (V.26). Regarding the requirement of proportionality, the Constitutional Court ruled that, as examined in its previous judgment (30/1992 (V.26)), the criminal conduct of incitement to hatred was set as a constitutional threshold for limiting the freedom of expression. Punishing other acts suitable for arousal of hatred would diminish the threshold. In addition, the criminal conduct introduced by Article 5 of Act XVII of 1996 does not comply with the constitutional criminal law requirements of legal certainty, definiteness, clarity and the necessity of preventing the arbitrary application of the law.</p> <p>The decision is important, as it states that incitement to hatred is the threshold for limiting freedom of expression. The decision also introduced a new element to the controversy described above, by describing the term 'incitement to hatred' as follows: 'it is only incitement that incorporates a level of danger 'above a certain limit' that may allow the restriction of the freedom of expression⁹²⁵.' Literature notes that the Constitutional Court, in its decision, did not clarify the exact meaning of the term, as the wording 'above a certain limit' is unclear⁹²⁶.</p> <p><u>3. Constitutional Court Decision 18/2004 (V.25)⁹²⁷</u></p> <p><u>Facts of the case:</u> The procedure, initiated by the President of Hungary, concerned the amendment of Article 269 of the Criminal Code, as suggested by the National Parliament. The procedure was initiated when the amendment was signed by the National Parliament and was sent for signature to the President. The amendment in question would have <i>inter alia</i> replaced the criminal conduct of incitement to hatred (<i>gyűlöltre uszítás</i>) with the criminal conduct of provoking to hatred (<i>gyűlöltre izgatás</i>) and would have added the criminal conduct of 'calling for the commission of a forcible act'.</p> <p><u>Court decision:</u> The Constitutional Court ruled that the amendment in question was unconstitutional and should be annulled.</p> <p><u>Reasoning and importance of the decision:</u> The Constitutional Court, in its decision, recalled the Constitutional Court's previous jurisprudence and, in particular, the thresholds that had previously been set for the limitation of freedom of expression. It noted that the main question to assess was whether the criminal conducts set out in the amendment met the constitutional thresholds.</p> <p>Regarding the criminal conduct of provoking to hatred, the Constitutional Court ruled that in line with the jurisprudence of the Supreme Court (currently called as Curia), the terms 'provoking to hatred' and 'inciting to hatred' capture different things.</p>
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⁹²⁴ Constitutional Court Decision 12/1999 (12/1999. (V. 21.) AB határozat), available at: <http://public.mkab.hu/dev/dontesek.nsf/0/492D281B4506140EC1257ADA0052AA1E?OpenDocument>.

⁹²⁵ Constitutional Court Decision 12/1999 (12/1999. (V. 21.) AB határozat), available in English at: http://www.mkab.hu/letoltesek/en_0012_1999.pdf.

⁹²⁶ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöltre uszítás' alkotmányos azonosítása felé), (2013), available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

⁹²⁷ Constitutional Court Decision 18/2004 (V.25)(18/2004. (V. 25.) AB határozat), available at: <http://public.mkab.hu/dev/dontesek.nsf/0/4EA2726C0A3F263EC1257ADA00529A10?OpenDocument>.

	<p>Whereas 'provoking addresses one's mind, incitement manipulates one's instincts and emotions and mobilises the addressees. Therefore, in the judicial interpretation, incitement is a graver act.'⁹²⁸</p> <p>Regarding the second criminal conduct, the Constitutional Court also ruled that calling for the commission of a forcible act does not meet the constitutional threshold. In its reasoning it noted the following: '[...] the offence is deemed to have been committed even without disturbing public peace or even without the call being suitable for disturbing public peace. However, such an abstract threat to public order and peace does not justify the application of a criminal law sanction'.</p> <p>The Decision is also of relevance with respect to the controversy generated by Constitutional Court Decision 30/1992 (V.26). Existing literature notes that the decision consistently refers to the term 'clear and present danger', while describing the meaning of the criminal conduct. Therefore the literature argues that the Constitutional Court with this decision sets clear boundaries for the application of the offence provision⁹²⁹.</p> <p><u>The Constitutional Court's jurisprudence can be summarised as follows:</u></p> <p>The above decisions of the Constitutional Court suggest that incitement to hatred as a criminal conduct is the threshold for limiting the fundamental right of freedom of expression. Controversial interpretations of the term 'incitement to hatred' exist. The most recent decision of the Constitutional Court suggests that such conduct is realised when it imposes a clear and present danger on the individuals of a community.</p> <p>Decisions of the Curia (previously called the Supreme Court) and of other higher courts, such as appellate courts (<i>ítélőtábla</i>) have also contributed to the interpretation of the term 'incitement to hatred':</p> <p><u>1. Supreme Court Decision 1997.165</u>⁹³⁰</p> <p><u>Facts of the case:</u> The perpetrators, who used shocking and offensive terms against Jewish people, were accused of incitement to hatred.</p> <p><u>Court decision:</u> The Supreme Court approved the decisions of lower instance courts, which acquitted the perpetrators.</p> <p><u>Reasoning and importance of the decision:</u> The court in its decision stated that, as set out in Constitutional Court Decision 30/1992 (VI.26), the term incitement to hatred should be interpreted in its colloquial meaning. On the basis of this interpretation, incitement aims to provoke hatred resulting in some action.</p> <p>Existing literature notes that this interpretation goes beyond the interpretation of the Constitutional Court and makes the threshold higher for penalising certain activities⁹³¹.</p> <p><u>2. Supreme Court Decision 1998.251</u>⁹³²</p>
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⁹²⁸ Constitutional Court Decision 18/2004 (V.25)(18/2004. (V. 25.) AB határozat), available in English at: http://www.mkab.hu/letoltesek/en_0018_2004.pdf.

⁹²⁹ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (*A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöletre uszítás alkotmányos azonosítása felé*), (2013) available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

⁹³⁰ The decision is not available on the website of the Curia, but could be accessed through an unofficial source, which is available at: <https://jak.ppk.hu/uploads/articles/12069/file/gy%C5%B1I.BH.pdf>.

⁹³¹ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (*A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöletre uszítás alkotmányos azonosítása felé*), (2013) available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

⁹³² The decision is not available on the website of the Curia, but could be accessed through an unofficial source, which is available at: <https://jak.ppk.hu/uploads/articles/12069/file/gy%C5%B1I.BH.pdf>.

	<p><u>Facts of the case:</u> One of the perpetrators who was involved in the previous case used strong words against the Jewish Community, including 'they should be cut out', and 'they should be kicked out'. The wording used by the perpetrator was more direct and offensive than in the first case.</p> <p><u>Court decision:</u> The Supreme Court approved the decisions of lower instance courts, which found the perpetrator guilty.</p> <p><u>Reasoning and importance of the decision:</u> The Supreme Court defined the term 'incitement to hatred' as the emotional preparation of violence. The decision does not specify that the conduct should materialise in an action. Existing literature notes that the meaning of emotional preparation of violence is unclear⁹³³.</p> <p><u>3. Supreme Court Decision 1999.5:</u> The Court Decision could not be accessed online, therefore the decision cannot be similarly described. Existing literature notes, however, that the decision reviews Supreme Court Decision 1997.165 and concludes that the perpetrator of the incitement to hatred should be able to understand that the hatred incited by him or her may result in radical (e.g. intolerant, exclusive, violent) activities. Existing literature notes that this interpretation also differs from those set out in previous Supreme Court and Constitutional Court decisions⁹³⁴.</p> <p><u>4. Court Decision 2005.46⁹³⁵</u> <u>Facts of the case:</u> The defendant, a member of the National Parliament, wrote an article in which he described the history of Hungary and provided reference to ethical/national groups which had invaded the country. This list included references to Jewish people. One of the main messages of the article was the following: 'Exclude them (note by the expert: Jewish people)!' The article was published in the journal of an extreme-right political party, of which 12,000 copies were distributed. The article was then read aloud during a radio programme by the perpetrator. <u>Court decision:</u> No information available. <u>Reasoning and importance of the decision:</u> The Court interpreted the meaning of the term 'incitement to hatred' as follows: incitement to hatred is committed if the conduct incites people to do something. The abstract danger is not enough, the perpetrator's conduct should realistically lead to the harm. The danger of harming some rights must be concrete and the potential of violence should be direct.</p> <p><u>5. Court Decision 2011.242⁹³⁶:</u> The Court Decision could not be accessed online, therefore the decision cannot be described in detail. A summary is available in existing literature. It quotes from the decision the definition of incitement to hatred, which introduces the following new element: incitement to hatred captures the realistic possibility of developing into a concrete violence.</p>
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⁹³³ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (*A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöletre uszítás alkotmányos azonosítása felé*), (2013), available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

⁹³⁴ András Koltay, 'The big Hungarian hate speech debate – on the way towards setting constitutional boundaries for the offence provision of incitement to hatred' (*A nagy Magyar gyűlöletbeszéd-vita: A 'gyűlöletre uszítás alkotmányos azonosítása felé*), (2013) available at: http://jog.tk.mta.hu/uploads/files/Allam-%20es%20Jogtudomany/2013_1_2/2013-1-2-koltay.pdf.

⁹³⁵ The decision is not available on the website of the Curia, but could be accessed through an unofficial source, which is available at: <https://jak.ppke.hu/uploads/articles/12069/file/gy%C5%B1.BH.pdf>.

⁹³⁶ The decision is not publicly available online.

	<p>To conclude, the jurisprudence of higher courts seems to interpret the definition of incitement to hatred differently than the Constitutional Court. The threshold set by the above decisions seems to be higher than that set in the Constitutional Court judgments referred to earlier. According to information received from the General Prosecutor's Office (<i>Legfőbb Ügyészség</i>), the threshold set by the Curia, and used in practice, can be summarised as follows:</p> <ul style="list-style-type: none"> - criminal conduct of the perpetrator incites to hatred to such an extent that it is capable of generating violence; - the perpetrator's conduct puts other people's rights into concrete and direct danger; - the danger of violence is concrete (i.e., it is probable that the incitement will lead to violence)⁹³⁷. <p>According to the General Prosecutor's Office, the above interpretation is too narrow and hinders the prosecution of incitement to hatred cases⁹³⁸. The European Commission against Racism and Intolerance (ECRI) in its fifth report, also notes that the criminal conduct of incitement to hatred is too strictly interpreted⁹³⁹.</p>
<p>Public denial of sins of national socialist or communist regimes (A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása)</p>	<p>The predecessor of the current provision was incorporated into the 'old' Hungarian Criminal Code in 2010, in the form of Article 269/C⁹⁴⁰. Article 269/C introduced the offence provision of 'public denial of Holocaust' (<i>holokauszt nyilvános tagadása</i>). The offence provision was amended in the same year by Act LVI of 2010⁹⁴¹. The title was changed to 'public denial of sins of national socialist and communist regimes' (<i>a nemzeti szocialista és kommunista rendszerek bűneinek nyilvános tagadása</i>) and the wording of the offence provision was altered⁹⁴².</p> <p>The wording of the offence provision, as set out in Article 333 of the current Criminal Code, differs from that of the previously existing offence provision. A learning material for judges published by the National Judicial Office (<i>Országos Bírósági Hivatal</i>)⁹⁴³ refers to three main differences, one substantive and two linked to the legal terminology used in the provision. The substantive change relates to the list of criminal conducts, which was extended. The former version of the Criminal Code penalised the acts of denial, doubt, and trivialisation of defined facts. The current version also penalises the criminal conduct of justifying the commission of genocide or other crimes committed by national socialist or communist regimes. The other two differences, linked to the wording of the offence provision, were introduced with the aim of ensuring the provision's compliance with international law. The new version of the Criminal Code uses the term 'against humanity' (<i>emberiesség elleni cselekmény</i>), instead of the former version which referred to 'mankind' (<i>emberiség elleni cselekmény</i>) when it specified the nature of facts</p>

⁹³⁷ Information received from General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹³⁸ Information received in form of a written communication on 3 August 2015.

⁹³⁹ ECRI, 'Report on Hungary - fifth monitoring report', (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf>.

⁹⁴⁰ According to Article 1 of Act XXXVI of 2010, Article 269/C is to be added to Act IV of 1978 on Criminal Code as follows, under the subtitle 'Public denial of Holocaust': 'Any person who, in front of the general public, denies, doubts or trivialises the commission of Holocaust thereby violating human dignity of the victims of Holocaust, commits a felony and is punishable by up to three years of imprisonment'. Act XXXVI of 2010 amending Act IV of 1978 on the Criminal Code (2010. évi XXXVI. Törvény a Büntető Törvénykönyvről szóló 1978. évi IV. törvény módosításáról), available at: <http://www.complex.hu/kzldat/t1000036.htm/t1000036.htm>.

⁹⁴¹ Act LVI of 2010 amending Act IV of 1978 on the Criminal Code (2010. évi LVI. Törvény a Büntető Törvénykönyvről szóló 1978. évi IV. törvény módosításáról), available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=131800.190270.

⁹⁴² The offence provision of public denial of sins of national socialist and communist regimes as set out in Article 269/C. is as follows: 'Any person who, in front of the general public, denies, doubts or trivialises the commission of genocide, or other crimes against humanity, by national socialist or communist regimes, commits a felony and is punishable by up to three years of imprisonment'.

⁹⁴³ National Judicial Office, 'Training Material - Special Part II. (Országos Bírósági Hivatal Különös rész II. című tananyaga), (no date available), available at: http://projektjeink.birosag.hu/sites/default/files/allomanyok/e-learning/btk/buntetojog3/lecke5_lap1.html#hiv7.

which are protected by the provision. There is a slight difference in Hungarian between the meaning of the two terms, i.e. 'emberiség elleni cselekmény' rather has a meaning of crimes against mankind, whereas the word 'emberiesség' allows for a slightly broader interpretation, which captures better the exact meaning of the English word 'humanity'. The last difference concerns an exchange of conjunction, from *and* to *or*, between the words 'genocide' and 'other crimes'. This is considered as a clarification with respect to the scope of application of the provision. Deriving from this alteration, the provision is now applicable in the case of denial of other crimes committed under socialist or communist regimes on an equal footing with genocide.

Since the offence provision was only incorporated into the Criminal Code in 2010, it has not been subject to numerous court rulings. There is one relevant higher court ruling⁹⁴⁴ touching upon the relationship of the offence provision with the freedom of expression, which had been issued (on 20 June of 2013) just before the new Criminal Code entered into force (on 1 July 2013). Consequently, the Constitutional Court's decision is linked to the previously existing offence provision, as set out in Article 269/C.

The ruling of the Constitutional Court is summarised as follows:

Constitutional Court Decision 16/2013 (VI.20.)

Facts of the case: The proposal for the constitutional review of Article 269/C was made by a district court judge in the course of a criminal procedure. As a result of the request for constitutional review, the criminal procedure was suspended. The proposal claimed that the provision penalising public denial of sins of national socialist or communist regimes was unconstitutional, as it ordered the punishment of types of conducts that fall within the scope of exercising the freedom of expression set out in Article IX(1)⁹⁴⁵ of the Fundamental Law⁹⁴⁶, and also contradicting Article I(3)⁹⁴⁷. In addition, the judge argued that the provision was in conflict with the prohibition of self-incrimination declared in the Criminal Procedure Code (*Büntetőjárásról szóló törvény*)⁹⁴⁸. The provision does not comply with Article B(1)⁹⁴⁹ of the Fundamental Law setting out the principle of the rule of law, and therefore does not provide legal certainty.

Court decision: The Constitutional Court ruled that Article 269/C of the Criminal Code was in line with the Fundamental Law.

Reasoning and importance of the decision: The Constitutional Court, in its decision, declared that the provision set out in 269/C limits the fundamental right of freedom of expression by assigning adverse consequences to personal opinions linked to a specific topic and under specific circumstances. The Court argued that the norm prohibits the expression of certain opinions irrespective of their malicious manner or the fact that they might be in accordance with one's personal beliefs. Article 269/C prohibits conducts which imply the phrasing and dissemination of personal and radical opinions concerning sins committed by the totalitarian regimes of the 20th century.

⁹⁴⁴ Constitutional Court Decision 16/2013. (VI.20.) (16/2013. (VI.20.) AB határozat) is available at: <http://public.mkab.hu/dev/dontesek.nsf/0/471A890F1114884FC1257ADA00525728?OpenDocument>.

⁹⁴⁵ Article IX(1) set out the following: Everyone shall have the right to freedom of speech.

⁹⁴⁶ Fundamental Law of Hungary (25 April 2011) (*Magyarország Alaptörvénye, 2011. április 25.*) is available at: <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>.

⁹⁴⁷ Article I(3) set out the following: The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

⁹⁴⁸ Article 8 of the Criminal Procedure Code sets out the following: No one may be compelled to make a self-incriminating testimony or to produce self-incriminating evidence.

⁹⁴⁹ Article B(1) of the Fundamental Law sets out the following: Hungary shall be an independent, democratic rule-of-law State.

	<p>The Constitutional Court, in its decision, recalled that freedom of expression was a key fundamental right, serving as a basis for the protection of communication rights. It noted, however, that freedom of expression was not an absolute right, therefore it could be subject to restrictions if certain conditions are met (i.e. necessity test):</p> <ul style="list-style-type: none"> - The legislation should be necessary to restrict the said freedom (criterion one); - The legislation should comply with the requirement of proportionality, in accordance with which the legislation should be necessary and adequate for the aim to be achieved (criterion two). <p>Regarding criterion one, the Constitutional Court ruled that the penalisation of the public denial of sins of national socialist or communist regimes, as set out in Article 269/C of the Criminal Code, was necessary. Such necessity was justified by the following constitutional values and objectives:</p> <ul style="list-style-type: none"> - human dignity of the relatives of victims, of those remembering victims and members of communities committed to/engaged with democratic values; - preservation of the unconditional social commitment to democracy and the democratic rule of law; - maintenance of public peace. <p>The main arguments related to these three points can be summarised as follows:</p> <p>(1) In line with the jurisprudence of the Constitutional Court and as reflected in Article IX(4)⁹⁵⁰ and (5)⁹⁵¹ of the Fundamental Law, the right to freedom of expression may not be exercised with the aim of violating the human dignity of others and of the Hungarian nation or of any national, ethnic, racial or religious community. Accordingly, the Fundamental Law states that the freedom of expression could be limited and prohibits the misuse of it based on Article I(3). The Court originated the protection of those engaged with democracy from Article II of the Fundamental Law⁹⁵² which declares the fundamental right to human dignity.</p> <p>(2) Operation of democratic regimes based on the principle of the rule of law is funded on values like human rights and other constitutional values, which shall be respected and protected by the state. The Constitutional Court argued that the protection of these values is as important as the protection of the memory of the degradation thereof by an ideology.</p> <p>(3) The Constitutional Court, in its decision, recalled the Constitutional Court's previous jurisprudence⁹⁵³ related to conduct which violates the human dignity of communities and is capable of threatening public peace. In accordance with previous rulings, these conducts may be subject to criminal restrictions according to the Constitution. The Court stated that the non-appropriate use of a political notion would not need to be criminalised. The threshold is only transgressed where certain notions would harm democratic values and threaten public peace.</p> <p>Regarding criterion two, the Constitutional Court argued that the provision set out in Article 269/C of the Criminal Code complied with the requirement of proportionality, as it foresaw the penalisation of certain specific conducts only. The application of other - less restrictive - measures – e.g. rules of infringement/quasi-criminal law or invoking civil liability - would not provide a sufficient level of protection for the constitutional values and objectives in question.</p>
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⁹⁵⁰ Article IX(4) of the Fundamental Law sets out the following: The right to freedom of speech may not be exercised with the aim of violating the human dignity of others.

⁹⁵¹ Article IX(5) of the Fundamental Law sets out the following: The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act.

⁹⁵² Article II of the Fundamental Law sets set out the following: Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.

⁹⁵³ Criminal Court Decision 14/2000. (V. 12.) (14/2000. (V. 12.) AB határozat) is available at <http://public.mkab.hu/dev/dontesek.nsf/0/24CF1744BFB75ABCC1257ADA0052846E?OpenDocument>.

	<p>To conclude, the Constitutional Court complied with its previous jurisprudence on the limitation of freedom of expression, by using the same reasoning and methods (i.e. necessity test) as in case of former decisions⁹⁵⁴. In this decision the new element is the reference to the protection of social commitment to democratic values, which extends the list of those constitutional objects which could justify restrictions of the fundamental right of freedom of expression.</p> <p>Finally, the Constitutional Court, in this judgment, also interpreted the meaning of the criminal conducts set out therein. It ruled that it captures conducts which, both under domestic and international legislation, are covered by the umbrella terms of 'genocide and acts against humanity'. In addition, it also extends to atrocities (<i>rémített</i>) if committed with similar weight as those committed under the national socialist and communist regimes, given that they are recognised as general historical facts.</p>																														
Indicator 2 - Quantitative evidence																															
<p>Incitement against a community (Közösség elleni uszítás)</p>	<p>Existing literature notes that, in Hungary, hate crime and hate speech incidents remain largely under-reported or are registered and consequently treated by the competent investigating and prosecuting authorities as crimes other than hate crimes and/or hate speech. Some estimates suggest that existing statistics represent around 0.3% of hate crimes and/or hate speech⁹⁵⁵.</p> <p><i>Number of cases investigated:</i> Statistical data are available on the number of registered cases.</p> <p>According to the website of the General Prosecutor's Office, the number of cases registered by the Police (<i>Rendőrség</i>) during the reference period was as follows⁹⁵⁶:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th>Year</th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> <th>2014</th> </tr> </thead> <tbody> <tr> <td>No of cases</td> <td>8</td> <td>6</td> <td>5</td> <td>3</td> <td>1⁹⁵⁷</td> </tr> </tbody> </table> <p>The source quoted was published on 31 March 2015. Since then no new report containing relevant statistical data has been published.</p> <p>The General Prosecutor's Office disaggregates these data by means of commission of the crime. The relevant data are provided in the table below:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th>Year</th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> <th>2014</th> </tr> </thead> <tbody> <tr> <td>Electronic media</td> <td>1</td> <td>0</td> <td>1</td> <td>0</td> <td>0</td> </tr> <tr> <td>Internet</td> <td>3</td> <td>2</td> <td>0</td> <td>0</td> <td>1</td> </tr> </tbody> </table>	Year	2010	2011	2012	2013	2014	No of cases	8	6	5	3	1 ⁹⁵⁷	Year	2010	2011	2012	2013	2014	Electronic media	1	0	1	0	0	Internet	3	2	0	0	1
Year	2010	2011	2012	2013	2014																										
No of cases	8	6	5	3	1 ⁹⁵⁷																										
Year	2010	2011	2012	2013	2014																										
Electronic media	1	0	1	0	0																										
Internet	3	2	0	0	1																										

⁹⁵⁴ Constitutional Court Decisions 30/1992. (V.26.), 36/1994. (IV. 24), 95/2008. (VII. 3), (30/1992. (V.26.) AB határozat, 36/1994. (IV. 24) AB határozat, 95/2008. (VII. 3) AB határozat) are available at <http://www.alkotmanybirosag.hu/hatarozat-kereso>.

⁹⁵⁵ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary – Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), p. 10, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

⁹⁵⁶ General Prosecutor's Office, 'Statistical data on criminality from 2013' (*Tájékoztató a 2013. évi bűnözésről*), (2014), available at: <http://www.mklu.hu/repository/mkudok8770.pdf>.

⁹⁵⁷ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

Printed media	1	0	0	0	0
Events	0	0	1	0	0
Outside of events	2	1	2	2	0
Billboards or leaflets	1	3	1	1	0

A different source published by the Ministry of Interior's Department responsible for Coordination and Statistics (*Belügyminisztérium Koordinációs és Statisztikai Osztály*)⁹⁵⁸, noted that the number of cases during the reference period of 2010-2015 was as follows:

- Provoking against a community (as set out in the previous Criminal Code, which was in force until 2013): 24.
- Incitement against a community (as set out in the new Criminal Code, in force since 2013): 5.

Number of cases prosecuted⁹⁵⁹:

Year	2010	2011	2012	2013	2014
No of cases	4	0	0	0	2

The website of the Ministry of Interior's Department responsible for Coordination and Statistics contains the following data regarding the number of cases prosecuted during the reference period of 2010-2015⁹⁶⁰:

Year	2010	2011	2012	2013	2014	2015
Provoking against a community	4	0	1	0	1	NA – legislation no longer in force
Incitement against a community	NA – legislation not yet in force	NA – legislation not yet in force	NA – legislation not yet in force	NA – legislation not yet in force	2	1

Number of cases adjudicated⁹⁶¹:

Year	2010	2011	2012	2013	2014
No of cases	3	6	1	No data	No data

⁹⁵⁸ Website of the Ministry of Interior's Department responsible for Coordination and Statistics (*Belügyminisztérium Koordinációs és Statisztikai Osztály*) dedicated to criminal statistics, available at: <https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuncselekményiAdatok>.

⁹⁵⁹ Lídia Balogh, Henrietta Dinók, András László Pap, 'Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice' (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012), available at: <http://www.fundamentum.hu/atirt-alapjogok/cikk/jog-altal-lathatatlan-gyulolet-buncselekmények-szabalyozasi-kerdesei-es-gyakorl>, and information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁰ Website of the Ministry of Interior's Department responsible for Coordination and Statistics (*Belügyminisztérium Koordinációs és Statisztikai Osztály*) dedicated to criminal statistics, available at: <https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuncselekményiAdatok><https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuntetoeljarasiAdatok>.

⁹⁶¹ Lídia Balogh, Henrietta Dinók, András László Pap, 'Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice' (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012), available at: <http://www.fundamentum.hu/atirt-alapjogok/cikk/jog-altal-lathatatlan-gyulolet-buncselekmények-szabalyozasi-kerdesei-es-gyakorl>.

Public denial of sins of national socialist or communist regimes (A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása)	Number of cases investigated:					
	Statistical data are available on the number of cases registered by the police ⁹⁶² .					
	Year	2010	2011	2012	2013	2014
	No of cases	NA	1	6	4	18 ⁹⁶³
	The source quoted was published on 31 March 2015. Since then no new report containing relevant statistical data has been published.					
	Out of 11 cases that were registered between 2010-2013, three concerned the denial of certain crimes specified in the offence provision, four the doubting of, and four the trivialisation thereof ⁹⁶⁴ .					
	In 2014, out of the 18 registered cases, three concerned the trivialisation of the crimes set out in the offence provision, in seven cases the suspect doubted the commission of crimes, and in eight cases the commission of such crimes was denied. In three cases the suspects' conduct concerned crimes committed by the communist regimes, while 15 cases related to the crimes committed by the national socialist regimes ⁹⁶⁵ .					
	A different source published by the Ministry of Interior's Department responsible for Coordination and Statistics ⁹⁶⁶ noted that the number of registered cases during the reference period of 2010-2015 was as follows:					
	- Public denial of sins of national socialist and communist regimes (as set out in the previous Criminal Code, which was in force until 2013): 13.					
	- Public denial of sins of national socialist or communist regimes (as set out in the new Criminal Code in force since 2013): 26.					
	Number of cases prosecuted⁹⁶⁷:					
	Year	2010	2011	2012	2013	2014
	No of cases	NA	0	1	0	8 ⁹⁶⁸
	The offence provision entered into force in 2010.					
	The website of the Ministry of Interior's Department responsible for Coordination and Statistics contains the following data regarding the number of cases prosecuted during the reference period of 2010-2015 ⁹⁶⁹ :					

⁹⁶² General Prosecutor's Office, 'Statistical data on criminality from 2013' (*Tájékoztató a 2013. évi bűnözésről*), available at: <http://www.mklu.hu/repository/mkudok8770.pdf>.

⁹⁶³ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁴ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁵ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁶ Website of the Ministry of Interior's Department responsible for Coordination and Statistics (*Belügyminisztérium Koordinációs és Statisztikai Osztály*) dedicated to criminal statistics, available at: <https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuncselekményiAdatok>.

⁹⁶⁷ Lídia Balogh, Henrietta Dinók, András László Pap, 'Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice' (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012), available at: <http://www.fundamentum.hu/atirt-alapjogok/cikk/jog-altal-lathatatlan-gyulolet-buncselekmények-szabalyozasi-kerdesei-es-gyakorlati-problemái> and information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁸ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁶⁹ Website of the Ministry of Interior's Department responsible for Coordination and Statistics (*Belügyminisztérium Koordinációs és Statisztikai Osztály*) dedicated to criminal statistics, available at:

Year	2010	2011	2012	2013	2014	2015
Public denial of sins of national socialist and communist regimes	0	0	1	2	0	1
Public denial of sins of national socialist or communist regimes	NA – offence provision not yet in force	NA – offence provision not yet in force	NA – offence provision not yet in force	0	8	2

Number of cases adjudicated⁹⁷⁰:

Year	2010	2011	2012	2013
No of cases	NA	0	0	No data

The offence provision entered into force in 2010.

Indicator 3 - Bottlenecks of practical implementation

Incitement against a community (Közösség elleni uszítás)	Clarity of offence provision:
	<p>Courts have extensively interpreted the meaning of the criminal conduct set out in Article 269 of the previous Criminal Code, which is almost <i>explicit verbis</i> reproduced in the new Criminal Code (See Indicator 1). There is no real consensus regarding the meaning of the term ‘incitement to hatred’.</p> <p>Despite these differences, stakeholders seem to agree that current interpretations of the term ‘incitement to hatred’ are too restrictive. Due to the strict interpretation, the offence provision is not used in practice⁹⁷¹.</p> <p>The General Prosecutor’s Office noted that with this restrictive interpretation, the offence provision has become a <i>de facto</i> material offence⁹⁷². In other words, despite the original intention of the legislator, it has become essential for the investigation, prosecution and adjudication of incitement to hatred to prove certain results.</p> <p>Higher courts have also interpreted the meaning of the term ‘general public’. General public is an important element of the offence provision and defines the manner of the commission of the crime. The term, according to the courts, encompasses the following: a crime is committed in front of the general public if, during the commission of the crime, a bigger group of people</p>

<https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuncselekmenyiAdatok><https://bsr.bm.hu/SitePages/DokumentumtarLista.aspx?libraryName=BuntetoeljarasiAdatok>

⁹⁷⁰ Lídia Balogh, Henrietta Dinók, András László Pap, ‘Invisible for the law- Questions related to the regulation of hate crimes and problems linked to practice’ (*A jog által láthatatlan- A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái*), (2012) available at: <http://www.fundamentum.hu/atirt-alapjogok/cikk/jog-altal-lathatatlan-gyulolet-buncselekmények-szabalyozasi-kerdesei-es-gyakorl>.

⁹⁷¹ Tamás Dombos and Márton Udvari, ‘Hate crimes in Hungary – Problems, recommendations and good practices’ (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf> and Information received from the General Prosecutor’s Office in form of a written communication on 3 August 2015.

⁹⁷² Information received from the General Prosecutor’s Office in form of a written communication on 3 August 2015.

	<p>was present, or there is a chance that a group of a bigger number of people will learn about the result of the crime. In the meaning of the provision a group should contain a bigger number of people and if this number cannot be specified, then it should be at least 20-30 people⁹⁷³. Article 459(12) of the Criminal Code also defines the term 'general public'. It refers to cases when 'among others a crime is committed through publication in the press, or through other media services, by way of reproduction of by means of publication on electronic communication networks'⁹⁷⁴.</p>
	<p><i>Suitability of offence provision to cover online crime:</i> Deriving from the definition of the general public as set out in Article 459(12) of the Criminal Code, the offence provision of incitement to hatred covers the commission of online crimes. This interpretation is also followed by the courts, who have adjudicated cases for such crimes committed online⁹⁷⁵.</p>
	<p><i>Suitability of offence provision to ensure freedom of expression:</i> The Constitutional Court has defined the criminal law threshold for limiting freedom of expression. The threshold is specified in the criminal conduct of incitement to hatred. A detailed assessment on the relationship between the transposing provision and freedom of expression is provided under Indicator 1.</p>
	<p><i>Suitability of offence provision to protect vulnerable groups:</i> The General Prosecutor's Office⁹⁷⁶ noted that, in principle, the offence provision provides protection for those in real need. Thus, it was argued, there is no need for the amendment of the offence provision in this respect. The offence provision, however, is not used in practice, mainly due to its restrictive interpretation, therefore it is not suitable for the protection of the most vulnerable.</p> <p>The European Commission against Racism and Intolerance (ECRI), in its fifth report, also notes that the criminal conduct of incitement to hatred is too strictly interpreted. An additional problem is that certain protected characteristics could be included in the offence provision. In particular, the ECRI referred to the lack of reference to citizenship, which, in its view, is not sufficiently covered by the current wording of the offence which refers to national groups. Nor is any reference made to language⁹⁷⁷. These issues were not mentioned by national level stakeholders.</p>
	<p><i>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</i> According to the offence provision, anyone can commit a crime, therefore there is no need to amend the existing legislation in this respect. The offence provision is not used in practice, mainly due to the strict interpretation of the criminal conduct of incitement to hatred,, therefore it is not suitable for the protection of the most vulnerable⁹⁷⁸.</p>
	<p><i>Other shortcomings of applicable offence provision:</i> The main shortcoming is linked to the restrictive interpretation of the criminal conduct of incitement to hatred, which, as explained above, is one of the reasons behind the low number of crimes investigated, prosecuted and adjudicated.</p> <p>Existing literature⁹⁷⁹ lists other issues which are not specific to the offence provision of incitement against a community, but</p>

⁹⁷³ Supreme Court Decision no. 660 (*Legfelsőbb Bíróság BJD 660*). No reference to the decision was found on the website of the Curia.

⁹⁷⁴ Article 459(12) of the Criminal Code.

⁹⁷⁵ Reference to court cases where the crime was committed online is available at: <http://helsinkifigyelo.hvg.hu/cimke/kozossege-elleni-izgatasa/>.

⁹⁷⁶ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

⁹⁷⁷ ECRI, 'Report on Hungary - fifth monitoring report', (2015), available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf>.

⁹⁷⁸ Information received from the General Prosecutor's Office in form of a written communication on 3 August 2015.

	<p>which concern all hate crimes and hate speech:</p> <ul style="list-style-type: none"> - Shortcomings of investigations: One of the major inefficiencies of the system results from the procedures of investigation and/or prosecution authorities, which often ignore circumstances that indicate the commission of a hate crime and/or hate speech. Personnel involved in the investigation often lack training on hate crime and/or hate speech. - Under-reporting: Some groups of victims, such as the Roma and LGBTI people, do not turn to the authorities and report hate crime and/or hate speech. The causes of under-reporting include low level of trust in the authorities, fear of secondary victimisation, and fear of the prejudices of authorities. Lack of knowledge of rights is an issue of concern in case of certain groups, such as the Roma and foreigners. LGBTI people fear that, as a result of reporting, they would be forced to come out. The Roma, in particular, fear that existing prejudices would make it difficult for them to appear before the authorities in the role of victims. - Shortcomings of victim support: Free legal aid is not available in Hungary in the investigation phase of proceedings, nor does psychological support form part of the victim support package. An additional problem is that only those legally residing in Hungary can benefit from the programme, and, even among eligible groups, many people are unaware of the existence of victim support services. - Lack of systematic data collection efforts: Different mechanisms exist for the collection of data; however, these mechanisms - which are specific to the different stages of the criminal proceedings (i.e. investigation, prosecution, trial phase) - are not connected. The different mechanisms collect different data. For example, only the Unified System of Criminal Statistics of the Investigative Authorities and of Public Prosecution (<i>Egységes nyomozó hatósági és ügyészégi bűnügyi statisztika</i>) is capable of breaking down the data by protected characteristics. This, however, is not done consistently, as entering information on the protected characteristics is not obligatory with respect to certain groups, such as LGBTI people, people with disabilities, and religious groups, even supposing the individuals identify those characteristics when reporting the crime. - Lack of training and sensitisation of personnel of competent authorities: The basic training of professionals working in the field either does not cover hate speech and hate crime at all, or covers it only superficially. Society also lacks sensitivity towards the issue.
<p>Public denial of sins of national socialist or communist regimes (A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása)</p>	<p><u>Clarity of offence provision:</u> Some elements of the offence provision have been clarified by higher courts.</p> <p><u>Suitability of offence provision to cover online crime:</u> Deriving from the definition of 'general public' as set out in Article 459(12) of the Criminal Code, the offence provision of public denial of sins of national socialist or communist regimes covers the commission of online crimes. This interpretation is also followed by the courts, which have adjudicated cases where such crimes were committed online⁹⁸⁰.</p> <p><u>Suitability of offence provision to ensure freedom of expression:</u> The Constitutional Court has defined the threshold for limiting freedom of expression by the offence provision (See Indicator 1).</p>

⁹⁷⁹ Tamás Dombos and Márton Udvari, 'Hate crimes in Hungary – Problems, recommendations and good practices' (*Gyűlöletbűncselekmények, Magyarországon – Problémák, javaslatok, jó gyakorlatok*), pp. 12-19, (2014), available at: <http://helsinki.hu/wp-content/uploads/tanulmany.pdf>.

⁹⁸⁰Reference to a court case where the crime was committed online is available at: <http://birosag.hu/szakmai-informaciok/altalanos-sajtokozlemenyszegedi-torvenyszek-nemzetiszocialista-vagy-kommunista>. Last visited on 15 July 2015.

	<p>Existing literature⁹⁸¹ argues that the provision confirmed by the Constitutional Court breaches the principle of 'content-neutrality', and thus unconstitutionally limits the freedom of expression. The offence provision, in line with the Constitutional Court's decision, could be interpreted too broadly, allowing for the criminalisation of particular content, even denial of any kind of further historical events.</p> <p>Existing literature⁹⁸² also suggests that the penalisation of the criminal conduct of 'trivialisation of sins' committed under totalitarian regimes might lead to self-censorship among historians. Thus, the provision disproportionately restricts the freedom of science and education provided by Article X(2)⁹⁸³ of the Fundamental Law.</p> <p><u>Suitability of offence provision to protect vulnerable groups:</u> The provision does not contain reference to any protected ground. This suggests that the crime is punishable irrespective of the group targeted/harmed thereby.</p> <p><u>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</u> According to the offence provision, anyone can commit a crime, therefore there is no need to amend the existing legislation in this respect.</p> <p><u>Other shortcomings of applicable offence provision:</u> No additional shortcomings identified.</p>
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Incitement against a community (Közösség elleni uszítás)</p>	<p>No legislative amendments have been introduced to the offence provision of the Criminal Code, nor are any such amendments foreseen.</p> <p>The General Prosecutor's Office noted that, due to the strict interpretation of the criminal conduct of incitement to hatred, the offence provision is rarely used in practice. In other words, the offence provision currently in force is without a purpose and does not provide a sufficient level of criminal law protection against hate speech. This is despite the fact that the penalisation of hate speech by criminal law means is a requirement deriving both from European and international legislation (e.g. from Article 4 point a) of the International Convention on the Elimination of All Forms of Racial Discrimination⁹⁸⁴, or from Article 20 point 2 of the International Covenant on Civil and Political Rights⁹⁸⁵). By acknowledging the gap in legislation, the General Prosecutor's Office has initiated the adoption of a new offence provision banning unlawful differentiation. The offence provision would aim to criminalise the following conduct: calling on to discriminate, commit violence or to show offensive behaviour,</p>

⁹⁸¹ Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért*), 2010, Opinion on proposed legislative amendment no. T/25 to the Criminal Code (*A büntető törvénykönyv módosítására vonatkozó T/25. számú törvényjavaslatról*), available at: http://tasz.hu/files/tasz/imce/tasz_nemzetiszocialista_kommunista_bunok_btk2010.pdf.

⁹⁸² Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért*), 2010, Opinion on proposed legislative amendment no. T/25 to the Criminal Code (*A büntető törvénykönyv módosítására vonatkozó T/25. számú törvényjavaslatról*), available at: http://tasz.hu/files/tasz/imce/tasz_nemzetiszocialista_kommunista_bunok_btk2010.pdf.

⁹⁸³ Article X(2) of the Fundamental Law sets out the following: The State shall not be entitled to decide on questions of scientific truth, and scientists shall have the exclusive right to evaluate any scientific research.

⁹⁸⁴ Pursuant to Article 4, point a) of the International Convention on the Elimination of All Forms of Racial Discrimination, State Parties '[...](a) shall 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 [...]' The Convention is available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

⁹⁸⁵ Pursuant to Article 20 point 2 of the International Covenant on Civil and Political Rights, 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The International Covenant on Civil and Political Rights is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

	public dissemination of ideas based on racial superiority or hate, racial discrimination or the support of activities based on racial discrimination. The Ministry of Justice, which received the initiative of the General Prosecutor's Office, has not yet taken further action ⁹⁸⁶ .
Public denial of sins of national socialist or communist regimes (A nemzetiszocialista vagy kommunista rendszerek bűneinek nyilvános tagadása)	No legislative amendments have been introduced to the offence provision of the Criminal Code, nor are any such amendments foreseen.

3.2 Effectiveness of the legislation transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
Transposing Provision 1 - Articles 21(1) and 17(1) and (2) of Act CIV of 2010	There is no case law from higher courts linked to the transposing provision of Article 6 of the AMSD, as set out in Article 21(1) of Act CIV of 2010. As explained under Section 2.3, Article 17(1) and (2) of Act CIV of 2010 is also considered as a transposing provision of Article 6 of the AMSD. One Constitutional Court decision touching upon the relationship of Article 17 of Act CIV of 2010 with freedom of expression, was identified. In this case, however, the constitutional complaint did not contain reference to Article 17 of Act CIV of 2010. Prior to the decision, a short introduction to Article 17(1) and (2) is provided. The provision was incorporated into Act CIV of 2010 in the form of Article 17 ⁹⁸⁷ in 2010. It entered into force on 1 January 2011. To date, the provision has been subject to amendment three times. The first amendment ⁹⁸⁸ related to the list of conducts, which was ordered. The former version of the provision sanctioned three behaviours, namely incitement to hatred against, exclusion of, and the insult of (either openly or surreptitiously) defined subjects. The current version does not sanction the conduct of insult. The second amendment ⁹⁸⁹ concerned the list of protected characteristics referred to in the provision. The wording 'group of individuals' has been deleted. Accordingly, the current version of the provision sanctions the above defined behaviours if committed against any nations, communities, national, ethnic, linguistic and other minorities or any majority, or religious groups. The third amendment ⁹⁹⁰ concerned the wording of the offence provision. The new version of the Act uses the term 'religious community' (<i>vallási közösség</i>) instead of the former version which referred to 'any church or religious group' (<i>egyház vagy vallási csoport</i>). The term ' <i>vallási közösség</i> ' allows for a slightly broader interpretation, as it suggests that there is no need for an institutionalised background in order to be protected under the provision.

⁹⁸⁶ Information received in form of a written communication from the General Prosecutor's Office on 3 August 2015.

⁹⁸⁷ Article 17 set out the following : (1) The media content may not incite hatred against individuals, nation, community, national, ethnic, linguistic or other minority or any majority, as well as any church or religious group. (2) The media content may not be aimed, openly or surreptitiously, at insulting or excluding individuals, nation, community, national, ethnic, linguistic and other minority or any majority, as well as any church or religious group.

⁹⁸⁸ According to Article 11(3) of Act XIX of 2011 amending Act CIV of 2010 on the freedom of the press and fundamental rules on medial content and Act CLXXXV of 2010 on Media Services and Mass Media (2011. évi XIX. törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól szóló 2010. évi CIV. törvény és a médiaszolgáltatásokról és a tömegkommunikációról szóló 2010. évi CLXXXV. törvény módosításáról), available at: <http://www.complex.hu/kzldat/t1100019.htm/t1100019.htm>.

⁹⁸⁹ According to Article 65(7) of Act XIX of 2011 amending Act CIV of 2010.

⁹⁹⁰ According to Article 113 of Act CXXXIII. of 2013 (2013. CXXXIII. törvény, 61. A sajtószabadságról és a médiatartalmak alapvető szabályairól szóló 2010. évi CIV. törvény módosítása), available at: <http://www.complex.hu/kzldat/t1300133.htm/t1300133.htm>.

	<p>There is one relevant higher court ruling⁹⁹¹, issued on 20 June of 2011, which examined the constitutionality of certain provisions of the Act CIV of 2010. The petitioners did not claim the unconstitutional nature of Article 17, therefore the Constitutional Court was not obliged to investigate this aspect. Despite the lack of reference to Article 17 in the constitutional complaint, the decision is of certain relevance, as the Constitutional Court made important observations regarding the interpretation of the limits of freedom of expression and the freedom of press in the context of the provision. In its decision, the Constitutional Court complied with its previous jurisprudence established in criminal matters concerning the restriction of these fundamental rights.</p> <p>The ruling of the Constitutional Court is summarised as follows: <u>Constitutional Court Decision 165/2011 (VI.20.)</u> <u>Facts of the case:</u> The Court examined Act CIV of 2010 on the basis of a constitutional complaint. <u>Court decision:</u> The Court ruled that certain provisions⁹⁹² were not in line with the Fundamental Law. <u>Reasoning and importance of the decision:</u> The Constitutional Court cross-referenced its Decision No. 96/2008⁹⁹³ in which it described the meaning of 'exclusionary speech capable of inciting to hatred'. These kinds of expressions, in recalling elements of ideologies of totalitarian regimes, question the human dignity of targeted groups and acknowledge them as marginalised communities in society. Such expressions go beyond the limits of freedom of expression. Equal treatment of individuals based on human dignity is a fundamental basis for democratic order. Media content providers who convey exclusionary thoughts capable of inciting to hatred, discredit a fundamental element of constitutional order. The Court also recalled its previous judgments in which it had examined the relationship of the provision setting out the prohibition of content capable of incitement to hatred, with freedom of expression.</p>
	<p>The content of the fundamental right to freedom of the press is based on the following two principles declared in the Fundamental Law: the right to freedom of speech (Fundamental Law IX(1)), and the obligation of the State to ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion (Fundamental Law IX(2)). The Court stated that, conceptually, it is impossible to accept a media content as a tool for building a public opinion which denies basic democratic values.</p> <p>To conclude, the Court reaffirmed that the restriction set out in Article 17 of the right to freedom of the press – in reference to all forms of media content – was necessary, could be justified by constitutional values and objects, and complied with the requirement of proportionality.</p>
<p>Transposing provision 2 - Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010</p>	<p>There is no case law for supreme or constitutional courts linked to the transposing provisions of Article 6 of the AMSD, as set out in Articles 176(1), 177(1), 178(1) of Act CLXXXV of 2010.</p>
<p>Transposing provision 3 - Article 3/A(1)(a)(aa) of Act CVIII of 2001</p>	<p>There is no case law for supreme or constitutional courts linked to the transposing provisions of Article 3(2) and (4) of the ECD, as set out in Article 3/A(1)(a)(aa) of Act CVIII of 2001.</p>

⁹⁹¹ Constitutional Court Decision 165/2011. (VI.20.) (165/2011. (VI.20.) AB határozat) is available at: <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798F004FEC26>.

⁹⁹² Article 2(1) annulled the phrase 'and printed press product' („és kiadott sajtótermékre” fordulatát megsemmisíti), the last phrase of Article 6(2) is not complied with Article 61(2) of the Fundamental Law, thus the last phrase of it is to be annulled (6. § (2) bekezdésének utolsó fordulata az Alkotmány 61. § (2) bekezdése alapján alkotmányellenes, ezért azt megsemmisíti) Article 17 was not claimed as unconstitutional by petitioners.

⁹⁹³ Constitutional Court Decision 96/2008. (VII. 4.) (Alkotmánybíróság 96/2008. (VII. 4.) AB határozat) is available at: <http://public.mkab.hu/dev/dontesek.nsf/0/82153F9B01E5D38FC1257ADA0052AEAF?OpenDocument>.

Indicator 2 - Quantitative evidence	
Transposing Provision 1 - Articles 21(1) and 17(1) and (2) of Act CIV of 2010	<p>The Media Council does not collect official data for statistical purposes. It is obliged, however, to provide the National Parliament with an annual report on its activities. As part of this report, reference to hate speech related cases is provided. These data can be summarised as follows:</p> <ul style="list-style-type: none"> • 2011: 1 (decision establishing breach of obligation); • 2012: 4 (no decision establishing breach of obligation); • 2013: 3 (in one case, decision establishing breach of obligation; in remaining cases, no decision establishing breach of obligation); • 2014: 1 (decision establishing breach of obligation)⁹⁹⁴. <p>The number of hate speech incidents has not increased since January 2015 (the date of the terrorist attacks in Europe). No decision of relevance has been taken in 2015⁹⁹⁵.</p>
Transposing provision 2 - Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010	The transposing provisions have never been made use of in practice ⁹⁹⁶ .
Transposing provision 3 - Article 3/A(1)(a)(aa) of Act CVIII of 2001	No data could be identified.
Indicator 3 -Bottlenecks of practical implementation	
Transposing Provision 1 - Articles 21(1) and Article 17(1) and (2) of Act CIV of 2010	<p>Clarity of the transposing provision:</p> <p>Neither the desk research nor the stakeholder consultation revealed additional issues related to the provision set out in Article 21(1) of Act CIV of 2010.</p> <p>A stakeholder⁹⁹⁷ also assessed the scope of Article 17 of Act CIV of 2010, and stated that the interpretation of the provision by the National Media and Infocommunications Authority complies with the jurisprudence of the Constitutional Court. As an example, he referred to Decision No. 30/1992. (V. 26.)⁹⁹⁸, in which the Constitutional Court assessed the constitutional nature of Article 269 of the Criminal Code. In accordance with this decision, a group of persons who can be separated/detached from others on any grounds (<i>bármely ismerv alapján elkülönülő személyek</i>) shall be protected. In the article the author notes that the broad interpretation of the provision should not make the application of the provision uncertain. The separation/detachment from others should be real and noticeable, furthermore, the members should be grouped by a certain substantive element of their identity (see also Decision No. 96/2008 of the Constitutional Court⁹⁹⁹).</p> <p>A different stakeholder, representing the Media Council, also argued that the provision was sufficiently clear¹⁰⁰⁰. It has been</p>

⁹⁹⁴ Information received via email from the Media Council on 8 September.

⁹⁹⁵ Information received via email from the Media Council on 8 September.

⁹⁹⁶ Information received via email from the Media Council on 8 September.

⁹⁹⁷ András Koltay 'Decisions made by the Media Authority and court reviews regarding hate speech' (*A médiahatóság döntései és azok bírósági felülvizsgálata a gyűlöletbeszéd tárgyában (2001-2013)*, (2013) available at: http://www.mediakutato.hu/cikk/2013_03_05_gyuloletbeszed_mediahatosag_birosag.pdf.

⁹⁹⁸ Constitutional Court Decision 30/1992. (V.26.) (30/1992. (V. 26.) AB-határozat), available at: <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798800473E9B?OpenDocument>.

⁹⁹⁹ Constitutional Court Decision 96/2008. (VI.30.) (96/2008. (VI.30.) AB-határozat), available at: <http://public.mkab.hu/dev/dontesek.nsf/0/82153F9B01E5D38FC1257ADA0052AEAF?OpenDocument>.

¹⁰⁰⁰ Information received via email from the Media Council on 08 September.

	<p>interpreted by higher courts (see above), as well as by the Media Council itself¹⁰⁰¹.</p> <p><i>Suitability of offence provision to protect vulnerable groups:</i></p> <p>Article 21(1) of Act CIV of 2010 sets out procedural rules. It does not contain reference to vulnerable groups, therefore the research question is not applicable to the provision in question.</p> <p>Stakeholder views seem to differ on the suitability of the offence provision to protect vulnerable groups, with some stakeholders¹⁰⁰² arguing that the list of subjects Article 17 aims to protect (i.e. any nations, communities, national, ethnic, linguistic and other minorities or any majority, or religious groups) is too extensive. The range of the protected groups is so broad that it might literally cover anyone. The most controversial group from the aspect of applicability is the so-called 'any majority'.</p> <p>By contrast, some stakeholders¹⁰⁰³ argue that the wording of the provision set out in Article 17 of Act CIV of 2010 should be more specific regarding the protected groups. It should include women specifically, instead of using the words 'other minorities' and 'any majority'. In line with this second view, Bernadett Szél (co-chair of the party Politics Can Be Different (LMP) (<i>Lehet Más a Politika</i>) submitted a proposal¹⁰⁰⁴ aiming at the inclusion of women as a protected group to the provision set out in Article 17. She suggested the addition of a paragraph setting out the following: 'Media content shall not present women in a disadvantaged or degraded situation in a harmful manner or for its own sake'.</p> <p>Some other stakeholders find the current provision suitable to protect the most vulnerable groups. In the opinion of a stakeholder interviewed¹⁰⁰⁵ from the Hungarian Publishers' Association (<i>Magyar Lapkiadók Egyesülete</i>) the list of protected characteristics in the provision is exhaustive, and covers all the possible vulnerable groups. There is no need to extend it. On a similar note, a stakeholder¹⁰⁰⁶ from the Hungarian Civil Liberties Union (HCLU) (<i>Társaság a Szabadságjogokért/TASZ</i>) argued that the application of an open-ended, explanatory-type category such as 'other minority' in the text of the norm is suitable to protect the targeted groups of the provision. It was considered as a good legislative/law-making technique to use open categories, the content of which could be defined by practice. The same stakeholder also noted, however, that the incorporation of the term 'any majority' to the provision raises doubts about the presumed aim of the legislation which was the protection of minorities. In other words, the theoretical question is raised as to how a majority could be protected under a provision which is aimed to provide legal remedy for harm committed against minorities. Furthermore, this term might lead to</p>
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¹⁰⁰¹ Decision of the Media Council no. 802/2013 (V. 8.) (802/2013. (V. 8.) sz. médiatanácsi határozatot), available at: http://mediatorveny.hu/cikk/620/A_Mediatanacs_8022013_V_8_szamu_határozata.

¹⁰⁰² Ildikó Vincze, 'Amendments to media-related acts' (A médiatörvények módosításai), (2012), available at: http://www.mediakutato.hu/cikk/2012_04_tel/07_mediatorvenyek_modositasai.

¹⁰⁰³ Sexual violence is not funny, Press release by 'For Women' Association and its partner associations (*A nemi erőszak nem vicces - a Nőkért Egyesület és a csatlakozó szervezetek sajtónyilatkozata*), (2014), available at: <http://nokert.hu/index.php/a-nkert-egyesuelet/2014-09-15-14-52-28/1329-2014-09-03-19-18-54>.

¹⁰⁰⁴ No. T/1228. MP Proposal by Bernadett Szél on the amendment of Act CIV of 2010 on the freedom of press and fundamental rules on medial content regarding the Council of Europe Convention on preventing and combating violence against women and domestic violence (*Dr. Szél Bernadett (LMP) képviselő T/1228. szám önálló indítványa a sajtószabadságról és a médiatartalmak alapvető szabályairól szóló 2010. évi CIV. törvénynek a nők elleni és a családon belüli erőszak megelőzéséről, valamint az ezek elleni küzdelemről szóló Isztambuli Egyezményrel összefüggő módosításáról szóló törvényjavaslat*), (2014), available at: <http://www.nokert.hu/index.php/jogok-eselyek/jogok-eselyek/1343-2014-10-13-19-18-15>.

¹⁰⁰⁵ Telephone interview with a lawyer representing the Hungarian Publishers' Association on 7 August, 2015.

¹⁰⁰⁶ Telephone interview with a programme officer TASZ, 22 July 2015.

	<p>self-censorship in relation to critical assessments of the majority.</p> <p><i>Suitability of offence provision to ensure freedom of expression:</i> Article 21(1) of Act CIV of 2010 sets out procedural rules. It does not contain reference to the conduct described as requiring penalisation by Article 6 of the AMSD. Considering the procedural nature of the provision, the research question is not application.</p> <p>According to a stakeholder interviewed¹⁰⁰⁷, Article 17 in the Act CIV of 2010 is similar to Article 332 of the Criminal Code, as both provisions prohibit the act of incitement to hatred against certain groups. The interviewee found the lack of clarity on whether it is obligatory for courts and for the Media Authority to use the 'clear and present danger' doctrine in cases involving the evaluation of the effects of the speech under investigation, to be problematic. This ambiguity affects the certainty of the application of those provisions which prohibit hate speech either in the form of media content or as a public act.</p> <p>The Media Council seems to hold a different view. A representative of the Media Council said that it interprets the provision set out in Article 17 of Act CIV of 2010, in accordance with the jurisprudence of higher courts. These decisions, however, related to the criminal offence provision of incitement against a community¹⁰⁰⁸.</p> <p><i>Other shortcomings of applicable offence provision:</i> Neither the desk research nor the stakeholder consultation revealed additional issues related to the provision set out in Article 21(1) of Act CIV of 2010.</p> <p>One stakeholder interviewed argued that the provision set out in Article 17 of Act CIV of 2010 provides for overly strict sanctions, which could lead to the self-censorship of media content providers.¹⁰⁰⁹</p>
<p>Transposing provision 2 - Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010</p>	<p><i>Clarity of the transposing provision:</i> Neither the desk research nor the stakeholder consultation identified issues related to the clarity of the provisions set out in Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010.</p> <p><i>Suitability of offence provision to protect vulnerable groups:</i> Neither the desk research nor the stakeholder consultation identified issues related to the suitability of the provisions set out in Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010 to protect vulnerable groups.</p> <p><i>Suitability of offence provision to ensure freedom of expression:</i> Neither the desk research nor the stakeholder consultation identified issues related to the suitability of the provisions set out in Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010 to ensure freedom of expression.</p> <p><i>Other shortcomings of applicable offence provision:</i> Neither the desk research nor the stakeholder consultation identified any additional issues related to the provisions set out in Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010.</p>
<p>Transposing provision 3 - Article 3/A(1)(a)(aa) of Act CVIII of 2001</p>	<p><i>Clarity of the transposing provision:</i> Neither the desk research nor the stakeholder consultation identified issues related to the clarity of the provisions set out in Article 3/A(1)(a)(aa) of Act CVIII of 2001.</p>

¹⁰⁰⁷ Telephone interview with a programme officer TASZ, 22 July 2015.

¹⁰⁰⁸ Decision of the Media Council no. 802/2013 (V. 8.) (802/2013. (V. 8.) sz. médiatanácsi határozatot), available at: http://mediatorveny.hu/cikk/620/A_Mediatanacs_8022013_V_8_szamu_hatarozata.

¹⁰⁰⁹ Telephone interview with a programme officer, TASZ, 22 July 2015.

	<i>Suitability of offence provision to protect vulnerable groups:</i> Neither the desk research nor the stakeholder consultation identified issues related to the suitability of the provisions set out in Article 3/A(1)(a)(aa) of Act CVIII of 2001 to protect vulnerable groups.
	<i>Suitability of offence provision to ensure freedom of expression:</i> Neither the desk research nor the stakeholder consultation identified issues related to the suitability of the provisions set out in Article 3/A(1)(a)(aa) of Act CVIII of 2001 to ensure freedom of expression.
	<i>Other shortcomings of applicable offence provision:</i> Neither the desk research nor the stakeholder consultation identified any addition issues related to the provisions set out in Article 3/A(1)(a)(aa) of Act CVIII of 2001.
Indicator 4 -Drivers behind the adoption of new legislation/amendment to existing legislation	
Transposing Provision 1- Articles 21(1) and 17(1) and (2) of Act CIV of 2010	No legislative amendments have been made, nor are any amendments planned to the transposing provisions ¹⁰¹⁰ .
Transposing provision 2 - Articles 176(1), 177(1) and 178(1) of Act CLXXXV of 2010	No legislative amendments have been made, nor are any amendments planned to the transposing provisions ¹⁰¹¹ .
Transposing provision 3 - Article 3/A(1)(a)(aa) of Act CVIII of 2001	No legislative amendments have been made, nor are any amendments planned to the transposing provisions.

3.3 Effectiveness of the rules regulating publishers' responsibility

In Hungary there is no single provision regulating the liability of publishers. Applicable rules are set out in both legislation (administrative, criminal and civil law) and in self-regulation/codes of conduct of self-regulatory bodies.

Rules are set out in the Criminal Code (criminal liability), the Civil Code (civil liability), as well as in Act CLXXXV of 2010, Act CIV of 2010 and Act CVIII of 2001 (administrative liability). Self-regulations have been developed by four main self-regulatory bodies, each of whom has its own set of rules. Each self-regulator has also signed a public administration agreement with the Hungarian media authority, which also contains some rules regulating liability for publishing hate speech.

Given the large number of applicable provisions, the Hungarian system is considered to be particularly complex. The table below, instead of assessing the effectiveness of each provision, provides an overall assessment of the effectiveness of each liability system.

¹⁰¹⁰ Telephone interview with a programme officer, TASZ, 22 July 2015.

¹⁰¹¹ Telephone interview with a programme officer, TASZ, 22 July 2015.

Indicator 1 - National case law on the interaction of provision with freedom of expression	
Criminal liability	Assessment of the effectiveness of the criminal law provisions regulating hate speech is provided under Section 3.1. None of the higher court decisions quoted under Section 3.1 explicitly cover the liability of publishers.
Civil liability	There is no relevant court decision on the topic yet. Reference has been found ¹⁰¹² to a complaint currently pending before the Constitutional Court, on the compliance of Article 2:54 of the Civil Code with the Fundamental Law. This complaint, however, does not contain explicit reference to the liability of publishers.
Administrative liability	Assessment of the effectiveness of administrative law provisions regulating hate speech is provided under Section 3.2.
Liability deriving from self-regulations	No reference to relevant higher court decisions was found.
Indicator 2 - Quantitative evidence	
Criminal liability	Number of decisions condemning publishers: Assessment of the effectiveness of criminal law provisions regulating hate speech is provided under Section 3.1. Existing data do not specify the type of offender. Consequently, based on existing data, it is unclear whether publishers have ever held liability for the commission of hate speech.
Civil liability	Number of decisions condemning publishers: Information on the number of court decisions taken is not publicly available.
Administrative liability	Number of decisions condemning publishers: Assessment of the effectiveness of administrative law provisions regulating hate speech is provided under Section 3.2.
Liability deriving from self-regulations	Number of decisions condemning publishers: Information on the number of disciplinary decisions taken by self-regulatory bodies is not publicly available. Some information could be gathered through stakeholder interviews. Two stakeholders, representing two different professional associations (i.e. Hungarian Advertising Self-regulatory body and Hungarian Publishers' Association) ¹⁰¹³ , stated that they have never dealt with any such cases.
Indicator 3 - Bottlenecks of practical implementation	
Criminal liability	Assessment of the effectiveness of criminal law provisions regulating hate speech is provided under Section 3.1. As explained under Section 2.4, in some cases, and in particular when the hate content is published through social media or blogs, publishers (i.e. operators of the online fora) cannot be held criminally liable in practice.
Civil liability	Existing literature claims that the current provision unnecessarily limits the freedom of expression, arguing that the current provision does not pass the test of necessity and proportionality ¹⁰¹⁴ .
Administrative liability	Assessment of the effectiveness of administrative law provisions regulating hate speech is provided under Section 3.2. As explained under Section 2.4, in some cases, and in particular when the hate content is published through social media or blogs, publishers (i.e. operators of online fora) cannot be held liable under administrative law in practice.
Liability deriving from self-regulations	One stakeholder noted that self-regulation only extends to media content providers. This implies that bloggers and those expressing opinions through social media cannot be subject to the proceedings of self-

¹⁰¹² Reference to the constitutional complaint: <http://www.jogiforum.hu/hirek/31501>.

¹⁰¹³ Information received on 26 August 2015 via email from a representative of the Hungarian Advertising Self-regulatory body. Information was also collected via an interview conducted on 7 August 2015 with a representative of the Hungarian Publishers' Association.

¹⁰¹⁴ Legal Forum (*Jogi Fórum*), 'The forgotten complaint' (*Egy elfelezett indítvány*), (2014) available at: <http://www.jogiforum.hu/hirek/31501>.

	regulators. The stakeholder noted, however, that the behaviour of these persons does not remain unpunished, as they may be subject to criminal liability, given that their behaviour meets the requirements set out in the Criminal Code ¹⁰¹⁵ . The statement did not concern the liability of publishers.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Criminal liability	Assessment of the effectiveness of criminal law provisions regulating hate speech is provided under Section 3.1.
Civil liability	No reference to any new amendments or planned amendments was identified.
Administrative liability	Assessment of the effectiveness of administrative law provisions regulating hate speech is provided under Section 3.2.
Liability deriving from self-regulations	No reference to any new amendments or planned amendments was identified.

¹⁰¹⁵ Information received via email from a lawyer of the Hungarian Publishers' Association on 20 August 2015.

NETHERLANDS

1 National context

In the Netherlands, groups typically subject to hate crime and hate speech are Jewish people, Muslims, Moroccans, people of African descent, LGBTI people, Turkish people, coloured people, people from Suriname and the Antilles, Roma and Sinti, and foreigners in general. According to the official discrimination figures¹⁰¹⁶ of the Dutch Public Prosecution Service, in 2013 45% of all incoming discrimination cases concerned discrimination on the basis of race, which includes skin colour, national and ethnic origin, descent; 39% related to Anti-Semitism; and 14% concerned discrimination on the basis of sexual orientation¹⁰¹⁷. According to the Dutch Complaint Bureau for Discrimination (*MDI*), in 2014 the following were the most common target groups of online discrimination: Jewish people, Muslims, people of African descent, people of other origin, Moroccans, homosexuals, Turkish people, natives, transgender and intersex people, Roma and Sinti¹⁰¹⁸.

The three main issues generating hate speech in 2014 included the Dutch cultural tradition of Saint Nicholas with his sidekick "Black Pete" (*Zwarte Piet*), the Israel/Gaza conflict and the emergence of IS/the Jihad. The MDI measured a strong increase of hatred and discrimination against Moroccans on Twitter in the period after the incident, with Dutch politician Geert Wilders promising that he would arrange for there to be 'fewer Moroccans' in the Netherlands during a local election night¹⁰¹⁹. It also measured a strong increase in Anti-Semitism due to the Gaza conflict, mainly on social media such as Facebook, Twitter, and Youtube¹⁰²⁰. The terrorist attacks in Paris in January 2015 also formed a source of online expressions of hatred¹⁰²¹. Moreover, several discriminatory incidents at Dutch mosques, and acts of aggression against individual Muslims in the public sphere, occurred in the weeks following the Paris attacks¹⁰²².

In the Netherlands, hate speech is a criminal offence under the Dutch Criminal Code, and it can also constitute a wrongful act under Article 6:162 of the Civil Code. The civil liability scheme is less frequently used than the criminal liability scheme. The Dutch Criminal Code does not contain so-called 'hate crimes'. However, the Public Prosecution Service is required to request that the sentence be increased by 50-100% in cases where the offence was motivated by discrimination or hatred¹⁰²³. The list of characteristics protected by the hate speech definition in the Criminal Code, includes race (comprising national and ethnic origin, colour and descent), religion or belief, sex, sexual orientation, or physical,

¹⁰¹⁶ In the Netherlands, the transposing provisions of Article 1(1) of the Council Framework Decision 2008/913/JHA are so-called discrimination provisions. More details are provided in Section 3.1 of this report.

¹⁰¹⁷ National Expert Centre on Discrimination (*Landelijk Expertise Centrum Discriminatie – LECD*), 'Figures in Picture 2013' (*Cijfers in Beeld 2013*), unpublished.

¹⁰¹⁸ Dutch Complaints Bureau for Discrimination on the Internet (*Meldpunt Discriminatie Internet – MDI*), 'Annual Report 2014' (*Jaarverslag 2014*), 2014, available at: <http://www.meldpunt.nl/site/page.php?lang=&pageID=34>.

¹⁰¹⁹ Dutch Complaints Bureau for Discrimination on the Internet (*Meldpunt Discriminatie Internet – MDI*), Scanner Report 2014 'Hatred against Moroccans and Anti-Semitism on Twitter' (*Scanneronderzoek 2014, 'Haat tegen Marokkanen en Antisemitisme op Twitter'*), 19 May 2014, available at: <http://www.meldpunt.nl/site/page.php?lang=&pageID=35>.

¹⁰²⁰ Dutch Complaints Bureau for Discrimination on the Internet (*Meldpunt Discriminatie Internet – MDI*), 'Strong increase in Anti-Semitism on the Internet due to the Gaza conflict', 29 July 2014, available at: <http://www.meldpunt.nl/site/page.php?lang=&pageID=35>.

¹⁰²¹ MDI, 'Annual Report 2014' (*Jaarverslag 2014*), p. 5.

¹⁰²² Van der Valk, I., Monitor Muslim Discrimination (*Monitor Moslim Discriminatie*), 'Imes report series, University of Amsterdam', March 2015, 6, available at: <http://imes.uva.nl/news/news/news/content-3/folder/2015/03/monitor-moslim-discriminatie.html>.

¹⁰²³ Discrimination Directive (*Aanwijzing Discriminatie*), 2007A010, Government Gazette 2007, 233, available at: https://www.om.nl/onderwerpen/discriminatie/@86289/aanwijzing/#_ftn2.

psychological or intellectual disability. Provisions regulating hate speech and hate crime have not been amended since 2012, nor is any amendment planned.

Dutch law is characterised by open wording, allowing for a range of interpretation by Dutch judges on a case-by-case basis. This is reflected in the limited number of Dutch hate speech bans, their sober statutory wording, and their application by the judge. Case law provides that that terms of abuse, invectives, vilifications, defamatory statements, Nazi propaganda and Holocaust denial, as well as both implicit, indirect incentives and explicit, direct calls to hatred and discrimination, can all constitute punishable forms of hate speech. The courts have increasingly taken into account the importance of a free political debate in the application of the hate speech bans. Case law is not, however, entirely clear on the parameters of this, with a significant lack of clarity still remaining about the precise point where severe criticism of government policy on immigration and integration, or criticism of religion, amounts to hate speech against particular minorities, or, indeed, when political proposals overstep the outer limits of the democratic state.

2 Legal framework

2.1 General description of the legislation applicable to hate crime and hate speech

In the Netherlands, hate speech is a criminal offence under the Dutch Criminal Code. Article 137c-e of the Criminal Code criminalises 'group defamation', 'incitement to hatred, discrimination or violence' and the dissemination thereof. These hate speech bans are inserted in Book II section V concerning 'offences against the public order'. The Dutch Criminal Code does not contain reference to so-called 'hate crimes'. However, the Discrimination Instruction of the Public Prosecution Service requires prosecutors to request that the sentence be increased by 50-100% in cases of 'generic offences that are motivated by discrimination or hatred'.

Hate speech can also constitute a wrongful act under Article 6:162 of the Civil Code regulating general civil liability, although this is not specific to hate speech. The prohibition under Article 6:162 applies if the expression 1) violates Articles 137c-e of the Criminal Code, or 2) violates a norm of 'due diligence'. The civil liability scheme is, however, less frequently used than the criminal liability scheme¹⁰²⁴.

2.2 Transposition of Council Framework Decision 2008/913/JHA

	Offence provision 1 Incitement to hatred, discrimination or violence (<i>aanzetten tot haat, discriminatie of geweld</i>)
Transposes Art. 1(1)(a) of CFD	Yes
Transposes Art. 1(1)(b) of CFD	No
Transposes Art. 1(1)(c) of CFD	No
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 137d of the Criminal Code ¹⁰²⁵
Definition of offence	Art 137d criminalises: (1) Any person who, orally or by means of written material or images, publicly incites to hatred of or discrimination against other persons, or violence against the person or the property of others, on account of their race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability.

¹⁰²⁴ Rodrigues, P.R., 'Collective actions as a structural instrument against discrimination' in Jongbloed, A.W. (ed.) *Strong together, on legal action by groups (Collective acties als structureel instrument tegen discriminatie, in: Jongbloed, A.W. (ed.), Samen sterk, over optreden in rechte door groeperingen)* (Den Haag, Boom Juridische Uitgevers, 2002), 91–103.

¹⁰²⁵ Article 137d Criminal Code (*Artikel 137d Wetboek van Strafrecht*), available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137d/geldigheidsdatum_23-05-2015.

	(2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased.
Penalties foreseen	Type and level of penalty under 137d(1): imprisonment for up to one year or a fine of up to EUR 8,100. Type and level of penalty under 137d(2): imprisonment for up to two years or a fine of up to EUR 20,250. Article 137h of the Criminal Code ¹⁰²⁶ provides that any person who commits the offence of 137d in the exercise of his profession, may be disqualified from practicing that profession.
Protected characteristic(s)	Under 137d(1) the protected characteristics are: race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability. Under 137d(2) the protected characteristics are: <i>idem</i> . <i>Note: The list of protected characteristics is exhaustive and does not include, for example, 'language'. Unlike Article 137c (see below), 137d does include 'sex'. The offence provision implements the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Explanatory Memorandum to the Bill introducing the offence uses a broad definition of 'race' by referring to the ICERD: this term includes national and ethnic origin, colour and descent. It does not include nationality in the sense of citizenship. With regard to the term 'race', the case law takes, as a starting point, the meaning of ICERD. Whether expression about foreigners, immigrants or asylum seekers is punishable under 137d will generally depend on its context¹⁰²⁷.</i>
Online crime	Yes. <i>Note: It results from the case law that the element "publicly" signifies that the expression can potentially come to the knowledge of the public. This includes expression in the public square, but also expression via the press, radio, television and the Internet. E-mail and telephone are, in principle, excluded. Expression is not public where only a limited and clearly described group of persons receive it. With regard to the Internet, publicly accessible websites must be distinguished from non-public webpages. On such latter forums, expression is only public when 'a broader circle of arbitrary third parties' can access it. A group of '10-12 friends', for example, is insufficient. This is different with a larger 'group of friends'. A perpetrator's intent must also consider the public nature of expression. If a perpetrator is aware that journalists are in the audience, he has knowingly accepted the considerable chance that his expression can come to the knowledge of the public and that he has, therefore, made his statements publicly¹⁰²⁸.</i>

	Offence provision 2 Dissemination or distribution of expression (<i>verspreidingsdelict</i>)
Transposes Art. 1(1)(a) of CFD	Yes
Transposes Art. 1(1)(b) of CFD	Yes

¹⁰²⁶ Article 137h of the Criminal Code (*Artikel 137h Wetboek van Strafrecht*): 'If the offender commits any of the offences defined in sections 131 to 134 inclusive, 137c to 137g inclusive, and 147a, in the exercise of his profession, he may be disqualified from practising that profession', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137h/geldigheidsdatum_25-05-2015.

¹⁰²⁷ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), p. 202.

¹⁰²⁸ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), pp. 205-206, pp. 291-292.

Transposes Art. 1(1)I of CFD	No
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 137e of the Criminal Code ¹⁰²⁹
Definition of offence	<p>Art 137e criminalises:</p> <p>(1) Any person who, for reasons other than the provision of factual information:</p> <ul style="list-style-type: none"> • makes public an utterance which he knows, or can reasonably be expected to know, is insulting to a group of persons on account of their race, religion or belief, sexual orientation, or physical, psychological or intellectual disability, or which incites to hatred or to discrimination against other persons, or violence against the person or property of others on account of their race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability. • distributes any object which he knows, or can reasonably be expected to know, contains such an utterance, or has in his possession any such object with the intention of distributing it or making the said utterance public. <p>(2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased.</p> <p><i>Note: 'Insulting to a group of persons' in Article 137e refers to the offence of group defamation in Article 137c (see below) that protects groups, not individual persons belonging to a particular group. Defamation and insult of an individual person is criminalised in Articles 261 and 266 of the Criminal Code¹⁰³⁰.</i></p> <p><i>Although Article 137c requires that the expression targets a plurality of persons, expression does not have to explicitly name a group in order to be punishable under Article 137c. In 1984, the Dutch Supreme Court considered an expression about 'a German Jewish woman who apparently had not been gassed' to constitute an offence under Article 137c, because 'it was clear for the average reader that the expression was insulting to the Jewish population¹⁰³¹'. As a result, expression concerning one person in particular can be insulting to a group at the same time. The question of whether expression is insulting to a group or an individual is connected with the objectivisation of a suspect's intent, i.e. establishing his intention¹⁰³².</i></p> <p><i>In Dutch law there is no gap in the protection of individuals against insults on the basis of their race or religion. However, – other than with group defamations in the sense of Article 137c – individual defamations and insults as per Articles 261 and 266 can only be prosecuted following a victim complaint. Strictly speaking, this does not fit with the rationale of the Netherlands' obligations under international law to actively fight against racism and discrimination. This could become an issue in the parliamentary discussion of the legislative proposal to abrogate, amongst others, the offence of group defamation in Article 137c¹⁰³³.</i></p>

¹⁰²⁹ Article 137e Criminal Code (*Artikel 137e Wetboek van Strafrecht*), available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137e/geldigheidsdatum_23-05-2015.

¹⁰³⁰ The offences of defamation and insult of an individual in Articles 261 and 266 of the Criminal Code (*Artikelen 261 en 266 Wetboek van Strafrecht*) are available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelXVI/Artikel261/geldigheidsdatum_13-07-2015, and http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelXVI/Artikel266/geldigheidsdatum_13-07-2015, respectively.

¹⁰³¹ Dutch Supreme Court, crim. Ch., 26 June 1984, *Netherlands Jurisprudence* 1985, 40.

¹⁰³² Hence, the phrase 'Fucking Turks, I'm sick of your mess. You always make a mess, you make a mess of the entire Netherlands' exclaimed against a suspect's neighbours could be understood as a group insult, because the latter sentence could only be understood as an attack on all Turks as a group. By contrast, the phrase 'You are dirty faggots, I hate that like poison' also exclaimed against a suspect's neighbours, could not be understood as a group insult, because the suspect later declared 'I'm not concerned about all homosexuals, I just hate them.' Brants, Ch., Kool, R., Ringnalda, A., *Strafbare discriminatie*, (Den Haag, Boom Juridische Uitgevers, 2007), 65–66.

¹⁰³³ Janssen, EH., *Faith in Public Debate* (Cambridge, Intersentia, 2015), 493.

Penalties foreseen	Type and level of penalty under 137e(1): imprisonment for up to six months or a fine of up to EUR 8,100. Type and level of penalty under 137e(2): imprisonment for up to one year or a fine of up to EUR 20,250. Article 137h of the Criminal Code ¹⁰³⁴ provides that any person who commits the offence of 137e in the exercise of his profession, may be disqualified from practicing that profession.
Protected characteristic(s)	Under 137e(1) the protected characteristics are: race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability. Under 137e(2) the protected characteristics are: <i>idem</i> .
Online crime	Yes. <i>Note: The Dutch Criminal Code criminalises the expression of opinions and the dissemination or distribution of those same expressions in separate articles. In accordance with the 'offences of dissemination' (verspreidingsdelicten), even a distributor who might not have actual knowledge about the content of expression, but who has reasonable grounds to suspect its punishable nature can be held liable. Article 137e criminalises the dissemination or distribution of expression (of third parties) that is punishable under Articles 137c (see below) or 137d. Examples of perpetrators are (mail order) bookshops of racist literature or mail order companies specialising in Nazi paraphernalia, but also individuals who distribute, or possess for the purpose of distribution, books, papers, pamphlets, films, cds or dvds. The offence requires that a perpetrator must act 'for reasons other than the provision of factual information'. For example, a historical museum is allowed to exhibit Nazi propaganda material. Furthermore, the media is allowed to report certain expression of others as part of the news, as long as the journalistic dissemination does not take on a propagandistic character. Scientific institutions can more easily rely on the exception of 'factual information'. For example, the Royal Library is allowed to make discriminatory publications dating from the period 1940-1945 online available¹⁰³⁵. Criteria are further described by case law.</i>

Explanation on the transposition of Articles 1(1)(b) of Council Framework Decision 2008/913/JHA:

Under Article 137e of the Criminal Code¹⁰³⁶, the 'public dissemination or distribution of expressions of racism and xenophobia' is punishable only if the expression amounts to 'group defamation' or 'incitement to hatred, discrimination or violence' in the sense of Articles 137c-d.

Furthermore, there is no offence provision in the Criminal Code for the 'public expression, with a racist aim, of an ideology which claims superiority, or which denigrates a group of persons on the grounds of race, colour, language, religion, nationality or ethnic origin'. Case law, however, allows for such expression to be punishable under Articles 137c-e¹⁰³⁷.

¹⁰³⁴ Article 137h of the Criminal Code (*Artikel 137h Wetboek van Strafrecht*): 'If the offender commits any of the offences defined in sections 131 to 134 inclusive, 137c to 137g inclusive, and 147a, in the exercise of his profession, he may be disqualified from practising that profession', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137h/geldigheidsdatum_25-05-2015.

¹⁰³⁵ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), 234-235.

¹⁰³⁶ Art 137e of the Criminal Code (*Artikel 137e Wetboek van Strafrecht*) criminalises: '(1) Any person who, for reasons other than the provision of factual information, makes public an utterance which he knows, or can reasonably be expected to know, is insulting to a group of persons on account of their race, religion or belief, sexual orientation, or physical, psychological or intellectual disability, or which incites hatred of or discrimination against other persons, or violence against the person or property of others, on account of their race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability; distributes any object which he knows, or can reasonably be expected to know, contains such an utterance, or has in his possession any such object with the intention of distributing it or making the said utterance public.', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137e/geldigheidsdatum_23-05-2015.

Explanation on the transposition of Articles 1(1)(c) of Council Framework Decision 2008/913/JHA:

There is no offence provision in the Criminal Code for the 'denial, condoning, grossly trivialisation of crimes' referred to under Article 1(1)(c) of the Framework Decision.

Case law, however, allows for such expression to amount to 'group defamation' or 'incitement to hatred, discrimination or violence' and be, therefore, punishable under Articles 137c-e of the Criminal Code¹⁰³⁸.

Explanation on the transposition of Articles 1(1)(d) of Council Framework Decision 2008/913/JHA:

There is no offence provision in the Criminal Code for the 'denial, condoning, grossly trivialisation of crimes' referred to under Article 1(1)(d) of the Framework Decision.

Case law provides that such expression can amount to 'group defamation' or 'incitement to hatred, discrimination or violence' and can, therefore, be punishable under Articles 137c-e of the Criminal Code¹⁰³⁹.

Explanation on the transposition of Article 4 of Council Framework Decision 2008/913/JHA

- **First option provided by Article 4 (i.e. racist and xenophobic motivation to be considered as an aggravating circumstance)**

The Dutch Criminal Code is divided into three books: First Book, General Provisions (*Eerste Boek, Algemene bepalingen*), which contains the general principles of Dutch criminal law, as well as general provisions that are applicable to all offence provisions; Second Book, Serious offences (*Tweede Boek, Misdrijven*) that contains specific felonies and misdemeanours; and Third Book, Minor offences (*Derde Boek, Overtredingen*) that contains specific minor offences. The so-called 'hate speech bans' of Articles 137c-e are inserted in Book II section V, concerning 'offences against the public order', and which criminalises 'conduct that forms a danger to social life and the natural order of society'¹⁰⁴⁰.

The Dutch Criminal Code does not contain so-called 'hate crimes'. The First Book does not contain a general provision stating that racist and xenophobic motivation should be considered as an aggravating circumstance by the courts. Nor is reference to racist or xenophobic motivation as an aggravating circumstance contained in any of the specific offence provisions in the Second and Third Books.

¹⁰³⁷ Dutch Supreme Court, 5 November 2002, jurisprudence no. 01362/02 U, ECLI: NL: HR: 2002: AE8821.

¹⁰³⁸ Dutch Supreme Court, 5 November 2002, jurisprudence no. 01362/02 U, ECLI: NL: HR: 2002: AE8821.

¹⁰³⁹ Dutch Supreme Court, 5 November 2002, LJV 01362/02 U, ECLI: NL: HR: 2002: AE8821.

¹⁰⁴⁰ Tekst & Commentaar, Wetboek van Strafrecht, Titel V, inleidende opmerkingen, Ten Voorde, Aant.1.

- **Second option provided by Article 4 (i.e. racist or xenophobic motivation considered by courts in the determination of penalties)**

It is not detailed in the Dutch Criminal Code that racist or xenophobic motivation should be considered by the courts in the determination of penalties. However, the Discrimination Instruction of the Public Prosecution Service (*Aanwijzing Discriminatie*) requires prosecutors to request the sentence to be increased by 50-100% for cases of 'generic offences with a discriminatory aspect' (*commune delicten met een discriminatoir aspect*), i.e. generic offences that are motivated by discrimination or hatred¹⁰⁴¹. The Discrimination Instruction was first drafted in 1999, and renewed in 2003 and 2007. Its validity was subsequently prolonged, and it still remains in force¹⁰⁴². The instruction also requires the discriminatory background of the offence to be announced in the prosecutor's closing statement. The discriminatory grounds must concern those set out in Article 137c of the Criminal Code, i.e. race, religion or belief, sexual orientation, or physical, psychological or intellectual disability. Courts are not, however, bound by the Public Prosecution Instructions concerning the application of aggravating circumstances.

The Discrimination Instruction cites the following non-exhaustive list of offence provisions applicable to 'generic offences with a discriminatory aspect':

- **Sedition (*Opruiing*) 131:** (1) Any person who in public, either verbally or in writing or through images, incites another, or others, to commit any criminal offence or act of violence against the authorities, shall be liable to a term of imprisonment not exceeding five years or a fine of the fourth category. (2) If the criminal offence incited is a terrorist offence, or is a serious offence for the preparation or facilitation of a terrorist offence, the term of imprisonment prescribed for the offence defined in subsection (1) shall be increased by one-third.
- **Public violence against property or persons (*Openlijk geweld tegen goederen en personen*) 141(1):** Any persons who commit public acts of violence in concert against persons or property shall be liable to a term of imprisonment not exceeding four years and six months or a fine of the fourth category.
- **Public violence resulting in any bodily harm. (*Openlijk geweld. Enig lichamelijk letsel*) 141(2.1):** The offender shall be liable to: 1° a term of imprisonment not exceeding six years or a fine of the fourth category, if he/she intentionally destroys property, or if the violence committed by him results in any bodily harm.
- **Public violence resulting in grievous bodily harm (*Openlijk geweld. Zwaar lichamelijk letsel*) 141(2.2):** The offender shall be liable to: 2° a term of imprisonment not exceeding nine years or a fine of the fifth category, if that violence results in grievous bodily harm.
- **Public violence resulting in death (*Openlijk geweld. De dood ten gevolge*) 141(2.3):** The offender shall be liable to: 3° a term of imprisonment not exceeding 12 years or a fine of the fifth category, if that violence results in death.
- **Arson – endangerment to property (*Brandstichting etc. met gevaar voor goederen*) 157(1):** Any person who intentionally sets a fire, or intentionally causes an explosion or a flood, shall be liable to: 1° a term of imprisonment not exceeding 12 years or a fine of the fifth category, if such act is likely to generally endanger property.
- **Arson - endangerment to life or risk of grievous bodily harm (*Brandstichting etc. levensgevaar of gevaar voor zwaar lichamelijk letsel*) 157(2):** Any person who intentionally sets a fire, or intentionally causes an explosion or a flood, shall be liable to: 2° a term of imprisonment not exceeding 15 years or a fine of the fifth category, if such act is likely to endanger the life of another person or to cause a risk of grievous bodily harm to another person.

¹⁰⁴¹ Discrimination Directive (*Aanwijzing Discriminatie*), 2007A010, Government Gazette 2007, 233, available at: https://www.om.nl/onderwerpen/discriminatie/@86289/aanwijzing/#_ftn2.

¹⁰⁴² Discrimination Directive (*Aanwijzing Discriminatie*), 1999A008; Discrimination Directive (*Aanwijzing Discriminatie*), 2003A005.

- **Arson - endangerment to life and resulting in death (*Brandstichting etc. levensgevaar en de dood ten gevolge*) 157(3)**: Any person who intentionally sets a fire, or intentionally causes an explosion or a flood, shall be liable to: 3^o life imprisonment or a determinate term of imprisonment not exceeding 30 years or a fine of the fifth category, if such act is likely to endanger the life of another person and the offence results in the death of a person.
- **Insult of an individual (*Eenvoudige belediging*) 266**: (1) Any insult, which is not of a slanderous or libellous nature, intentionally expressed in public verbally or in writing or by means of an image, or verbally against a person in his presence or by other acts, or by means of written matter or an image sent or offered, shall constitute simple defamation and shall be punishable by a term of imprisonment not exceeding three months or a fine of the second category. (2) Acts which are intended to express an opinion about the protection of public interests, and which are not at the same time designed to cause any more offence, or cause offence in any other way than follows from that intent, shall not be punishable as simple defamation.
- **Menace (*Bedreiging*) 285(1)**: The threat of public violence jointly committed against persons or property, the threat of violence against an internationally protected person or his protected property, or the threat of any serious offence endangering the general safety of persons or property, or resulting in general danger for the provision of services, of rape, of indecent assault, of any serious offence against the life of a person, of hostage-taking, of aggravated assault or of arson, shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category.
- **Harassment (*Belaging*) 285b**: (1) Any person who unlawfully, systematically, intentionally violates another person's personal privacy with the intention of compelling that other person to act, or to refrain from certain acts, or to tolerate certain acts, or of instilling fear in that person, shall be guilty of stalking and shall be liable to a term of imprisonment not exceeding three years or a fine of the fourth category. (2) Prosecution shall take place only on complaint of the person against whom the serious offence has been committed.
- **Manslaughter (*Doodslag*) 287**: Any person who intentionally takes the life of another person shall be guilty of manslaughter and shall be liable to a term of imprisonment not exceeding 15 years or a fine of the fifth category.
- **Assault (*Eenvoudige mishandeling*) 300(1)**: Assault shall be liable to a term of imprisonment not exceeding three years or a fine of the fourth category.
- **Assault resulting in grievous bodily harm. (*Eenvoudige mishandeling. Zwaar lichamelijk letsel*) 300(2)**: If the offence results in grievous bodily harm, the offender shall be liable to a term of imprisonment not exceeding four years or a fine of the fourth category.
- **Assault resulting in death. (*Eenvoudige mishandeling. De dood ten gevolge*) 300(3)**: If the offence results in death, the offender shall be liable to a term of imprisonment not exceeding six years or a fine of the fourth category.
- **Assault with premeditation (*Mishandeling met voorbedachte rade*) 301(1)**: Assault committed with premeditation shall be liable to a term of imprisonment not exceeding four years or a fine of the fourth category.
- **Assault with premeditation resulting in grievous harm (*Mishandeling met voorbedachte rade. Zwaar lichamelijk letsel*) 301 (2)**: If the offence results in grievous bodily harm, the offender shall be liable to a term of imprisonment not exceeding six years or a fine of the fourth category.
- **Assault with premeditation resulting in death (*Mishandeling met voorbedachte rade. De dood ten gevolge*) 301 (3)**: If the offence results in death, the offender shall be liable to a term of imprisonment not exceeding nine years or a fine of the fifth category.
- **Aggravated assault (*Zware mishandeling*) 302(1)**: Any person who intentionally inflicts grievous bodily harm on another person shall be guilty of aggravated assault and shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category.
- **Aggravated assault resulting in death (*Zware mishandeling. De dood ten gevolge*) 302(2)**: If the offence results in death, the offender shall be liable to a term of imprisonment not exceeding 10 years or a fine of the fifth category.
- **Aggravated assault with premeditation (*Zware mishandeling met voorbedachte rade*) 303(1)**: Aggravated assault committed with premeditation shall be liable to a term of imprisonment not exceeding 12 years or a fine of the fifth category.
- **Aggravated assault with premeditation. Resulting in death (*Zware mishandeling met voorbedachte rade. De dood ten gevolge*) 303(2)**: If the offence results in death, the offender shall be liable to a term of imprisonment not exceeding 15 years or a fine of the fifth category.
- **Damage to property. (*Beschadiging goederen*) 350(1)**: Any person who intentionally and unlawfully destroys, damages, renders unusable or disposes of any property belonging in whole or in part to another, shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category.

Categories Maximum fine

1 st category	EUR 405
2 nd category	EUR 4,050
3 rd category	EUR 8,100
4 th category	EUR 20,250
5 th category	EUR 81,000
6 th category	EUR 810,000

Reports have highlighted that the instructions are not complied with¹⁰⁴³. In its fourth report on the Netherlands, ECRI recommended that the Dutch authorities introduce a provision explicitly establishing racist motivation as a specific aggravating circumstance in sentencing. The Dutch authorities have, however, informed ECRI that they are against introducing such a provision in the Criminal Code, as it would require such motivation to be proven¹⁰⁴⁴. The National Discrimination Prosecutor has declared not to be against the introduction of such a provision. However, the National Discrimination Prosecutor is critical of its practical effect. Although such a provision would require the courts by law to elevate the sentence if a racist motive can be proven, courts are expected, in practice, to impose lower penalties and thereby discount this requirement in their sentencing¹⁰⁴⁵.

Other important hate speech offence provisions

Article 137c of the Criminal Code is not a transposing provision per se. In accordance with case law, however, it is used to penalise those behaviours set out in Article 1(1) of the CFD. Article 137c comprises insults through invectives or terms of abuse, and defamatory statements about a particular group on the basis of its race, religion etc. This can include forms of Holocaust denial.

	Offence provision Group defamation (<i>groepsbelediging</i>)
Transposes Art. 1(1)(a) of CFD	No
Transposes Art. 1(1)(b) of CFD	No
Transposes Art. 1(1)(c) of CFD	No

¹⁰⁴³ Anne Frank Stichting, Third report racism, anti-semitism and extreme right-wing violence (*Derde rapportage racisme, antisemitisme en extreemrechts geweld*) December 2014, available at:

http://www.annefrank.org/ImageVaultFiles/id_17108/cf_21/Racisme_2013_VJI.PDF.

¹⁰⁴⁴ Report of the European Committee against Racism and Intolerance of 20 June 2013 on the Netherlands, fourth monitoring cycle, CRI(2013)39, p. 13, available at:

<http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

¹⁰⁴⁵ Stakeholder interview on 1 June 2015 with the National Discrimination Prosecutor.

CFD	
Transposes Art. 1(1)(d) of CFD	No
Transposes Art. 4 of CFD	No
Legal reference to provision	Article 137c of the Criminal Code ¹⁰⁴⁶
Definition of offence	<p>Article 137c criminalises:</p> <p>(1) Any person who, orally or by means of written material or images, gives intentional public expression to views insulting to a group of persons on account of their race, religion or belief, sexual orientation, or physical, psychological or intellectual disability;</p> <p>(2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased.</p> <p><i>Note: Article 137c forms an independent offence and does not consider a racist motive as an aggravating circumstance to these latter offences; it thus does not form a lex specialis to Articles 261 and 266 as leges generales. This signifies that defamation or insult of an individual person on the basis of his/her race or religion is punishable under Articles 261 or 266, and not under Article 137c. Pursuant to the Discrimination Instruction of the Public Prosecution Service, prosecutors are obliged to request that the sentence be increased by 50-100% in cases of individual defamation or insult 'with a discriminatory aspect'.</i></p> <p><i>Article 137c of the Criminal Code has in numerous occasions have been interpreted by courts¹⁰⁴⁷.</i></p>
Penalties foreseen	<p>Type and level of penalty under 137c (1): imprisonment for up to one year or a fine of up to EUR 8,100.</p> <p>Type and level of penalty under 137c (2): imprisonment for up to two years or a fine of up to EUR 20,250.</p> <p>Article 137h of the Criminal Code¹⁰⁴⁸ provides that any person who commits the offence 137c in the exercise of his profession, may be disqualified from practicing that profession.</p>
Protected characteristic(s)	<p>Under 137c(1) the protected characteristics are: race, religion or belief, sexual orientation, or physical, psychological or intellectual disability.</p> <p>Under 137c(2) the protected characteristics are: <i>idem</i>.</p> <p><i>Note: The list of protected characteristics is exhaustive and does not include, for example, 'language' or 'sex', the latter is included in Article</i></p>

¹⁰⁴⁶ Article 137c Criminal Code (*Artikel 137c Wetboek van Strafrecht*), available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137c/geldigheidsdatum_23-05-2015.

¹⁰⁴⁷ Case law has *inter alia* assessed the meaning of insulting behaviours by saying that invectives and terms of abuse concerning a particular group may be insulting according to their nature and purport, and that the context of a public debate or another context cannot remove their punishable character. It has also assessed the difference between religious insult and religious criticism, which latter behaviour fell within the scope of application of the criminal offence provision on blasphemy (ex Article 147 of the Criminal Code), which provision was abolished in 2013. On several occasions the Dutch Supreme Court has found Nazi propaganda by using swastikas and other Nazi symbols to constitute an punishable insult to Jews on the ground of their race, thereby punishable in accordance with Article 137c or e of the Criminal Code. In most cases, the Dutch courts have found the ridiculing, denial or minimisation of the Second World War and the Holocaust to constitute an indirect form of punishable group insult of Jews on the grounds of their race or religion for the purposes of 137c or e of the Criminal Code. The expression was considered insulting to them because it concerned a topic with which the group identified itself, or because the expression brought to mind certain associations with Nazi ideology. Such insulting expression was found punishable because it 'offended the feelings of the group'. The Supreme Court has not yet decided as to whether the sole denial of the Holocaust is punishable in itself. Case law, as created by the lower courts, considers the denial of the Holocaust to generally constitute an insult to Jews on the grounds of their race or religion, because it is uttered in the broader context of anti-Semitic expression, the proclamation of racial doctrines or the support of Nazi ideology.

¹⁰⁴⁸ Article 137h of the Criminal Code (*Artikel 137h Wetboek van Strafrecht*) reads: 'If the offender commits any of the offences defined in sections 131 to 134 inclusive, 137c to 137g inclusive and 147a, in the exercise of his profession, he may be disqualified from practising that profession', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137h/geldigheidsdatum_25-05-2015.

	<p>137d. This provision implements the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Explanatory Memorandum to the bill introducing the offence uses a broad definition of 'race' by cross-referring to the ICERD: this term includes national and ethnic origin, colour and descent. It does not include nationality in the sense of citizenship. With regard to the term 'race', the case law takes as a starting point the meaning of ICERD. Whether expression about foreigners, immigrants or asylum seekers is punishable under 137c will generally depend on its context¹⁰⁴⁹.</p>
Online crime	<p>Yes.</p> <p>Case law allows for the element "publicly" to signify that the expression can potentially come to the knowledge of the public. This includes expression in the public square, but also expression via the press, radio, television and the Internet. E-mail and telephone are, in principle, excluded. Expression is not public where only a limited and clearly described group of persons can receive it. With regard to the Internet, publicly accessible websites must be distinguished from non-public webpages. On such latter forums, expression is only public when 'a broader circle of arbitrary third parties' can see it. A group of '10-12 friends' is insufficient. This is different with a larger 'group of friends'.</p> <p>It is noted that a perpetrator's intent must also relate to the public nature of expression. If a perpetrator is aware that journalists are in the audience, he has knowingly accepted the considerable chance that his expression can come to the knowledge of the public and that he made his statements publicly¹⁰⁵⁰.</p>

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

Legal definition of provision transposing Article 6 of AMSD	
Transposing provisions	Article 137d Criminal Code (<i>Artikel 137d Wetboek van Strafrecht</i>) as provided under section 2.1 (<i>supra</i>)
Incitement to hatred, discrimination or violence	Article 137e Criminal Code (<i>Artikel 137e Wetboek van Strafrecht</i>) as provided under section 2.1 (<i>supra</i>)
Dissemination or distribution of expression	<p>With regard to hate speech uttered via television, in 1996 the Dutch Supreme Court annulled an acquittal for group insult and incitement to racial hatred or discrimination on the ground of Article 137c-d of the Criminal Code, for several statements made by the leader and members of the extreme right-wing political CD party during television shows. In essence, the statements claimed that Dutch society and population had to be protected against the youth gangs of, mixed race marriages with, and affirmative action to the benefit of, 'foreigners, minorities and asylum seekers'. According to the Supreme Court, the suspects did not enjoy immunity from liability under Article 53 of the Criminal Code, because they could not be considered to be publishers in the sense of that article¹⁰⁵¹.</p> <p>With regard to hate speech uttered via television, in 2014 the Dutch Supreme Court annulled the decision of the Amsterdam Court of Appeal, in which a local politician had been acquitted of the charges of group insult and incitement to discrimination with regard to homophobic expression uttered during a television interview after a local election debate in Amsterdam. According to the Court of Appeal, the reporter had told the politician he worked for a local broadcasting association and had requested him to answer some questions, during which time the reporter had a microphone and a cameraman behind him. The suspect had, therefore, made his statements publicly, even though the audience was not at hearing distance. Together with the editorial office of the broadcasting association, the reporter selected parts of the</p>

¹⁰⁴⁹ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), p. 202.

¹⁰⁵⁰ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), pp. 205-206, pp. 291-292.

¹⁰⁵¹ Dutch Supreme Court, crim. ch., 16 April 1996, *Netherlands Jurisprudence* 1996, 527, para. 6.4.

(4) A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the storage of information provided by a recipient of the service, is not liable for the information that is stored at the request of a recipient of the service, on condition that the provider:

- a. does not have actual knowledge of illegal activity or information and, with regard to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- b. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(5) These paragraphs do not affect the possibility of obtaining a court order to terminate or prevent an infringement or an injunction for the removal or disabling of access to information.

Note: With regard to hate speech published on the Internet, the National Discrimination Prosecutor has declared that it is standard policy to prosecute the author of expression (a user of a website) or the owner, the administrator or moderator of the website, not a provider¹⁰⁵⁵. In its annual reports, the MDI also declares that it almost always sends a request to remove expression to the author of expression (user of a website) or the owner or administrator of a website. A provider is rarely approached because it has less interference with the content of a website, and the author and owner are considered to be primarily responsible for hate speech. Past experience shows that if a website is taken offline by a provider, it is quickly put online again via a new provider¹⁰⁵⁶.

With regard to hate speech published on the Internet, in 2012 in the AEL case, the Dutch Supreme Court endorsed the conviction on the ground of Articles 137c and e of the Criminal Code by the Court of Appeal, with regard to the publication of an 'Auschwitz cartoon' by the Arabic European League (AEL) on its own websites (para. 3.1 supra). According to the Court of Appeal, the subjective intention of the suspect to raise a debate on the double standards in the application of the hate speech bans was not decisive. If expression must be considered in light of its context, this context should be apparent to third parties. With regard to the Internet, the context of expression should be readily apparent. Although the 'disclaimer' that appeared on screen together with the cartoon could be considered as a context that could remove the punishable character of expression, in this case the expression was simply gratuitously offensive¹⁰⁵⁷.

With regard to hate speech published on the Internet, in 2012 the Supreme Court also rejected an appeal against the conviction of the owner and administrator of a website by the Court of Appeal, with regard to several publications on its website in which Muslims, Turks and immigrants were compared with 'berber-monkeys, cockroaches, rats and rapists' (para. 3.1 supra). According to the Court of Appeal, the suspect had declared to be the administrator and owner of the website, to have placed his own articles on his website, and to have edited and placed articles by others on his website. The suspect had, therefore, declared himself to be liable for their content¹⁰⁵⁸.

¹⁰⁵⁵ Stakeholder interview on 1 June 2015 with the National Discrimination Prosecutor.

¹⁰⁵⁶ MDI, 'Annual report 2014' (*Jaarverslag 2014*), 8.

¹⁰⁵⁷ Dutch Supreme Court, crim. Ch., 27 March 2012, *Netherlands Jurisprudence* 2012, 220.

¹⁰⁵⁸ Dutch Supreme Court, crim. Ch., 26 June 2012, *Netherlands Jurisprudence* 2012, 415.

2.4 Responsibility for publishing hate speech

Criminal law

The hate speech offences of Articles 137c-e of the Criminal Code do not distinguish between the media used to express opinions, therefore they apply to all media (newspapers, radio, television, Internet etc.). However, with regard to liability for publishing hate speech, different media actors can be distinguished. Next to the author of expression, (chief) editors and radio and television broadcasters can be liable as accomplices for publishing hate speech under Articles 137c-d of the Criminal Code – on the basis of Article 48 of the Criminal Code– if they are actually involved in the creation and the content of expression. Distributors who might not have actual knowledge about the content of expression, but who have ‘reasonable grounds to suspect its punishable nature’ can also be held liable under Article 137e of the Criminal Code. The media is allowed to report certain negative expression of others as part of the news, as long as the reporting does not itself become propaganda.

Different liability rules apply to publishers and printers of printed press and to Internet Service Providers (ISPs). Criminal responsibility of publishers and printers for hate speech is regulated in Articles 53 and 54 of the Criminal Code (*Artikel 53 en 54 Wetboek van Strafrecht*)¹⁰⁵⁹ concerning the liability for so-called ‘press offences’, i.e. offences committed by means of the press (*drukpersmisdrijven*). The customary term ‘press offences’ is outdated, as the speech offences in the Criminal Code do not distinguish between the media used to express opinions. Articles 53 and 54 of the Criminal Code are, however, confined to the printed press, with audiovisual material and the Internet excluded¹⁰⁶⁰. The Articles afford the publisher and the printer immunity from prosecution under the conditions that the publication indicates the name and residence of the publisher or printer, and the offender¹⁰⁶¹, that the offender can be prosecuted, and that the offender resides in the Netherlands.

The rationale of these Articles was to prevent censorship by publishers and printers and to protect freedom of expression and information. Publishers and printers are afforded immunity only with respect to their normal publishing and printing activities¹⁰⁶². The Articles afford publishers and printers a strong position, a privilege, and protect them from prosecution even if they know the content to be of a punishable nature. On the other hand, they are liable for anonymous publications that do not indicate the offender

¹⁰⁵⁹ Article 53 of the Criminal Code: ‘(1) In the case of serious offences committed by means of a printing press, the publisher shall not be prosecuted in his capacity as publisher if his name and address appear on the printed matter and the identity of the offender is known or if, upon first notice, after institution of a preliminary inquiry, the publisher has disclosed the identity of the offender. (2) This provision shall not apply if, at the time of publication of the printed matter, the offender could not be prosecuted or was resident or established outside the Kingdom in Europe’, available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelV/Artikel53/geldigheidsdatum_29-05-2015.

Article 54 of the Criminal Code: ‘(1) In the case of serious offences committed by means of a printing press, the printer shall not be prosecuted in his capacity as printer if his name and address appear on the printed matter and if the identity of the offender is known or if, upon first notice, after institution of a preliminary inquiry, the printer has disclosed the identity of the offender. (2) This provision shall not apply if the natural or legal person, who/which commissioned the printing of the item, could not be prosecuted or was resident or established outside the Kingdom in Europe’, available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelV/Artikel54/geldigheidsdatum_29-05-2015.

¹⁰⁶⁰ Radio and television broadcasting companies are generally involved in the creation and the content of expression and are therefore liable for the publication or the dissemination of hate speech under Articles 137c-e of the Criminal Code.

¹⁰⁶¹ Not only authors but also editors can constitute an offender of press offences. If the offender is unknown with the police, the publisher must disclose the identity of the offender, upon first notice, after institution of a preliminary inquiry. The printer must, upon first notice, after institution of a preliminary inquiry, disclose the identity of his client – often the publisher – if he is unknown.

¹⁰⁶² This does not include the ‘dissemination or distribution of expression’ in the sense of Article 137e of the Criminal Code. Under the latter article, even a distributor who might not have actual knowledge about the content of expression, but who has reasonable grounds to suspect its punishable nature, may be held liable.

on the basis of Articles 418 and 419 of the Criminal Code (*Artikel 418 en 419 Wetboek van Strafrecht*)¹⁰⁶³, even if they do not know the content of the publication. The penalties foreseen in these articles are imprisonment for up to one year or a fine of up to EUR 8,100.

Pursuant to Article 48 of the Criminal Code (*Artikel 48 Wetboek van Strafrecht*)¹⁰⁶⁴, the publisher and printer can be held liable as an accomplice of a press offence, if their intent with regard to the punishable nature of the publication can be established¹⁰⁶⁵. Pursuant to Article 49 of the Criminal Code (*Artikel 49 Wetboek van Strafrecht*)¹⁰⁶⁶, in case of complicity, the maximum of the principle punishments prescribed for the serious offences – including the hate speech bans of Article 137c-e of the Criminal Code – are reduced by one-third, while additional punishments for complicity stay the same.

Criminal responsibility of ISPs for publishing hate speech is regulated by a separate Article 54a of the Criminal Code (*Artikel 54a Wetboek van Strafrecht*).¹⁰⁶⁷ Article 54a is a result of the necessity to align the Dutch law with Directive 2000/31/EC (ECD). The Article affords an intermediary of telecommunication services that transmits or stores (unlawful) data from a third party, immunity from prosecution under the condition that he/she complies with an order from the public prosecutor to take all measures that may be reasonably required of it in order to disable this data. Only if an intermediary does not comply with a lawful order to disable this data, can it be held liable. Article 54a is modelled after Articles 53 and 54 of the Criminal Code and, similarly, aims to prevent censorship by intermediaries and to protect freedom of expression and information. Unlike Articles 53-54, Article 54a is not confined to 'press offences', but comprises all offences that entail the transmission and storage of data. Different from publishers and printers, intermediaries are assured of immunity, irrespective of whether the person from whom the data originated can be prosecuted and where that person resides. Unlike Articles 53-54, Article 54a does not require that intermediaries disclose the identity of 'an

¹⁰⁶³ Article 418 of the Criminal Code: 'Any person who publishes any written matter, or any image of a criminal nature, shall be liable to a term of detention not exceeding one year or a fine of the third category, if: (1) the identity of the offender is neither known, nor was disclosed upon first notice, after institution of a preliminary inquiry; (2) the publisher knew, or should have expected, that at the time of publication the offender could not be prosecuted or would be resident or established outside the Kingdom in Europe', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelXXX/Artikel418/geldigheidsdatum_29-05-2015.

Article 419 of the Criminal Code: 'Any person who prints any written matter, or any image of a criminal nature, shall be liable to a term of detention not exceeding one year or a fine of the third category, if: (1) the identity of the person, who commissioned the printing of the item, is neither known, nor was disclosed upon first notice, after institution of a preliminary inquiry; (2) the printer knew, or should have expected, that at the time of publication the person, who commissioned the printing of the item, could not be prosecuted or would be resident outside the Kingdom in Europe', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelXXX/Artikel419/geldigheidsdatum_29-05-2015.

¹⁰⁶⁴ Article 48 of the Criminal Code: 'The following persons shall be criminally liable as accomplices to a criminal offence: (1) any persons who intentionally aid and abet the commission of the serious offence; (2) any persons who intentionally provide opportunity, means or information for the commission of the serious offence', available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelIV/Artikel48/geldigheidsdatum_29-05-2015.

¹⁰⁶⁵ Tekst & Commentaar, Wetboek van Strafrecht, Artikel 54, Aant. 7.

¹⁰⁶⁶ Article 49 of the Criminal Code: '(1) In the case of complicity, the maximum of the principal punishments prescribed for the serious offence shall be reduced by one third. (2) In the case of a serious offence carrying a sentence of life imprisonment, a term of imprisonment not exceeding twenty years shall be imposed. (3) The additional punishments for complicity shall be the same as for the serious offence. (4) In the determination of the punishment, only those acts that were intentionally facilitated or promoted by the accomplice, and their consequences, shall be taken into account', available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelIV/Artikel49/geldigheidsdatum_29-05-2015.

¹⁰⁶⁷ Article 54a of the Criminal Code: 'An intermediary which provides a telecommunication service that consists of the transfer or storage of data from a third party, shall not be prosecuted in its capacity as intermediary telecommunication provider if it complies with an order from the public prosecutor to take all measures that may be reasonably required of it in order to disable this data, which order shall be issued by the public prosecutor after he has applied for and received a written authorisation from the examining magistrate', available at: http://wetten.overheid.nl/BWBR0001854/EersteBoek/TitelIV/Artikel54a/geldigheidsdatum_29-05-2015.

offender', i.e. the person who is responsible for the content of the unlawful data, to the judicial authorities.

Intermediaries are afforded immunity only with respect to their normal activities and must not act beyond 'mere conduit, caching, and hosting'. In Article 54a the 'mere conduit, caching, and hosting' are defined as 'the transmission and storage of data from a third party' (*doorgifte en opslag die van een ander afkomstig zijn*). Instead of the term 'Internet Service Provider', Article 54a uses the more general term 'intermediary' (*tussenpersoon*), to include other providers of telecommunication services, such as mobile telephone and network operators. Intermediaries are not allowed to interfere with the creation, the content and / or destination of transferred or stored data, nor may the storage of data be placed under their authority. If a hosting provider knows that it stores unlawful data and 'facilitates' or 'co-operates' in unlawful conduct, an intermediary is no longer acting 'as such'. To be exempted from liability an intermediary must 'take all measures that may be reasonably required of it in order to disable this data'. This can include the removal of data. In this regard, Article 54a is connected with Article 125o of the Code of Criminal Procedure (*Artikel 125o Wetboek van Strafvordering*)¹⁰⁶⁸, which provides the legal ground to block access or remove content in an 'automated work'. The desired measures must meet the standards of subsidiarity and proportionality, with intermediaries which store data expected to take more far-reaching measures than those who merely transfer data.

An intermediary is required to disable data only in response to an order issued by the public prosecutor after he has applied for and received a written authorisation from the examining magistrate. A Notice-and-Take-Down order (NTD order) may only be issued by the Public Prosecution if the host of the website is located or is represented in the Netherlands. In cases where the ISP is located abroad, the ISP may be alerted and asked to voluntarily undertake the necessary steps, and the information concerning the site may also be given to the relevant State. On the basis of this information the relevant authorities can decide on the next steps. A NTD order may not be issued by the Public Prosecutor with regard to data that are stored on a computer outside the country. However, an order can be given to prevent the dissemination of this data in the Netherlands. The Public Prosecutor may order the Dutch ISP to make the information unavailable for people on the Dutch territory. If an intermediary does not obey the order, it can be prosecuted as an accomplice to the criminal offence applicable to the data, on the basis of Article 48 of the Criminal Code (*Artikel 48 Wetboek van Strafrecht*). No independent criminal offences exist comparable to those for publishers and printers in Articles 418 and 419 of the Criminal Code (*Artikel 418 en 419 Wetboek van Strafrecht*). Pursuant to Article 49 of the Criminal Code (*Artikel 49 Wetboek van Strafrecht*), in case of complicity, the maximum of the principle punishments prescribed for serious offences are reduced by one-third, while additional punishments for complicity stay the same. In addition, the intermediary can be prosecuted for failing to comply with an order by a civil

¹⁰⁶⁸ Article 125o of the Code of Criminal Procedure: '(1) If, during a search in an automated device, data are found with regard to which, or by means of which, the offence has been committed, the public prosecutor or, during the preliminary inquiry, the examining magistrate, may decide that those data shall be made inaccessible as far as necessary for the breaking up of a criminal offence or for the prevention of new criminal offences. (2) Making data inaccessible is understood to mean the taking of measures for preventing the administrator of the automated device meant in the first paragraph, or third persons, from further cognizance or use of those data, as well as for the prevention of further distribution of those data. Making inaccessible includes removing the data from the automated device, preserving them for the prosecution. (3) As soon as the interest of the prosecution allows the discontinuance of the measures meant in the second paragraph, the public prosecutor or, during the preliminary inquiry, the examining magistrate, may decide that those data shall be restored to the disposal of the administrator of the automated device', available at: http://wetten.overheid.nl/BWBR0001903/EersteBoek/TitelIV/Zevendeafdeling/Artikel125o/geldigheidsdatum_2_9-05-2015.

servant on the basis of Article 184 of the Criminal Code (*Artikel 184 Wetboek van Strafrecht*)¹⁰⁶⁹.

Civil law

In addition to criminal liability, the media also have civil responsibility for publishing hate speech, and these two liability schemes can co-exist. Hate speech and hate crime can constitute a wrongful act under Article 6:162 of the Civil Code (*Artikel 6:162 Burgerlijk Wetboek*)¹⁰⁷⁰. The Article cites the following unlawful acts: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law, pertaining to proper social conduct. Hate speech would fall under the two latter categories; under 6:162 of the Civil Code, the media can be held civilly liable in respect of expression that violates the hate speech offences in Articles 137c-e of the Criminal Code, or that violates a norm of 'due diligence'. Dutch civil law does not have a system of punitive damages. With regard to unlawful expression, interested parties can request material and immaterial damages, rectifications and injunctions. If there are multiple perpetrators, they are jointly and severally liable. If the unlawful act is committed in the context of work for a commissioner, an employer or a legal entity, these latter persons are also liable. In the Civil Code, there exists no equivalent to Articles 53-54 of the Criminal Code concerning the immunity from liability for publishers and printers. As regards the responsibility of ISPs, Article 6:196c was inserted in the Civil Code in order to align the Dutch law with the ECD¹⁰⁷¹. Article 6:196c of the Civil Code (*Artikel 6:196c Burgelijk Wetboek*)¹⁰⁷²

¹⁰⁶⁹ Article 184(1) of the Criminal Code: 'Any person who intentionally fails to comply with an order issued, or a formal request made, under statutory regulation by a civil servant charged with any supervisory task, or by a civil servant charged with the detection or investigation of criminal offences, or who has been authorised to detect or investigate criminal offences, and any person who intentionally prevents, obstructs or frustrates any action undertaken by any of such civil servants to enforce a statutory requirement, shall be liable to a term of imprisonment not exceeding three months or a fine of the second category', available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelVIII/Artikel184/geldigheidsdatum_29-05-2015.

¹⁰⁷⁰ Article 6:162 of the Civil Code: '(1) A person who commits an unlawful act toward another, which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof. (2) Except where there is a ground for justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. (3) An unlawful act can be imputed to its author if it results from his fault, or from a cause for which he is answerable according to law or common opinion', available at: http://wetten.overheid.nl/BWBR0005289/Boek6/Titel3/Afdeling1/Artikel162/geldigheidsdatum_29-05-2015.

¹⁰⁷¹ 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'), OJ L 178, 17.7.2000, p. 1-16., available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031>.

¹⁰⁷² Article 6:196c reads: '(1) A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the transmission in a communication network of information provided by a recipient of the service, or providing access to a communication network, is not liable for the information transmitted, on condition that the provider: a. does not initiate the transmission; b. is not the one who decides to whom the information will be transmitted; and c. has not selected or modified the information contained in the transmission.

(2) For the purpose of paragraph 1, the acts of transmission and of merely providing access to a communication network include the automatic, intermediate and transient storage of the information transmitted insofar as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, is not liable for the automatic, intermediate and temporary storage of that information, on condition that the provider: a. does not modify the information; b. complies with conditions on access to the information; c. complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; d. does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and e. acts expeditiously to remove or to disable access to the information it has stored, upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(4) A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the storage of information provided by a recipient of the service, is not liable for the

exempts 'providers of information society services' from liability for unlawful content put on their services by others, under a limited number of conditions. ISPs benefit from immunity only if they are in no way involved, other than by providing the technical means to facilitate the communication concerned. The Article does not exclude the possibility of obtaining a court order to end or prevent the distribution of unlawful content by the ISP. The Article does not contain a general obligation for ISPs to monitor the data they transmit or store, or to actively seek facts or circumstances indicating illegal activity. No duty for ISPs to report alleged illegal activities undertaken or data provided via their services, has been enacted. As long as ISPs do not cache or host data on their services, they do not have to take any measures, provided that they do not initiate the transmission, nor decide who receives the data, nor select and/or amend the transmitted data. ISPs that offer hosting services have to take measures in order to avoid liability only if they should reasonably be aware of facts and/or circumstances clearly pointing to this unlawful character. A notification in itself is insufficient in order for this knowledge to be established. Only with regard to 'manifestly unlawful activities or data', do hosting providers have to promptly remove or disable access to unlawful content.

Administrative law

The Dutch Media Act of 2008 does not grant the Dutch Media Authority (*het Commissariaat voor de Media*)¹⁰⁷³ the power to impose any administrative fines on the media for publishing or disseminating hate speech, a possibility which existed between 2008 and 1 January 2014¹⁰⁷⁴. The provisions required the Minister, i.e. the Dutch Media Authority, to refuse to grant or to withdraw a broadcasting licence, or to forbid the use of a broadcasting licence, or to forbid the transmission of a channel via cable or air, in cases where a television channel or broadcasting company had repeatedly been convicted for incitement to hatred, discrimination or violence in the sense of Article 137d of the Criminal Code. These provisions were introduced in order to take measures against media programmes spreading hatred, for which the makers or the persons responsible for the programmes had been convicted, and where there existed a serious risk of recurrence. The provisions have been abrogated, as the sanctions were considered to be disproportionate¹⁰⁷⁵, and to lack judicial review. In exceptional situations where the aforementioned provisions could apply, Article 137h of the Criminal Code is used instead. This latter Article affords the courts the ability to temporarily disqualify the offender from practicing his profession in cases of a conviction for hate speech, if this is deemed necessary to prevent recurrence.

Self-regulation

Several forms of self-regulation by the media and Internet intermediaries exist. Liability deriving from such self-regulation co-exists with the criminal and civil liability schemes. The Netherlands Press Council (*de Raad voor de Journalistiek*) forms an independent self-

information stored at the request of a recipient of the service, on condition that the provider:

a. does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or b. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(5) These paragraphs do not affect the possibility of obtaining a court order to terminate or prevent an infringement, or an injunction for the removal or disabling of access to information', available at: http://wetten.overheid.nl/BWBR0005289/Boek6/Titel3/Afdeling4A/Artikel196c/geldigheidsdatum_29-05-2015.

¹⁰⁷³ The website of the Dutch Media Authority is available at: <http://www.cvdm.nl/english/>.

¹⁰⁷⁴ It concerned the following articles of the Media Act: 2.32 (1)(b); 2.33 (1)(b); 2.46 (1)(b); 2.47 (1)(b); 2.65 (3); 2.67 (1)(b); 3.3 (1); 3.4 (1)(c); 6.10 (2)(3); and 7.15. The text of these articles are incorporated in Act of 29 December 2008, Government Gazette 2012, 583, available at: <https://zoek.officielebekendmakingen.nl/stb-2008-583.html>.

¹⁰⁷⁵ Act of 18 December 2013, Government Gazette 2013, 570, available at: <https://zoek.officielebekendmakingen.nl/stb-2013-570.html>.

regulatory body for the media¹⁰⁷⁶. All important media organisations participate in the Press Council: the Netherlands Union of Journalists (*Nederlandse Vereniging van Journalisten*), the Netherlands Society of Chief-Editors (*Nederlands Genootschap van Hoofdredacteuren*), and several coordinating organisations of printed press and organisations of public and commercial broadcasting. The Press Council has developed 'Guidelines for Journalistic Behaviour' (*Leidraad van de Raad voor de Journalistiek*)¹⁰⁷⁷ whose principles apply to all media and platforms, and all journalistic organisations and journalists are expected to adhere to these guidelines. Interested parties can file a complaint with the Press Council concerning journalistic malpractices, including complaints about media programmes spreading hatred. The self-regulation does not itself contain explicit reference to the prohibition of incitement to hatred, but, rather, the Press Council mediates and decides whether a medium or journalist has acted with due diligence and whether a publication has violated good journalistic practice. The Press Council cannot impose a sentence nor require that a rectification be published, nor can it assure the complainant financial compensation. The Press Council only gives its opinion on a complaint and publishes its decision on its website and in the professional magazine for journalists. Also, it circulates its decisions on a wide scale by sending it to the national news agency and to several other media. While these media are asked to publish the Council's decision, they are not obliged to do so.

For ISPs, Article 54a of the Criminal Code and Article 196c of the Civil Code imply the existence of a certain form of self-regulation, and the articles are meant to cover those cases in which this self-regulation falls short. In the Netherlands, there are no statutory 'Notice-and-Take-Down' procedures that give further substance to the responsibilities of ISPs. However, a Notice-and Take-Down procedure has been put in place and signed by the Dutch Government, along with a large number of ISPs and interest groups. The Code of Conduct 'Notice and Take Down' (*Gedragscode 'Notice and Take Down'*)¹⁰⁷⁸ was coordinated by the National Infrastructure to Fight Cybercrime (*NICC – Nationale Infrastructuur ter bestrijding van Cybercrime*), supervised by the Ministry of Economic Affairs, and is administered through the Platform for the Information Society (*ECP-EPN – Platform voor de Informatie Samenleving*)¹⁰⁷⁹. The NTD Code concerns intermediaries that provide public telecommunication services on the Internet in the Netherlands, and contains a procedure for handling notifications of unlawful and punishable data on the Internet. If, according to the intermediary, the notification concerns 'manifestly unlawful or punishable content', the intermediary takes care that this content is promptly taken down. If no unequivocal decision about the unlawful or punishable character of the content is made, the notifier can file a complaint with the judicial authorities, or take the matter to court. In this respect, the functioning of the Complaint Bureau for Discrimination on the Internet (*Meldpunt Discriminatie Internet – MDI*)¹⁰⁸⁰ is important. The MDI is an independent NGO created in 1997, which is co-founder of the International Network against Cyber Hate (INACH) and which works together with the police and the judicial authorities to combat hatred and discrimination on the Internet. The MDI handles notifications of incoming complaints and it also operates on the basis of research. In 2013, after government funding of the MDI was discontinued, another complaints Bureau for Internet Discrimination (*Meldpunt Internet Discriminatie – MIND*)¹⁰⁸¹ was created at the initiative of the Ministry of Security and Justice and the Ministry of Social Affairs and

¹⁰⁷⁶ The website of the Press Council is available at: <http://www.rvdj.nl/english>.

¹⁰⁷⁷ An English translation of the guidelines is available at: <http://www.rvdj.nl/english/guidelines>.

¹⁰⁷⁸ An English translation of the Dutch Code of Conduct 'Notice and Take Down' is available at: http://www.ecp-epn.nl/sites/default/files/NTD_Gedragscode_Engels.pdf.

¹⁰⁷⁹ The website of the ECP-EPN is available at: <https://ecp.nl>.

¹⁰⁸⁰ More information about the MDI is available on its website at: <http://www.meldpunt.nl/site/page.php?lang=1&pageID=24>.

¹⁰⁸¹ The website of MIND is available at: <http://www.mindnederland.nl>.

Employment. MIND forms part of NLConfidential, an independent organisation that supports citizens to share information via several hotlines for complaints and help.

3 Effectiveness of the legal framework

3.1 Effectiveness of legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate crime/hate speech vs. freedom of expression	
<p>Offence provision</p> <p>Group defamation and its dissemination or distribution</p>	<p>Articles 137c and e of the Criminal Code</p> <p>Article 137c is not a transposing provision per se. However, in accordance with case law, the provision is used to penalise behaviours as set out in Article 1(1) of the CFD.</p> <p>Contextual review: a three-step test for balancing 137c with freedom of expression</p> <p>For determining the punishability of an expression under Article 137c of the Criminal Code, the courts must take a suspect's freedom of expression into account. For this purpose, in three decisions in 2001 and 2003, the Dutch Supreme Court developed a method of contextual review consisting of a 'three-step test'¹⁰⁸². This method is consistently used by the courts and it can be generally concluded that the threshold between freedom of expression and criminal conduct is clear. Nevertheless, the determination of the punishable nature of expression remains a highly contextual matter.</p> <p>The cases all concerned the question of whether expression about homosexuals, based on a religious conviction and uttered in public debate, constituted a punishable group insult. The first step of the test examines whether the expression taken in isolation and its direct textual context, thus according to its nature and purport, is insulting. The second step examines whether the broader context – that being to enter into a public debate by proclaiming a religious conviction – can remove the punishable insulting character of the expression. The third step examines whether the expression, notwithstanding its broader context of proclaiming a religious conviction in a public debate, is gratuitously offensive and therefore punishable.</p> <p>In the third case in 2003, the Dutch Supreme Court rejected an appeal against the acquittal by the Court of Appeal on the ground of 137c of the Criminal Code of a reverend for having called homosexuality a 'filthy and vile sin' in a letter published in a regional newspaper. The Supreme Court considered that the court had interpreted the term insulting correctly by deciding that 'the expression, regarded in its context, is evidently directly connected to the suspect's religious conviction and his intent to warn humankind is clear, which is why, for the suspect, the expression is of importance to a public debate.' The terminology used was not gratuitously offensive, because 'in the Bible homophilia is regarded as an 'atrocious' or a 'horrible sin'.</p> <p>This three-step test equally applies to secular political expression and to expression concerning people's race, religion etc. In a recent decision of 16 December 2014, the Supreme Court¹⁰⁸³ annulled an acquittal with regard to homophobic expression uttered in a political context (discussed under Article 137d – <i>infra</i>).</p>

¹⁰⁸² Dutch Supreme Court, crim. ch., 9 January 2001, *Netherlands Jurisprudence* 2001, 203; Dutch Supreme Court, crim. ch., 9 January 2001, *Netherlands Jurisprudence* 2001, 204, annotation De Hullu; Dutch Supreme Court, crim. ch., 14 January 2003, *Netherlands Jurisprudence* 2003, 261, annotation Mevis.

¹⁰⁸³ Dutch Supreme Court, crim. ch. 16 December 2014, *Netherlands Jurisprudence* 2015/108, annotation Rozemond.

<p>Transposing provisions Incitement to hatred, discrimination or violence and its dissemination or distribution</p>	<p>Articles 137d and e of the Criminal Code <i>As higher court decisions often concern both Articles 137d and 137e of the Criminal Code, this row is not broken down per offence provision, but contains reference to the interpretation of both Articles 137d and 137e. Where a decision concerns only one of the provisions, reference to the relevant offence provision is added.</i></p> <p>Contextual review but no three-step test for balancing 137d with freedom of expression Similarly to 137c of the Criminal Code, for the determination of the punishability of expression under Article 137d of the Criminal Code, the context and circumstances in which expression is uttered is of importance. Although the Dutch Supreme Court - with regard to 137d of the Criminal Code - attaches importance to the context of expression, the Court has not explicitly developed a similar three-step test.¹⁰⁸⁴ The question is the extent to which hate speech must be tolerated as a side effect of public debate. In the famous case against Dutch politician Geert Wilders, who was prosecuted for hate speech with regard to his statements on Islam and Muslims, the Amsterdam District Court, for the first time, explicitly applied the method of contextual review by means of a three-step test to 137d of the Criminal Code with regard to incitement to discrimination (<i>infra</i>).</p> <p>Other important case law assessing the borderline between the right of politicians to freedom of expression and the offence provisions</p> <p>1. In 2014, in the Delano Felter case, the Dutch Supreme Court further delineated the freedom of expression of politicians. The Court annulled the decision of the Amsterdam Court of Appeal, in which a local politician had been acquitted of charges of group insult and incitement to discrimination, with regard to homophobic expressions he made during a television interview after a local election debate in Amsterdam. Statements included, 'The problem is that we are confronted with aggressive homosexuals'; 'People with sexual deviations must be tackled by heterosexuals'; and 'People with sexual deviations must be combatted. This is very serious. Those people must bugger off. Well, in any case the homosexual'.</p> <p>The Court of Appeal considered that the politician had not overstepped the limits of free public debate, as his expression was neither threatening nor intimidating, nor did it constitute incitement to hatred or violence. The Supreme Court, however, found that a politician has a responsibility in public debate not to express views that are contrary to the law and the principles of the democratic state. This does not exclusively concern expression that incites hatred, discrimination or violence, but also includes expression that incites intolerance. The Court thereby explicitly referred to the case law of the ECtHR¹⁰⁸⁵.</p> <p>2. In 2009, Dutch politician and leader of the Freedom Party (PVV) Geert Wilders was prosecuted for group insult and incitement to hatred and discrimination, for several statements he made concerning Islam, islamisation and Muslims, in interviews and writings in the media and his film <i>Fitna</i>, which was published on the Internet. One example concerned the phrase 'I'm talking about what comes to the Netherlands and breeds here. If you look at the statistics and its development (...) Muslims will migrate from cities to the countryside. We must stop the tsunami of the islamisation.' In 2011, the Amsterdam District Court acquitted Wilders of all charges¹⁰⁸⁶. In the Wilders case, many central questions about the</p>
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¹⁰⁸⁴ The introduction of such a test for 137d of the Criminal Code is not self-evident. In 1971 the Dutch Government thought that it would go against the spirit of ICERD to introduce a clause that excluded from liability under 137c-d of the Criminal Code, expression aimed at giving an opinion on matters of public interest that is not gratuitously offensive.

¹⁰⁸⁵ Dutch Supreme Court, crim. Ch. 16 December 2014, *Netherlands Jurisprudence* 2015/108, annotation Rozemond.

¹⁰⁸⁶ Amsterdam District Court, 23 June 2011, *jurisprudence no.* BQ9001, *Mediaforum* 2011, p. 280–282, annotation Van Noorloos; *Ars Aequi* 2012, p. 288–289, annotation

interpretation and application of 137d of the Criminal Code were raised, with the decision of the District Court deviating from previous case law on a number of points.

The District Court set strict requirements for the elements of 137d of the Criminal Code. It required that expression must manifestly concern a group on the basis of its religion, and thus strictly distinguished criticism of Islam from criticism of Muslims. With regard to incitement to hatred, the court required that expression must include a seditious, 'reinforcing element' and thereby brought 137d of the Criminal Code close to Article 131, which criminalises the incitement to criminal offences. With regard to incitement to discrimination, the court required that the expression must have more or less directly and explicitly incited to concrete forms of discrimination. Most of Wilders' expressions did not meet these requirements.

Subsequently, with regard to expression that did qualify as incitement to discrimination for the purposes of 137d of the Criminal Code, the District Court applied the method of contextual review, placing Wilders' expression in the broader context of the public debate on Islam, immigration and the multicultural society. The court attached much importance to the perspective of Wilders (who considers his expression necessary to expose social problems) and considered his expression as criticism of government policy or as political proposals that he hopes to realise after he has gained political power in a democratic manner. Proposed political measures that – if put in place – could violate a statutory prohibition of discrimination are thus not punishable per se. On this point, the decision of the court deviates from previous case law.

Finally, the court introduced a new term: despite its broader context within public debate, expression is nevertheless punishable under 137d of the Criminal Code, if it is 'excessive'. The court, however, did not clarify why Wilders' expressions were not, ultimately, considered 'excessive' nor did it provide any further explanation of the term. The strict interpretation of 137d of the Criminal Code by the District Court in the Wilders case thus resulted in a limited scope.

However, on 18 December 2014, the public prosecution announced that they will prosecute Wilders for group insult on the basis of race and incitement to hatred and discrimination, for promising that he would arrange for there to be 'fewer Moroccans' in the Netherlands to his chanting supporters ('fewer, fewer fewer!') in a café during a local election night, as well as to a TV reporter at a market in The Hague. The case may shed further light on the ambiguous relationship between the freedoms and responsibilities of a politician with regard to statements made in political debate. It is anticipated that the Delano Felter decision of the Dutch Supreme Court (supra) will form an important compass.

Indicator 2 - Quantitative evidence																																											
<p>Offence provision and transposing provisions</p> <p>Group defamation; Incitement to hatred, discrimination or violence; Dissemination or distribution of expression</p>	<p>These figures are based on the official overview of discrimination figures of the Public Prosecution Service between 2009-2013 provided in the report 'Figures in Picture' (<i>Cijfers in Beeld 2013</i>) by the National Expert Centre on Discrimination (<i>Landelijk Expertise Centrum Discriminatie – LECD</i>)¹⁰⁸⁷. No official figures for 2014 have yet been made available. The report maps the handling of discrimination facts by the Public Prosecution on the basis of the discrimination articles of the Criminal Code. These include – next to the hate speech bans of Articles 137c, d, and e – Articles 137f and g and Article 429quater of the Criminal Code¹⁰⁸⁸. While the report specifies the number of investigated cases per article, the numbers of prosecuted and adjudicated cases are not specified per article and comprise all discrimination articles. As most cases concern the hate speech bans of Articles 137c, d and e, these latter numbers do give a general estimation of prosecuted and adjudicated cases. The figures are categorised in tables here below.</p> <p>Number of cases investigated: On the basis of Article 137c of the Criminal Code: 125 in 2010; 134 in 2011; 104 in 2012; and 72 in 2013. On the basis of Article 137d of the Criminal Code: 21 in 2010; 13 in 2011; 17 in 2012; 5 in 2013. On the basis of Article 137e of the Criminal Code: 12 in 2010; 13 in 2011; 6 in 2012; and 8 in 2013.</p>																																										
	<table border="1"> <thead> <tr> <th>CASES INVESTIGATED</th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> </tr> </thead> <tbody> <tr> <td>137c</td> <td>125</td> <td>134</td> <td>104</td> <td>72</td> </tr> <tr> <td>137d</td> <td>21</td> <td>13</td> <td>17</td> <td>5</td> </tr> <tr> <td>137e</td> <td>12</td> <td>13</td> <td>6</td> <td>8</td> </tr> <tr> <td>137f</td> <td>0</td> <td>0</td> <td>0</td> <td>1</td> </tr> <tr> <td>137g</td> <td>9</td> <td>8</td> <td>2</td> <td>4</td> </tr> <tr> <td>429quater</td> <td>4</td> <td>4</td> <td>2</td> <td>0</td> </tr> <tr> <td>Total</td> <td>171</td> <td>172</td> <td>131</td> <td>90</td> </tr> </tbody> </table>				CASES INVESTIGATED	2010	2011	2012	2013	137c	125	134	104	72	137d	21	13	17	5	137e	12	13	6	8	137f	0	0	0	1	137g	9	8	2	4	429quater	4	4	2	0	Total	171	172	131
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¹⁰⁸⁷ National Expert Centre on Discrimination (*Landelijk Expertise Centrum Discriminatie – LECD*), 'Figures in Picture 2013' (*Cijfers in Beeld 2013*), unpublished.

¹⁰⁸⁸ Article 137f of the Criminal Code: 'Any person who takes part in, or who extends financial or other material support to activities aimed at discrimination against persons because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding three months or a fine of the second category.' Available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137f/geldigheidsdatum_03-06-2015.

Article 137g of the Criminal Code: '1) Any person who, in the exercise of his office, profession or business, intentionally discriminates against persons because of their race shall be liable to a term of imprisonment not exceeding six months or a fine of the third category. 2) If the offence is committed by a person who makes a habit of it or by two or more persons in concert, a term of imprisonment not exceeding one year or a fine of the fourth category shall be imposed.' Available at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelV/Artikel137g/geldigheidsdatum_03-06-2015.

Article 429quater of the Criminal Code: '1) Any person who, in the discharge of his office, practice of a profession or in conducting a business, discriminates against persons on the grounds of their race, their religion, their beliefs, their sex or their hetero- or homosexual orientation, shall be liable to a term of detention not exceeding two months or a fine of the third category. 2) Any person who, in the discharge of his office, practice of a profession or in conducting a business, undertakes or refrains from undertaking, for no reasonable grounds, certain acts which can have the purpose or effect in regard of persons with a physical, mental or intellectual disability of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the field of politics or economics, in social or cultural matters or any other area of social life, shall be liable to the same punishment.' Available at: http://wetten.overheid.nl/BWBR0001854/DerdeBoek/TitelII/Artikel429quater/geldigheidsdatum_03-06-2015.

Number of cases prosecuted:

Number of cases prosecuted by subpoena: 121 in 2010; 90 in 2011; 71 in 2012; and 48 in 2013.

FORMS OF PROSECUTION	2010	2011	2012	2013
Subpoena	121	90	71	48
Transaction	17	14	17	4
Conditional dismissal	1	10	5	3
Dismissal	31	52	34	30
Penal order by prosecutor	/	/	2	4
Other	/	/	7	1
Total	170	166	136	90

Number of cases adjudicated:

Number of cases adjudicated in total: 120 in 2010; 83 in 2011; 85 in 2012; and 89 in 2013.

CASES ADJUDICATED	2010	2011	2012	2013
Conviction	90	57	66	64
Acquittal	21	22	12	16
Other	9	4	7	9
Total	120	83	85	89

In its fourth report on the Netherlands, ECRI describes the statistics provided by the Dutch Public Prosecution Service as containing data on the number of cases referred to the prosecutor, broken down by type of offence and by year, and the cases which have been settled by the prosecutor or referred to court. They do not, however, contain any data on general offences with a racist motivation, the number of investigations opened by the police in relation to hate speech and hate crime per reference year, nor on the convictions and acquittals, broken down per offence and per reference year. According to ECRI, the lack of data makes it difficult to analyse if there has been any improvement in the response of the criminal justice system to racially motivated offences. ECRI therefore recommends developing a central and consistent monitoring system for the application of criminal law provisions to racism and racial discrimination, as a means of assessing their effectiveness¹⁰⁸⁹.

In a letter on 11 February 2015 to the Dutch Parliament, the Government declared its intention to reinforce its anti-discrimination policy, amongst others, by facilitating the reporting of hate speech and hate crimes with the authorities, and by improving the registration of such offences by the authorities¹⁰⁹⁰. The National Discrimination Prosecutor has declared that a

¹⁰⁸⁹ Report of the European Committee against Racism and Intolerance of 20 June 2013 on the Netherlands, fourth monitoring cycle, CRI(2013)39, p. 17, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

¹⁰⁹⁰ Letter of progress discrimination (*Voortgangsbrief discriminatie*) of the Ministers of Internal Affairs, Social Affairs and Employment, and Security and Justice of 11 February 2015, 2015-0000039792, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2015/02/12/kamerbrief-bij-jaarlijkse-rapportage-discriminatie.html>.

	<p>new system (including data on general offences with a racist motivation) is being developed and will be put in place in 2016¹⁰⁹¹.</p> <p>Given the lack of data and research, it is difficult to assess whether under-reporting is an issue of concern in the Netherlands. At the request of the Ministry of Social Affairs and Employment, the Social and Cultural Planbureau (<i>Sociaal en Cultureel Planbureau – SCP</i>) a scientific government institute, in a report of January 2014, mapped the extent to which inhabitants of the Netherlands experience discrimination. According to the report, 'Experienced discrimination in the Netherlands' (<i>Ervaren discriminatie in Nederland</i>), only one in eight cases of experienced discrimination is reported either to the police and complaints bureau, or internal authorities, or family and friends. Reasons given for not reporting such incidents are: the belief that reporting is no use, uncertainty as to what constitutes discrimination, a search for alternative solutions, fear of reprisal, or lack of awareness on where and how to report such incidents¹⁰⁹².</p>
Indicator 3 - Bottlenecks of practical implementation	
<p>Offence provision Group defamation</p>	<p>Clarity of offence provision: Dutch law is characterised by open wording that allows for a range of interpretation by the Dutch judge in concrete cases. This is reflected in the limited number of Dutch hate speech bans, their sober statutory wording, and their application by the judge. Given the principle of legality, the hate speech bans may be narrowly interpreted</p> <p>Article 137c of the Criminal Code does not specify which forms of expression are 'insulting' by its terms. Case law has, however, established terms of abuse, invectives, vilifications, defamatory statements, Nazi propaganda and Holocaust denial as punishable forms of group defamation. Although the statutory wording of 137c might be unclear regarding the exact scope of the article, this does not appear to hinder its application, as most hate speech cases concern group defamation on the basis of Article 137c</p> <p>Suitability of offence provision to cover online crime: The hate speech offences of Articles 137c-e of the Criminal Code do not distinguish between the media used to express opinions. As they apply equally to all media (newspapers, radio, television, Internet etc.), the offence provisions are, therefore, suitable to cover online crime.</p> <p>Suitability of offence provision to ensure freedom of expression: Article 137c of the Criminal Code does not contain a statutory 'free speech clause' that exempts from liability expression uttered in public debate on a matter of public concern. However, the Dutch Supreme Court has developed a method of contextual review consisting of a 'three-step test' for balancing the application of the offence in Article 137c with the interest of freedom of expression. Pursuant to this test, when expression taken in isolation and its direct textual context, thus according to its nature and significance, is insulting (step 1), the broader context – being to enter into a public debate – can remove the punishable insulting character of the expression (step 2), provided that it is not gratuitously offensive (step 3). In determining the punishability of expression under Article 137c of the Criminal Code, the courts must take a suspect's freedom of expression into account. It follows, therefore, that Article 137c is suitable to ensure freedom of expression.</p> <p>Suitability of offence provision to protect vulnerable groups: Articles 137c-e of the Criminal Code protects people against expression on the grounds of a limited list of protected</p>

¹⁰⁹¹ Stakeholder interview on 1 June 2015 with the National Discrimination Prosecutor.

¹⁰⁹² Social and Cultural Planbureau (*Sociaal en Cultureel Planbureau – SCP*), 'Experienced discrimination in the Netherlands' (*Ervaren discriminatie in Nederland*), The Hague, January 2014, 60-63, available at: http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland.

characteristics. The term 'race' includes national and ethnic origin, colour and descent, even though these characteristics are not summed up in the statutory wording of the offences. This is because the offence provisions implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The term 'race' does not include nationality in the sense of citizenship. With regard to the term 'race', the case law takes the meaning of ICERD as its starting point. Whether expression about foreigners, immigrants or asylum seekers and expression that refers to people's nationality (for example expression about Moroccans, Turks, people from Suriname or the Antilles) in fact targets people on the basis of their national or ethnic background and is therefore punishable under 137c-e, will generally depend on its context.

In its fourth report on the Netherlands, ECRI recommends that the Dutch authorities introduce in Article 137 c-g of the Criminal Code (offence provisions concerning discrimination), 'citizenship' as a protected characteristic¹⁰⁹³. The National Discrimination Prosecutor has declared itself to be against such an introduction. It argues that 1) (expression that makes) distinctions on the basis of nationality must be possible (distinction between EU and non-EU citizens); 2) when expression that refers to people's nationality in fact targets people on the basis of their national or ethnic background, it is punishable under 137c-e; 3) such a characteristic is impossible to enforce as it would bring expression about all kinds of groups such as Greeks, Italians etc. under the scope of Articles 137c-e¹⁰⁹⁴.

The LECD report, 2013, subdivides entries under the discrimination ground of 'race' into 1) skin color, comprising the following groups: Anti-black (African descent); Coloured (Non-African descent); Whites; and 2) National and ethnic descent, comprising the following groups: people from Suriname; people from the Antilles; Turks; Moroccans; Roma/Sinti; Immigrants/ Foreigners; other national or ethnic origin¹⁰⁹⁵. All of these groups are protected against hate speech under Articles 137c-e, depending on the context of expression. In principle, the offence provisions appear to cover all the grounds that should be protected.

Courts have interpreted the above issues in various occasions. The following paragraphs provide examples of relevant court decisions:

Article 137c of the Criminal Code criminalises insult to a group on the basis of its race and national or ethnic background, but not on the basis of its nationality in the sense of citizenship. Case law, however, allows for expression about foreigners, immigrants or asylum seekers to be punishable under Article 137c on the basis of its context.

In 1976, the Dutch Supreme Court found the electoral pamphlets by the extreme right-wing political party NVU comprising the phrase 'The Hague must remain white and safe. Out with the people from Suriname and the Antilles, who sponge off our labour and prosperity (...)' to constitute an insult of a group on the ground of its race. According to the Supreme Court, the indictment clearly concerned 'non-white people from Suriname and the Antilles', thus a group on the ground of its race, which included skin colour next to national and ethnic background and origin, and not its nationality¹⁰⁹⁶.

In 1983, the Dutch Supreme Court considered expressions about 'guest workers, people from Suriname, Hindu, Creoles, Moroccans, Jews and Turks' insulting on the ground of race¹⁰⁹⁷. In addition, in 1990, the Dutch Supreme Court found

¹⁰⁹³ Report of the European Committee against Racism and Intolerance of 20 June 2013 on the Netherlands, fourth monitoring cycle, CRI(2013)39, p. 12, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/netherlands/NLD-CbC-IV-2013-039-ENG.pdf>.

¹⁰⁹⁴ Stakeholder interview with the National Discrimination Prosecutor. LECD report 2013, 22.

¹⁰⁹⁵ LECD report 2013, 22, 29-30.

¹⁰⁹⁶ Dutch Supreme Court, crim. ch., 24 June 1975, *Netherlands Jurisprudence* 1975, 450, annotation Mulder; Dutch Supreme Court, crim. ch., 15 June 1976, *Netherlands Jurisprudence* 1976, 551, annotation Van Veen.

¹⁰⁹⁷ Dutch Supreme Court, crim. ch., 29 March 1983, *Netherlands Jurisprudence* 1983, 532.

	<p>statements about 'foreigners, Turks, Moroccans and others from Africa' to constitute expression about groups of 'a certain ethnic background' and therefore about groups on the ground of their 'race', considering the connection and context in which it was uttered¹⁰⁹⁸.</p> <p>In 2003 the Dutch Supreme Court considered the designation of foreigners, and specifically asylum seekers and refugees, as 'tyrants, thieves, murderers, severe condemned men and rapists' in the context of the entire publication, to constitute an insult of asylum seekers and refugees on the ground of their race. Even in the context of a public debate on an unresolved murder case and the unrest this case had caused in society, the use of such terms was deemed gratuitously offensive¹⁰⁹⁹.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): Article 137c-e of the Criminal Code does not distinguish between different perpetrators. As the Article does not exclude any individual or group of perpetrators, the offence provisions are suitable for the national context. The LECD report, 2013, specifies the discrimination ground, and the place and manner of discrimination facts in the period 2009-2013. In 2013, most suspects (77%) were white individuals. Of these, 49% were mostly suspected of discrimination on the basis of race (49%). 42% of these cases concerned anti-Semitism. The age-bracket with the highest proportion of suspects was the 20-39 years age range (35%). In addition, 82% of the suspects were male. Most discrimination facts were committed on the public road (40%), followed by the Internet (16%); most offences were committed orally (60%), followed by image (16%).¹¹⁰⁰</p> <p>Other shortcomings of applicable offence provision: None identified.</p>
<p>Transposing provision Incitement to hatred, discrimination or violence</p>	<p>Clarity of offence provision: Article 137d of the Criminal Code does not define 'incitement'. Case law of the Supreme Court has established that expression that implicitly, indirectly incites others to hatred, discrimination or violence can already constitute an 'incitement' in accordance with 137d. However, in the case law of lower courts 'incitement' has, on occasion, been limited to explicit, direct calls to precisely-defined acts of discrimination or violence, and its application has been limited to those situations where there is a direct threat to public order or a risk of violent conflict. The required degree of likelihood that expression results in the desired conduct is unclear.</p> <p>The term 'violence' concerns all kinds of violent behaviour, and these are likely to constitute criminal offences. The term 'hatred' is neither defined nor criminalised in Dutch statutory law. In 2002, the Dutch Supreme Court defined 'incitement to hatred' as: to set a group against 'the average, native citizen', thus the rest of the population, in order to discredit it and to incite to hatred against it, which leads to an '<i>intrinsic conflicting dichotomy</i>' in society¹¹⁰¹.</p> <p>Suitability of offence provision to cover online crime: See above, the same as for Article 137c.</p> <p>Suitability of offence provision to ensure freedom of expression: Article 137d of the Criminal Code does not contain a statutory 'free speech clause' that exempts from liability expression uttered in public debate on a matter of public concern. The Dutch Supreme Court has not developed a similar method of contextual review consisting of a 'three- step test' for balancing the application of the offence in Article 137d with the interest of freedom of expression. In determining the punishability of expression under Article 137d of the Criminal Code, however, the</p>

¹⁰⁹⁸ Dutch Supreme Court, crim. ch., 14 March 1989, *Netherlands Jurisprudence* 1990, 29, annotation Schalken.

¹⁰⁹⁹ Dutch Supreme Court, Crim. Ch., 15 April 2003, *Netherlands Jurisprudence* 2003, 334.

¹¹⁰⁰ LECD report 2013, 33, 36, 38, 39, 40.

¹¹⁰¹ Dutch Supreme Court, Crim. Ch., 2 April 2002, *LJN AD8693*, *NJ* 2002, 421, annotation Mevis, para. 3.4.

	<p>Dutch Supreme Court attaches importance to the context of expression. In the application of Article 137d, lower courts apply a contextual review, attaching importance to a suspect's freedom of expression, thereby ensuring that Article 137d is suitable to maintain freedom of expression.</p>
	<p>Suitability of offence provision to protect vulnerable groups: See above, the same as for Article 137c.</p>
	<p>The coverage of vulnerable groups has been interpreted by courts in various occasions. These court decisions are referred to below:</p> <p><i>Interpretation linked to minority vs. majority</i> Article 137d of the Criminal Code does not only protect minorities but also majorities of a particular race or religion against incitement to hatred, discrimination or violence. This results from the Hofstadgroep case. The case concerned a group of Muslim fundamentalists accused of constituting a terrorist cell that propagated the use of violent jihad during meetings and distributed radical fundamentalist writings, mostly written by group member Mohammed Bouyeri – convicted of the murder of the Dutch film director Theo Van Gogh. In 2006, the members were prosecuted for participation in a criminal organisation (140–140a of the Criminal Code) that aimed – amongst other things - to incite criminal offences and violence against the public authorities for the purposes of 131–132 of the Criminal Code, and to incite hatred and violence against disbelievers pursuant to 137d of the Criminal Code.</p> <p>In 2008, the Hague Court of Appeal found that adhering to a radical fundamentalist ideology does not necessarily lead to the use of violence. An individual is free to proclaim his/her opinion that only God should be acknowledged as the sovereign power, democracy is incompatible with Islam and must therefore be rejected and replaced by a system founded on the Sharia. It therefore found that the writings pointing out the obligation to hate disbelievers and to show hostility towards them, or the obligation of true Muslims to distance themselves from them, were not punishable. According to the Hague Court of Appeal, Article 137d of the Criminal Code merely protects certain minority groups on the ground of religion or belief, because of their vulnerability. 'Disbelievers' could hardly be considered as a vulnerable group. By contrast, the writings that glorified or incited to jihad, were punishable under Article 137d or 131 of the Criminal Code¹¹⁰².</p> <p>In 2010, the Supreme Court annulled this decision; stating that neither the wording of the offence nor the drafting history of Article 137d of the Criminal Code, confined its protection to vulnerable minorities¹¹⁰³. The Hague Court had, therefore, wrongly judged 'disbelievers' as not constituting a protected group under 137d of the Criminal Code. After referral, the Amsterdam Court considered that calling on an obligation to show hostility towards disbelievers, to loathe and dislike them and to fight them, dead or alive, equally constituted an incitement to hatred and violence against disbelievers punishable under 137d of the Criminal Code¹¹⁰⁴.</p> <p><i>Interpretation linked to the coverage of migrants</i> On several occasions, the Dutch Supreme Court has upheld a conviction on the ground of 137d/e of the Criminal Code (and/or 137c) with regard to criticism of the government policy on immigration and on foreigners expressed by political parties and/or</p>

¹¹⁰² The Hague Court of Appeal, Crim. Ch., 23 January 2008, *jurisprudence no.* BC2576.

¹¹⁰³ Dutch Supreme Court, Crim. Ch., 2 February 2010, BK5172/ 5174 / 5175 / 5182 / 5189 / 5193 / 5196.

¹¹⁰⁴ Amsterdam Court of Appeal 17 December 2010, *jurisprudence no.* B08032; Dutch Supreme Court, crim. Ch., 3 July 2012, *jurisprudence no.* BW5121/ 5132 / 5136 / 5161 / 5178, NS 2012, 296, RvdW 2012, 1021.

its leaders. The central question brought before the Supreme Court often concerned the question of whether or not opinions expression about foreigners and non-Dutch residents referred to their nationality in the sense of citizenship, or to their national or ethnic descent (discussed under Article c of the Criminal Code supra). In other cases, the central question brought before the Supreme Court concerned the question of whether 137d of the Criminal Code is comprised of only direct incitements of third parties to hate or discriminate against a particular group, or whether it also encompasses attempts to gain votes in order to create discriminatory laws.

In 1995, the Dutch Supreme Court upheld a conviction for group insult and incitement to racial hatred or discrimination on the ground of 137e of the Criminal Code, with regard to 154 folders by the extreme right-wing political party CP'86 about a 'multi-racial hotchpot'. According to the Court, the term 'multi-racial hotchpot', when considered in the context of the other words used in the folders, such as 'illegal foreigners', 'asylum frauds' and 'uncontrollable crime rates', was aimed at the group of ethnic minorities residing in the Netherlands¹¹⁰⁵. Likewise, in 1996, the Dutch Supreme Court annulled an acquittal for group insult and incitement to racial hatred or discrimination on the ground of 137c-d of the Criminal Code, with regard to several statements made by the leader and members of the CD during television shows. These statements claimed that the Dutch society and population had to be protected against the youth gangs of, mixed race marriages with, and affirmative action to the benefit of 'foreigners, minorities and asylum seekers'. According to the Court, liability under 137c-e of the Criminal Code does not depend on the question of whether or not the expression about these latter groups explicitly refers to their race, but on the nature and context of the expression¹¹⁰⁶.

In 1978, the Dutch Supreme Court endorsed a conviction for incitement to discrimination on the ground of 137e of the Criminal Code, with regard to electoral pamphlets by the extreme right-wing political party NVU comprising the phrase 'As soon as the NVU has obtained the political power in our country, it will restore order, starting by expelling all people from Suriname and Turkey and other so-called guest workers from the Netherlands.' The Court rejected the plea made by the NVU that the party only wanted to realise the desired distinction, if that was possible in a lawful manner, and therefore did not incite to discrimination for the purposes of 137e¹¹⁰⁷. Likewise, in 1999 in the Janmaat case, the Dutch Supreme Court confirmed the conviction on the ground of 137d of the Criminal Code, of politician Janmaat, leader of the extreme right-wing political party CD with regard to his statement, 'As soon as we get the possibility and the power, we abolish the multicultural society.' uttered during a demonstration. According to the Court of Appeal, a 'multicultural society' consists of different communities, amongst others ethnic minorities'. The expression thus concerned ethnic and – by extension - racial groups, even though it did not explicitly refer to them. The expression was not punishable in itself, but had to be interpreted in the context of exclamations by other participants in the demonstration, such as 'The Netherlands for the Dutch', 'Our people first' and 'Full is full'. In this context, Janmaat's statement could be not be considered in any other way than aiming to remove ethnic minorities from Dutch society. The expressions taken as a whole had the purport to incite to hatred and discrimination of ethnic minorities. In this case, Janmaat had not addressed himself to the legislator and simply criticised the Government. Janmaat had no parliamentary immunity, as the expression was made outside of Parliament. The Court stated that he had to act with reserve and caution, because of the influence of public opinion and the bad language generally connected with demonstrations. Co-citizens are entitled to protection against the rousing of public sentiment that impairs their human dignity on the ground of Articles 137c-e of the Criminal Code¹¹⁰⁸.

¹¹⁰⁵ Dutch Supreme Court, crim. Ch., 2 May 1995, *Netherlands Jurisprudence* 1995, 621, para. 5.3.

¹¹⁰⁶ Dutch Supreme Court, crim. ch., 16 April 1996, *Netherlands Jurisprudence* 1996, 527, para. 6.4.

¹¹⁰⁷ Dutch Supreme Court, crim. ch., 14 March 1978, *jurisprudence no. AC3463*, *Netherlands Jurisprudence* 1978, 664.

¹¹⁰⁸ Dutch Supreme Court, Crim. Ch., 18 May 1999, *Netherlands Jurisprudence* 1999, 634, annotation 't Hart.

	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): See above, the same as for Article 137c.</p>
	<p>Other shortcomings of applicable offence provision: None identified.</p>
<p>Transposing provision Dissemination or distribution of expression</p>	<p>Clarity of offence provision: Article 137e of the Criminal Code requires that a perpetrator must act 'for reasons other than the provision of factual information'. Additional criteria are further fleshed out by case law. For example, a historical museum is allowed to exhibit Nazi propaganda material. Furthermore, the media is allowed to report certain negative expression of others as part of the news, provided that the reporting itself does not take on a propagandistic character. Scientific institutions can more easily rely on the exception of 'factual information'. For example, the Royal Library is allowed to make discriminatory publications dating from the period 1940-1945 available online¹¹⁰⁹. This element does not hinder the application of the offence in practice.</p>
	<p>Suitability of offence provision to cover online crime: See above, the same as for Article 137c.</p>
	<p>Suitability of offence provision to ensure freedom of expression: Article 137e of the Criminal Code requires that a perpetrator must act 'for reasons other than the provision of factual information'. This clause, amongst others, ensures that the media can report on matters of public concern and that scientific expression is exempted. This ensures that Article 137e is suitable to protect freedom of expression.</p>
	<p>Suitability of offence provision to protect vulnerable groups: See above, the same as for Article 137c.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): See above, the same as for Article 137c.</p>
	<p>Other shortcomings of applicable offence provision: None identified.</p>

¹¹⁰⁹ Nieuwenhuis, AJ., Janssens, ALJ., *Uitingsdelicten* (3rd edn, Deventer, Kluwer, 2011), 234-235.

Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Offence provision Group defamation</p>	<p>After existing in Dutch law for 80 years, and being preserved due to the continued support of the confessional parties, the offence of blasphemy in the former Article 147 of the Criminal Code was abolished on 3 December 2013. When the Senate voted in favour of abolishment of the offence, it adopted a motion that requested the Government to examine the possible amendment of the hate speech bans of Article 137 of the Dutch Criminal Code 'in order to assure that this Article affords a sufficient protection against a serious perceived insult of citizens through insult of a religion, without unduly restricting freedom of expression'¹¹¹⁰. The report subsequently made by the Scientific Research and Documentation Centre (<i>Wetenschappelijk Onderzoeks en Documentatie Centrum – WODC</i>) recommended against such an amendment because 1) no obligations of this nature exist in international law to criminalise these sort of expressions and the hate speech bans of 137 offer sufficient protection to comply with the international obligations; 2) the <i>subjective</i> conception of insult of citizens that is <i>experienced</i> as very serious through the insult of a religion, is incompatible with the <i>objective</i> conception of insult in 137c, which protects people's dignity in the eyes of others (<i>negative imaging</i>). Its criminalisation can conflict with the principle of legality, and does not fit with the premise that criminal law is an <i>ultimum remedium</i>; 3) the criminalisation of insult of religion violates Article 19 ICCPR, which sets the threshold for criminal prohibitions with the 'incitement to discrimination, hostility or violence'¹¹¹¹. Subsequently, no proposals have been made to criminalise the 'insult of religion' under Articles 137c-e of the Criminal Code.</p>
<p>Offence provision and transposing provisions</p> <p>Group defamation and incitement to hatred, discrimination or violence and its dissemination and distribution</p>	<p>In September 2012, a representative of the Freedom Party (<i>Partij voor de Vrijheid – PVV</i>), Driessen, initiated a bill that proposed the entire abrogation of the hate speech bans of Articles 137c-e of the Criminal Code, except for incitement to violence¹¹¹². The bill was not enacted. On 10 October 2014, another representative of the Freedom Party, Van Klaveren, proposed a new, identical bill. According to the explanatory memorandum, the bill primarily aims to restore the '<i>lex certa</i> principle'. In the eyes of the initiator, Articles 137c-d of the Criminal Code are too vague and for this reason must be abrogated. Furthermore, the initiator argues that the interests and values protected in 137c-d of the Criminal Code are already sufficiently protected by the offences of defamation and insult of an individual, incitement to violence, incitement to criminal offences, threatening and factual discrimination¹¹¹³. In its critical advice of 5 December 2014, the Council of State concluded that the bill is contrary to the Netherlands' obligations under international law (EU Council Framework Decision; Additional Protocol to the Convention on Cybercrime; ICERD; and ICCPR)¹¹¹⁴. The bill has not yet been discussed in Parliament</p> <p>In 2006 a draft act¹¹¹⁵ was proposed by the Christian Union (<i>ChristenUnie – CU</i>) to penalise the 'denial of genocides' in a new Article 137da of the Criminal Code¹¹¹⁶. The aim of the draft was to explicitly and separately criminalise revisionism/negationism</p>

¹¹¹⁰ *Kamerstukken I*, 2012–2013, 32203, A; *Kamerstukken I*, 2013–2014, 32203, C; *Handelingen I*, 2013–2014, no. 10, item 2; *Handelingen I*, 2013–2014, no. 10, item 12.

¹¹¹¹ Scientific Research and Documentation Centre (*Wetenschappelijk Onderzoeks en Documentatie Centrum – WODC*), *Criminalising 'insult of religion' (Strafbaarstelling 'belediging van geloof')*, The Hague: Boom Lemma Uitgevers 2014.

¹¹¹² *Kamerstukken II*, 33369, no. 1–2.

¹¹¹³ *Kamerstukken II*, 34051, no. 1-2; 3, p. 3–7.

¹¹¹⁴ *Kamerstukken II*, 34051, no. 4–5.

¹¹¹⁵ *Kamerstukken II* 2005-2006, 30579, no. 1-3.

¹¹¹⁶ Proposed Article 137da of the Criminal Code (*Artikel 137da Wetboek van Strafrecht*) criminalised: 'any person who publicly – orally, in writing or by portrayal – denies or minimises, approves or justifies genocides in a gross manner, (1) either with the malicious intent to incite to hatred, discrimination or violence against persons or property on the ground of their race, religion or belief, gender or homosexual orientation or physical, psychical or mental handicap, (2) or with the knowledge or reasonable suspicion that he thereby insults a group of people on those same discriminatory grounds.'

	<p>in the light of an effective fight against racist and xenophobic acts, and thereby to contribute to a clear and consistent regulation in this field. The draft constituted an addition to the existing hate speech bans, but was not to be considered as an extension of the existing law¹¹¹⁷. The legislative proposal was severely criticised by the Council of State (<i>Raad van State</i>) and rejected by a majority in Parliament in 2011¹¹¹⁸, which agreed that the case law associated with Articles 137c and d ensures that they are sufficient the purposes of new Article 137da. As the latter offence required that a perpetrator must have the malicious intent to incite to hatred, discrimination or violence or that a suspicion exists that the expression is insulting, its scope seemed to fall entirely under existing Articles 137 c and d. In its fourth country report on the Netherlands, adopted on 20 June 2013, ECRI considers that, given the eminently preventive character of criminal law provisions, the above-mentioned behaviour (i.e. revisionism/negationism) should be clearly provided for by statute and recommends including it in the Dutch Criminal Code as per ECRI's General Policy Recommendation No. 7¹¹¹⁹.</p>
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3.2 Effectiveness of the legislation transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
<p>Transposing provisions of Article 6 of the AMSD</p> <p>(Group defamation and incitement to hatred, discrimination or violence and its dissemination or distribution)</p>	<p>Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>). The higher court decisions quoted under Section 3.1 do not concern the provision of audio-visual media services.</p> <p>There are no decisions of the Dutch Supreme Court concerning group defamation, incitement to hatred, discrimination or violence, or its dissemination, committed by audio-visual media service providers (Article 137c-e of the Criminal Code).</p>
<p>Transposing provisions of Articles 3(2) and 3(4)(a)(i) of the ECD</p> <p>(Criminal liability of intermediaries and civil liability of service providers)</p>	<p>There are no higher court decisions assessing the relationship of the transposing provisions of Articles 3(2) and 3(4)(a)(i) of ECD with freedom of expression.</p> <p>There are no decisions of the Dutch Supreme Court concerning the <i>criminal liability</i> of intermediaries for group defamation, incitement to hatred, discrimination or violence, or its dissemination (Article 54a of the Criminal Code). There are no decisions of the Dutch Supreme Court concerning the <i>civil liability</i> of ISPs for group defamation, incitement to hatred, discrimination or violence, or its dissemination (Article 6:196c of the Civil Code).</p>

¹¹¹⁷ *Kamerstukken II*, 2005–2006, 30579, no. 3, p. 1–3; *Kamerstukken II*, 2008–2009, 30579, no. 7, p. 4.

¹¹¹⁸ *Kamerstukken II* 2005-2006, 30579, no. 5; *Handelingen II* 13 September 2011, 105-15, p. 64.

¹¹¹⁹ Report of the European Committee against Racism and Intolerance of 20 June 2013 on the Netherlands, fourth monitoring cycle, CRI(2013)39, p. 12, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>

Indicator 2 - Quantitative evidence																																																																																			
<p>Transposing provisions of Article 6 of the AMSD</p> <p>(Group defamation and incitement to hatred, discrimination or violence and its dissemination or distribution)</p>	<p>Number of decisions condemning ISPs:</p> <p>Data are not available. The hate speech bans of Articles 137c-e of the Criminal Code do not distinguish between different perpetrators or media used to express opinions. The LECD report, 2013, does not specify – with regard to the number of investigated, prosecuted and adjudicated cases - the different perpetrators or media used to express opinions. However, the LECD report, 2013, does specify the location where the crimes were committed¹¹²⁰. These latter numbers give a general estimation of notified discrimination facts committed in the press/ the media and on the Internet. The figures are categorised in the table here below.</p> <table border="1"> <thead> <tr> <th>Where</th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> </tr> </thead> <tbody> <tr> <td>Internet</td> <td>19</td> <td>11</td> <td>9</td> <td>14</td> </tr> <tr> <td>Press (media)</td> <td>3</td> <td>1</td> <td>2</td> <td>4</td> </tr> <tr> <td>Of total</td> <td>170</td> <td>169</td> <td>114</td> <td>88</td> </tr> <tr> <td>In %</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>Internet</td> <td>11%</td> <td>7%</td> <td>8%</td> <td>16%</td> </tr> <tr> <td>Press (media)</td> <td>2%</td> <td>1%</td> <td>2%</td> <td>5%</td> </tr> <tr> <td>Of total</td> <td>100%</td> <td>100%</td> <td>100%</td> <td>100%</td> </tr> </tbody> </table> <p>The Dutch Complaints Bureau for Discrimination on the Internet (<i>Meldpunt Discriminatie op het Internet – MDI</i>) deals with most hate speech on the Internet, rather than the Public Prosecution. In its annual reports, the MDI maps its handling of notifications of discrimination on the basis of Articles 137c-g of the Criminal Code¹¹²¹. The figures are categorised in tables here below.</p> <p>Overview MDI figures 2010-2014</p> <p>In 2014, the MDI received 1,179 notifications about 1,117 expressions. The MDI found 493 of 1,117 expressions to be punishable. 445 of which were removed from the platform where it was published upon request by the MDI, a rate of 90%. The MDI reported eight expressions to the Public Prosecution.</p> <table border="1"> <thead> <tr> <th></th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> <th>2014</th> </tr> </thead> <tbody> <tr> <td>Notifications</td> <td>1,174</td> <td>1,039</td> <td>925</td> <td>809</td> <td>1,179</td> </tr> <tr> <td>Expressions</td> <td>1,572</td> <td>1,624</td> <td>1,035</td> <td>924</td> <td>1,117</td> </tr> <tr> <td>Punishable ex 137c-g CC</td> <td>684</td> <td>651</td> <td>449</td> <td>489</td> <td>493</td> </tr> <tr> <td>Removed upon request</td> <td>520</td> <td>363</td> <td>303</td> <td>377</td> <td>445</td> </tr> <tr> <td>Removal-percentage</td> <td>86%</td> <td>71%</td> <td>78%</td> <td>87%</td> <td>90%</td> </tr> <tr> <td>Reports to the PP</td> <td>4</td> <td>14</td> <td>18</td> <td>2</td> <td>8</td> </tr> </tbody> </table>	Where	2010	2011	2012	2013	Internet	19	11	9	14	Press (media)	3	1	2	4	Of total	170	169	114	88	In %					Internet	11%	7%	8%	16%	Press (media)	2%	1%	2%	5%	Of total	100%	100%	100%	100%		2010	2011	2012	2013	2014	Notifications	1,174	1,039	925	809	1,179	Expressions	1,572	1,624	1,035	924	1,117	Punishable ex 137c-g CC	684	651	449	489	493	Removed upon request	520	363	303	377	445	Removal-percentage	86%	71%	78%	87%	90%	Reports to the PP	4	14	18	2	8
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¹¹²⁰ LECD, 'Annual Report 2013' (*Jaarverslag 2013*), 33-34.

¹¹²¹ MDI, 'Annual Reports 2010-2014' (*Jaarverslagen 2010-2014*), available at: <http://www.meldpunt.nl/site/page.php?lang=&pageID=34> .

Handling of notifications by MDI 2010-2014

	2010	2011	2012	2013	2014
No request: action by third parties	4	0	6	9	15
No request: action by notifier	2	0	0	0	1
No request: referral to foreign MDI	13	5	10	9	9
No request: email/spam	4	2	0	0	1
No request: location abroad	33	19	14	18	13
No request: already removed	1	12	12	2	19
Request: to foreign provider	10	6	30	0	13
Request: to Dutch provider	8	0	1	2	10
Request: to author or owner	588	510	356	433	415
Included in existing report file	21	97	18	14	35
Direct report to PP, extreme expression	0	0	2	2	1
Total	684	651	449	489	531

Notified expressions per characteristic 2010-2014

MOST COMMON CATEGORIES	2010	2011	2012	2013	2014
Anti-Semitism	414	252	285	250	328
Discrimination against Muslims	276	319	196	222	219
Discrimination against Moroccans	210	141	132	111	103
Discrimination against other origin	202	520	151	97	93
Anti-black racism or Afro-phobia	164	182	99	193	255
Discrimination on basis of sexual preference	61	88	62	55	33
Discrimination against Turks	22	44	27	18	41

Punishable expressions per characteristic in 2014

ANTISEMITISM	TOTAL	PUNISHABLE
Anti-Semitism	328	188
Of which Holocaust denial	55	45
RELIGION	TOTAL	PUNISHABLE
Discrimination against Muslims	219	118
Christians or other	14	1
RACE	TOTAL	PUNISHABLE
Anti-black racism or Afro-phobia	255	93

	Discrimination against Moroccans	103	41		
	Discrimination against Turks	41	23		
	Discrimination against Asians	14	6		
	Discrimination against Roma and Sinti	14	6		
	Discrimination against natives	74	5		
	OTHER GROUNDS	TOTAL	PUNISHABLE		
	Sexual preference	33	12		
	Sex	5	1		
	Handicap	6	0		
	Age	4	0		
Notified expressions per medium/ location 2010-2014					
	2010	2011	2012	2013	2014
Websites	1117	1132	769	745	384
Social Media				343	597
Web and discussion fora	242	308	119	103	68
Weblogs	112	83	53	41	22
Video	55	64	18	14	1
Email/spam	29	13	23	13	11
Other	9	1	22	8	34
Transposing provisions of Articles 3(2) and 3(4)(a)(i) of the ECD (Criminal liability of intermediaries and civil liability of service providers)	No data available.				
Indicator 3 -Bottlenecks of practical implementation					
Transposing provisions of Article 6 of the AMSD and Articles 3(2) and 3(4)(a)(i) of the ECD Group defamation and incitement to hatred, discrimination or violence and its dissemination or distribution Criminal liability of intermediaries and civil liability of service providers	Clarity of the transposing provision: Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>). Information provided under section 3.3, indicator 3, concerning Articles 54a of the Criminal Code and 6:196c of the Civil Code (<i>infra</i>).				
	Suitability of offence provision to protect vulnerable groups: Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>). Information provided under section 3.3, indicator 3, concerning Articles 54a of the Criminal Code and 6:196c of the Civil Code				

	<i>(infra)</i> .
	Suitability of offence provision to ensure freedom of expression: Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>). Information provided under section 3.3, indicator 3, concerning Articles 54a of the Criminal Code and 6:196c of the Civil Code (<i>infra</i>).
	Other shortcomings of applicable offence provision: Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>). Information provided under section 3.3, indicator 3, concerning Articles 54a of the Criminal Code and 6:196c of the Civil Code (<i>infra</i>).
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing provisions of Article 6 of the AMSD and Articles 3(2) and 3(4)(a)(i) of the ECD</p> <p>Group defamation and incitement to hatred, discrimination or violence and its dissemination or distribution</p> <p>Criminal liability of intermediaries and civil liability of service providers</p>	<p>Information provided under section 3.1 concerning Articles 137c-e of the Criminal Code (<i>supra</i>).</p> <p>Information provided under section 3.3, indicator 4, concerning Articles 54a of the Criminal Code and 6:196c of the Civil Code (<i>infra</i>).</p>

3.3 Effectiveness of the rules regulating publishers' responsibility

Indicator 1 - National case law on the interaction of provision with freedom of expression	
<p>Criminal liability of publishers and printers</p>	<p>There are no decisions of the Dutch Supreme Court concerning the relationship of the rules regulating the criminal liability of publishers or printers for hate speech published via the printed press, with freedom of expression. Articles 53-54 of the Criminal Code afford publishers and printers immunity from prosecution, under certain conditions, with regard to hate speech published in the printed press. It is, as a general rule, the authors of expression, such as the author of a column in a newspaper, the person interviewed in a magazine, the writer of a novel, who are prosecuted. This case law has been discussed in para. 3.1 (<i>supra</i>).</p> <p>Regarding the publication of hate speech through other means, see the ISP information in the tables under Sections 3.1 and 3.2.</p>

Criminal liability of intermediaries	There are no decisions of the Dutch Supreme Court concerning the relationship of the rules regulating the criminal liability of intermediaries on the basis of Article 54a of the Criminal Code for hate speech published on the Internet, with freedom of expression.																																								
Civil liability of service providers	There are no decisions of the Dutch Supreme Court concerning the relationship of the rules regulating the civil liability of intermediaries for hate speech published on the Internet, with freedom of expression.																																								
Self-regulation	There are no decisions of the Dutch Supreme Court on the relationship of applicable self-regulation with the freedom of expression.																																								
Indicator 2 - Quantitative evidence																																									
Criminal liability of publishers and printers	<p>Number of decisions condemning publishers:</p> <p>Data are not available. The hate speech bans of Articles 137c-e of the Criminal Code do not distinguish between different perpetrators or media used to express opinions. The LECD report, 2013, does not specify – with regard to the number of investigated, prosecuted and adjudicated cases - the different perpetrators or media used to express opinions. However, it does specify the location where the crimes are committed¹¹²². These numbers give a general estimation of notified discrimination facts committed in the press/ the media and on the Internet. The figures are categorised in the table here below.</p> <table border="1"> <thead> <tr> <th>Where</th> <th>2010</th> <th>2011</th> <th>2012</th> <th>2013</th> </tr> </thead> <tbody> <tr> <td>Internet</td> <td>19</td> <td>11</td> <td>9</td> <td>14</td> </tr> <tr> <td>Press (media)</td> <td>3</td> <td>1</td> <td>2</td> <td>4</td> </tr> <tr> <td>Of total</td> <td>170</td> <td>169</td> <td>114</td> <td>88</td> </tr> <tr> <td>In %</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>Internet</td> <td>11%</td> <td>7%</td> <td>8%</td> <td>16%</td> </tr> <tr> <td>Press (media)</td> <td>2%</td> <td>1%</td> <td>2%</td> <td>5%</td> </tr> <tr> <td>Of total</td> <td>100%</td> <td>100%</td> <td>100%</td> <td>100%</td> </tr> </tbody> </table>	Where	2010	2011	2012	2013	Internet	19	11	9	14	Press (media)	3	1	2	4	Of total	170	169	114	88	In %					Internet	11%	7%	8%	16%	Press (media)	2%	1%	2%	5%	Of total	100%	100%	100%	100%
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Of total	100%	100%	100%	100%																																					
Criminal liability of intermediaries	No data available.																																								
Civil liability of service providers	No data available.																																								
Self-regulation	Data are provided under section 3.2, indicator 2, in the overview of the MDI figures from 2010-2014 (<i>supra</i>).																																								
Indicator 3 - Bottlenecks of practical implementation																																									
Criminal liability of publishers and printers	No aspects can be identified which hinder the application in practice of the provision regulating publishers' criminal responsibility.																																								
Criminal liability of intermediaries	<p>Competence of the public prosecutor to issue a NTD order: an unclear legal basis.</p> <p>The legal basis of the competence of the public prosecutor to issue an order to take down illegal information – as referred to in Article 54a of the Criminal Code – is unclear. The legislative history of Article 54a refers to Article 125o of the Code of Criminal Procedure that provides the legal ground to block access or remove content in an 'automated work' (para. 2.4 <i>supra</i>), but this Article has a number of limitations which render it unsuitable as a legal basis for a NTD order: Article 125o is only applicable to a 'search'; the article concerns making data inaccessible by the Public Prosecutor or the Examining Magistrate themselves (not</p>																																								

¹¹²² LECD, 'Annual Report 2013' (*Jaarverslag 2013*), 33-34.

	<p>a third party)); and the inaccessibility must be reversed as soon as the interest in the criminal investigation no longer requires it. In addition, Article 125o does not provide the basis for an order to a third party to make data inaccessible. Certain specialists suggest that the competence of the public prosecutor to issue a NTD order must have a clear, independent, explicit statutory legal basis¹¹²³.</p> <p>Exercise of the competence to issue an NTD order and compliance by the ISP: system of safeguards</p> <p>Key criteria for the exercise by the Public Prosecutor of the competence to issue a NTD order are: 1) the authorisation of the Examining Magistrate; 2) proportionality and subsidiarity. The National Discrimination Prosecutor has termed Article 54a of the Criminal Code 'a nearly dead letter' arguing that it is almost impossible to obtain an authorisation from the Examining Magistrate for a NTD order, because the prosecutor cannot provide the information and evidence requested by the Examining Magistrate, who is cautious in imposing such a far-reaching measure¹¹²⁴. It appears that for the regulation of the NTD order to be effective, it should at least provide feasible requirements concerning information and evidence provided by the prosecution to obtain authorisation from the Examining Magistrate. Certain specialists argue that it is unmanageable for the Public Prosecution to order NTD orders with regard to all crimes. They suggest that guidelines should be developed indicating for the types of offences for which an NTD order is desirable¹¹²⁵.</p> <p>Compliance with an NTD order by an ISP can conflict with the customer/user who can claim damages as a result of the inaccessibility of his/her information. Given the intrusive character of making information inaccessible, it is important that the ISP or the customer/ user can appeal this measure. However, as the legal basis of the competence of the public prosecutor to issue an NTD order is unclear, the applicable system of safeguards also becomes unclear. Certain specialists suggest that the regulation of the NTD order should provide a clear statutory system of safeguards, including the possibility of complaint, the reversal of inaccessibility of data, judicial review in court, and compensation of costs¹¹²⁶.</p>
<p>Civil liability of service providers</p>	<p>No aspects can be identified which hinder the application in practice of the provision regulating publishers' civil responsibility.</p>
<p>Self-regulation</p>	<p>Statutory Notice-and-Take-Down-system in national law</p> <p>Other than the competence of the public prosecution to issue an NTD order, there are no statutory NTD procedures in Dutch law that give further substance to the responsibilities of ISPs. However, there exists a self-regulatory NTD system. Pursuant to the NTD Code, a notifier can request a provider to remove illegal information. A provider who is notified of alleged illegal content must: 1) evaluate whether or not the content is punishable, which may be particularly difficult in the area of 'hate speech'; 2) balance the interest of the harm suffered by a notifier resulting from the alleged unlawful content, with the interest of the freedom of expression of a customer / user if that content appears to be legal but is nonetheless removed. As the law and the case law do not provide detailed criteria for this balancing act, it is up to ISPs themselves to determine their 'duty of care' on a case-by-case basis. If an ISP does not take adequate action it can be held liable for damages suffered by the interested parties.</p> <p>Certain specialists argue that ISPs are thus forced to 'take the seat of the judge'¹¹²⁷. Some advocate the development of a statutory notice-and-take-down system, for example, inspired by the so-called 'DMCA-procedure' in the United States that gives</p>

¹¹²³ Schellekens, M.H.M., Koops, B.J., Teepe, W.G., An analysis of Article 54a of the Criminal Code in light of a Notice-and-Take-Down-regime (*Wat niet weg is, is gezien. Een analyse van art. 54a Sr in het licht van een Notice- and-Take-Down-regime*), University of Tilburg, November 2007, 42-44.

¹¹²⁴ Stakeholder interview on 1 June 2015 with the National Discrimination Prosecutor.

¹¹²⁵ Schellekens, Koops, & Teepe 2007, 44.

¹¹²⁶ Schellekens, Koops, & Teepe 2007, 44.

¹¹²⁷ Van der Sloot, B., Beyond responsibility: the ISP on the seat of the judge, (*De verantwoordelijkheid voorbij: De ISP op de stoel van de rechter*), Tijdschrift voor Internetrecht, no. 5 November 2011, 36-40.

	<p>more legal certainty¹¹²⁸. The American Digital Millennium Copyright Act (DMCA)¹¹²⁹ provides that an ISP must act upon any request of a third party. A provider can rely on the correctness of a request and cannot be held liable for possible damages. After a provider has taken down the information, it must notify the customer / user as soon as possible. The customer can prove the lawful character of the information within a set period of time, following which the take down is reversed until a final decision is issued by a judge, if the matter has been pursued in the courts by the notifier.</p> <p>Other: European Framework for a Notice-and-Take-Down-procedure</p> <p>Given the transnational nature of the Internet, material that is available in the Netherlands and punishable according to Dutch law will often be hosted abroad. The Public Prosecutor has no competence to issue an NTD order directed at a foreign ISP that has no branches in the Netherlands. However, a provider that offers his services on the Dutch territory has to comply with Dutch law. Therefore, a foreign ISP can be held criminally liable for the content on a website it hosts, if the provider is knowledgeable about the content, even if the Public Prosecutor is not competent to issue an NTD order. In cases where the hosting website or ISP is located outside the Netherlands, there are limited possibilities to enforce cooperation. It is stated that, in practice, the order by the Public Prosecution is only enacted in cases where it can be enforced. However, the fact that the prosecutor cannot enforce the NTD order does not change the criminal responsibility of the foreign provider if it is aware of the illegal content and refuses to take it down. In that case, a foreign provider can be prosecuted in the Netherlands¹¹³⁰. The National Discrimination Prosecutor has declared that foreign providers are rarely prosecuted¹¹³¹. Rather, the Public Prosecution shall request assistance from the authorities where the ISP is located. However, such a request must normally have an international legal basis, and the foreign state shall only cooperate if its law also provides for an NTD competence with similar terms and conditions. Certain specialists therefore recommend developing an international General Framework for a Notice-and-Take-Down-procedure, for example in the context of the European Union or the Council of Europe¹¹³². The Public Prosecution can order a Dutch ISP to block the <i>transmission</i> of illegal information <i>hosted</i> abroad, but specialists question whether this is technically feasible and efficient.</p>
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Criminal liability of publishers and printers	No reference to new legislation / amendment to existing legislation was identified.
Criminal liability of intermediaries	<p>Concept New Act Computercriminality III</p> <p>The concept for a New Computercriminality Act III (<i>Wet Computercriminaliteit III</i>)¹¹³³ proposes to introduce into the Code of Criminal Procedure a new Article 125p that provides an independent, explicit statutory basis for the competence of the Public Prosecutor to issue an NTD order. This competence already existed on the basis of Article 54a of the Criminal Code, but the Article raised so many legal concerns that, in practice, courts would not always accept an NTD order (<i>supra</i>). Article 54a is preserved and slightly adapted to clarify the (immunity from) liability of ISPs. According to proposed Article 125q, the Public Prosecutor can give an NTD order to an 'electronic communication provider' (ECP) to 'take all reasonable measures' to disable information in order to stop or prevent criminal offences, upon authorisation of the Examining Magistrate. The Public Prosecutor</p>

¹¹²⁸ Schellekens, Koops, & Teepe 2007, 44; Van Eijk, N.A.N.M., Van Engers, T.M., Wiersma, C., Jasserand, C.A., Abel, L.L.M., 'Moving Towards Balance, A study into duties of care on the Internet, Institute for Information Law (IViR), Leibniz Center for Law', University of Amsterdam, 2010, 2.

¹¹²⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860.

¹¹³⁰ Smit, A.M.G., Criminal law on cybercrime in the Netherlands, AIDP Country Report, Electronic Review of the IAPL, 2014, RH-11:1, 21-22.

¹¹³¹ Stakeholder interview on 1 June 2015 with the National Discrimination Prosecutor.

¹¹³² Smit 2014, 37; Schellekens, Koops, & Teepe 2007, 45.

¹¹³³ The concept for a New Computercriminality Act III is published on: <https://www.internetconsultatie.nl/computercriminaliteit>.

	<p>allows the ECP to be heard, as a 'suspect' it has the right to an attorney during a court hearing on the imposed measure. The NTD order applies to all criminal offences in the Dutch Criminal Code.</p> <p>The Explanatory Memorandum to the draft act explains that this order can also be directed to website administrators, even though this does not arise from the statutory wording of Article 125p¹¹³⁴. Interested parties can file a complaint with the court if they disagree with the imposed measure. The competence of the Public Prosecution to issue an NTD order is considered to be a temporary measure that can be reviewed by the court at the end of a trial. If the information is hosted abroad, the Public Prosecution can order <i>access providers</i> to make the information inaccessible in the Netherlands by blocking IP addresses for as long as the information remains available. Certain specialists conclude that this competence of the Public Prosecution under certain circumstances can result in an obligation for access providers to filter specific websites¹¹³⁵. The draft act also proposes to introduce a new Article 125q into the Code of Criminal Procedure, pursuant to which the Public Prosecutor can impose a penalty where an ECP does not comply with the NTD order.</p>
Civil liability of service providers	No reference to new legislation / amendment to existing legislation was identified.
Self-regulation	No reference to any amendment to existing self-regulation was identified.

¹¹³⁴ The Explanatory Memorandum to the draft act for a New Computercriminality Act III is published on: <https://www.internetconsultatie.nl/computercriminaliteit>.

¹¹³⁵ Oerlemans, J.J., From a "Take down"-order to Internetfilters for police purposes? (*Van een "Take down"-bevel naar internetfilters voor politiedoeleinden?*), posted on 23 July 2013 at: <http://oerlemansblog weblog.leidenuniv.nl/2013/07/23/van-een-take-down-bevel-naar-internetfilters-voor-politiedoeleinden/>. Earlier: Oerlemans, J.J., The draft act reinforcing the fight against computercriminality, a closer look (*Het conceptwetsvoorstel versterking bestrijding computercriminaliteit nader bezien*), Tijdschrift voor Internetrecht No. 5 October 2010, 148-152.

SWEDEN

1 National context

Every year, the Swedish Council for Crime Prevention (*Brottsförebyggande Rådet*), an agency under the Ministry of Justice, focusing on research and development within the judicial system and working towards reducing crime by disseminating knowledge on crime and crime prevention, compiles statistics and produces annual reports on hate crimes, including hate speech. According to these statistics, the most common hate crimes are xenophobic/racist in nature, with the majority being Afrophobic, Islamophobic and anti-Roma. In 2013, of the 5,508 reported hate crimes, 3,999 were xenophobic, 625 related to sexual orientation, 327 were Islamophobic, 321 were Christophobic or targeting other religions, 193 were anti-Semitic and 45 were transphobic¹¹³⁶. Statistics on hate crimes reported in 2015 are not yet available¹¹³⁷ thus, it is not yet possible to say whether hate crime incidents have become more frequent in the aftermath of this year's terror attacks.

Provisions relating to hate speech can be found in the Constitution¹¹³⁸ and the Criminal Code¹¹³⁹. Hate speech is punishable under the respective laws (i.e. the Constitutional Acts and the Criminal Code), depending on the forum in which it takes place. Hate speech in certain printed matter, such as newspapers and magazines, and in radio, TV and certain other recordings, is covered by two Constitutional Acts (which form part of the Swedish Constitution) – the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. All other hate speech crimes are covered by the provisions of the Criminal Code. Agitation against a national or ethnic group, which includes threatening, or expressing contempt for, a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation, is punishable under the Swedish Constitution in the case of published printed matter and audiovisual media, and under the Criminal Code in other cases. There are no specific provisions on hate speech against individuals, but, rather, these fall under the provisions on defamation and insulting behaviour, or the provisions on unlawful threat and molestation. There are no specific offence provisions on hate crime. As described under Section 2.1, certain motives, however, are considered as aggravating circumstances in other type of crimes, and these cases are considered hate crimes in the Swedish context.

In 2010, a new provision on aggravating circumstances was added to the Criminal Code. This provision states that, in assessing the criminal value of a crime, it shall be considered as an aggravating circumstance if the motive for the crime was to aggrieve a person or an ethnic group by reasons of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance. The latest amendments to the specific provisions on hate crimes in the Criminal Code and the Constitutional Acts were made in 2002.

No major problems have been identified with the current legislation. However, there might be some difficulties with proving motive in hate speech cases against individuals, as hate speech legislation is not applicable to cases against individuals, but only against groups. In

¹¹³⁶ The Swedish Council for Crime Prevention, 'Hate Crimes 2013' (*Brottsförebyggande rådet, Hatbrott 2013*), (2013), available at: https://www.bra.se/download/18.3a6ad56314700900bc155c/1408536192247/2013_14_Hatbrott_2013.pdf.

¹¹³⁷ At least not on the date of submission of the report to the European Parliament.

¹¹³⁸ Swedish Constitution: the Freedom of the Press Act (*tryckfrihetsförordningen, 1949:105*), chapter 7, Article 4, para 11; chapter 7, Article 6; the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen, 1991:1469*), chapter 5, Article 1.

¹¹³⁹ The Criminal Code (*Brottsbalken, 1962:700*), chapter 16, section 8.

such cases, the provisions on aggravating circumstances apply where the motive for the crime was to "aggrieve a person or an ethnic group by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance". Such motives can be difficult to prove. Although freedom of expression enjoys a strong protection in Swedish law, the legislator has, nonetheless, chosen to restrict this freedom when it comes to hate speech.

2 Legal framework

2.1 General description of the legislation applicable to hate crime and hate speech

Hate crimes are not expressly regulated in Swedish legislation. Instead, they constitute one of the motivating aspects behind other crimes. For the purposes of hate crime statistics, the Swedish Council for Crime Prevention uses the following definition of a hate crime: "Crimes against an individual, a group of individuals, property, an institution or a representative for one of these, motivated by fear of, or hostility or hate towards the victim based on skin colour, nationality or ethnic background, religious belief, sexual orientation or transgender identity or expression, and which the perpetrator believes, knows or perceives the individual or group of individuals to have."¹¹⁴⁰. Hate speech in the Swedish legislation falls under the offence of agitation against a national or ethnic group.

The Swedish Constitution (*Grundlagen*) is the highest law. It consists of four fundamental laws: the Instrument of Government (*regeringsformen, 1974:152*)¹¹⁴¹, the Act of Succession (*successionsordningen, 1810:0926*)¹¹⁴², the Freedom of the Press Act (*tryckfrihetsförordningen, 1949:105*)¹¹⁴³ and the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen, 1991:1469*)¹¹⁴⁴. No laws may contradict the Constitution. The four main sources of law are legislation, preparatory legislative materials, case law and literature. Legislation is the primary source of law, while preparatory legislative materials, case law and literature are used to interpret the law on a case-by-case basis. Government Bills are the most important preparatory documents for interpreting legislation.

Provisions relating to hate crime and hate speech can be found in the Constitution and the Criminal Code (*Brottsbalken 1962:700*)¹¹⁴⁵. Hate speech is punishable under different laws depending on the forum in which it is committed. Hate speech in certain printed matters, such as newspapers and magazines, and in radio, TV and certain other recordings is covered by two Constitutional Acts – the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. All other forms of hate speech, as well as hate crime, are covered by the provisions of the Criminal Code. Hate speech is defined under the offence provision of agitation against a national or ethnic group. Agitation against a national or ethnic group, which includes threatening or expressing contempt for a national, ethnic or other such group of persons

¹¹⁴⁰ The Swedish Council for Crime Prevention, 'Hate Crimes 2013' (*Brottsförebyggande rådet, Hatbrott 2013*), (2013), available at: https://www.bra.se/download/18.3a6ad56314700900bc155c/1408536192247/2013_14_Hatbrott_2013.pdf.

¹¹⁴¹ The Instrument of Government (*regeringsformen, 1974:152*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Kungorelse-1974152-om-beslu_sfs-1974-152/.

¹¹⁴² The Act of Succession (*successionsordningen, 1810:0926*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Successionsordning-18100926_sfs-1810-0926/.

¹¹⁴³ The Freedom of the Press Act (*tryckfrihetsförordningen, 1949:105*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Tryckfrihetsforordning-19491_sfs-1949-105/.

¹¹⁴⁴ The Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen, 1991:1469*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Yttrandefrihetsgrundlag-1991_sfs-1991-1469/?bet=1991:1469.

¹¹⁴⁵ The Criminal Code (*Brottsbalken 1962:700*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Brottsbalk-1962700_sfs-1962-700/.

with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation is punishable under the Swedish Constitution in the case of published printed matter and audiovisual media, and under the Criminal Code in all other cases. There are no specific provisions on hate speech against individuals, but, rather, they fall under the provisions on defamation and insulting behaviour, or the provisions on unlawful threat and molestation.

In 2010, a new provision on aggravating circumstances was added to the Criminal Code. This provision states that, in assessing the criminal value of a crime, it shall be considered an aggravating circumstance if the motive for the crime was to aggrieve a person or an ethnic group by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance. Crimes committed with these aggravating motives are considered hate crimes in the Swedish context. No other amendments to the provisions on hate crimes in the Criminal Code and the Constitutional Acts have been made since 2002.

There are no specific provisions on liability relating to hate crimes or hate speech in administrative or civil law in Sweden. However, victims of hate speech can file civil claims for the compensation of their damages under the general civil law rules, as set out in the Tort Liability Act (*Skadeståndslagen (1972:207)*)¹¹⁴⁶.

2.2 Transposition of Council Framework Decision 2008/913/JHA

	Offence provision 1 Incitement against a population group (<i>hets mot folkgrupp</i>) The provision on incitement against a population group was adopted in 2002, thus before the adoption of the CFD. The provision has not been amended with the purpose of transposing the CFD.
Transposes Art. 1(1)(a) of CFD	Yes <i>Note: The provisions only apply to population groups and not to individuals.</i>
Transposes Art. 1(1)(b) of CFD	Yes
Transposes Art. 1(1)(c) of CFD	No, the article has not been transposed into Swedish legislation.
Transposes Art. 1(1)(d) of CFD	No, the article has not been transposed into Swedish legislation.
Transposes Art. 4 of CFD	No
Legal reference to provision	Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 4, para 11 ¹¹⁴⁷ , Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 6 ¹¹⁴⁸ ,

¹¹⁴⁶ The Tort Liability Act (*Skadeståndslagen (1972:207)*), available at: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Skadestandslag-1972207_sfs-1972-207/.

¹¹⁴⁷ The Swedish Constitution: the Freedom of the Press Act is available in English at: <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>.

	<p>Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1¹¹⁴⁹, The Criminal Code, chapter 16, section 8¹¹⁵⁰</p>
<p>Definition of offence</p>	<p>In Sweden, the commission of the offence in question (including the constitutional offences) gives rise to criminal liability. The Constitution does not make reference to the sanctions to be imposed. These are provided for in the Criminal Code.</p> <p><u>Swedish Constitution: the Freedom of the Press Act, Chapter 7, Article 4, para 11:</u> With due regard to the purpose of freedom of the press for all under Chapter 1, the following acts shall be deemed to be offences against the freedom of the press if committed by means of printed matter and where punishable under law: [...] 11. agitation against a population group, whereby a person threatens or expresses contempt for a population group, or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation; [...]</p> <p><u>Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 6:</u> Provisions of law relating to penal sanctions for offences under Articles 4 and 5 apply in cases where the offence is deemed to be an offence against the freedom of the press. [...]</p> <p><u>Swedish Constitution: the Fundamental Law on Freedom of Expression, Chapter 1, Article 9:</u> The provisions of this Fundamental Law concerning radio programmes apply also [...] when the editorial office of a printed periodical or radio programme, an enterprise for the professional production of printed matter, or matter equated with printed matter under the Freedom of the Press Act, or of technical recordings, or a news agency, with the aid of electromagnetic waves: 1. supplies to the general public, in response to a special request, information taken from a database the content of which can only be modified by the person carrying on the activity, either by direct transfer, or indirectly by the production of a technical recording, written document or picture; 2. otherwise, in accordance with a prior agreement, supplies information to the public by direct transfer from a database under point 1; or 3. by means of public playback, supplies information to the public from a database under point 1.</p> <p>The provisions of paragraph one apply also to any other person holding a valid certificate of no legal impediment to publication in respect of such activity. The issue of such a certificate requires that: – the activity is organised in the manner referred to in paragraph one and transmissions emanate from Sweden; – a qualified responsible editor has been appointed and has accepted the appointment; and – the activity has a name such that it cannot easily be confused with the name of another activity under this Article. [...]</p>

¹¹⁴⁸ Ibid.

¹¹⁴⁹ Ibid.

¹¹⁵⁰ Criminal Code (Act 1962:700), available at: <http://www.notisum.se/rnp/sls/lag/19620700.htm>. This provision was last amended in 2002. The preparatory work and comments can be found in Government Bill 2001/02:59. The main issues in the Bill were the introduction of a penal provision on serious hate crimes, the inclusion of sexual orientation in the provision on hate crimes, and the repealing of the Act on political uniforms. The Government Bill is available (in Swedish only) at: <http://www.regeringen.se/content/1/c4/09/18/177a98a8.pdf>.

	<p><u>Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1:</u> The acts listed as freedom of the press offences in Chapter 7, Articles 4 and 5 of the Freedom of the Press Act shall be regarded as freedom of expression offences if they are committed in a radio programme or technical recording and are punishable under law. [...]</p> <p><u>The Criminal Code, chapter 16, section 8:</u> A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation, shall be sentenced for agitation against a national or ethnic group to imprisonment for at most two years or, if the crime is petty, to a fine. If the crime is serious, the punishment shall be imprisonment between six months and four years. [...]</p>
Penalties foreseen	<p>Type of penalty: imprisonment or fine. The fines are specified under the general rules in chapter 25 of the Criminal Code. According to the general rules, fines should be awarded for between 30 to 150 days, each daily fine is between SEK 50 (EUR 5) and SEK 1,000 (EUR 100). Level of penalty: up to 4 years</p>
Protected characteristic(s)	<p>The protected characteristics are: national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation</p> <p><i>Note: The provisions only apply to population groups and not to individuals. Hate speech against individuals falls under the provisions on defamation or insulting language, which do not contain any reference to protected characteristics (the Criminal Code, chapter 5, section 1 stipulates that "A person who points out someone as being a criminal or as having a reprehensible way of living, or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be sentenced for defamation to a fine." And chapter 5, section 3 stipulates that "A person who vilifies another by an insulting comment or accusation, or by other infamous conduct towards him, shall be sentenced, if the act is not punishable under Section 1 or 2, for insulting behaviour to a fine.")</i></p>
Online crime	<p>Yes. If the offence has been committed online on a website that is considered to be a database in accordance with the Swedish Constitution (the Fundamental Law on Freedom of Expression, Chapter 1, Article 9), then the liability lies under the provisions of the Constitution. If the website is not considered such a database, then the liability lies under the Criminal Code, in accordance with the provisions referenced above.</p>

Explanation on the transposition of Article 4 of Council Framework Decision 2008/913/JHA

The first option under the CFD has been transposed into Swedish legislation by Chapter 29, section 2, paragraph 7 of the Criminal Code.

- **First option provided by Article 4 (i.e. racist and xenophobic motivation to be considered as an aggravating circumstance)**

The Swedish Criminal Code consists of three parts: a General Part (*allmänna bestämmelser*), which contains the general principles of Swedish criminal law, describing what a crime and criminal sanctions are and the applicability of Swedish law; a part on the Crimes (*om brotten*) that contains the specific offence provisions; and a third part on the Sanctions (*om påföljderna*), which describes the different sanctions.

The second part, on Crimes, does not contain a general provision stating that racist and xenophobic motive should be considered as an aggravating circumstance by the courts, nor is reference to racist or xenophobic motivation as an aggravating circumstance explicitly contained in any of the specific offence provisions.

The third part, on Sanctions, contains a general provision on hate crime as an aggravating circumstance. Chapter 29, section 2, para 7 stipulates that:

- "In assessing the criminal value, the following aggravating circumstances shall be given special consideration in addition to what is applicable to each and every type of crime:
[...]
7. whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance."
- **Second option provided by Article 4 (i.e. racist or xenophobic motivation considered by courts in the determination of penalties)**

The second option has not been transposed.

2.3 Transposition of the Audiovisual Media Services Directive and the Electronic Commerce Directive

Legal definition of provision transposing Article 6 of AMSD	
<p>Transposing provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p>	<p><u>Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 4, para 11:</u> With due regard to the purpose of freedom of the press for all under Chapter 1, the following acts shall be deemed to be offences against the freedom of the press if committed by means of printed matter and if they are punishable under law: [...] 11. agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation. [...]</p> <p><u>Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 6:</u> Provisions of law relating to penal sanctions for offences under Articles 4 and 5 apply also in cases where the offence is deemed to be an offence against the freedom of the press. Provisions concerning private claims on account of offences against the freedom of the press are laid down in chapter 11. If the defendant is convicted of an offence specified in Article 4, para 14 or 15, and the printed matter is a periodical, an order may be issued, on request, for the verdict to be inserted in the periodical.</p> <p><u>Swedish Constitution: the Fundamental Law on Freedom of Expression [<i>audiovisual media</i>], Chapter 1, Article 6:</u> This Fundamental Law applies to transmissions of radio programmes which are directed to the general public and intended for reception</p>

using technical aids. Such transmissions of radio programmes are understood to include also the provision of live broadcasts and recorded programmes which are specifically requested, provided the starting time and the content cannot be influenced by the receiver. In the case of radio programmes transmitted by satellite and emanating from Sweden, the provisions of this Fundamental Law concerning radio programmes in general apply.

[...]

Swedish Constitution: the Fundamental Law on Freedom of Expression, Chapter 1, Article 9:

The provisions of this Fundamental Law concerning radio programmes apply also [...] when the editorial office of a printed periodical or radio programme, an enterprise for the professional production of printed matter, or matter equated with printed matter under the Freedom of the Press Act, or of technical recordings, or a news agency, with the aid of electromagnetic waves:

1. supplies to the general public, in response to a special request, information taken from a database the content of which can only be modified by the person carrying on the activity, either by direct transfer, or indirectly by the production of a technical recording, written document or picture;
2. otherwise, in accordance with a prior agreement, supplies information to the public by direct transfer from a database under point 1; or
3. by means of public playback, supplies information to the public from a database under point 1.

The provisions of paragraph one apply also to any other person holding a valid certificate of no legal impediment to publication in respect of such activity. The issue of such a certificate requires that:

- the activity is organised in the manner referred to in paragraph one and transmissions emanate from Sweden;
- a qualified responsible editor has been appointed and has accepted the appointment; and
- the activity has a name such that it cannot easily be confused with the name of another activity under this Article.

[...]

Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1:

The acts listed as freedom of the press offences in Chapter 7, Articles 4 and 5 of the Freedom of the Press Act shall be regarded as freedom of expression offences if they are committed in a radio programme or technical recording and are punishable under law. [...]

Swedish Constitution: the Fundamental Law on Freedom of Expression, Chapter 7, Article 1:

The rules laid down in Chapter 9, Articles 1 to 4 of the Freedom of the Press Act concerning supervision and prosecution shall apply also with regard to radio programmes and technical recordings, and freedom of expression cases. The Chancellor of Justice may delegate a public prosecutor to act as prosecutor in a freedom of expression case which concerns liability or confiscation on account of unlawful portrayal of violence, agitation against a population group, offences against civil liberty, unlawful threats, threats made against a public servant or perversion of the course of justice committed in a technical recording. The right to institute legal proceedings may not, however, be delegated in cases where the matter concerns the freedom of expression offences agitation against a population group or offences against civil liberty.

In the case of radio programmes, the period within which legal proceedings may be instituted for a freedom of expression offence is six months from the date on which the programme was broadcast, or, where the matter concerns the making available of information under Chapter 1, Article 9, paragraph one, points 1 and 2, from the date on which the information was no longer kept available. For instances of such public playback from a database under Chapter 1, Article 9, paragraph one, point 3, the period is six months from the date of the playback.

In the case of technical recordings, the period is one year from the date on which the recording was published. In the case of recordings

	<p>which lack any of the information prescribed under Chapter 3, Article 13, however, the rules laid down in law concerning the period during which an action may be brought apply, with the limitation that legal proceedings may not be instituted more than two years from the date on which the recording was brought to the attention of the Chancellor of Justice.</p> <p><i>Analysis of the legal provisions:</i></p> <p>Provisions relating to audiovisual media can be found in the Fundamental Law on Freedom of Expression, and referenced provisions in the Freedom of the Press Act of the Swedish Constitution. Chapter 5, Article 1 of the Fundamental Law on Freedom of Expression states that the acts listed as freedom of the press offences in chapter 7, Articles 4 and 5 of the Freedom of the Press Act shall also be regarded as freedom of expression offences if they are committed in a radio programme or technical recording, and are punishable under law. Chapter 1, Article 9 explains in more detail what is meant by radio programmes and technical recordings, which also includes audiovisual media services provided by media service providers. In accordance with chapter 1, Article 6 of the Fundamental Law on Freedom of Expression, references in this Law to radio programmes apply also to television programmes and to the content of certain other transmissions.</p> <p>The provisions only apply to population groups and not to individuals. Crimes against individuals fall under the provisions on defamation or insulting language, which do not contain any reference to protected characteristics. The relevant offences in question can be found in the Freedom of the Press Act, chapter 7, Article 4. They are:</p> <ul style="list-style-type: none"> - agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation, - defamation, whereby one person alleges that another is criminal, or blameworthy in his or her way of life, or otherwise communicates information liable to expose another to the contempt of others, and, if the person defamed is deceased, the act causes offence to his or her survivors, or might otherwise be considered to violate the sanctity of the grave except, however, in cases in which it is justifiable to communicate information in the matter, having regard to the circumstances, and proof is presented that the information was correct, or that there were reasonable grounds for the assertion; - insulting language or behaviour, whereby one person insults another by means of offensive invective, or allegations, or other insulting behaviour towards him or her; - unlawful threats, whereby one person threatens another with a criminal act, in a manner liable to create serious fears in the person threatened for the safety of his or her person, or property, or that of another; <p>The rules laid down in chapter 7, Article 1 of the Freedom of the Press Act concerning supervision and prosecution shall apply also with regard to radio programmes and technical recordings, and freedom of expression cases. This means that there are no special provisions on the supervision and prosecution in the Fundamental Law on Freedom of Expression, as the provisions laid down in the Freedom of the Press apply. Thus, the liability provisions relating to printed media apply to freedom of expression cases. The same applies to court proceedings. Chapter 7, Article 6 of the Freedom of the Press Act stipulates that provisions of law relating to penal sanctions for offences under Articles 4 and 5, apply also in cases where the offence is deemed to be an offence against the freedom of the press. The Constitutional Acts do not contain any provisions on penalties. The provisions on liability for hate crimes under the Constitutional Acts correspond to the provisions on liability for hate crimes under the Criminal Code, thus, the same penalties are applied as in the Criminal Code.</p>
Legal definition of provision transposing Articles 3(2) and 3(4)(a)(i) of ECD	
Transposing provision 1	The Act on Electronic Commerce does not establish a liability scheme <i>per se</i> . It allows courts or author authorities, however, to apply certain restrictions described below. These restrictions are administrative in nature.

<p>Free movement and the applicability of Swedish law <i>(fri rörlighet och tillämpning av svensk rätt)</i></p>	<p>The Act on Electronic Commerce and Other Information Society Services¹¹⁵¹, section 3: 'A service provider established in another EEA state than Sweden, has the right to, notwithstanding Swedish legislation within the coordinated field, provide information society services to recipients in Sweden. A court or another authority may, however, pursuant to a law, take a measure that restricts the free movement of such service, if it is necessary to protect: 1. public order and safety, 2. [...] 3. [...] Such measures must be directed towards a specific service that damages, or risks causing damage, to any one of these protected interests. The measure must be proportionate to the interest to be protected.'</p> <p>Swedish law does not specifically mention hate crimes, and only provides the possibility of restricting the freedom to provide information society services in cases where it is necessary to protect "public order and safety".</p>
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2.4 Responsibility for publishing hate speech

Media responsibility for publishing hate speech is regulated by the Swedish Constitution through the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The Freedom of the Press Act is the only legislation applicable to offences relating to the abuse of freedom of the press and related complicity (ch.1 Art.3), but, since the Act does not contain any provisions on penalties, the penalties set out in the Criminal Code for corresponding crimes are applicable (ch.7 Art.6). The Criminal Code regulates criminal liability and no self-regulation on this matter for, or by, relevant professional associations, could be identified. The Freedom of the Press Act applies to printed matter (ch.1 Art.5) that has been published (ch.1 Art.6). It also applies to periodicals and to some of the audiovisual media listed in the Fundamental Law on Freedom of Expression (ch.1 Art.7). The Act defines a periodical as "any newspaper, magazine or other such printed matter, which, according to its publishing schedule, is intended for publication in at least four issues or instalments a year, appearing at different times under a particular title, and posters and supplements pertaining thereto" (ch.1 Art.7). Publishers can also be held liable under the general rules on damages in civil law. While there are no corresponding rules in administrative law, the criminal and civil liability schemes can be applied in parallel.

Provisions on liability for audiovisual media (i.e. sound radio, television and certain similar transmissions, public playback of material from a database, and films, video recordings, sound recordings and other technical recordings, ch.1 art.1 of the Fundamental Law on Freedom of Expression) can be found in the Fundamental Law on Freedom of Expression. These provisions apply to transmissions of radio programmes (references to radio programmes apply also to television programmes, and to the content of other certain transmissions of sound, pictures

¹¹⁵¹ The Act on Electronic Commerce and Other Information Society Services (*Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster*), available at: <http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-2002562-om-elektronisk-sfs-2002-562/>.

or text made using electromagnetic waves, ch.1 Art.1) which are directed to the public and intended for reception using technical aids. Such transmissions also include live broadcasts and recorded programmes which are specifically requested, provided the starting time and the content cannot be influenced by the receiver (ch.1 Art.6). The Fundamental Law on Freedom of Expression applies to technical recordings which have been published (ch.1 Art.10).

Responsibility

The liability for offences against the freedom of the press committed by means of a **periodical** lies with the responsible editor. If a deputy had been notified and was acting as responsible editor, the deputy is liable (ch.8 Art.1). If no certificate of no legal impediment to publication existed at the time when the periodical was published, or if the responsible editor was no longer qualified, or his or her appointment as responsible editor been terminated, the **owner** is liable. The owner is also liable if the editor was appointed for appearance's sake, or was otherwise clearly not in possession of the powers of an editor (ch.8 Art.2). If it is not possible to identify the owner at the time when the periodical was published, the printer is held liable in place of the owner (ch.8 Art.3). If the periodical lacks information concerning the name of the printer, or if such information is known by the disseminator to be incorrect and it is not possible to identify the printer, the disseminator is liable in place of the printer (ch.8 Art.4).

The liability for offences against the freedom of the press committed by means by a **non-periodical** lies with the author. However, the author is not liable if the matter was published without his/her consent, or if his/her name or pseudonym was used without his/her consent (ch.8 Art.5). If the author cannot be held liable, then the liability falls on the editor. However, the editor is not liable if his/her name or pseudonym was used without his/her consent (ch.8 Art.6). If neither the author nor the editor is liable, or if he or she was deceased when the matter was published, **the publisher** is liable. The publisher is the person who has undertaken to print and publish the writings of another person or persons (ch.8 Art.7). If there is no known publisher, the printer is held liable (ch.8 Art.8). If the printer cannot be identified, then the liability falls on the distributor (ch.8 Art.9).

Circumstances which would result in liability of a different person can only be taken into consideration prior to the main hearing (ch.8 Art.11). When determining the liability, it is deemed that the person held liable had the knowledge of the content (ch.8 Art.12). If no one can be held liable, or if the person who is liable cannot be summoned in Sweden, the prosecutor or the plaintiff may apply to have the printed matter confiscated instead of instituting legal proceedings (ch.9 Art.5). The provisions on liability (ch.8 Arts. 1, 2, 5, 6, 7, 10, 11 and 12) also apply to matter printed abroad and published in Sweden, unless otherwise provided in the Freedom of the Press Act (ch.13 Art.1). With regard to matter printed abroad, the provisions on liability apply to the person who caused the matter to be delivered for dissemination in Sweden, or, if the person cannot be held liable, the person who is deemed to be the disseminator (ch.13 Art.4).

In the case of **audiovisual media**, the provisions on liability under freedom of expression are to be applied restrictively and, where there is doubt, the defendant shall rather be acquitted than convicted (ch.1 Art.5 of the Fundamental Law on Freedom of Expression). There is no corresponding provision in the Criminal Code, which means that the provisions on liability in the Fundamental Law on Freedom of Expression

are more restrictive. The provisions on liability do not apply to transmissions from abroad or transmissions by satellite that do not emanate from Sweden (ch.1 Art.7), nor do they apply to live broadcasts of current events, or of religious services, or public performances arranged by some person other than the person operating the programme service (ch.1 Art.8).

Criminal liability for freedom of expression offences committed in a radio programme or technical recording rests with the responsible editor. If a deputy is acting in place of the responsible editor, liability rests with the deputy (ch.6 Art.1). If the liability cannot be attributed to the editor (e.g. if there was no editor or if the editor had been appointed for appearance's sake), liability rests with the person responsible for appointing the editor. If there is no information on the identity of the editor or owner, the liability rests with the disseminator. This applies also if the information provided with the recording implies that the person who caused the technical recording to be made is domiciled abroad, or if the information is incorrect and this fact is known to the disseminator (ch.6 Art.2). If a freedom of expression offence has been committed and no one is deemed liable, the public prosecutor or the plaintiff may apply to have the recording confiscated instead of instituting legal proceedings (ch.7 Art.2).

Penalties

The rules laid down in the Freedom of the Press Act concerning supervision and prosecution apply also to radio programmes and technical recordings, and freedom of expression cases (ch.7 Art.1 of the Fundamental Law on Freedom of Expression). This means that there are no special provisions on supervision and prosecution in the Fundamental Law on Freedom of Expression, as the provisions laid down in the Freedom of the Press apply. Thus, the liability provisions relating to printed media also apply to freedom of expression cases. Since neither the Freedom of the Press Act nor the Fundamental Law on Freedom of Expression contain any provisions on penalties, the penalties set out in the Criminal Code for corresponding crimes are applicable (ch.7 Art.6 of the Freedom of the Press Act).

Agitation against a national or ethnic group by the threatening or expression of contempt with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation is punishable with a fine or imprisonment for up to two years. If the crime is serious, the punishment is imprisonment between six months and four years (ch.18 Art.8 of the Criminal Code).

Since the provision on agitation against a national or ethnic group only applies to groups of people but not to individuals, there are a number of other provisions in the Criminal Code that can be applied (e.g. defamation or insulting behaviour). None of these provisions contain any of the special characteristics listed in the agitation provision. However, in assessing the criminal value of the crime, special consideration shall be given to whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance (ch.20 Art.2).

A person who points out another as being a criminal, or as having a reprehensible way of living, or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be sentenced for **defamation** to a fine (ch.5 Art.1). If the crime is serious, the

punishment shall be a fine or imprisonment for up to two years (ch.5 Art.2). In some cases, hate crimes against individuals can fall under this provision, when pointing out a person as being a criminal or as having a reprehensible way of living. However, the main provision relating to hate crimes against individuals is the provision on insulting behaviour. A person who vilifies another by an insulting comment or accusation, or by other infamous conduct towards him, shall be sentenced for **insulting behaviour** to a fine. If the offence is serious, the punishment is a fine or imprisonment for up to six months (ch.5 Art.3).

3 Effectiveness of the Legal Framework

3.1 Effectiveness of the legislation transposing Council Framework Decision 2008/913/JHA

Indicator 1 - National case law on hate crime/hate speech vs. freedom of expression	
<p>Transposing provision 1</p> <p>Agitation against a national or ethnic group</p> <p><u>Criminal Code, chapter 16, section 8:</u> A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation, shall be sentenced for agitation against a national or ethnic group to imprisonment for at most two years or, if the crime is petty, to a fine. If the crime is serious, the punishment shall be imprisonment between six months and four years. [...]</p>	<p><u>The higher court decision interpreting the relationship between the applicable offence provision and freedom of expression did not concern the media, multimedia or press. Therefore, as described under Section 2.1, only the offence provision set out in the Criminal Code is relevant. In other words, with respect to the constitutional provisions, no relevant higher court decision has been identified.</u></p> <p><u>Case NJA 2005 p.805¹¹⁵²</u></p> <p>During a sermon, a priest made several derogatory statements against homosexuals. In its judgment, the Supreme Court stated that there is no difference between derogatory statements against homosexuals and any other protected groups under the hate speech provisions. The Court stated that current legislation on hate speech contains limitations so that not every statement containing the views of a particular group, and not every expression of contempt, is punishable by law. The Court then referred to the preparatory work for the hate speech legislation, stating that for criminal liability, it should be required that the statement exceeds the limit for an informed and responsible discussion about the group in question. When considering whether an action constitutes criminal incitement against homosexuals, the statement must always be assessed in its context, as in other cases concerning hate speech, and the motives when the statement was made must also be taken into account.</p> <p>In addition, the Court stated that there must be a certain degree of impunity for critical statements. The decisive factor should be how the message would appear in an objective assessment. It must be clear that the intention of the perpetrator was to spread a message that expresses threats or contempt for the group in question. Here, the Court also recalled the so called 'instruction' in the Constitutional Acts. It means that the person judging in freedom of expression or press freedom cases, or watching over these freedoms, must take into account that they constitute the foundations of a free social order, pay attention to the purpose of the statement rather than to how it was made, and rather free than punish. Citing and discussing religious works does not fall under criminal liability. However, it should not be permitted to use religious texts to threaten or express contempt against homosexuals, just as it is not permitted to use these texts to threaten or express contempt against Christians or Muslims.</p> <p>The Court asked whether, on account of freedom of religion and freedom of expression, the word contempt should be given a</p>

¹¹⁵² NJA 2005 p.805 available at: <https://lagen.nu/dom/nja/2005s805>.

more restrictive interpretation than that apparent from the law and its preparatory work. When assessing the circumstances of the case, the Court found no reason why the hate crime provision in ch.15 s.8 of the Criminal Code should not be applicable in this case, or that the provision would be contrary to the Constitution. The Court found that the freedom of expression provision does not prevent the prosecution of the priest, and that there were no other provisions in the Constitution that would prevent the priest from being found guilty of hate speech.

The Court then referred to ECHR cases on the application of Article 9 of the European Convention and the protection of freedom of expression of thoughts and ideas based on religion (e.g. Kokkinakis vs. Greece). The Supreme Court stated that the decisive factor appeared to be whether the restriction of the priest's freedom to preach was necessary in a democratic society, which necessitated an assessment of whether the restriction was proportionate to the protected interest. In assessing such a matter, the Member State enjoys a certain margin of appreciation (e.g. Gunduz vs. Turkey). Further, the ECHR has, in a number of cases, highlighted the importance of the freedom of speech in political situations (e.g. Jerusalem vs. Austria). This can also be applied in religious cases. At the same time, the Supreme Court said, the ECHR has equally stated that the person making the statements has certain responsibilities, e.g. not to make statements that are unjustifiably offensive.

The Supreme Court also stated that Articles 9 (*on freedom of thought, conscience and religion*) and 10 (*on freedom of expression*) of the European Convention not only protect the content of opinions and information, but also the manner in which they are spread (e.g. Jersild vs. Denmark, Manoussakis vs. Greece). It then stated that when the ECHR assesses whether an alleged limitation is necessary in a democratic society, it assesses whether the limitation responds to an urgent societal need, if it is proportionate to the legitimate aim to be met, and whether the reasons that the national authorities indicate to justify it are relevant and sufficient (e.g. Sunday Times vs. Great Britain). According to the Supreme Court, the ECHR believes it may be necessary to punish and even prevent hate speech, i.e. expressions which spread, advocate, encourage or justify hatred based on intolerance. An overall assessment of the circumstances shall be made, including the content of what had been said and the context in which the statements were made, to determine whether the restriction is proportionate in relation to the purpose and the reasons for it are relevant and sufficient. The nature and severity of the punishment shall also be considered.

The Supreme Court found that, in an overall assessment of the circumstances, and in light of the ECHR practice, it was clear that in this case it was not a question of hate speech, as the priest's statements could not be considered as encouraging or justifying hatred against homosexuals. The Supreme Court stated that under such circumstances it was likely that the ECHR, after an examination of a restriction of the priest's right to preach his Bible-based view that a conviction would constitute, would find that such a limitation was not proportionate, and thereby would constitute a violation of the European Convention. The Supreme Court stated that the expression 'contempt' in the provision on agitation against a national or ethnic group, could not be considered to have such a distinct meaning that a real conflict of laws would arise here between the European Convention and the Criminal Code. This means that the liability provision of agitation against a national or ethnic group should, in this case, be interpreted more narrowly than the preparatory work suggests, so that it aligns with the Convention. Such an application in line with the Convention does not allow, in this case, for a conviction against the priest under the current circumstances of the case.

The Supreme Court found that, taking all of the above into consideration, including the judgments of the ECHR, the priest's statements did not constitute hate speech, and the case was dismissed.

This interpretation of the relationship between applicable legislation and the freedom of expression is consistently used by

	courts.
<p>Transposing provision 2</p> <p>Aggravating circumstances</p> <p>Criminal Code, chapter 29, section 7: 'In assessing the criminal value, the following aggravating circumstances shall be given special consideration in addition to what is applicable to each and every type of crime: [...] 7. whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance.'</p>	<p>No court decisions from the Supreme Court assessing the relationship between hate crime as an aggravating circumstance and freedom of expression, have been identified.</p>
Indicator 2 - Quantitative evidence	
<p>Transposing provisions 1 and 2</p>	<p>As explained under Sections 2.1 and 2.2, criminal penalties are also imposed in cases where the offence realises the conducts set out in the Constitutional Acts. Thus, only statistics linked to crimes are referred to below.</p> <p>Crime statistics are compiled by the Swedish National Council for Crime Prevention (<i>Brottsförebyggande rådet, Brå</i>), and it compiles statistics on hate speech and hate crime annually. For hate crimes, including hate speech, Brå also reports on the number of cases prosecuted. The latest report is from 2014 and contains statistics on the previous year (2013). The reports contain statistics on police reports with identified hate crime motives, as well as self-reported exposure to hate crime. There are no corresponding statistics on case law; however the Swedish judiciary is currently developing systems for more comprehensive information on hate crimes¹¹⁵³.</p> <p>The statistics are compiled with information collected from police reports with identified hate crime motives, including self-reported exposure to hate crime based on data from the Swedish Crime Survey (SCS). In the last year, statistics have also been drawn from the Politicians' Safety Survey (PTU). The Police computer systems for recording crimes do not have specific crime codes for hate crimes. Although the computer system does provide space to mark offences as a potential hate crime,</p>

¹¹⁵³ Swedish National Council for Crime Prevention, 'Hate Crime 2013', (2013), p.126, available at: https://www.bra.se/download/18.5e2a4a6b14ab166759928c/1421243287010/2014_14_Hatbrott_2013.pdf.

this is something that is often overlooked. For these reasons, a special method is used by the Swedish National Council for Crime Prevention in order to compile the statistics¹¹⁵⁴.

Number of cases investigated:

There are no statistics on the number of cases investigated, only on the number of reported hate crimes (including hate speech)¹¹⁵⁵ and on the number of cases that have been solved. The statistics are based on the number of reported hate crimes. These numbers do not exclusively reflect cases linked to the relevant transposing measures. The **number of cases reported** is:

2010: 5,139
 2011: 5,493
 2012: 5,518
 2013: 5,508

Type of motive	2010	2011	2012	2013
Xenophobic/racist	3,786	3,936	3,979	3,999
Anti-Semitic	161	194	221	193
Islamophobic	272	278	306	327
Christianophobic and other anti-religious	119	179	258	321
Sexual orientation	770	854	713	625
Transphobic	31	52	41	45
Total	5,139	5,493	5,518	5,508

Table 1¹¹⁵⁶

The numbers indicated in the table above are relatively high, despite the fact that under-reporting is an issue of concern in Sweden¹¹⁵⁷. This suggests that, in reality, the number of hate crime incidents is even higher than the numbers indicated in the table above.

Number of cases prosecuted:

The statistics pertain to *all* hate crimes reported, which may also include provisions which might not be considered as transposing provisions. The same categories are used for statistics on reported and prosecuted cases.

Only a small number of the cases reported lead to person-based clearances, which means that "a person was linked to the crime by means of a decision to prosecute, or by acceptance of prosecutor fines, or been granted a waiver of prosecution"¹¹⁵⁸. Currently, only statistics up to 2012 are available.

¹¹⁵⁴ Ibid. p.19.

¹¹⁵⁵ Ibid. p.41. These numbers also include hate crimes on the basis of sexual orientation. In 2008, the definition of hate crimes was widened by Brå to include more groups of people, e.g. hate crimes against the majority (which would, for example, include a hate crime against a Christian Swede on the basis of race or religion) or hate crimes against people who the offender believes represent a group of people, e.g. journalists or politicians.

¹¹⁵⁶ Ibid.

¹¹⁵⁷ Victoria Kawesa, 'Racist violence in Sweden', available at: <http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Sweden%20-online.pdf>.

¹¹⁵⁸ Ibid. p.10.

	<p>In 2010, of the 347 person-based clearances, 326 led to a decision to prosecute, 14 led to a summary imposition of a fine, and in 7 cases the prosecutor decided not to prosecute.</p> <p>In 2011, of the 344 person-based clearances, 321 led to a decision to prosecute, 11 led to a summary imposition of a fine, and in 12 cases the prosecutor decided not to prosecute.</p> <p>In 2012, of the 161¹¹⁵⁹ person-based clearances, 151 led to a decision to prosecute, 8 led to a summary imposition of a fine, and in 2 cases the prosecutor decided not to prosecute.</p> <p>Number of cases adjudicated: There are currently no statistics on the number of cases adjudicated.</p> <p>With respect to Offence provision 2, Swedish judges are not required to indicate whether they have taken into consideration the provision on aggravating circumstances (which is used in hate crime offences against individuals). Thus, it is not possible to get any statistics on the number of cases¹¹⁶⁰.</p>
Indicator 3 - Bottlenecks of practical implementation	
Transposing provisions 1 and 2	<p>Clarity of offence provision: The offence provision on hate speech in the Freedom of the Press Act, Chapter 7, Article 4, para 11 and the corresponding provision in ch.16 s.8 of the Criminal Code, although clear, only applies to agitation against a national or ethnic group (offence provision 1). There are no specific provisions on hate crimes against individuals. Such cases often fall under legislation on defamation, insulting behaviour, unlawful threat, or abuse. In such cases the prosecution can use the provision on aggravating circumstances (offence provision 2), which stipulates that the motive of the crime shall be given special consideration, if the motive was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance. However, it is often difficult to prove a motive for the crime and what the perpetrator was thinking¹¹⁶¹.</p> <p>Suitability of offence provision to cover online crime: The provisions (offence provisions 1 and 2) are neutral with regard to technology and thus apply to all offences, including those committed online. Similar difficulties, however, apply, as it remains hard to prove a motive. It is also not always easy to prove who has made the statements online¹¹⁶².</p> <p>Suitability of offence provision to ensure freedom of expression: Sweden has a very strong protection of the freedom of expression. The provision on hate speech (offence provision 1) constitutes a deliberate restriction of freedom of expression. Hate speech is an offence under both the Criminal Code and the Constitutional Acts (i.e. it is punishable even if the offence is committed in any of the media that are protected by the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, such as printed matter). The question of balance between freedom of expression and the interests that these provisions should protect, was the subject of detailed consideration when the provisions were first adopted, and also during subsequent changes made to them. Freedom of</p>

¹¹⁵⁹ Ibid. The 2012 statistics are based on estimated numbers, as only 67% of the cases reported in 2012 had been closed.

¹¹⁶⁰ Conclusion based on stakeholder consultation (Official at Brå) on May 29, 2015.

¹¹⁶¹ Conclusion based on stakeholder consultation (Prosecutor) on May 29, 2015.

¹¹⁶² Conclusion based on stakeholder consultation (Prosecutor) on May 29, 2015.

	<p>expression is also taken into account in the application of the offence provision in individual cases. From the courts, there are examples of both convictions and acquittals where the question of freedom of expression was discussed¹¹⁶³. The ways in which higher courts interpret the relationship between freedom of expression and offence provision number one has been detailed above.</p> <p>Offence provision 2 is not relevant – it only refers to aggravating circumstances, while determining the penalty.</p>
	<p>Suitability of offence provision to protect vulnerable groups: Offence provisions 1 and 2: Currently there is an ongoing investigation into whether transgender people should also be included in hate speech legislation¹¹⁶⁴. The current legislation only mentions sexual orientation, and not sexual identity, which is the transgender concern. However, Swedish criminal law, with its provisions on threat, abuse, defamation, etc. gives all individuals a fundamental protection against attacks on their person, regardless of their group affiliation¹¹⁶⁵.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators): The offence provisions (both offence provisions 1 and 2) are suitable to the current national context. The provisions target those who perpetrate the crime¹¹⁶⁶.</p>
	<p>Other shortcomings of applicable offence provision: There are no apparent shortcomings in the offence provisions (both offence provisions 1 and 2). However, there are often difficulties with proving the motives of the perpetrator¹¹⁶⁷.</p>
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Transposing provisions 1 and 2	<p>Offence provision 1: There have been no recent amendments to hate crime legislation in Sweden. There is currently an ongoing investigation on whether transgender people should be specifically protected by the legislation, as well as an investigation as to whether it is appropriate to use the word "race" in legislation¹¹⁶⁸.</p> <p>Offence provision 2: No recent amendments have been identified with relation to offence provision 2. However, the Government is currently considering whether it is appropriate to see the word "race" in legislation.</p>

¹¹⁶³ Conclusion based on stakeholder consultation (Official at the Ministry of Justice on May 29, 2015).

¹¹⁶⁴ Conclusion based on stakeholder consultation (Official at the Ministry of Justice) on May 29, 2015 and Committee Directive 2014/115, available at: https://www.riksdagen.se/sv/Dokument-Lagar/Utdredningar/Kommittedirektiv/Starkt-skydd-for-transpersoner_H2B1115/.

¹¹⁶⁵ Conclusion based on stakeholder consultation (Official at the Ministry of Justice) on May 29, 2015.

¹¹⁶⁶ Conclusion based on stakeholder consultation (Official at the Ministry of Justice) on May 29, 2015.

¹¹⁶⁷ Conclusion based on stakeholder consultation (Prosecutor) on May 29, 2015.

¹¹⁶⁸ Conclusion based on stakeholder consultation (Official at the Ministry of Justice) on May 29, 2015.

3.2 Effectiveness of the legislation Transposing the Audiovisual Media Services Directive and the Electronic Commerce Directive

Indicator 1 - National case law on the interaction of transposing provision with freedom of expression	
<p style="text-align: center;">Transposing Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p> <p>Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 4, para 11: With due regard to the purpose of freedom of the press for all under Chapter 1, the following acts shall be deemed to be offences against the freedom of the press if committed by means of printed matter and if they are punishable under law: [...]</p> <p>11. agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation; [...]</p> <p><u>Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1:</u> The acts listed as freedom of the press offences in Chapter 7, Articles 4 and 5 of the Freedom of the Press Act shall be regarded as freedom of expression offences if they are committed in a radio programme or technical recording and are punishable under law. [...]</p>	<p>As described under Section 2.3, the transposing provisions are set out in the Constitutional Acts. These Acts, however, do not contain reference to penalties. Reference to the penalties to be imposed is set out in the Criminal Code. This table only contains reference to the relevant provisions of the Constitutional Acts.</p> <p>Case NJA 2007 p.805 II¹¹⁶⁹</p> <p>The Chancellor of Justice was the prosecutor in the case since it concerned hate speech on a website falling under the Constitutional Acts. The website contained two articles which made derogatory statements about homosexuals and the Roma. The defendant, GJ, was considered to be the publisher of the website.</p> <p>This case concerned liability under the Constitutional Acts, in particular ch.5 s.1 of the Fundamental Law on Freedom of Expression (which refers to ch.7 art.4 para.11 of the Freedom of the Press Act on hate crimes and other crimes), which is applicable to technical recordings, such as the website in this case. The Supreme Court noted that the basic conditions for liability are the same under the Constitutional Acts and the Criminal Code. However, the Constitutional Acts differ from the Criminal Code with their special rules on liability, according to which, as a general rule, the publisher is exclusively responsible for the crimes. The Court also referred to the so-called 'instruction' in ch.1 s.5 of the Fundamental Law on Freedom of Expression, according to which the judge adjudicating over the misuse of the freedom of expression should remember that freedom of expression is a cornerstone of a free social order. He or she should always pay more attention to the purpose of the publication rather than to how it was made, and, when in doubt, rather give the benefit of the doubt.</p> <p>In addition to cases NJA 2005, p.805 (see above) and NJA 2006 p.467 (<i>which is not relevant in the context of hate speech</i>), the Supreme Court also referred to the ECHR case law, including the principles already mentioned in case NJA 2005, p.805. The Supreme Court found that, in the present case, it was clear that a conviction would include a restriction of freedom of expression. The Court then asked whether the restriction of the freedom of expression, which would follow from a conviction in the present case, would be regarded as necessary in a democratic society. The Supreme Court then referred to case law from ECHR, e.g. Steel and Morris vs. Great Britain. In order for a restriction of the freedom of expression to be deemed to have been necessary, it is not required that it was indispensable, but it requires the existence of a pressing social need. Further, it requires that the reasons which form the basis of a particular case are relevant and sufficient, and that the restriction is proportionate to the legitimate purposes that motivated it. The ECHR also pays attention to the context surrounding the statement, and not just the content of the message.</p> <p>Taking all of these aspects into consideration, the Court then looked at the circumstances of the case. It found that the article about homosexuals did not contain any threats against homosexuals and could not be considered as hate speech. Furthermore, although the article was available online it could only be found by those who were actively looking for the website. It found that, in view of the special protection that the website enjoys under the Constitutional Acts, there were no</p>

¹¹⁶⁹ Case NJA 2007 p.805 II available at: <https://lagen.nu/dom/nja/2007s805>.

	<p>sufficient grounds for a conviction.</p> <p>With regard to the article on Roma, the Court found that it did not contain any threats and did not, therefore, constitute hate speech, although it did contain a sentence expressing contempt against Roma. Again, however, the Court found that, in view of the special protection that the website enjoys under the Constitutional Acts, there were no sufficient grounds for a conviction, and the case was dismissed.</p>
<p>Transposing Provision 2</p> <p>Free movement and the applicability of Swedish law (<i>fri rörlighet och tillämpning av svensk rätt</i>)</p> <p><u>The Act on Electronic Commerce and Other Information Society Services, section 3:</u> 'A service provider established in another EEA state than Sweden, has the right to, notwithstanding Swedish legislation within the coordinated field, provide information society services to recipients in Sweden. A court or another authority may, however, pursuant to a law, take a measure that restricts the free movement of such services, if it is necessary to protect:</p> <ol style="list-style-type: none"> 1. public order and safety, 2. [...] 3. [...] <p>Such measures must be directed towards a specific service that damages, or risks causing damage to, any one of these protected interests. The measure must be proportionate to the interest to be protected.'</p> <p>The Swedish law does not specifically mention hate crimes, and only provides the possibility of restricting the freedom to provide information society services in cases where it is necessary to protect "public order and safety".</p>	<p>No relevant case law has been identified</p>

Indicator 2 - Quantitative evidence	
<p>Transposing Provision 1</p> <p>Incitement against a population group <i>(hets mot folkgrupp)</i></p>	<p>Number of decisions condemning service providers: Hate speech under the Constitutional Acts is prosecuted by the Chancellor of Justice. No statistical data on the number of cases prosecuted are available.</p> <p>Number of court decisions: 2010: 0 2011: 1 2012: 1 2013: 1 2014: 0¹¹⁷⁰</p> <p>There are currently 4 ongoing cases relating to hate speech¹¹⁷¹.</p> <p>The number of decisions taken seems to be low. No information regarding under-reporting has been identified.</p>
<p>Transposing provision 2</p> <p>Free movement and the applicability of Swedish law <i>(fri rörlighet och tillämpning av svensk rätt)</i></p>	<p>It is not possible to extract information on the number of cases that have been adjudicated, as the provision does not contain any reference to hate crimes¹¹⁷².</p>
Indicator 3 - Bottlenecks of practical implementation	
<p>Transposing Provision 1</p> <p>Incitement against a population group <i>(hets mot folkgrupp)</i></p>	<p>Clarity of the transposing provision: Transposing provision 1: The criminal act of hate speech is the same in the Constitutional Acts as in the Criminal Code. See Section 3.1 above for full details.</p> <p>Transposing provision 2: The relevant transposing provision does not contain any reference to hate crimes or hate speech.</p>
<p>Transposing provision 2</p> <p>Free movement and the applicability of Swedish law <i>(fri rörlighet och tillämpning av svensk rätt)</i></p>	<p>Suitability of offence provision to protect vulnerable groups: Transposing provision 1: The criminal act of hate speech is the same in the Constitutional Acts as in the Criminal Code. See Section 3.1 for full details. Transposing provision 2: The relevant transposing provision does not contain any reference to hate crimes or hate speech, and no relevant cases have been identified. Thus, it cannot be assessed whether or not the provision is suitable to protect vulnerable groups.</p>
	<p>Suitability of offence provision to ensure freedom of expression: Transposing provision 1: Freedom of expression enjoys strong protection in Sweden and the provision does not constitute a restriction of the freedom to express oneself.</p>

¹¹⁷⁰ Cases prosecuted by the Chancellor of Justice are available at: <http://www.jk.se/Rattegangar/tryck-och-yttrandefrihet/avslutade.aspx>.

¹¹⁷¹ The ongoing cases prosecuted by the Chancellor of Justice are available at: <http://www.jk.se/Rattegangar/tryck-och-yttrandefrihet/pagaende.aspx>.

¹¹⁷² Conclusion based on stakeholder interview (Official at Brå) on May 29, 2015.

	Transposing provision 2: The relevant provision expressly states that any restrictive measure must be proportionate to the interest to be protected, thus ensuring the protection of freedom of expression.
	Other shortcomings of applicable offence provision: Transposing provisions 1 and 2: No other shortcomings have been identified.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Transposing Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p> <p>Transposing provision 2</p> <p>Free movement and the applicability of Swedish law (<i>fri rörlighet och tillämpning av svensk rätt</i>)</p>	Transposing provision 1 and 2: There have been no recent amendments to the relevant legislation.

3.3 Effectiveness of the rules regulating publishers' responsibility

Indicator 1 - National case law on the interaction of provision with freedom of expression	
<p>Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p> <p>Swedish Constitution: the Freedom of the Press Act, chapter 7, Article 4, para 11: With due regard to the purpose of freedom of the press for all under Chapter 1, the following acts shall be deemed to be offences against the freedom of the press if committed by means of printed matter and if they are punishable under law: [...] 11. agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or</p>	<p>As explained in Section 2.4, only the constitutional provisions apply to the responsibility of publishers, with the Criminal Code containing only the applicable penalties. This table references to the constitutional provisions.</p> <p>Case NJA 2007 p.805 II as quoted in the section above.</p> <p>No other relevant case law has been identified.</p>

<p>sexual orientation; [...]</p> <p>Swedish Constitution: the Fundamental Law on Freedom of Expression, chapter 5, Article 1: The acts listed as freedom of the press offences in Chapter 7, Articles 4 and 5 of the Freedom of the Press Act, shall be regarded as freedom of expression offences if they are committed in a radio programme or technical recording and are punishable under law. [...]</p>	
Indicator 2 – Quantitative evidence	
<p>Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p>	<p>See table under Section 3.2</p>
Indicator 3 - Bottlenecks of practical implementation	
<p>Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p>	<p>See table under Section 3.2</p>
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Provision 1</p> <p>Incitement against a population group (<i>hets mot folkgrupp</i>)</p>	<p>There have been no recent amendments to the relevant legislation.</p>

Annex IV – National studies blasphemy and religious insult

AUSTRIA

1 National context

In Austria, the Criminal Code contains the provision of 'disparagement of religious precepts' (*Herabwürdigung religiöser Lehren*) under Article 188 of the Criminal Code¹¹⁷³ and the provision of 'disturbance of the practice of religion' under Article 189 of the Criminal Code. Such provisions do not protect any named deity or religious figurehead, but, rather, the religious feelings and dignity of individuals, in order to protect religious peace in society¹¹⁷⁴. Two additional offence provisions may also be used, however, neither one specifically addresses blasphemy and religious insult. Article 117 of the Criminal Code prohibits any form of insult (*inter alia*) on grounds of religion including mockery violating human dignity¹¹⁷⁵, while Article 283 of the Criminal Code addresses incitement to hatred, prohibiting 'hostile acts against a church or religious society located in Austria, or against a group belonging to such a church or religious society, [...] in a manner capable of endangering public order or inciting against or insulting in a way that offends human dignity.'¹¹⁷⁶

The creation of Article 188 might result from the specific historic relationship between the Catholic Church and State in Austria, determined by the concordat (*Konkordat*), the international agreement between the Republic of Austria and the Vatican of 1937, and the complementary concordat of 1960¹¹⁷⁷. Such agreements regulate the status of the Roman Catholic Church in Austria as a public body, as well as its corresponding rights. Today, in addition to the Roman Catholic Church, 15 other churches and religious communities are categorised as public bodies in Austria, e.g. the Protestant Church, the Islamic Community, the Jewish Community and Jehovah's Witnesses¹¹⁷⁸.

In Austria, 'disparagement of religious precepts' is forbidden by law and regulated by the Criminal Code, with penalties comprising either a fine (low penalties) or imprisonment. Few prosecutions have recently been registered under Article 188. The same provisions apply in cases where the offence is committed by the media, as the provision explicitly states that the disparagement and/or mockery have to be committed 'publicly'.

Article 188 states that the disparagement of a recognised worship, church or religious society has to be exercised in a 'manner capable of giving rise to justified annoyance'. Thus, 'annoyance' must be justified from an objective point of view. Different actors take different stances on whether Article 188 reasonably limits freedom of expression. However,

¹¹⁷³ Law 60/1975 'Criminal Code' (60. Bundesgesetz: Strafgesetzbuch), Federal Law Gazette, available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029737>.

¹¹⁷⁴ Information collected through consultation with national stakeholder (academic/criminal law expert).

¹¹⁷⁵ Law 60/1975 'Criminal Code' available at:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40110121>.

¹¹⁷⁶ Law 60/1975 'Criminal Code', available at:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12039035>; RWZ

'Criminal Law Amendment 2015 (Strafrechtsänderungsgesetz 2015: Ministerialentwurf) available at:

http://lesen.lexisnexis.at/news/strafrechtsaenderungsgesetz-2015-ministerialentwurf/rwz/aktuelles/2015/12/lnat_news_019154.html.

¹¹⁷⁷ Pelinka, A., Rosenberger, S., *Austrian Politics (Österreichische Politik – Grundlagen, Strukturen, Trends)* (3rd edn, Facultas, Vienna, 2007) 210–11.

¹¹⁷⁸ City of Vienna (*Stadt Wien*) 'Religion in Austria' (*Informationen zu Religionen in Österreich*) (2015) available at: <https://www.help.gv.at/Portal.Node/hlpd/public/content/82/Seite.820010.html>.

such restrictions must be considered on a case-by-case basis¹¹⁷⁹. The law – if interpreted in a narrow way – aims to protect the dignity of people. However, the term 'disparagement/degrading' (*Herabwürdigung*) allows certain scope for interpretation¹¹⁸⁰.

General civil rules concerning compensation for damages apply to cases taken under Article 188. While pecuniary damage as a proven result of disparagement of religious precepts is unlikely, should such a case arise, the criminal judge could also decide on a civil law matter, or refer the case to a civil law proceeding.

In the aftermath of the attacks against 'Charlie Hebdo', the discussion on whether Article 188 conflicts with freedom of expression of the media (regulated under Article 13 of the Austrian Basic Law (*Staatsgrundgesetz*)) has gained significance.¹¹⁸¹ Journalists, media representatives, politicians and civil society describe the law as outdated. During the 2015 amendment of the Austrian Criminal Code, many voices called for the abolition of the provision. In this context, NGOs, in particular, stressed that the protection of individuals and vulnerable groups under the offence provision on incitement to hatred (Article 283) and its application should also be improved. Civil society critics, meanwhile, claim that 'blasphemy law'¹¹⁸² grants preferential treatment to recognised churches and beliefs, when compared to non-recognised self-representative bodies of vulnerable groups.

Mechanisms also exist for media self-regulation: the Austrian Press Council (*Österreichischer Presserat*) is a body aiming at enhancing the self-regulation of print media, including prohibiting the disparagement and mockery of religious precepts/teachings or legally permitted institutions of churches or religious societies in Austria, in a manner capable of creating justified annoyance.

¹¹⁷⁹ Bachner-Foregger 'Criminal Law: Article 188 disparagement of religious precepts', Online Database (§ 188 StGB. Herabwürdigung religiöser Lehren) (2014) available at: https://rdb.manz.at/document/1141_stgb_2_p188.

¹¹⁸⁰ Information collected through consultation with national stakeholder (academic/criminal law expert).

¹¹⁸¹ Der Standard 'Blasphemy law can prevent hate' (*Paragraf kann Gewalt verhindern*) (13 January 2015) available at: <http://derstandard.at/2000010294047/Paragraf-kann-Hass-verhindern>; Litigation Association of NGOs Against Discrimination (*Klagsverband*) 'Criminal Law Amendment: Litigation Association states 'outcome is ambivalent' (*Strafrechtsnovelle: Bilanz für Klagsverband durchwachsen, Schutz vor sexueller Belästigung ausgeweitet*) available at: <http://www.klagsverband.at/archives/10000>.

¹¹⁸² Information collected through consultation with national stakeholder (academic/criminal law expert) 27 June 2015.

2 Legal Framework

2.1 General description of legislation applicable to blasphemy and/or religious insult

In Austria, the Criminal Code contains the provision of 'disparagement of religious precepts' (*Herabwürdigung religiöser Lehren*) under Article 188¹¹⁸³, and the provision of 'disturbance of the practice of religion' under Article 189. Such provisions do not protect any named deity or religious figurehead, but, rather, the religious feelings and dignity of individuals, in order to protect religious peace in society¹¹⁸⁴.

Two additional offence provisions may also be used in this context, although neither specifically addresses blasphemy and religious insult. Article 117 of the Criminal Code prohibits any form of insults (*inter alia*) on grounds of religion including mockery violating human dignity¹¹⁸⁵. Article 283 of the Criminal Code, which addresses incitement to hatred, prohibits any hostile acts against a church or religious community located in Austria, or against a group belonging to such a church or religious community, in a manner capable of endangering public order and in a way that offends human dignity¹¹⁸⁶.

General civil rules concerning compensation for damages apply to each of these provisions. However, the granting of pecuniary compensation on the basis of damage caused by the disparagement of religious precepts, is unlikely.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Disparagement of religious precepts	Article 188 of Criminal Code ¹¹⁸⁷
Offence provision 2 Disturbance of the practice of religion	Article 189 of Criminal Code ¹¹⁸⁸
Definition of offence	
Offence provision 1 Disparagement of religious precepts	'Whoever publicly disparages or mocks a person or an object of worship or a dogma, a legally permitted ceremony, or a legally permitted institution of a church or religious community located in Austria, in a manner capable of giving rise to justified annoyance [...] commits disparagement of religious precepts'.

¹¹⁸³ Law 60/1975 'Criminal Code', available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029737>.

¹¹⁸⁴ Information collected through consultation with national stakeholder (academic/criminal law expert), 3 July 2015.

¹¹⁸⁵ Law 60/1975 'Criminal Code', Federal Law Gazette, available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40110121>.

¹¹⁸⁶ Law 60/1975 'Criminal Code', available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12039035>; RWZ 'Criminal Law Amendment 2015' (*Strafrechtsänderungsgesetz 2015: Ministerialentwurf*) available at: http://lesen.lexisnexis.at/news/strafrechtsaenderungsgesetz-2015-ministerialentwurf/rwz/aktuelles/2015/12/lnat_news_019154.html.

¹¹⁸⁷ Law 60/1975 'Criminal Code', available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029737>.

¹¹⁸⁸ Law 60/1975 'Criminal Code' available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029738>.

Offence provision 2 Disturbance of the practice of religion	'1. Whoever, using violence or threat, disturbs a divine service or an act of divine service of a church or religious community located in Austria [...] commits a disturbance of the practice of religion'. 2. Whoever commits mischief in a place dedicated to a legally recognised religious practice, or on the occasion of a legally recognised divine service, or using an object directly destined for a legally recognised divine service of a church or religious community located in Austria, in a manner capable of raising justified annoyance [...] commits a disturbance of the practice of religion ¹¹⁸⁹ .'
Penalties foreseen	
Offence provision 1 Disparagement of religious precepts	Fine not exceeding 360 daily penalty units or imprisonment for a term not exceeding six months ¹¹⁹⁰ .
Offence provision 2 Disturbance of the practice of religion	Fine or imprisonment up to two years ¹¹⁹¹ .
Online crime	
Offence provision 1 Disparagement of religious precepts	Article 188 does not explicitly refer to online criminal behaviour. However, online offences fall within the scope of the provisions, which state that the offence must be committed in public ¹¹⁹² .
Offence provision 2 Disturbance of the practice of religion	Such offences cannot be committed online.

2.3 Media responsibility for blasphemy and/or religious insult

In Austria, the Criminal Code provisions on blasphemy and religious insult are applicable to media as, in order to be considered an offence, the behaviour must take place publicly.

In terms of criminal responsibility, the Austrian law makes a distinction between factual and non-factual information, comments and images published and/or spread. For factual reports complying with rules of journalistic professionalism, journalists are protected by the law. In the case of publication of caricatures, comments, pictures and images fulfilling the offence provisions of religious insult, mockery or

¹¹⁸⁹ Law 60/1975 'Criminal Code', available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029738>.

¹¹⁹⁰ Law 60/1975 'Criminal Code', available at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029737>.

¹¹⁹¹ Law 60/1975 'Criminal Code', available at: <http://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296&FassungVom=2015-07-05&Artikel=&Paragraf=189&Anlage=&Uebergangsrecht=>.

¹¹⁹² Information collected through consultation with national stakeholder (academic/criminal law expert), 3 July 2015.

disparagement, the offender may be subject to criminal prosecution¹¹⁹³. In Austria media self-regulation also exists. The Austrian Press Council (*Österreichischer Presserat*) works to enhance the self-regulation of print media. It set up the Principles of Journalistic Work (*Grundsätze für die publizistische Arbeit*) in 2013, aiming at *inter alia* prohibiting the disparagement and mockery of religious precepts of legally recognised churches or religious communities¹¹⁹⁴. The Press Council can apply disciplinary sanctions in cases where these Principles of Journalistic Work are violated (Article 7.2 and 7.3 of the Principles of Journalistic Work).

3 Effectiveness of the legal framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of legislation on blasphemy and/or religious insult

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
<p>Offence Provision 1</p> <p>Disparagement of religious precepts</p>	<p>Freedom of expression:</p> <p>Case N°: 150s52/12d, 11 December 2013¹¹⁹⁵</p> <p>Facts:</p> <p>The regional court of Vienna (<i>Landesgericht Wien</i>) found the defendant guilty of disparagement of religious precepts according to Article 188 of the Criminal Code. Specifically, the court found that, on 15 October 2009, the defendant had disparaged the prophet Mohammed in a manner capable of giving rise to justified annoyance, in the presence of 32 persons in the context of her lecture, 'seminar series Islam'. She was sentenced to a fine of EUR 480 or to a substitute sanction of imprisonment for 60 days. An appeal against this decision was filed to the higher court.</p> <p>Court decision:</p> <p>The higher court rejected the appeal and upheld the verdict of the regional court.</p> <p>Court reasoning:</p> <p>The higher court stated that, in cases where comments not only shock or express a 'provocative' opinion, but are also an abusive attack to religious communities, a criminal conviction is considered a necessary measure in the protection of matters regarded as sacred by believers.</p> <p>The court further reasoned that a limitation of the defendant's freedom of expression was justifiable in order to protect religious peace and religious beliefs of others. In this case, the defendant's statements regarding the alleged sexual preferences of the prophet Mohammed were considered to be derogatory remarks, which did not fall within an objective discussion about Islam¹¹⁹⁶.</p>

¹¹⁹³ Information collected through consultation with national stakeholder (academic/criminal law expert) 3 July 2015.

¹¹⁹⁴ Austrian Press Council 'Principles of journalistic work' (*Grundsätze für die publizistische Arbeit*) (2013) available at: http://www.presserat.at/show_content.php?hid=2.

¹¹⁹⁵ Higher Regional Court, Graz, decision N° 150s52/12d, 11 December 2013.

¹¹⁹⁶ Higher Regional Court, Graz, decision N° 150s52/12d, 11 December 2013.

	<p>Freedom of thought, conscience and religion:</p> <p>No Supreme Court judgments were identified.</p>
<p>Offence Provision 2</p> <p>Disturbance of the practice of religion</p>	<p>Freedom of expression:</p> <p>No Supreme Court judgments were identified.</p>
	<p>Freedom of thought; conscience and religion:</p> <p>No Supreme court judgments were identified.</p>
<p>Indicator 2</p> <p>Quantitative evidence</p>	
<p>Offence Provision 1</p> <p>Disparagement of religious precepts</p>	<p>Number of cases investigated: No information found.</p> <p>Number of cases prosecuted: No information found.</p> <p>Number of cases adjudicated: The number of judgements since 2010 is 5¹¹⁹⁷.</p>
<p>Offence Provision 2</p> <p>Disturbance of the practice of religion</p>	<p>Number of cases investigated: No information found.</p> <p>Number of cases prosecuted: No information found.</p> <p>Number of cases adjudicated: The number of judgements since 2010 is 12¹¹⁹⁸.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Offence Provision 1</p> <p>Disparagement of religious precepts</p>	<p>Clarity of offence provision:</p> <p>The term 'disparagement' or 'degrading' (<i>Herabwürdigung</i>) provides scope for interpretation, which may lead to too broad an understanding of the term. This might result in greater limits to freedom of expression¹¹⁹⁹.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>The provision states that, in order to be disparaging of religious precepts, a comment or behaviour must be made publicly, making the provision applicable to online crime. However, starting a prosecution could be difficult in practice, in cases where</p>

¹¹⁹⁷ Statistics Austria 'Criminal statistics' (2014), STATcube – Statistical database of Statistics Austria.

¹¹⁹⁸ Statistics Austria 'Criminal statistics' (2014), STATcube – Statistical database of Statistics Austria.

¹¹⁹⁹ Information collected through consultation with national stakeholder (academic/criminal law expert), 3 July 2015.

	the service providers of Austrian websites are registered abroad.
	<p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>Evidence gathered through stakeholder interviews does not allow for any clear conclusion to be drawn about the suitability of the provision to ensure freedom of expression and freedom of thought, conscience and religion. Some stakeholders considered the offence provision sufficient to ensure freedom of expression, while others suggested the abolition of Article 188, stating that such provision is outdated, with the protection of persons and groups better covered by other offence provisions of the Criminal Code, e.g. such as that on incitement to hatred. Some expressed the view that the provision on incitement to hatred placed fewer limits on freedom of expression than the provision of disparagement of religious precepts¹²⁰⁰.</p> <p>Article 188 does not prohibit the freedom of expressing opinions criticising specific religious concepts, rather, it prohibits the degradation and disparagement of religious beliefs¹²⁰¹. Its compliance with freedom of expressed should, therefore, be considered on a case-by-case basis.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>Consultations with NGO stakeholders suggest that right-wing extremists are responsible for recent blasphemy and religious insult against Muslims and Jews.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings identified.</p>
<p>Offence Provision 2</p> <p>Disturbance of the practice of religion</p>	<p>Clarity of offence provision:</p> <p>No issues with regard to the clarity of this provision were identified.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>The offences described in this provision cannot be committed online.</p>
	<p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>No issues with regard to the suitability of this provision to ensure freedom of expression and or freedom of thought, conscience and religion, were identified.</p>
	<p>Suitability of offence provision for current national context (e.g. targets the right group of perpetrators):</p> <p>Consultations with NGO stakeholders suggest that right-wing extremists are responsible for recent incidents of blasphemy and religious insult against Muslims and Jews.</p>
	<p>Other shortcomings of applicable offence provision:</p>

¹²⁰⁰ Information collected through consultation with national stakeholder (legal expert/NGO), 17 June 2015.

¹²⁰¹ Bachner-Foregger 'Criminal Law: Article 188 disparagement of religious precepts', Online Database (2014).

	No other shortcomings were identified.
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Offence Provision 1 Disparagement of religious precepts	There was no new legislation or amendments to existing legislation, and no changes are planned in the future.
Offence Provision 2 Disturbance of the practice of religion	There was no new legislation or amendments to existing legislation, and no changes are planned in the future.

3.2 Effectiveness of the rules regulating media responsibility for blasphemy and/or religious insult

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
Offence Provision 1 Disparagement of religious precepts	Freedom of expression: See Section 3.1.
	Freedom of thought, conscience and religion: See Section 3.1.
Offence Provision 2 Disturbance of the practice of religion	Freedom of expression: See Section 3.1.
	Freedom of thought; conscience and religion: See Section 3.1.
Article 7.2 and 7.3 of the Principle of Journalistic Work	Freedom of expression: No high court judgment was identified.
	Freedom of thought, conscience and religion: No high court judgment was identified.
Indicator 2 - Quantitative evidence	
Offence Provision 1 Disparagement of religious precepts	See Section 3.1.
Offence Provision 2 Disturbance of the practice of religion	See Section 3.1.

Article 7.2 and 7.3 of the Principle of Journalistic Work	No data available.
Indicator 3 - Bottlenecks of practical implementation	
Offence Provision 1 Disparagement of religious precepts	See Section 3.1.
Offence Provision 2 Disturbance of the practice of religion	See Section 3.1.
Provision 1 Article 7.2 and 7.3 of the Principle of Journalistic Work	The traceability/prosecution of international internet providers, in particular, is mentioned as one of the main obstacles to the effective application of these provisions.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Offence Provision 1 Disparagement of religious precepts	See Section 3.1.
Offence Provision 2 Disturbance of the practice of religion	See Section 3.1.
Provision 1 Article 7.2 and 7.3 of the Principle of Journalistic Work	There was no new legislation or amendments to existing legislation, and no changes are planned in the future.

GERMANY

1 National context

According to the Constitution (*Grundgesetz*, GG), Germany is a secular State (Section 137 GG), however, religious communities (churches) are public bodies granted legal status¹²⁰².

The German State-church law regulates the relationship between churches and the State, guaranteeing freedom of religion (Section 4 GG) and the institutional legal positions of the religious communities (Section 140 GG). The German Constitution grants protection to any religious community recognised as a statutory body by the German States (*Länder*)¹²⁰³. The Constitution also regulates freedom of religious education (Section 7 (2)(3) GG) and the prohibition of discrimination on the grounds of religious and ideological view (Section 3(3) GG). In addition, the principles of freedom of expression and freedom of the media are protected by the Constitution (Section 5(1) and Section 5(3)).

Section 166 of the German Criminal Code contains the provision on insults to religious confessions, religious communities and philosophical view associations (Section 166 *StGB Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*) and is referred to as the German blasphemy law¹²⁰⁴. The provision also deals with religious insults affecting public order. While no civil or administrative rules deal specifically with blasphemy or religious insult, compensation can be asked for immaterial damage (according to the general rules on compensation for damages), as such offences would affect 'human dignity'¹²⁰⁵ (Section 253 of the Civic Code (*Bürgerliches Gesetzbuch* (BGB))¹²⁰⁶.

The reform of the Criminal Code in 1969 clarified that Section 166 aims at protecting public order rather than the idea of god and the religious feeling of the individual¹²⁰⁷. Section 166 covers public speech and public scripts, including those issued through the media or online. The groups usually accused of the commission of blasphemy or religious insult are gay activists, artists, cartoonists and Nazis¹²⁰⁸. Before the terrorist attacks of September 2001 in the USA, the target of blasphemy offences tended to be Christian religious denominations and their members, however, since then, there has been an increase in the number of Muslims targeted. No amendment, or abolition, of Section 166 of the Criminal Code took place as a result of these changes.

Experts point to a perceived overlap between Section 166 and Section 130 of the German Criminal Code (*Volksverhetzung*) on hate speech. Several proposals have been tabled

¹²⁰² Mückl, Stefan, Current challenges for the state church law (*Aktuelle Herausforderungen für das Staatskirchenrecht*), in: *AUS POLITIK UND ZEITGESCHICHTE* (APUZ 24/2013), <http://www.bpb.de/apuz/162394/aktuelle-herausforderungen-fuer-das-staatskirchenrecht?p=all>.

¹²⁰³ Federal Ministry of the Interior (BMI), Religious and world view communities (*Religions- und Weltanschauungsgemeinschaften*), http://www.bmi.bund.de/PERS/DE/Themen/Informationen/religionsgemeinschaften/religionsgemeinschaften_node.html.

¹²⁰⁴ dejure.org, Law information System Ltm. (*Rechtsinformationssysteme GmbH*), (*Strafgesetzbuch, Abschnitt 11, 166 Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*), <http://dejure.org/gesetze/StGB/166.html>.

¹²⁰⁵ Stern, Lena, The penalty due to the creed abuse (*Der Strafgrund der Bekenntnisbeschimpfung*), 2011, Edition Rechtskultur <http://www.uni-regensburg.de/rechtswissenschaft/buengerliches-recht/loehning/medien/band30a.pdf>.

¹²⁰⁶ dejure.org, Law information System Ltm. (*Rechtsinformationssysteme GmbH*), (*Strafgesetzbuch, Abschnitt 11, 166 Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*), <https://dejure.org/gesetze/BGB/253.html>.

¹²⁰⁷ Fischer, German Criminal Code (StGB), 58. Aufl. 2011, § 166 StGB, Rn. 1.

¹²⁰⁸ Analysis by the author of 44 court rulings related to Section 166, Law information System Ltm. (*Rechtsinformationssysteme GmbH*), <https://dejure.org/dienste/lex/StGB/166/1.html>.

(especially after the Charlie Hebdo attacks in France) to abolish Section 166, on the grounds that that blasphemy and religious insult are already covered by the hate speech legislation in Section 130 (*Volksverhetzung*) of the Criminal Code¹²⁰⁹. Supporters of the abolition of Section 166 on blasphemy and religious insult believe that Section 130 on hate speech adequately protects the peaceful living of different religious groups in Germany, and claim that those who wish to have the specific protection of a single group, in addition to the general protection of all groups or 'parts of the population' and individuals¹²¹⁰, undermine the principle of equality of all religious groups¹²¹¹.

¹²⁰⁹ Deutsche Welle, 'Scrap German blasphemy law to promote tolerance, legal expert demands' 2015, <http://www.dw.com/en/scrap-german-blasphemy-law-to-promote-tolerance-legal-expert-demands/a-18213179>.

¹²¹⁰ Schwencke, Thomas, Basics Journalism: Press Law for Journalists and Bloggers (*Basiswissen Journalismus: Presserecht für Journalisten und Blogger*), 2013, <http://upload-magazin.de/blog/715-basiswissen-journalismus-presserecht-fur-journalisten-und-blogger/>.

¹²¹¹ Zeit-Online, Blasphemy. Is blasphemy a necessary crime? (*Blasphemie. Ist Gotteslästerung ein notwendiger Straftatbestand?*), 2015, <http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/blasphemie-gotteslaesterung-straftatbestand-religion/seite-4>.

2 Legal framework

2.1 General description of the legislation applicable to blasphemy and/or religious insult

Section 166 of the German Criminal Code on the insult of confessions, religious communities and philosophical view associations (*Section 166 StGB Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*) is referred to as the blasphemy law¹²¹². While no civil or administrative rules specifically deal with blasphemy or religious insult, compensation may be asked for immaterial damage (according to the general rules on compensation for damages), as such offences would affect 'human dignity'¹²¹³ (Section 253 of the Civil Code (*Bürgerliches Gesetzbuch (BGB)*)¹²¹⁴.

The reform of the Criminal Code in 1969 in the Federal Republic clarified that Section 166 aims at protecting public order rather than the idea of god and the religious feeling of the individual¹²¹⁵. As noted, some critics believe that blasphemy is already covered by the hate speech legislation in Section 130 (*Volksverhetzung*) of the Criminal Code.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Defamation of religions, religious and ideological associations	Section 166 of the German Criminal Code ¹²¹⁶
Definition of offence	
Offence provision 1 Defamation of religions, religious and ideological associations	(1) Whosoever publicly or through dissemination of written materials (section 11(3)) defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment not exceeding three years, or a fine. (2) Whosoever publicly or through dissemination of written materials (section 11(3)) defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall incur the same penalty ¹²¹⁷ .

¹²¹² dejure.org, Law information System Ltm. (Rechtsinformationssysteme GmbH), (*Strafgesetzbuch, Abschnitt 11, §166 Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*), <http://dejure.org/gesetze/StGB/166.html>.

¹²¹³ Stern, Lena, The penalty due to the creed abuse (*Der Strafgrund der Bekenntnisbeschimpfung*), 2011, Edition Rechtskultur <http://www.uni-regensburg.de/rechtswissenschaft/buergerliches-recht/loehning/medien/band30a.pdf>.

¹²¹⁴ dejure.org, Law information System Ltm. (Rechtsinformationssysteme GmbH), (*Strafgesetzbuch, Abschnitt 11, §166 Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen*), <https://dejure.org/gesetze/BGB/253.html>.

¹²¹⁵ Fischer, German Criminal Code (StGB), 58. Aufl. 2011, § 166 StGB, Rn. 1.

¹²¹⁶ Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1477.

¹²¹⁷ *ibid.*

Penalties foreseen	
Offence provision 1 Defamation of religions, religious and ideological associations	Imprisonment not exceeding three years, or a fine ¹²¹⁸ .
Online crime	
Offence provision 1 Defamation of religions, religious and ideological associations	The offence provision is applicable to online crime although this is not explicitly mentioned in the provision itself.

2.3 Media responsibility for blasphemy and/or religious insult

Freedom of the Press is guaranteed in Section 5 of the Constitution¹²¹⁹. As Germany is a federal State, each of the German States (*Länder*) has its own press laws regulating specific matters.

Section 166 of the Criminal Code also applies to the media, as it covers public speech and public scripts, including those circulated through the media and online.

The German Press Council (*Deutscher Presserat*) is a self-regulating body responsible for dealing with complaints against the media¹²²⁰. The complaint system is based on the voluntary commitment of the German media to the Press Code¹²²¹, which specifies that the press should not insult religious, philosophical or moral beliefs¹²²² (Section 10 of the Press Code). Disciplinary proceedings carried out by the German Press Council can run in parallel with criminal proceedings in cases where a criminal provision has been violated e.g. a violation of the Press Code can be investigated in parallel with a criminal investigation on blasphemy according to Section 166 of the Criminal Code.

The complaint mechanism before the Press Council starts with a formal written complaint, which is reviewed by the Press Council. If the complaint is well-founded, the editorial office is then asked for a statement. If the Press Council finds that there was a violation of the Press Code, it can apply the following sanctions against the editorial office¹²²³:

- a public reprimand (with obligatory publication of a rectification press release);

¹²¹⁸ *ibid.*

¹²¹⁹ Schwencke, Thomas, Basics Journalism: Press Law for Journalists and Bloggers (*Basiswissen Journalismus: Presserecht für Journalisten und Blogger*), 2013, <http://upload-magazin.de/blog/715-basiswissen-journalismus-presserecht-fur-journalisten-und-blogger/>.

¹²²⁰ German Press Council, <http://www.presserat.de/>.

¹²²¹ German Press Council, German Press Code, <http://www.presserat.de/pressekodex/pressekodex/>.

¹²²² *ibid.*

¹²²³ German Press Council, Complaint explanation, https://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Beschwerdeanleitung.pdf.

- a non-public reprimand (where publication is avoided for relevant reasons, such as victim protection);
- disapproval;
- notice.

The Press Council can decide not to apply a sanction if the person or body liable for the behaviour has already taken steps to repair the offence (e.g. by an editorial correction).

3 Effectiveness of the legal framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of the legislation on blasphemy and/or religious insult

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
<p>Offence provision 1</p> <p>Defamation of religions, religious and ideological associations</p>	<p>Freedom of expression: <i>BVerwG 1 B 60.97 from 11 December 1997 of the Federal Administrative Court (Bundesverwaltungsgericht)</i></p> <p>Facts: Michael Schmidt-Salomon wrote a musical called the Maria-Syndrom, which was to premiere on 28 May 1994. A religious group applied to the Court on the ground that they felt insulted by the content of the musical, and the Court decided to forbid the play according to Section 166 of the German Criminal Code¹²²⁴. The decision was appealed before the Federal Administrative Court.</p> <p>Court decision: The Federal Administrative Court rejected the appeal¹²²⁵.</p> <p>Court reasoning: According to the Federal Administrative Court reasoning, freedom of expression and art is guaranteed by the Constitution, however, such freedom must be balanced with the fundamental rights of others. Art works which impair the constitutionally guaranteed order, therefore, are subject to limitations when other constitutional principles come into conflict with the exercise of the freedom of art expression and art. A balance of opposing, but equally constitutionally protected, interests must be achieved.</p> <p>The Court considered that the main purpose of the performance was the denigration and vilification of the Christian faith. It considered tolerance for religious and ideological matters important for keeping the peace in society. The Court also stated that everyone should be able to pursue his faith without fear of defamation.</p> <p>Freedom of thought; conscience and religion:</p>

¹²²⁴ Krogh, Calvin E., *The Maria-syndrom – censored (Das Maria-Syndrom – Censored)*, 2002, <http://www.maria-syndrom.de/krogh1.htm>.

¹²²⁵ Federal Administrative Court, Decision. 11.12.1997, Az.: 1 B 60.97, <https://www.jurion.de/Urteile/BVerwG/1997-12-11/1-B-6097>.

	See decision above
Indicator 2 Quantitative evidence	
Offence provision 1 Defamation of religions, religious and ideological associations	No data are available on investigated, prosecuted and adjudicated cases under Article 166 of the Criminal Code.
Indicator 3 - Bottlenecks of practical implementation	
Offence provision 1 Defamation of religions, religious and ideological associations	Clarity of offence provision: The general opinion among the stakeholders is that the provision is clear, but rarely used in practice, with only 10 convictions under the blasphemy legislation since 1969. By contrast, hate speech legislation is believed to have had a stronger impact in the prosecution of religious offences ¹²²⁶ , with such offences addressed by Section 130 of the Criminal Code, which aims at fighting hate speech and transposes Framework Decision 2008/913/JHA, as well as protecting the peaceful living of different groups in Germany. Stakeholders state that those who wish the specific protection of a single group, in addition to the general protection of all groups offered by the legislation on hate speech, undermine the principle of equality of all religious groups ¹²²⁷ .
	Suitability of offence provision to cover online crime: The offence provision is suitable to cover online crime. However, stakeholders believe that Section 130 of the Criminal Code on hate speech, along with the Telemedia Act, provide better protection against hate speech.
	Suitability of offence provision to ensure freedom of expression and/or freedom of thought, conscience and religion: A balance between blasphemy/religious insult law and freedom of expression is set by the judge on a case-by-case basis. Freedom of expression in the arts is protected under the Constitution, and is largely respected, especially with regard to satire and comedy. Yet, freedom of expression of artists is chilled through strict hate speech laws. German authorities in fact very rarely use blasphemy laws against artists. However, there have been several examples of artworks being removed from exhibitions due to hurting religious feeling ¹²²⁸ .
	Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):

¹²²⁶ Index on Censorship, Germany: A positive environment for free expression clouded by surveillance, 2013, <https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/>.

¹²²⁷ Zeit-Online, Blasphemy. Is blasphemy a necessary crime? (*Blasphemie. Ist Gotteslästerung ein notwendiger Straftatbestand?*), 2015, <http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/blasphemie-gotteslaesterung-straftatbestand-religion/seite-4>.

¹²²⁸ Index on Censorship, Germany: A positive environment for free expression clouded by surveillance, 2013, <https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/>.

	<p>According to the stakeholders interviewed, with the Charlie Hebdo case in Paris the provision is unfolding a bias towards Muslims. When blasphemy is committed against Islam and Muslim communities, the provision in fact seems to apply less strictly¹²²⁹.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>According to the stakeholders interviewed, a latent Islamophobic atmosphere is developing in Germany. This general negative approach might affect the application in practice of the blasphemy legislation.</p>
<p>Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation</p>	
<p>Offence provision 1</p> <p>Defamation of religions, religious and ideological associations</p>	<p>Since the Charlie-Hebdo events in Paris, a debate on the abolition of Section 166 of the Criminal Code is ongoing. According to the Protestant Legal Institute, legislation on hate speech sufficiently guarantees the protection of religious peace. Requests to remove blasphemy from Germany's Criminal Code were made by the Germany's Liberal Free Democratic Party and the Green Party¹²³⁰. The German Legal Association (<i>Deutscher Juristentag</i>), in 2014, also called for the abolition of Section 166, mainly because of the low number of convictions¹²³¹ under this Section.</p>

3.2 Effectiveness of the rules regulating media responsibility for blasphemy and/or religious insult

<p>Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion</p>	
<p>Offence provision 1</p> <p>German Press Code number 10</p>	<p>Freedom of expression:</p> <p>No higher courts cases were found.</p> <p>Freedom of thought, conscience and religion:</p> <p>No higher courts cases were found.</p>
<p>Offence provision 2</p> <p>Defamation of religions, religious and ideological associations</p>	<p>Freedom of expression:</p> <p>See Section 3.1</p> <p>Freedom of thought, conscience and religion:</p> <p>See Section 3.1</p>

¹²²⁹ *ibid.*

¹²³⁰ Arte, Blasphemy and the limits of freedom of expression (*Blasphemie und die Grenzen der Meinungsfreiheit*), <http://info.arte.tv/de/der-blasphemie-paragraph-und-die-grenzen-der-meinungsfreiheit>.

¹²³¹ Lorenz, Pia, Punishable "blasphemy" does not protect religious feelings (*Strafbare "Gotteslästerung" schützt nicht religiöse Gefühle*), Legal Tribune Online, 2015, <http://www.lto.de/recht/hintergruende/h/charlie-hebdo-karikaturen-straftbar-beschimpfung-bekanntnisse-166-stgb/>.

Indicator 2 - Quantitative evidence	
Offence provision 1 German Press Code number 10	Number of decisions condemning the media service providers and publishers: Between 2010 and 2014 there were 12 complaints to the German Press Council.
Offence provision 2 Defamation of religions, religious and ideological associations	See Section 3.1
Indicator 3 - Bottlenecks of practical implementation	
Offence provision 1 German Press Code number 10	According to stakeholders, the main aspects hindering the application in practice of the provision regulating the media's responsibility is the voluntary commitment of the media to the Press Code. Such regulations have, therefore, no general binding effect.
Offence provision 2 Defamation of religions, religious and ideological associations	See Section 3.1
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Offence provision 1 German Press Code number 10	The German Press Code has not been amended, nor are any amendments planned in the future.
Offence provision 2 Defamation of religions, religious and ideological associations	See Section 3.1

DENMARK

1 National context

Denmark is not a secular state, as the Constitutional Act of Denmark states the Evangelical Lutheran Church to be its national State church¹²³².

The current Danish provision on blasphemy, covering publicly-stated religious insult, was inserted into Section 140 of the Criminal Code in 1930, entering into force on 1 January 1933¹²³³. Although specifically criminalising religious insults, the provision is commonly referred to as blasphemy provision. No specific groups are usually targeted for blasphemy, nor are any specific groups routinely accused of religious insult. The original purpose of forbidding religious insult was to guarantee respect for the State church as a societal and powerful institution and to protect peace in society¹²³⁴. In recent times, proponents of the blasphemy provision claim that the provision works to protect religious minorities and social peace¹²³⁵.

The Danish provision on hate speech in Section 266(b) of the Criminal Code is also relevant in the area of religious insult¹²³⁶. This provision penalises public statements through which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation. Section 266(b) of the Criminal Code was adopted in 1939 as a means of protecting the Jews in Denmark¹²³⁷.

There is a clear overlap between Section 140 and Section 266(b) of the Criminal Code (See Section 2.1), although, in practice, Section 266(b) has been invoked more frequently. Recent case law stemming from Section 266(b) illustrates that it is mostly Muslims who are being targeted by hate speech and, to a lesser extent, Jews¹²³⁸. From February 2015, following the terrorist attack in Copenhagen, Muslim women experienced an increase in violence and degrading treatment in the public sphere¹²³⁹. While the victims of hate speech can often be identified as belonging to a particular religious or ethnic group, it is not possible, however, to identify a typical group routinely accused of hate speech under Section 266(b) of the Criminal Code.

The provision on blasphemy and religious insult also applies to offences committed through the media (e.g. publications, radio, TV or online). Additional protection is also guaranteed – albeit indirectly – by the self-regulatory Press Ethical Rules. Furthermore, according to the Media Liability Act, media editors and publishers are criminally liable for blasphemy and religious insults. No changes to blasphemy laws and regulations have taken place since 2012, nor are any planned in the future.

¹²³² Section 4 of the Constitution: 'The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State'.

¹²³³ Criminal Code (*Straffeloven*), Consolidated Act no. 871 of 04/07/2014, available at: <https://www.retsinformation.dk/Forms/r0710.aspx?id=164192 - Kap14>.

¹²³⁴ Jacob Mchangama, *Konsekvenser ved ophævelse af blasfemiparagraffen*, Tidsskrift for Kriminalret – Tfk 2014.953, side 2.

¹²³⁵ Henning Koch, *Ytringsfrihed og tro*, i Lisbeth Christoffersen (ed.), *Gudebilleder: Ytringsfrihed og religion i en globaliseret verden* (2006), side 74.

¹²³⁶ Criminal Code (*Straffeloven*), Consolidated Act no. 871 of 04/07/2014, available at: <https://www.retsinformation.dk/Forms/r0710.aspx?id=164192 - Kap27>.

¹²³⁷ *Straffelovrådets betænkning om straffastsættelse og strafferammer*, Betænkning nr. 1424 (2002), kapitel 27.

¹²³⁸ Rigsadvokaten, *Praksisoversigt Racediskrimination*, RA-2009-609-0053 (4 July 2014).

¹²³⁹ Danmarks Radio, *Muslimere bliver overfaldet efter terror angreb* (22 februar 2015), available at http://www.dr.dk/Nyheder/Ligetil/Dagens_fokus/Indland/2015/02/Muslimere_blicher_overfaldet_efter_terror_angreb.htm.

2 Legal framework

2.1 General description of legislation applicable to blasphemy and/or religious insult

Section 4 of the Constitution states the Evangelical Lutheran Church in Denmark to be the national State church, meaning that Denmark is not a secular State. Freedom of religion is, however, codified in Section 67 of the Constitution.

Section 140 of the Danish Criminal Code criminalises blasphemy, stating that those who publicly mock or insult the doctrines or worship of any legal religious community will be punished. While the provision does not specifically contain the word 'blasphemy' but, rather, references religious insult, this is commonly understood to mean blasphemy.

Section 140 has been invoked by the public prosecutor only in very exceptional circumstances. Since 1930, only three cases were identified where the public prosecutor brought charges under the Section 140 provision.

Section 266(b) of the Danish Criminal Code is also relevant in the context of religious insult, as it criminalises hate speech through which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation.

A clear overlap exists between Section 140 and Section 266(b) of the Criminal Code, with most examples of alleged religious insult being dealt with by public prosecutors under Section 266(b) on degrading speech.

No civil and administrative provisions for blasphemy exist in Danish law; therefore, there is no real alternative to the criminal liability scheme. However, the media has established the Press Ethical Rules as a means of self-regulation the conduct of the media.¹²⁴⁰ The Press Ethical Rules do not provide specific rules relating to blasphemy and religious insult, however, and no cases on blasphemy seem to have been dealt with by the Press Council (see Section 2.3).

¹²⁴⁰ Press Ethical Rules available at <http://www.pressnaevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx>.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Crimes against public order and peace ¹²⁴¹	Section 140 in Chapter 15 of the Criminal Code ¹²⁴² .
Definition of offence	
Offence provision 1 Crimes against public order and peace	'Those who publicly mock or insult the doctrines or worship of any religious community that is legal in this country, will be punished [..]'
Penalties foreseen	
Offence provision 1 Crimes against public order and peace	Fine or imprisonment up to four months.
Online crime	
Offence provision 1 Crimes against public order and peace	Yes – the provision states that the insult must be publicly expressed.

2.3 The media's responsibility for blasphemy and/or religious insult

The Media Liability Act¹²⁴³ applies to domestic periodical publications, sound and image programmes transmitted by Danmark Radio (the Danish Broadcasting Corporation), TV/2 DANMARK A/S and TV 2's regional enterprises (Section 1 of the Media Liability Act). The Act also applies to electronic information systems, especially news agencies, which are registered with the Press Council.

The media liability applies to three main actors:

- (1) the person who has actually made a blasphemous remark (Section 10 of the Media Liability Act);
- (2) the editor of the publication, in cases where the person who made the blasphemous remark is anonymous (Section 11 of the Media Liability Act);
- (3) the publisher, in cases the editor cannot be held responsible (e.g. where information cannot be found about the editor).

¹²⁴¹ Individual offence provisions of the Danish Criminal Code do not have separate titles. Only Chapters of the Criminal Code have titles.

¹²⁴² Criminal Code (*Straffeloven*), Consolidated Act no. 871 of 04/07/2014, available at: <https://www.retsinformation.dk/Forms/r0710.aspx?id=164192 - Kap14>.

¹²⁴³ Media Liability Act (*Medieansvarsloven*) available at <https://www.retsinformation.dk/forms/R0710.aspx?id=143047>.

No other actor can be held liable for blasphemy/religious insult according to Section 140¹²⁴⁴. Penalties are set out within Section 140, and are described as a fine or imprisonment of up to four months.

The Media Liability Act also established the Press Council as an independent public tribunal to deal with complaints against the mass media. The Act states that both the content and the conduct of the mass media must conform to sound press ethics, and, although the Act does not provide a complete definition of what such ethics entail, it may be interpreted in light of the Press Ethical Rules of guidance. These self-regulating guidelines¹²⁴⁵ have been adopted by the Press Council.

The Press Council cannot impose a penalty on the organisation within the mass media against whom the complaint has been made, nor can it grant financial compensation to the complainant. In cases concerning sound press ethics, it can express its criticism, and may order the editor to publish the decision of the Council.

Decisions by the Press Council are final and cannot be appealed to another administrative authority according to Section 50 of the Media Liability Act. Criminal penalties, in the form of fines and/or imprisonment, can only be applied where a public prosecutor takes the media organisation to court according to Section 140 of the Criminal Code.

¹²⁴⁴ Sandfeld Jakobsen, S., Schaumburg-Müller S., *Media Law in Denmark* (DJØF Publishing, 2011), page 55.

¹²⁴⁵ Press Ethical Rules: <http://www.pressenaevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx>.

3 Effectiveness of Legal Framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of legislation on blasphemy and/or religious insult

Indicator 1 National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
Offence Provision 1 Crimes against public order and peace	Freedom of expression: There are no Supreme court judgments under Section 140 of the Criminal Code.
	Freedom of thought; conscience and religion: There are no Supreme Court judgments under Section 140 of the Criminal Code.
Indicator 2 Quantitative evidence	
Offence Provision 1 Crimes against public order and peace	There have been no investigated, prosecuted or adjudicated cases under Section 140 of the Criminal Code in the period between 2010-2014 ¹²⁴⁶ .
Indicator 3 - Bottlenecks of practical implementation	
Offence Provision 1 Crimes against public order and peace	Clarity of offence provision: Section 140 of the Criminal Code protects the religious feelings connected with the doctrines and worship of different religions. The provision on blasphemy and religious insult can therefore be enforced only after a detailed interpretation of religious texts. Such approach forces the public prosecutor to enter into theological discussions, which the courts will need to assess, determine and ultimately sanction. This combination of interpretation of religious concepts and criminal provisions may lead to a lack of clarity and may challenge the fundamental principle of rule of law and legal certainty ¹²⁴⁷ .
	Suitability of offence provision to cover online crime: The provision covers public mocking, or insults of doctrines or worships of a legally recognised religious community. The insult must be expressed publicly in order to be considered an offence. Insults that are expressed in public, through the media or online, fall within the scope of this provision ¹²⁴⁸ .
	Suitability of offence provision to ensure freedom of expression and or freedom of thought, conscience and religion: An intense academic, as well as political, debate focusing on whether or not Section 140 of the Criminal Code limits the freedom of expression and/or freedom of thought, conscience and religion has been taking place over the last ten years.

¹²⁴⁶ Criminal Law Committee, *Udtalelse om de juridiske konsekvenser af en ophævelse af straffelovens § 140 om blasfemi*, Betænkning nr. 1548 (2014), side 52ff.

¹²⁴⁷ Institut for Human Rights, *Ytringsfrihed - Status 2013* (2013), side 24ff.

¹²⁴⁸ Criminal Law Committee, *Udtalelse om de juridiske konsekvenser af en ophævelse af straffelovens § 140 om blasfemi*, Betænkning nr. 1548 (2014), side 40.

	<p>However, no objective conclusion can yet be drawn.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>Section 140 of the Criminal Code is suitable for the current national context. The provision targets and protects both the religious majority, and religious minorities, against blasphemy and religious insult.</p>
	<p>Other shortcomings of the applicable offence provision:</p> <p>The Public Prosecutor determines whether an alleged violation under Section 140 should be dismissed, or an investigation should be undertaken. NGOs however, argued that cases are often dismissed by the Public Prosecutor without investigation and this may deprive the victims of religious insult from access to justice.</p>
Indicator 4- Drivers for the adoption of new legislation/amendments to existing legislation	
<p>Offence Provision 1</p> <p>Crimes against public order and peace</p>	<p>No legislative changes have been made since 2012, and none are planned. Politicians and academics have debated the possible redundancy of Section 140 of the Criminal Code¹²⁴⁹ as it is used very rarely in practice. This argument has been used to support the repeal of Section 140, particularly given the scope of the more-frequently used hate speech provision in Section 266(b) and the overlap between Section 140 and Section 266(b). In 2011, a group of experts was charged by the Danish Parliament to look into the legal and practical implications of a potential repeal of the blasphemy and religious insult provision. The group published its report in November 2014¹²⁵⁰ however, in February 2015, the Danish government decided against the repeal of Section 140 of the Criminal Code¹²⁵¹.</p>

3.2 Effectiveness of rules regulating media responsibility for blasphemy and/or religious insult

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
<p>Provision 1</p> <p>Section 10, 11 of the Media Liability Act</p>	<p>Freedom of expression:</p> <p>No Supreme Court judgments were identified.</p> <p>Freedom of thought, conscience and religion:</p> <p>No Supreme Court judgments were identified.</p>
<p>Provision 2</p> <p>Section 43 of the Media Liability Act</p>	<p>Freedom of expression:</p> <p>No Supreme Court judgments were identified.</p> <p>Freedom of thought, conscience and religion:</p> <p>No Supreme Court judgments were identified.</p>

¹²⁴⁹ Criminal Law Committee, *Udtalelse om de juridiske konsekvenser af en ophævelse af straffelovens § 140 om blasfemi*, Betænkning nr. 1548 (2014), side 76ff.

¹²⁵⁰ Criminal Law Committee, *Udtalelse om de juridiske konsekvenser af en ophævelse af straffelovens § 140 om blasfemi*, Betænkning nr. 1548 (2014).

¹²⁵¹ Ministry of Justice, *Brev til Retsudvalget af 26. februar 2015 med sagsnr. 2015-731-0046. Retsudvalget 2014-15 REU Alm. del Bilag 194.*

Indicator 2 - Quantitative evidence	
Provision 1 Section 10, 11 of the Media Liability Act	There are no publicly available statistics on court decisions condemning the media. In general decisions from Danish courts are not published and thus not publicly accessible ¹²⁵²
Provision 2 Section 43 of the Media Liability Act	The Press Council does not hold any statistics on its decisions regarding the Press Ethical Rules with respect to blasphemy and religious insult ¹²⁵³ .
Indicator 3 - Bottlenecks of practical implementation	
Provision 1 Section 10, 11 of the Media Liability Act	The rules on the responsibility of the media clearly define who is responsible for blasphemy and religious insult. However, such rules are less clear in defining the content of blasphemy and religious insult. Thus, the same remarks with regard to Indicator 3 mentioned under Section 3.1 apply here also.
Provision 2 Section 43 of the Media Liability Act	No issues identified.
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Provision 1 Section 10, 11 of the Media Liability Act	There was no new legislation or amendments to existing legislation, and no changes are planned in the future.
Provision 2 Section 43 of the Media Liability Act	There was no new legislation or amendments to existing legislation, and no changes are planned in the future.

¹²⁵² Criminal Law Committee, *Udtalelse om de juridiske konsekvenser af en ophævelse af straffelovens § 140 om blasfemi*, Betænkning nr. 1548 (2014), side 52ff.

¹²⁵³ Decisions from the Press Council are available at: <http://www.pressenaevnet.dk/Kendelser.aspx>.

GREECE

1 National context

In Greece, the issue of blasphemy and/or religious insult is framed by the context of the national, social, cultural and religious tradition of the country, and, in particular, the interlinkages between the State and the Church. The Greek legislative framework on blasphemy and religious insult is usually activated in response to artwork displayed in exhibitions¹²⁵⁴, screenings of movies¹²⁵⁵, theatrical performances¹²⁵⁶ and releases of books¹²⁵⁷ that are considered, by some, to be 'indecent' (*άσεμνα*) and/or 'insulting' (*υβριστικά*).

The religious group which more frequently –if not exclusively- evokes these provisions is that of the Eastern Orthodox Church of Christ. No court judgments issued on the basis of the relevant national provisions have been identified for any other religions other than the Eastern Orthodox Christian¹²⁵⁸.

A significant number of cases brought before the Greek courts with respect to blasphemy, concerns instances of verbal conflict between individuals. When cases are evoked on the basis of Article 361 of the Penal Code (PC) on insult (*εξύβριση*), this provision is automatically paired with Article 198 of the PC on blasphemy, given that the offensive and abusive phrases include insulting references –often of a sexual nature- against the divine¹²⁵⁹.

There is no separation of Church and State in Greece. The first line of the Greek Constitution declares that it is proclaimed 'In the name of the Holy and Consubstantial and Indivisible Trinity' (*Εις το όνομα της Αγίας και Ομοουσίου και Αδιαίρετου Τριάδος*). Article 3 of the Constitution¹²⁶⁰, entitled 'Relations of Church and State' (*Σχέσεις Εκκλησίας και Πολιτείας*) recognises the Eastern Orthodox Church of Christ as the

¹²⁵⁴ In 2003, the painting 'Asperges Me' by the Belgian artist Thierry de Cordier was removed from the Outlook exhibition in Athens. See The Guardian, 'Obscene' art offends orthodox Greek taste', 14.12.2003, available at: <http://www.theguardian.com/world/2003/dec/14/arts.artsnews>.

¹²⁵⁵ In 1988, the screening of Martin Scorsese's 'Last Temptation' was prohibited in Athens with Judgment no 17115/1988 of the Athens Single-Member Court of First Instance (*Μονομελές Πρωτοδικείο Αθηνών*).

¹²⁵⁶ The playwright of 'The Saint of Preveza', a play which satirised the then scandal involving the Metropolitan of Preveza, was initially found guilty for religious insult until the Supreme Court (*Άρειος Πάγος*) reversed the sentence, for lack of motivation regarding 'malice' (Supreme Court Judgment no 928/1984).

¹²⁵⁷ In 2000, the novel M' (M to the power of n) by M. Androulakis was withdrawn from the market in Thessaloniki. See news website in.gr archive, 'Holy war for M. Androulakis' M' (*Ιερός πόλεμος για το Μν του Μίμη Ανδρουλάκη*), March 2000, available at: http://archive.in.gr/news/2000/polit/p_mar02.htm.

¹²⁵⁸ Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy No. 47, Council of Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.269, 272. During interviews stakeholders (Ombudsman, Public Prosecutor) confirmed that there are no court judgments (at least of Second Instance or Supreme Court) which relate to other religions.

¹²⁵⁹ Information obtained through stakeholder interviews (ombudsman, lawyer, public prosecutor)

¹²⁶⁰ Article 3 of the Greek Constitution stipulates:

Relations between Church and State

1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and syn-odal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.

2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.

3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited.

'prevailing religion'. The term 'prevailing religion' does not mean that the Eastern Orthodox Church prevails over others, but, rather that almost all Greeks are Orthodox¹²⁶¹. The relationship between the Orthodox religion and the Greek State is deeply symbolic. It is not only a State Church which was created by the State and organised as a legal entity with specific public power privileges, but it is also a 'national' Church - the Church of the Nation¹²⁶².

Literature review, desk research and interviews with stakeholders have given no indication that blasphemy and/or religious insults incidents have become more frequent in Greece in the aftermath of the recent terrorist attacks. The Racist Violence Recording Network (*Δίκτυο Καταγραφής Περιστατικών Ρατσιστικής Βίας*) established in 2011, monitors incidents of racist violence, including those on the basis of religion, but its reports do not specify if these incidents are also linked to the commission of blasphemy and/or religious insult¹²⁶³.

In Greece, blasphemy and religious insult constitute criminal offences, regulated in Articles 198 and 199 PC respectively. Malicious blasphemy and religious insult constitute misdemeanors (*πλημμελήματα*), while non-malicious blasphemy was downgraded from a misdemeanor to an infringement (*πταισµα*) in 2012¹²⁶⁴.

Both provisions reprimand anyone who commits blasphemy and/or religious insult 'in any way whatsoever' (*µε οποιονδήποτε τρόπο*) which, by interpretation, could also cover online commission¹²⁶⁵, however, there is no settled case-law on the matter¹²⁶⁶.

No provisions of administrative and/or civil law, nor measures of a disciplinary nature where identified as relevant and applicable to blasphemy and/or religious insult. The general provisions of the Greek Civil Code (CC) on compensation for pecuniary and moral damage (Articles 914 and 932) are not applicable in the case of Articles 198 and 199 PC, which are of a more 'spiritual nature' as the legally protected good is intangible, therefore, there cannot be civil claimants and compensation¹²⁶⁷.

As with online commission, it is sufficient under the Greek that the described unlawful behaviour manifests 'in any way whatsoever'; thereby covering blasphemy and religious insult through the media. No provisions exist which are more specific, with some limited exceptions, e.g. Article 14(3) of the Greek Constitution which, in cases of an offence against the Christian or any other known religion, allows for seizure of press (print media) by order of the public prosecutor, exceptionally after circulation, or Presidential Decree (PD) 109/2010¹²⁶⁸ transposing Directive 2010/13 into the Greek legal order which

¹²⁶¹ Spyropoulos, P.C., Fortsakis T.P., Constitutional Law in Greece, 2nd ed., 2013, Wolters Kluwer Law & Business, p.239.

¹²⁶² Manitakis A., 'The distinction between believer and citizen' (*Η διάκριση του πιστού από τον πολίτη*), available at: <http://www.metanastefsi.net/uploads/7/6/8/3/7683554/ppol.pdf>.

¹²⁶³ Racist Violence Recording Network, Annual Report 2013, available at: http://www.hlhr.gr/images/site/1010/1035_large/report2013final.pdf; Annual Report 2014, available at: <http://www.unhcr.gr/1againstracism/etisia-ekthesi-2014/>.

¹²⁶⁴ Article 24(3a) of Law 4055/2012 'Fair trial and its reasonable duration' (*Δίκαιη δίκη και εύλογη διάρκεια αυτής*), Government Gazette A'51/2012.

¹²⁶⁵ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹²⁶⁶ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

¹²⁶⁷ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

¹²⁶⁸ Presidential Decree 109/2010 'Harmonization of the Greek broadcasting legislation with the provisions of Directive 2010/13/EC (OJ L 95, 15.4.2010) of the European Parliament and Council, which codified the provisions of Directive 89/552 / EEC (OJ L 298, 17.10.1989) the Council, as it stood after was last amended by Directive 2007/65 / EC (OJ L 332, 18.12.2007) of the European Parliament and of the Council on the coordination of certain laws, regulations and administrative provisions of the Member States concerning the provision of audiovisual media services, Government Gazette A'190/05.11.2010 (Προεδρικό Διάταγμα 109/2010

prohibits transmission of commercials or telemarketing ads during the broadcasting of religious ceremonies.

Radio and television in Greece is overseen by an independent authority, the National Radio and Television Council (*Εθνικό Συμβούλιο Ραδιοτηλεόρασης- ΕΣΡ - ESR*), which may impose administrative sanctions, such as recommendations/warnings, monetary fines and licence revocations. The legal framework applicable to the ESR does not include specific references to blasphemy and religious insult. Administrative sanctions have been imposed for broadcasts deemed insulting due to their religious element, on the grounds of quality degradation, and also through legal interpretation of generally applicable legislation¹²⁶⁹.

It does not appear to be possible that blasphemy and religious insult as regulated in Articles 198 and 199 PC shall be subject to the provisions regulating civil liability of the media¹²⁷⁰ regarding compensation, as there is no direct and explicit inclusion to its scope of application and no relevant case-law¹²⁷¹.

Articles 198 and 199 PC had remained unaltered since their adoption in 1931. In March 2012, Law 4055/2012¹²⁷² introduced an amendment to Article 198(2) on non-malicious blasphemy, which was downgraded from a misdemeanor (*πλημμέλημα*) to an infringement (*πταίσμα*).

The majority of cases brought before a court on the basis of Articles 198 and 199 PC relate to everyday human interaction and verbal conflict between individuals, namely cases of ordinary insult (*εξύβριση*). Cases that involve the interaction of national legislation on blasphemy and/or religious insult and freedom of expression on the one hand, and freedom of thought, conscience and religion on the other hand, refer to artwork displayed, circulated or performed within the Greek territory, either by Greek, or by foreign artists. Such cases relate to the freedom of art as a more specific aspect of the right to freedom of expression (Article 16(1) of the Constitution). Supreme Court judgements are very limited and national case-law does not include a judicial balancing between the penal provisions on blasphemy and religious insult, and the constitutional provisions safeguarding freedom of expression and freedom of thought, conscience and religion.

It is argued that the elements of the offences established by Articles 198 and 199 PC are vague concepts and value expressions that should be interpreted restrictively and in line with the Constitution, as wider application could compromise the negative aspect of freedom of conscience and religion, namely the right to being atheistic, agnostic or non-

«Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 2010/13/ΕΕ (ΕΕ L 95 της 15.4.2010) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου, με την οποία κωδικοποιήθηκαν οι διατάξεις της Οδηγίας 89/552/ΕΟΚ (ΕΕ L 298 της 17.10.1989) του Συμβουλίου, όπως ίσχυε μετά την τελευταία τροποποίηση της από την Οδηγία 2007/65/ΕΚ (ΕΕ L 332 της 18.12.2007) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου για το συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων.» ΦΕΚ Α'190/05.11.2010).

¹²⁶⁹ See for example Decisions 137/2003, 5/2005 and 219/2012, available through search on the National Radio and Television Council [website](#).

¹²⁷⁰ Law 1178/1981 'Regarding civil liability of the press and other provisions', Government Gazette Α'187/16.07.1981 (Νόμος 1178/1981 «Περί αστικής ευθύνης του τύπου και άλλων τινών διατάξεων», ΦΕΚ Α' 187/16.07.1981) and Article 4(10) of Law 2328/1995 'Legal status of private television and local radio, regulation of issues of the broadcasting market and other provisions', Government Gazette Α'159/03.08.1995 (Νόμος 2328/1995 «Νομικό καθεστώς της ιδιωτικής τηλεόρασης και της τοπικής ραδιοφωνίας, ρύθμιση θεμάτων της ραδιοτηλεοπτικής αγοράς και άλλες διατάξεις», ΦΕΚ Α'159/03.08.1995).

¹²⁷¹ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

¹²⁷² Law 4055/2012 'Fair trial and its reasonable duration', Government Gazette Α'51/2012 (Νόμος 4055/2012 «Δίκαιη δίκη και εύλογη διάρκεια αυτής», ΦΕΚ Α'51/2012). This amendment was brought with Article 24(3a).

religious¹²⁷³. Moreover, the lack of specific provisions regarding the commission of blasphemy and/or religious insult through the media, and the lack of extensive or settled case law on this, leaves too-wide a margin for ad hoc, conjunctive and proportional, interpretation of the abovementioned general provisions.

2 Legal framework

2.1 General description of the legislation applicable to blasphemy and/or religious insult

In Greece, blasphemy and religious insult constitute criminal offences. Chapter 7 of the Greek PC, entitled 'Plots against Religious Peace' (*Επιβουλή της θρησκευτικής ειρήνης*) comprises four articles: on malicious blasphemy (Article 198), on blasphemy concerning religions/religious insult (Article 199); on disturbance of a religious assembly (Article 200), and on insult of the dead (Article 201). The provisions most frequently used and almost exclusively encountered in theory and case-law on blasphemy and religious insult, are Articles 198 and 199.

The legal perception of the interests protected by the provisions of Articles 198 and 199 PC is rather diverse, with different opinions amongst legal practitioners¹²⁷⁴. Although the title of the Chapter indicates that the protected good is religious peace, both the explanatory memorandum and legal theory and interpretation considered other legal interests to be within the scope of application, such as religion, the religious sense, a sense of reverence, religious freedom, the predominant position of the Eastern Orthodox Church etc¹²⁷⁵. The prevailing trend seems to support the view that the legally protected good is the religious feeling of citizens (*θρησκευτικό συναίσθημα πολιτών*).

The provision of Article 198 PC sets two types of blasphemous behavior which constitute criminal offences, by distinguishing between malicious and non-malicious/simple blasphemy (*Κακόβουλη Βλασφημία – Μη-κακόβουλη/απλή βλασφημία*). The term of 'maliciousness' used in the text of the provision relates to the subjective element of the crime (*υποκειμενική υπόσταση εγκλήματος*), to the existence or lack of intention (*δόλος*) of the perpetrator.

Article 198(1) penalises anyone who publicly insults God, in any way whatsoever. The act falling under this provision may constitute any direct or indirect manifestation of contempt towards God, which could be considered to be particularly insulting. This contempt can be expressed either orally or in writing, but can also derive from a complex event, from the content or form of its manifestation. This could cover a broad range of acts, e.g. oral or written expression, gestures, depictions, images, broadcast of mass media¹²⁷⁶. The first paragraph of Article 198 also requires that the insult of God is 'malicious', meaning that the perpetrator aims to show contempt or hostile attitude towards God, and seeks satisfaction from this particular act in a gloating or sadistic

¹²⁷³ Information obtained through stakeholder interviews (lawyer).

¹²⁷⁴ Tsapogas M., 'Blasphemy and justice in a Greek Orthodox context' in Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy No. 47, Council of Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.114-115. This was also elaborated during stakeholder interviews, June-July 2015 (lawyer).

¹²⁷⁵ Tsapogas M., 'Blasphemy and justice in a Greek Orthodox context' in Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy No. 47, Council of Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.114-115. This was also elaborated through stakeholder interviews, June-July 2015 (lawyer).

¹²⁷⁶ Information obtained through stakeholder interviews, June-July 2015 (lawyer). See also the description in Margaritis M., 'Penal Code: Interpretation – implementation' (*Ποινικός Κώδικας: Ερμηνεία – Εφαρμογή*), 3rd Ed., P.N. Sakkoulas, Athens, 2014, p.542-546.

mood¹²⁷⁷. The term 'God' covers the supreme being of any monotheistic religion together with the respect towards divinity in general. The act of contempt is penalised not only when it refers directly to God but also when directed against divine and sacred properties attributed to God, such as omniscience, omnipotence etc¹²⁷⁸. With respect to the manifestation of contempt taking place 'publicly', this is interpreted¹²⁷⁹ as where the act can be brought to the attention of an indefinite number of people, regardless of whether it took place in a public space or if indeed third parties perceived it - the probability or possibility of the act being witnessed is enough¹²⁸⁰. The requirement of publicity under Article 198 is met, even before a religiously indifferent audience¹²⁸¹.

Article 198(2) penalises anyone who publicly manifests by blasphemy a lack of respect towards divinity. The element of 'maliciousness' is not required to reprimand this lack of respect. The notion of the 'divine' (*θεία*) is broader than 'God' and can incorporate anything considered sacred by religious doctrine, e.g. the Holy Trinity, the saints, the holy mysteries and rites, sacred symbols and images¹²⁸².

Article 199 reprimands anyone who publicly and maliciously insults the Eastern Orthodox Church or any other religion known in Greece, in any way whatsoever. It covers any contemptuous behavior against doctrines, customs or rules, including insults expressed through cinema or theatre¹²⁸³. It can be committed in any way and refer to the doctrine, either directly - mainly with insulting words against religion- or indirectly, through brutal and vulgar expressions or actions that insult the religious customs and rituals, e.g. symbols, images of Christ, Virgin Mary and the Saints¹²⁸⁴. Objective criticism and audit of a religious teaching does not constitute religious insult.

The provision refers to any 'tolerable' (*ανεκτή*) religion in the sense of any 'known' (*γνωστής*) religion¹²⁸⁵. 'Known' religion in the Greek legal order does not mean recognised by history or society or even a State authority. As unanimously accepted in case-law and theory, this term describes every religion whose teachings are public and therefore accessible to the persons concerned and not apocryphal and whose worship is obvious and not mystical¹²⁸⁶. Article 199 also covers clerics and monks of the Eastern

¹²⁷⁷ Mallios V., Papapantoleon C., 'Satire and blasphemy: the adventures of a right' (*Σάτιρα και βλασφημία: οι περιπέτειες ενός δικαιώματος*) in Hellenic League for Human Rights 'God has no need for a prosecutor: Church, blasphemy and Golden Dawn' (*Ο Θεός δεν έχει ανάγκη εισαγγελέα: Εκκλησία, βλασφημία και Χρυσή Αυγή*), Nefeli, 2013, p.5.

¹²⁷⁸ Mallios V., Papapantoleon C., 'Satire and blasphemy: the adventures of a right' (*Σάτιρα και βλασφημία: οι περιπέτειες ενός δικαιώματος*) in Hellenic League for Human Rights 'God has no need for a prosecutor: Church, blasphemy and Golden Dawn' (*Ο Θεός δεν έχει ανάγκη εισαγγελέα: Εκκλησία, βλασφημία και Χρυσή Αυγή*), Nefeli, 2013, p.4

¹²⁷⁹ Supreme Court judgment no 119/1988 and no 1083/2004.

¹²⁸⁰ Mallios V., Papapantoleon C., 'Satire and blasphemy: the adventures of a right' (*Σάτιρα και βλασφημία: οι περιπέτειες ενός δικαιώματος*) in Hellenic League for Human Rights 'God has no need for a prosecutor: Church, blasphemy and Golden Dawn' (*Ο Θεός δεν έχει ανάγκη εισαγγελέα: Εκκλησία, βλασφημία και Χρυσή Αυγή*), Nefeli, 2013, p.5-6;

Margaritis M., 'Penal Code: Interpretation – implementation' (*Ποινικός Κώδικας: Ερμηνεία – Εφαρμογή*), 3rd Ed., P.N. Sakkoulas, Athens, 2014, p.542-546.

¹²⁸¹ Tsapogas M., 'Blasphemy and justice in a Greek Orthodox context' in Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy No. 47, Council of Europe Publishing, March 2010, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e), p.114.

¹²⁸² Margaritis M., 'Penal Code: Interpretation – implementation' (*Ποινικός Κώδικας: Ερμηνεία – Εφαρμογή*), 3rd Ed., P.N. Sakkoulas, Athens, 2014, p.542-546.

¹²⁸³ Blachos A. F., The crime of religious insult (*Το έγκλημα της καθύβρισης θρησκευμάτων*), Penal Chronicles (*ΠοινΧρ ΛΔ*), 1984, p.641-648.

¹²⁸⁴ Opinion 47/1993 of the Prosecutor of the Court of Appeals of Thessaloniki.

¹²⁸⁵ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹²⁸⁶ Tsatsos D., Stathopoulos M., Melissas D., 'Freedom of religious conscience and freedom of conscience' (*Ελευθερία θρησκευτικής συνείδησης και ελευθερία συνείδησης*), Greek Justice law review (*Ελληνική Δικαιοσύνη*) 44, 2003, pp.355-364.

Orthodox Church¹²⁸⁷. Particular attention, however, should be given to the mimicry/caricature of the functionaries of religion in the context of art –especially theatre- where Courts should be very cautious when exploring the element of intent¹²⁸⁸.

This provision is regarded as intending to remind non-believers, that religious sentiment is deeply rooted in millions of people and therefore the Law intervene to avert potential crisis¹²⁸⁹.

According to the Greek courts, the non-material nature and sanctity of the notions protected by those provisions are incompatible with the concept of private interest which can be restored by the actual or symbolic award of certain financial amounts. Protection is awarded in the sense of safeguarding public interest, irrespective of the subjects (people) on whom the insult might reflect¹²⁹⁰. The general provisions of the Greek CC on compensation for pecuniary and moral damage (Articles 914 and 932 CC) are not applicable in the case of Articles 198 and 199 PC, which are of a more 'spiritual nature' as the legally protected good is intangible and there cannot be civil claimants and compensation¹²⁹¹. No provisions of administrative and/or civil law, nor measures of a disciplinary nature, were identified as relevant and applicable to blasphemy and/or religious insult in Greece.

¹²⁸⁷ Information obtained through stakeholder interviews, June-July 2015 (lawyer).

¹²⁸⁸ Margaritis M., 'Penal Code: Interpretation – implementation' (*Ποινικός Κώδικας: Ερμηνεία – Εφαρμογή*), 3rd Ed., P.N. Sakkoulas, Athens, 2014, p.542-546.

¹²⁸⁹ Margaritis M., 'Penal Code: Interpretation – implementation' (*Ποινικός Κώδικας: Ερμηνεία – Εφαρμογή*), 3rd Ed., P.N. Sakkoulas, Athens, 2014, p.542-546.

¹²⁹⁰ Supreme Court Judgment no 1298/2002, Court of Appeals of Piraeus Judgment no 92/2001.

¹²⁹¹ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Malicious blasphemy	Article 198 PC
Offence provision 2 Religious insult	Article 199 PC
Definition of offence	
Offence provision 1 Malicious blasphemy	1. Anyone who publicly and maliciously insults God, in any way whatsoever, shall be punished by confinement of up to two years. 2. Whoever, apart from the case of paragraph 1, publicly manifests by blasphemy a lack of respect towards divinity, shall be punished by detention of up to six months or by a fine of up to EUR 3,000.
Offence provision 2 Religious insult	Anyone who publicly and maliciously insults the Eastern Orthodox Church or any other religion tolerable in Greece, in any way whatsoever, shall be punished by confinement of up to two years.
Penalties foreseen	
Offence provision 1 Malicious blasphemy	Confinement ¹²⁹² of up to two years for malicious blasphemy – Article 198(1). Detention of up to six months or a fine of up to EUR 3,000 for non-malicious blasphemy – Article 198(2)
Offence provision 2 Religious insult	Confinement of up to two years.
Online crime	
Offence provision 1 Malicious blasphemy	Article 198 penalises anyone who publicly insults God, in any way whatsoever. The expression 'in any way whatsoever' (<i>με οποιονδήποτε τρόπο</i>) could also cover online crime ¹²⁹³ , however, there is no settled case-law on the matter ¹²⁹⁴ .
Offence provision 2 Religious insult	As above - Article 199 also uses the expression 'in any way whatsoever' (<i>με οποιονδήποτε τρόπο</i>).

¹²⁹² Article 18 PC distinguishes criminal behaviour into three categories (felonies, misdemeanours and infringements), on the basis of the penalty foreseen in each specific provision, as follows:

a) Felonies (*κακουργήματα*): life imprisonment -if specifically stated in the provision (*ισόβια κάθειρξη*) / imprisonment (*κάθειρξη*), of five to twenty years (Article 52 PC);
b) Misdemeanours (*πλημμελήματα*): confinement (*φυλάκιση*) of ten days to five years / monetary penalty (*χρηματική ποινή*) of EUR150 to EUR15,000 (Articles 53 and 57 PC);
c) Infringements (*πταίσματα*): detention (*κράτηση*) from one day to one month / fine (*πρόστιμο*) of EUR 29 to EUR 590 (Articles 55 and 57 PC).

¹²⁹³ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹²⁹⁴ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

2.3 Media responsibility for blasphemy and/or religious insult

As with online commission, it is sufficient under the provisions of the Greek PC on blasphemy and religious insult that the described unlawful behaviour manifests 'in any way whatsoever'. Therefore these could also cover blasphemy and religious insult through the media. No extensive or settled case law yet exists on this¹²⁹⁵.

The Greek legal order differentiates between the various types of media (print media/press and radio and television). Article 14(2) of the Greek Constitution establishes freedom of the press (*τύπος*) in an absolute way and prohibits censorship. Freedom of the press includes freedom of printing and producing, and freedom of publishing as well as freedom of distribution¹²⁹⁶. Article 14(3) of the Greek Constitution entails very specific, exceptional restrictions to these freedoms, which are strictly and narrowly interpreted. One such restriction relates to offences against the Christian or any other known religion, where seizure by order of the public prosecutor shall be allowed exceptionally after circulation^{1297,1298}. The notion of 'press' under Article 14(2) of the Constitution covers every printed material appropriate and intended for circulation, including mechanical representations, therefore also covers an important proportion of the material circulated on the internet – mainly the on-line versions of already existing media (newspapers, magazines, radio and television stations)¹²⁹⁹. Regarding blogs, given that newer forms of communication on the internet are not directly and explicitly regulated in Greek substantial or procedural law, national case-law during the last years has been variable regarding whether these constitute 'press'¹³⁰⁰. It does not appear to be possible that blasphemy and religious insult as regulated in Articles 198 and 199 PC shall be subject to the provisions regulating civil liability of the media¹³⁰¹ regarding compensation, given their 'spiritual' nature, the lack of a direct and explicit inclusion to its scope of application and absence of relevant case law¹³⁰².

¹²⁹⁵A case was brought before the Three-member First Instance Court of Athens regarding a humorous newspaper column which included satirical comments about Christmas (Judgment 4959/1994). The Court did not accept the charges on religious insult, making a distinction between the elements of provision 199 of the Penal Code and ironic, satirical humor.

¹²⁹⁶ Spyropoulos, P.C., Fortsakis T.P., Constitutional Law in Greece, 2nd ed., 2013, Wolters Kluwer Law & Business, p.207.

¹²⁹⁷ Article 14(2) of the Greek Constitution stipulates '2. The press is free. Censorship and all other preventive measures are prohibited' and Article 14(3) foresees that '3. The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of:

- a) an offence against the Christian or any other known religion;
- b) an insult against the person of the President of the Republic;
- c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State;
- d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.'

¹²⁹⁸ Rammos C. N., 'On the occasion of the Charlie Hebdo events. Considerations regarding freedom of expression and its limits in difficult situations on the basis of the jurisprudence of the ECtCR' (*Με αφορμή τα γεγονότα στο Charlie Hebdo. Προβληματισμοί γύρω από την ελευθερία έκφρασης και τα όριά της στις δύσκολες περιπτώσεις με βάση τη νομολογία του ΕΔΔΑ*), Contribution to the conference on the ECHR, Hellenic Judges Academy, 24.02.2015, available at: <http://www.constitutionalism.gr/site/rammos-charlie-hebdo/>, p.17.

¹²⁹⁹ Multi-member Court of First Instance of Thessaloniki, Judgment 22228/2011.

¹³⁰⁰ For example Single-member Court of First Instance of Rodopi, Judgment 44/2008 and Appeals Court of Dodekanisa, Judgment 232/2010 accepting the submission of blogs to the provisions concerning the 'press' and contra case law of the Multi-member Court of First Instance of Thessaloniki, Judgment 22228/2011.

¹³⁰¹ Law 1178/1981 'Regarding civil liability of the press and other provisions', Government Gazette A'187/16.07.1981 (Νόμος 1178/1981 «Περί αστικής ευθύνης του τύπου και άλλων τινών διατάξεων», ΦΕΚ Α' 187/16.07.1981) and Article 4(10) of Law 2328/1995 'Legal status of private television and local radio, regulation of issues of the broadcasting market and other provisions', Government Gazette A'159/03.08.1995 (Νόμος 2328/1995 «Νομικό καθεστώς της ιδιωτικής τηλεόρασης και της τοπικής ραδιοφωνίας, ρύθμιση θεμάτων της ραδιοτηλεοπτικής αγοράς και άλλες διατάξεις», ΦΕΚ Α'159/03.08.1995).

¹³⁰² Information obtained through stakeholder interviews, June-July 2015 (Public Prosecutor).

Specific criminal provisions from 1931 regarding 'indecent' (*άσεμνα*) documents, printed material, books, images, drawings, emblems, photographs, cinematographic films or other objects of any kind, are still in force¹³⁰³. The notion of 'indecent' does not relate directly and/or exclusively to the religious sentiment but may be also used in this context.

According to Article 15(1) of the Constitution¹³⁰⁴ the protective provisions for the press are not applicable to audiovisual media, including radio and television broadcasting, which is subject to the control and oversight of an independent authority. Article 15(2) of the Greek Constitution provides the legal basis for the relevant exclusive competence of the National Radio and Television Council (*Εθνικό Συμβούλιο Ραδιοτηλεόρασης – ΕΣΡ – ESR*)¹³⁰⁵. The ESR controls the content of the broadcastings, in order to safeguard the application of national and European legislation and uphold the public interest in relation to the right to information, pluralism, protection of minors and persons in general, consumer protection and cultural diversity¹³⁰⁶. As explained during stakeholder consultations¹³⁰⁷, the particularity of electronic media –especially that of radio and television in comparison to traditional press, but also compared to other audiovisual means of expression mainly of an artistic character, e.g. movies and artwork- is that electronic media is direct and reaches the public, sometimes irrespective of their own will. In other words, while the public can choose whether they will buy a newspaper, or a ticket for a movie that could potentially contain messages of a blasphemous content, television and radio broadcasts enter almost every household and individuals cannot control in advance the quality and/or the content of broadcast they will be exposed to. Hence, the role of the ESR is to ensure the overall quality of broadcasts in terms of safeguarding public interest, including against ridicule of religious and/or ecclesiastical elements.

The legal framework applicable to the ESR does not include specific references to blasphemy and religious insult¹³⁰⁸. However, within its competence of imposing administrative sanctions on the grounds of quality degradation, and through legal interpretation of generally applicable legislation (see following paragraphs) the ESR has issued decisions on the insulting content of broadcasts encompassing a religious element. Of the five relevant decisions, three¹³⁰⁹ relate to insults against the Greek Orthodox religion, one¹³¹⁰ was relevant to the degrading behavior of a journalist against representatives of the Dodecatheon (*δωδεκαϊστές*) and one¹³¹¹ was issued following disparaging references by a TV presenter against the Muslim minority in Greece. Out of

¹³⁰³ Articles 29 and 30 of Law 5060 of 30 June 1931, 'Regarding the press, insults of honour in general and other relevant provisions' (*Νόμος περί άσεμνων*).

¹³⁰⁴ Article 15(1) of the Constitution states that '1. The protective provisions for the press in the preceding article shall not be applicable to films, sound recordings, radio, television or any other similar medium for the transmission of speech or images'.

¹³⁰⁵ Article 15(2) of the Greek Constitution provides that '2. Radio and television shall be under the direct control of the State. The control and imposition of administrative sanctions belong to the exclusive competence of the National Radio and Television Council, which is an independent authority, as specified by law. The direct control of the State, which may also assume the form of a prior permission status, shall aim at the objective and on equal terms transmission of information and news reports, as well as of works of literature and art, at ensuring the quality level of programs mandated by the social mission of radio and television and by the cultural development of the Country, as well as at the respect of the value of the human being and the protection of childhood and youth. (...)'

¹³⁰⁶ National Radio and Television Council, Annual Report 2014, available on the National Radio and Television Council [website](#), p.6.

¹³⁰⁷ Information obtained through stakeholder interviews, June-July 2015 (ESR).

¹³⁰⁸ Information obtained through stakeholder interviews, June-July 2015 (ESR).

¹³⁰⁹ Decisions 137/2003, 5/2005 and 219/2012, available through search on the National Radio and Television Council [website](#).

¹³¹⁰ Decision 244/2004 available through search on the National Radio and Television Council [website](#).

¹³¹¹ Decision 38/2014 available through search on the National Radio and Television Council [website](#).

these five decisions, only one¹³¹² imposed a fine of EUR 15,000, with the remaining four being limited to imposing a recommendation (*σύσταση*).

Following the delegation of legislative power of Article 15(2) of the Constitution, Law 2863/2000¹³¹³ regulates the function and defines the responsibilities of the ESR, without any specific reference to blasphemy and/or religious insult. Law 2328/1995¹³¹⁴ on private television includes only a general requirement for any broadcast (including commercials) transmitted by radio or television to respect the personality, honour, reputation, private and family life, professional, social, scientific, artistic, political or other similar activity of every person whose image appears on the screen or whose name or information is sufficient to identify them. Article 1(3)(c) which required that television commercials should not insult religious or political beliefs and Article 5(e) which prohibited the transmission of advertisements during the broadcasting of religious ceremonies, were both repealed in 2000¹³¹⁵. The prohibition of transmission of commercials or telemarketing ads during the broadcasting of religious ceremonies was reintroduced through Presidential Decree 109/2010¹³¹⁶ which transposed Directive 2010/13 into the Greek legal order.

In terms of self-regulation, the Journalists' Union of Athens Daily Newspapers (*Ένωση Συντακτών Ημερήσιων Εφημερίδων Αθηνών –ΕΣΗΕΑ – ESHEA*) has approved (by a Decision of its General Assembly) the 'Principles of Ethics of the Journalistic Profession'¹³¹⁷. Article 7(b) specifically requires that, in the context of a globalised media market which brought enhanced educational and cultural responsibilities for the media, journalists 'shall avoid vulgarisms, vulgarity and linguistic barbarity, applying, even in satire and caricature, the rules of professional ethics and social responsibility'. Article 7(d) requires that journalists

¹³¹² Decision 219/2012 was issued on the occasion of a broadcast of a satirical show that commented on the economic situation of the country and the favorable treatment the Church enjoys in respect of taxation and other financial burdens. According to the reasoning of the ESR, the broadcast surpassed satirical criticism and expanded to include ridicule of certain functional objects e.g. the Holy Grail which was presented filled with ice-cream and to falsifying religious supplications, including a very known and symbolic church hymn. According to the ESR 'the show exceeded the tolerable limits of satire and caused a reaction of Christians, as a similar reaction would be caused by ridiculing Islam to the the faithful of that respective religion'.

¹³¹³ Law 2863/2000 'National Radio and Television Council and other authorities and bodies of the broadcasting services sector', Government Gazette A'262/29.11.2000 (*Νόμος 2863/2000 «Εθνικό Συμβούλιο Ραδιοτηλεόρασης και άλλες αρχές και όργανα του τομέα παροχής ραδιοτηλεοπτικών υπηρεσιών»*, ΦΕΚ Α'262/29.11.2000).

¹³¹⁴ Law 2328/1995 'Legal status of private television and local radio, regulation of issues of the broadcasting market and other provisions', Government Gazette A'159/03.08.1995 (*Νόμος 2328/1995 «Νομικό καθεστώς της ιδιωτικής τηλεόρασης και της τοπικής ραδιοφωνίας, ρύθμιση θεμάτων της ραδιοτηλεοπτικής αγοράς και άλλες διατάξεις»*, ΦΕΚ Α'159/03.08.1995).

¹³¹⁵ Through Presidential Decree 100/2000 'Harmonization of the Greek broadcasting legislation with the provisions of Directive 97/36 of the European Parliament and of Council of 30 June 1997 (OJ No. L 202) of Directive 89/552 / EEC Council of 17.10.89 (OJ No. L 298) on the provision of services', Government Gazette A'98/17.03.2000 (*Προεδρικό Διάταγμα 100/2000 «Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 97/36 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 30ης Ιουνίου 1997 (ΕΕ αριθ. L 202) της Οδηγίας 89/552/ΕΟΚ του Συμβουλίου της 17.10.89 (ΕΕ αριθ. L 298) σχετικά με τη παροχή υπηρεσιών»*, ΦΕΚ Α'98/17.03.2000).

¹³¹⁶ Presidential Decree 109/2010 'Harmonisation of the Greek broadcasting legislation with the provisions of Directive 2010/13/EC (OJ L 95, 15.4.2010) of the European Parliament and Council, which codified the provisions of Directive 89/552 / EEC (OJ L 298, 17.10.1989) the Council, as it stood after was last amended by Directive 2007/65 / EC (OJ L 332, 18.12.2007) of the European Parliament and of the Council on the coordination of certain laws, regulations and administrative provisions of the Member States concerning the provision of audiovisual media services, Government Gazette A'190/05.11.2010 (*Προεδρικό Διάταγμα 109/2010 « Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 2010/13/ΕΕ (ΕΕ L 95 της 15.4.2010) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου, με την οποία κωδικοποιήθηκαν οι διατάξεις της Οδηγίας 89/552/ΕΟΚ (ΕΕ L 298 της 17.10.1989) του Συμβουλίου, όπως ίσχυε μετά την τελευταία τροποποίηση της από την Οδηγία 2007/65/ ΕΚ (ΕΕ L 332 της 18.12.2007) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου για το συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων.»* ΦΕΚ Α'190/05.11.2010).

¹³¹⁷ Journalists' Union of Athens Daily Newspapers, General Assembly Decision of 19-20 May 1998, 'Principles of Ethics of the Journalistic Profession' (*Ένωση Συντακτών Ημερήσιων Εφημερίδων Αθηνών, Απόφαση Γενικής Συνέλευσης της 19-20 Μαΐου 1998, 'Αρχές Δεοντολογίας του Δημοσιογραφικού Επαγγέλματος'*), available at: <http://www.esiea.gr/arxes-deontologias/>.

'contribute creatively to protecting our national tradition and safeguarding our cultural heritage'.

Similarly, the Greek Code for Advertising and Communication (*Ελληνικός Κώδικας Διαφήμισης – Επικοινωνίας*)¹³¹⁸ of the Association of Advertising Agencies (*Ένωση Εταιριών Διαφήμισης & Επικοινωνίας Ελλάδος*) and the Hellenic Advertisers Association (*Σύνδεσμος Διαφημιζομένων Ελλάδος*) is a self-regulation guideline document. Article 2 requires that advertisements should not contain statements or visual/acoustic representations that offend morals and the prevailing decency perceptions (*ήθη και επικρατούσες αντιλήψεις ευπρέπειας*), while Article 12 prohibits defamation of any person or group of persons. No direct reference is made to blasphemy or religious insult.

3 Effectiveness of the legal framework and its relationship with freedom of expression, freedom of thought and conscience

3 Effectiveness of the legislation on blasphemy and/or religious insult

In Greece, the grid of constitutional provisions that guarantee freedom of expression and freedom of thought and conscience are Articles 13 (Religious freedom)¹³¹⁹, 14 (Freedom of the press), 15 (Cinema, sound recordings, radio, television) and 16 (Freedom of art, science, research and teaching)¹³²⁰.

Greek case-law on the basis of Articles 198 and 199 PC derives almost exclusively from First and Second Instance Courts. In Greece, these cases cover two broad categories¹³²¹. The majority relates to verbal conflict between individuals and other concern works of art, which according to some people have a 'blasphemous' content, as 'indecent' and/or 'insulting' and are relevant to the freedom of art as a more specific aspect of the right to freedom of expression¹³²². Most of the defendants are acquitted on appeal (during either penal or civil proceedings), mainly for lack of intent and cases do not reach the Supreme Court¹³²³.

Even in the limited cases which have reached the Supreme Court, the reasoning of the judgment is limited to examining the constitutive elements of the offences established through 198 and 199 PC and/or to whether there was intention/maliciousness on behalf of

¹³¹⁸ The Association of Advertising Agencies of Greece (*Ένωση Εταιριών Διαφήμισης & Επικοινωνίας Ελλάδος – ΕΔΕΕ-ΕΔΕΕ*) and the Hellenic Advertisers' Association (*Σύνδεσμος Διαφημιζομένων Ελλάδος – ΣΔΕ- SDE*) issued the 'Greek Code for Advertising and Communication' (*Ελληνικός Κώδικας Διαφήμισης – Επικοινωνίας*) on the basis of the legal authorisation provided in Law 2863/2000. The latest version (2007) is available for download at: http://www.see.gr/index.php?option=com_content&view=article&id=20&Itemid=22.

¹³¹⁹ Article 13(1) and 13(2) of the Greek Constitution provide:

1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.
2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.

¹³²⁰ Article 16(1) of the Greek Constitution stipulates:

1. Art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State. Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the Constitution.

¹³²¹ Information on the classification and the content of the categories obtained during stakeholders interviews, June-July 2015 (Lawyer, Public Prosecutor).

¹³²² For example, in 1988, the screening of Martin Scorsese's 'Last Temptation' was prohibited in Athens through a court order (Athens Single-member Court of First Instance, Judgment no 17115/1988). In 2000, the novel *Mv* (*M to the power of n*) by M. Androulakis was withdrawn from the market in Thessaloniki (Single-member Court of Athens, Judgment 5208/2000). In 2003, the painting 'Asperges Me' by the Belgian artist Thierry de Cordier was removed from the 'Outlook' art exhibition in Athens. On the same year, Gerhard Haderer's comic book 'The Life of Jesus' was confiscated after its circulation on the basis of Article 14(4) of the Constitution and charges were brought against the writer, the publisher and the booksellers for religious insult under Article 199 PC.

the perpetrator, or to assessing whether the work in question constitutes 'art' which would fall under Article 16(1) of the Constitution¹³²⁴. National case-law does not include a judicial balancing between the penal provisions on blasphemy and religious insult, and the constitutional provisions safeguarding freedom of expression and freedom of thought, conscience and religion.

The full text of the limited number of relevant judgements delivered by the Supreme Court (*Άρειος Πάγος*) is not available online, neither publicly nor on legal databases subject to subscription. In the following section the information derives from stakeholder interviews and is based on commented extracts of the judgments, as published in national legal reviews.

¹³²³ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹³²⁴ Information obtained during stakeholder interviews, June-July 2015 (lawyer).

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
<p>Offence Provision 1</p> <p>Malicious blasphemy</p>	<p>Freedom of expression:</p> <p>1) Supreme Court Judgment 233/1978¹³²⁵.</p> <p><u>Facts:</u> The theatrical manager, the playwright and the actor of a satirical play were prosecuted under both provisions of PC 198 and 199 because the actor appeared on stage as a cleric of the Eastern Orthodox Church in conversation with God. The dialogue was satirical, highly political and rather sarcastic towards events and figures of the seven year military regime (1967-1974).</p> <p><u>Court decision:</u> The appeal was rejected.</p> <p><u>Court reasoning:</u> The Supreme Court considered that the satirical variant of the most known religious prayer (<i>Σύμβολο της πίστewος</i> – The Creed) was obviously declarative of the intended religious insult of the Ecumenical Councils that drafted the prayer, as well as of the Eastern Orthodox Church. It confirmed the reasoning of the Courts of First and Second instance and maintained the conviction of the actor as perpetrator and of the playwright and theatrical manager as instigators for both blasphemy and religious insult.</p>
	<p>Freedom of thought; conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>
<p>Offence provision 2</p> <p>Religious insult</p>	<p>Freedom of expression:</p> <p>1) Supreme Court Judgment 233/1978. <i>See above.</i></p> <p>2) Supreme Court Judgment 928/1984¹³²⁶</p> <p><u>Facts:</u> The members of a theatrical company were prosecuted for religious insult, as the stage was designed to resemble a church and was equipped with all sacred symbols, e.g. cross and other ecclesiastical objects, in addition to which the characters – some of which were supposed to be priests - were shown engaging in lewd acts.</p> <p><u>Court decision:</u> The appeal was accepted.</p>

¹³²⁵ The text of the Judgment is not available. The description of the case was provided during stakeholder interviews, June-July 2015 (lawyer).

¹³²⁶ The text of the Judgment is not available. The description of the case was provided during stakeholder interviews, June-July 2015 (lawyer).

	<p><u>Court reasoning:</u></p> <p>The condemning Judgment was overturned on the grounds of lacking specific and detailed reasoning - and, more specifically, because it did not specify whether the defendants were aware of the insulting character of their acts - but also because the actual venue was not a church and extracts from the Holy Scripture were not used. The reasoning did not include arguments relevant to the freedom of expression of the artists or to the freedom of art in general.</p> <p>Freedom of thought; conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>
<p>Indicator 2 Quantitative evidence</p>	
<p>Offence Provision 1</p> <p>Malicious blasphemy</p>	<p>Number of cases investigated: p Data are not available. As explained during stakeholder interviews (lawyer, public Prosecutor), no overall statistics are available through a centralised channel. While every public prosecutor's office might maintain quantitative information, this can only be retrieved ad-hoc and through individual communication.</p> <p>Number of cases prosecuted: Data are not available. As above.</p> <p>Number of cases adjudicated: Data are not available. As above.</p>
<p>Offence provision 2</p> <p>Religious insult</p>	<p>Number of cases investigated: Data are not available. As explained during stakeholder interviews (public prosecutor), no overall statistics are available through a centralised channel. While every public prosecutor's office might maintain quantitative information, this can only be retrieved ad-hoc and through individual communication.</p> <p>Number of cases prosecuted: Data are not available. As above.</p> <p>Number of cases adjudicated: Data are not available. As above.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Offence Provision 1</p> <p>Malicious blasphemy</p>	<p>Clarity of offence provision:</p> <p>It is argued¹³²⁷ that the elements of the offence of blasphemy as articulated in Article 198 PC constitute indefinable notions as the law uses value expressions (<i>αξιολογικές εκφράσεις</i>) and vague concepts (<i>αόριστες έννοιες</i>), e.g. 'maliciously' or 'lack of respect'. In the sensitive area of Penal Law, this could contradict the need for clarity and precision to safeguard legal certainty.</p>

¹³²⁷ Information obtained through stakeholder interviews, June-July 2015 (lawyer).

	<p>Therefore, these should be interpreted restrictively and in line with the Constitution. This seems to be the case in practice, as - despite the wide and abstract wording and, according to certain opinions, problematic drafting- in most cases the prosecution is not carried out and the case is set aside in the archive or the Courts dismiss the actions¹³²⁸. Article 198 PC is, in practice, obsolete, as the prosecutors and the Courts interpret the facts (words of blasphemy addressed towards a certain individual) as constituting common insult (<i>εξύβριση</i>) against the individual and not against God or divinity. In substance, the prosecutors and the Courts assess the intent of the perpetrator and conclude that his intent is to address a common insult against someone by means of blasphemous words¹³²⁹.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>As explained above in Section 2.1, Article 198 PC penalises anyone who publicly insults God, in any way whatsoever. The expression 'in any way whatsoever' (<i>με οποιονδήποτε τρόπο</i>) could also cover online crime¹³³⁰, however, there is no settled case law on the matter¹³³¹.</p>
	<p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>In Greece, cases based on 198 and 199 PC cover two broad categories. The majority relates to verbal conflict between individuals. In reality, these acts constitute ordinary insult (<i>εξύβριση</i>) where the offensive and abusive phrases include insulting references -usually of a sexual content- against the divine and are meant to insult the individual and not the divine or the religion. In those cases, the legislation on blasphemy is not contradicted to the legal framework on freedom of expression, freedom of thought and conscience. The remaining cases concern works of art, which according to some people have a 'blasphemous' content, as 'indecent' and/or 'insulting'. Most cases refer to artwork displayed, circulated or performed within the Greek territory, either by Greek, or by foreign artists and relate to the freedom of art as a more specific aspect of the right to freedom of expression¹³³².</p> <p>Despite the abovementioned issues regarding the clarity of Article 198 PC, in practice most cases do not go further the First or Second Instance. Moreover, in cases that there is also a dimension of protecting freedom of expression and/or freedom of thought, conscience and religion, the Courts' reasoning is usually based on procedural aspects such as the incompatibility of the non-material character of the offence with the submission of a civil claim, or on the lack of intent/maliciousness on behalf of the defendants¹³³³. On this basis, the defendants are usually acquitted on appeal, during either penal or civil proceedings. In the very limited cases which have reached the Supreme Court, the reasoning of the judgment does not include a judicial balancing between the penal provisions on blasphemy and religious insult, and the constitutional provisions safeguarding freedom of expression and freedom of thought, conscience and religion. Rather, it examines the constitutive elements of the offences established through 198 and 199 PC, or whether the work in question constitutes 'art' in the sense</p>

¹³²⁸ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

¹³²⁹ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹³³⁰ Information obtained through stakeholder interviews, June-July 2015 (ombudsman, lawyer, public prosecutor).

¹³³¹ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

¹³³² In 1988, the screening of Martin Scorsese's 'Last Temptation' was prohibited in Athens through a court order (Athens Single-member Court of First Instance, Judgment no 17115/1988). In 2000, the novel *Mv (M to the power of n)* by M. Androulakis was withdrawn from the market in Thessaloniki (Single-member Court of Athens, Judgment 5208/2000). In 2003, the painting 'Asperges Me' by the Belgian artist Thierry de Cordier was removed from the 'Outlook' art exhibition in Athens. On the same year, Gerhard Haderer's comic book 'The Life of Jesus' was confiscated after tis circulation on the basis of Article 14(4) of the Constitution and charges were brought against the writer, the publisher and the booksellers for religious insult under Article 199 PC .

¹³³³ Information obtained through stakeholder interviews, June-July 2015 (public prosecutor).

	<p>of Article 16(1) of the Constitution. Despite the limited convictions it is, however, argued that maintaining criminal reprimand under Articles 198 and 199 PC in fact means that the State seeks to 'enforce' respect towards God/divinity in a way that the negative aspect of freedom of religion is compromised, namely the right to being atheistic, agnostic or non-religious¹³³⁴.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>Stakeholders did not raise any issue regarding the suitability of the offence provision to the current national context. The use of this provision still reflects the national context, particularly the interlinkages between the State and the Eastern Orthodox Church. There is no indication that blasphemy and/or religious insults incidents have become more frequent in Greece in the aftermath of the recent terrorist attacks.</p> <p>Other shortcomings of applicable offence provision:</p> <p>Some stakeholders, e.g. the Atheist Union of Greece¹³³⁵, request the abolition of the provision noting that instead of protecting social peace, it could legitimise violence and directly hinder the human right of freedom of opinion and expression. The Hellenic League for Human Rights¹³³⁶ also advocates in favour of the abolition of both provisions arguing, inter alia, that the protected good is merely the notion of God, while the prohibition of expression of opinions regarding the divine by an ordinary law entails a contradiction with the general, fundamental rights safeguarded in Articles 13, 14 and 16 of the Constitution.</p> <p>In September 2012 a man was arrested on charges of posting malicious blasphemy and religious insults on a Facebook page named 'Elder Pastitsios the Pastafarian', combining the name of Elder Paisios, a famous, late Greek-Orthodox monk, and the Greek traditional dish 'pastitsio'¹³³⁷. At First Instance, in January 2014, the accused was sentenced to ten months of confinement with probation¹³³⁸. This generated public debate on the provisions of 198 and 199 PC and stakeholders¹³³⁹ have also requested the abolition of the relevant provisions, on that occasion.</p> <p>An alternative was described during stakeholder interviews¹³⁴⁰, whereby, instead of abolishing the provision of Article 198 of the PC, its two paragraphs could be merged into a single, clear provision which would not include the notion of 'maliciousness'.</p>
<p>Offence provision 2</p> <p>Religious insult</p>	<p>Clarity of offence provision:</p> <p>See above.</p>

¹³³⁴ Information obtained through stakeholder interviews, June-July 2015 (Lawyer).

¹³³⁵ Atheist Union of Greece, Press Release on the participation to the open government consultation regarding the amendment of the Penal Code – call for the abolition of Articles 198-199 of the PC, 26.03.2015, available [here](#).

¹³³⁶ Hellenic League for Human Rights, 'Arguments for the abolition of offenses against religious peace', available at: <http://www.hlhr.gr/index.php?PageLang=greek>.

¹³³⁷ Apostolou N., 'Blasphemy in democracy's birthplace? Greece arrests Facebook user', October 2012, available at: <http://www.csmonitor.com/World/Europe/2012/1002/Blasphemy-in-democracy-s-birthplace-Greece-arrests-Facebook-user>; Ethnos.gr news site, 'Malicious blasphemy and religious insult – "Elder Pastitsios" on trial' (Κακόβουλη βλασφημία και καθύβριση θρησκευμάτων – Σε δίκη ο ... «Γέροντας Παστίσιος»), September 2012, available at: <http://www.ethnos.gr/article.asp?catid=22768&subid=2&pubid=63715686>.

¹³³⁸ To Vima newspaper, "'Elder Pastitsios" sentenced' (Καταδικάστηκε ο «Γέροντας Παστίσιος»), January 2014, available at: <http://www.tovima.gr/society/article/?aid=557665>.

¹³³⁹ Dimitras P., 'The cross-political party enhances law against blasphemy' (Ο διακομματικά ενισχυμένος νόμος κατά της βλασφημίας), 25.09.2012 at news-blog tvxs, available at: <http://tvxs.gr/news/egrapsan-eipan/o-diakommatika-enisxymenos-nomos-kata-tis-blafimias-toy-panagioti-dimitra>.

¹³⁴⁰ Information obtained through stakeholder interviews, June-July 2015 (Public Prosecutor).

	In addition, it was mentioned that this provision tends not to be used in practice, or if used, that the relevant cases are unlikely to reach the phase of a Court hearing ¹³⁴¹ .
	Suitability of offence provision to cover online crime:
	See above.
	Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:
	See above
	Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):
See above.	
Other shortcomings of applicable offence provision:	
None identified.	
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Offence Provision 1 Malicious blasphemy	Article 198 PC had remained unaltered since its adoption in 1931. In March 2012, Law 4055/2012 ¹³⁴² introduced an amendment only as regards Article 198(2) PC on non-malicious blasphemy which was downgraded from a misdemeanor (<i>πλημμέλημα</i>) to an infringement (<i>πταισµα</i>). This in practice means that the margin of the foreseen penalties was reduced from confinement (<i>φυλάκιση</i>) of ten days to five years / monetary penalty (<i>χρηµατική ποινή</i>) of EUR150 to EUR15,000 to detention (<i>κράτηση</i>) from one day to one month / fine (<i>πρόστιµο</i>) of €29 to €590. It could be argued that this change was to some extent an intermediate response to the arguments in favour of the abolition of the criminal dimension of blasphemy, however the issue of penal reprimand remains.
Offence provision 2 Religious insult	Article 199 of the PC has remained unaltered since its adoption in 1931.

3 Effectiveness of the rules regulating media responsibility for blasphemy and/or religious insult

As mentioned above in Section 2.3, under the provisions of the Greek Penal Code on blasphemy and religious insult, it is sufficient that the described unlawful behaviour manifests 'in any way whatsoever'. Therefore these could also cover blasphemy and religious insult through the media, although there has been no extensive or settled case law on this¹³⁴³. Most cases relate to freedom of expression in its more specific form of artistic expression and no cases were identified in relation to the effectiveness of rules regulating the media's

¹³⁴¹ Information obtained through stakeholder interviews, June-July 2015 (Public Prosecutor).

¹³⁴² Law 4055/2012 'Fair trial and its reasonable duration', Government Gazette A'51/2012 (*Νόµος 4055/2012 «Δίκαιη δίκη και εύλογη διάρκεια αυτής», ΦΕΚ Α'51/2012*). This amendment was brought with Article 24(3a).

¹³⁴³ For example, a case was brought before the Three-member First Instance Court of Athens regarding a humoristic newspaper column which included satiric comments about Christmas (Judgment 4959/1994). The Court did not accept the charges on religious insult, making a distinction between the elements of provision 199 of the Penal Code and ironic, satirical humor.

responsibility for blasphemy and/or religious insult with a view to their interaction with freedom of expression and freedom of thought, conscience and religion.

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
Offence Provision 1 Malicious blasphemy	Freedom of expression: No relevant higher court decisions were identified.
	Freedom of thought, conscience and religion: No relevant higher court decisions were identified.
Offence provision 2 Religious insult	Freedom of expression: No relevant higher court decisions were identified.
	Freedom of thought, conscience and religion: No relevant higher court decisions were identified.
Offence provisions 3 Self-regulatory provisions Principles of Ethics of the Journalistic Profession Greek Code for Advertising and Communication	Freedom of expression: No relevant higher court decisions were identified.
	Freedom of thought, conscience and religion: No relevant higher court decisions were identified.
Indicator 2 - Quantitative evidence	
Offence Provision 1 Malicious blasphemy	<p>Number of decisions condemning the media service providers and publishers:</p> <p>No relevant higher (or any other) court decisions were identified.</p> <p>In particular as regards the competence of the ESR to impose sanctions, out of its <u>five administrative decisions</u> issued on the occasion of insulting broadcasts encompassing a religious element, on the grounds of quality degradation and through legal interpretation of generally applicable legislation:</p> <ul style="list-style-type: none"> • three¹³⁴⁴ (Decisions 137/2003, 5/2005 and 219/2012) relate to insults against the Greek Orthodox religion; • one¹³⁴⁵ (Decision 244/2004) related to the degrading behavior of a journalist against representatives of the Dodecatheon (<i>δωδεκαίστες</i>) and

¹³⁴⁴ Decisions 137/2003, 5/2005 and 219/2012, available through search on the National Radio and Television Council [website](#).

¹³⁴⁵ Decision 244/2004 available through search on the National Radio and Television Council [website](#).

	<ul style="list-style-type: none"> one¹³⁴⁶ (Decision 38/2014) was issued following disparaging references by a TV presenter against the Muslim minority in Greece. <p>Of these five decisions, only one¹³⁴⁷ imposed a fine of EUR15,000, with the remaining four were limited to imposing a recommendation (<i>σύσταση</i>).</p>
<p>Offence provision 2</p> <p>Religious insult</p>	<p>Number of decisions condemning the media service providers and publishers:</p> <p>Same as above.</p>
<p>Offence provisions 3</p> <p>Self-regulatory provisions</p> <p>Principles of Ethics of the Journalistic Profession</p> <p>Greek Code for Advertising and Communication</p>	<p>No information regarding the application of these provisions was identified.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Offence Provision 1</p> <p>Malicious blasphemy</p>	<p>There are no specific provisions regarding the commission of blasphemy and/or religious insult through the media, the legal framework applicable to the ESR does not include specific references to blasphemy and religious insult and any practical implementation is subject to ad hoc, conjunctive and proportional, interpretation. There has not been extensive or settled case law on blasphemy and religious insult through the media and many upcoming developments, e.g. blogs are subject to variable views.</p>
<p>Offence provision 2</p> <p>Religious insult</p>	<p>Same as above.</p>
<p>Offence provisions 3</p> <p>Self-regulatory provisions</p> <p>Principles of Ethics of the Journalistic Profession</p>	<p>No information regarding the application of these provisions was identified.</p>

¹³⁴⁶ Decision 38/2014 available through search on the National Radio and Television Council [website](#).

¹³⁴⁷ Decision 219/2012 was issued on the occasion of a broadcast of a satirical show that commented on the economic situation of the country and the favorable treatment the Church enjoys in respect of taxation and other financial burdens. According to the reasoning of the ESR, the broadcast surpassed satirical criticism and expanded into ridicule of certain functional objects e.g. the Holy Grail, which was presented filled with ice-cream, and to falsifying religious supplications, including a very known and symbolic church hymn. According to the ESR *'the show exceeded the tolerable limits of satire and caused a reaction of Christians, as a similar reaction would be caused by ridiculing Islam to the the faithful of that respective religion'*.

<p>Greek Code for Advertising and Communication</p>	
<p>Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation</p>	
<p>Offence Provision 1 Malicious blasphemy</p>	<p>None identified.</p>
<p>Offence provision 2 Religious insult</p>	<p>None identified.</p>
<p>Offence provisions 3 Self-regulatory provisions Principles of Ethics of the Journalistic Profession Greek Code for Advertising and Communication</p>	<p>No changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>

FINLAND

1 National context

In Finland, blasphemy and religious insults are both criminalised by the same provision. Chapter 17, Section 10 of the Criminal Code covers both blaspheming (defined as 'mocking the Christian God') and religious insult (considered to be shaming matters considered 'sacred' by other religions)¹³⁴⁸. The rationale behind the existence of this provision is the protection of freedom of religious worship and the feelings of religious individuals, as well as the maintenance of public order.¹³⁴⁹

In Finland the Church and the State are still connected. In fact, although the Constitution guarantees freedom of religion (Section 11) and bans discrimination on the grounds of religion (Section 6), the Evangelical Lutheran Church of Finland and the Orthodox Church are granted certain specific privileges (e.g. the possibility to levy taxes collected through the State).

Freedom of religion is guaranteed in the Constitution and in secondary legislation. However, the use of blasphemy and religious insult provisions to protect the religious majority became controversial in the 1960s and prosecutions against blasphemous behaviours have since become rare¹³⁵⁰. In the modern context, the provision is used to penalise insults against religious minorities (e.g. Islam). The provision is not, however, frequently used, with, at most, a handful of cases discussed before the court each year¹³⁵¹.

The relevant offence, called 'Breach of religious peace', was last revised in 1998. Blasphemy and religious insult committed online, or through the media, also fall within the scope of the provision, as it makes reference to 'publicly' mocking and shaming God, or matters held sacred by religious communities. The provision has not been amended recently, nor has there been any serious discussion of such reforms in recent years. Blasphemy and/or religious insult committed by the media are also covered by media self-regulation guidelines, as drafted by the Council of Mass Media.

Groups that are typically accused of committing blasphemy and/or religious insult include, but are not limited to, individuals commenting on immigrants in online forums¹³⁵². Religious insult has become more frequent in the last 15 years, as religious diversity increases. However, the official statistics on such incidents are very small and it is difficult to draw any definitive conclusions on this issue.

The legislation on blasphemy and religious insult constitutes a limitation on the freedom of expression. To date, there has been one Supreme Court judgment in this area, where the Court held that breach of religious peace also covers sarcastic comments made with the aim of criticising public authorities where the author also deliberately seeks to denigrate a religion¹³⁵³.

¹³⁴⁸ Law 39/1889 'Criminal Code' (*Rikoslaki*), Chapter 17, Section 10 (RL 17 luku 10 §).

¹³⁴⁹ Tulkki, K., *'Uskonnonvapauden ja sananvapauden keskinäisestä suhteesta rikosoikeuden kannalta arvioiden'* [2010] Edilex 2010/28, 1-9. The offence is listed under 'offences against public order' (Chapter 17 of the Criminal Code).

¹³⁵⁰ Tulkki, K., *'Uskonnonvapauden ja sananvapauden keskinäisestä suhteesta rikosoikeuden kannalta arvioiden'* [2010] Edilex 2010/28, 1-9.

¹³⁵¹ National Research Institute of Legal Policy 'Overview of the criminality situation – Appendix: tables' (*Oikeuspoliittinen tutkimuslaitos – Rikollisuustilanne. Liitetaulukot*) (2013) available at <http://www.optula.om.fi/fi/index/julkaisut/rikollisuustilanne/rikollisuustilanne2013.html>.

¹³⁵² Pöyhtäri, R., Haara, P. and Raittila, P., *Vihapuhe sananvapautta kaventamassa* (Tampere University Press, Tampere, 2013).

¹³⁵³ Supreme Court judgment KKO:2012:58.

2 Legal framework

2.1 General description of legislation applicable to blasphemy and/or religious insult

The Finnish Constitution guarantees both freedom of expression (Section 12) and freedom of religion and conscience (Section 11). While freedom of expression is guaranteed to 'everyone', the Constitution also provides that laws may limit such freedoms in specific cases¹³⁵⁴. The statutory provision on blasphemy and religious insult can thus be considered as specific limitations on the freedom of expression allowed by the Constitution.

Blasphemy and religious insult are regulated primarily through criminal law, i.e. the Criminal Code (*Rikoslaki*).

The old blasphemy offence has been amended several times, most recently in 1998, with the offence now referred to as 'breach of religious peace'. It covers both blasphemy as it is traditionally understood (i.e. mocking the Christian God) and religious insult i.e. those behaviours defaming or degrading what a registered church or a registered religious community holds sacred, (including interfering with a worship or religious service)¹³⁵⁵. The offence is listed under the Section on 'Offences against public order' (Chapter 17 of the Criminal Code) which seeks to protect freedom of religious worship and the religious feelings of individuals, as well as public order¹³⁵⁶.

Civil liability rules do not apply in this context, as compensation can only be granted in cases where there has been personal injury or damage to property. Few cases exist where compensation can be awarded i.e. for the mental suffering of a victim in the context of crimes limiting his/her freedom (e.g. false imprisonment), peace (e.g. trespass), honour (e.g. defamation) or private life (e.g. invasion of privacy). While, in theory, violation against 'peace' could be taken to include religious peace, in practice, case law on this issue does not exist. In addition, it is unlikely that a 'breach of religious peace' would be interpreted as a crime against specific victims, as it is considered a public order offence.

¹³⁵⁴ Law 731/1999 'Finland's Constitution' (*Suomen Perustuslaki*), section 12, available at <https://www.finlex.fi/fi/laki/ajantasa/1999/19990731>.

¹³⁵⁵ Law 39/1889 'Criminal Code' (*Rikoslaki*), Chapter 17, Section 10 (RL 17 luku 10 §).

¹³⁵⁶ Tulkki, K., *'Uskonnonvapauden ja sananvapauden keskinäisestä suhteesta rikosoikeuden kannalta arvioiden'* [2010] Edilex 2010/28, 1-9.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Breach of religious peace	Chapter 17, Section 10 of the Criminal Code (RL 17 luku 10 §) ¹³⁵⁷ .
Definition of offence	
Offence provision 1 Breach of religious peace	'Whoever: 1) publicly blasphemes or, with intent to insult, publicly defames or degrades something that a church or a religious community, within the meaning of Freedom of Religion Act (267/1922) ¹³⁵⁸ , regards as sacred, or 2) by making noise, via threatening behaviour, or otherwise, interferes with a service of worship, ecclesiastical ceremony, other religious practice or funeral function, shall be sentenced for breach of religious peace'.
Penalties foreseen	
Offence provision 1 Breach of religious peace	Fine or imprisonment up to six months.
Online crime	
Offence provision 1 Breach of religious peace	Yes. The provision covers 'publicly' mocking and shaming God, or matters held sacred by religious communities.

2.3 Media responsibility for blasphemy and/or religious insult

The criminal law framework also covers blasphemy and religious insult committed by or through the media (printed media, broadcast or online media). The courts decide on guilt and applicable penalties in line with the framework below.

Criminal responsibility firstly covers individuals committing or participating in the crime¹³⁵⁹, including crimes committed via the media. Criminal law provisions are supplemented by Section 13 of the Law on the exercise of freedom of expression in mass media¹³⁶⁰, which sanctions editors-in chief, who through their negligence, contribute to relevant crimes being committed via mass media. Editors-in-chief

¹³⁵⁷ Act 39/1889, Criminal Code (*Rikoslaki*), available at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

¹³⁵⁸ Law 267/1922 has been repealed by Law 453/2003. Law 453/2003 (2 §) covers the Evangelical-Lutheran Church, the Orthodox Church and any religious community registered in line with Law 453/2003, Chapter 2.

¹³⁵⁹ Law 39/1889 'Criminal Code' (*Rikoslaki*), Chapter 17, Section 10 (RL 17 luku 10 §).

¹³⁶⁰ Act 460/2003, Law on the exercise of freedom of expression in mass media (*Laki sananvapauden käyttämisestä joukkoviestinnässä*), section 13 ('*päätoimittajarikkomus*').

(of print, broadcast or online media) may also be found guilty of an infringement if materials breaching the criminal law provision are made available via their publications, and/or if the editor-in-chief has intentionally, or through negligence, failed in the duty to oversee operations¹³⁶¹. Therefore, if a relevant criminal statement is published (e.g. in a newspaper), the author of the statement may be criminally liable and, in the circumstances described above, (when the conditions above are satisfied) the editor-in-chief may also be fined for a minor infringement.

Media self-regulation also exists, through guidelines drafted by the Council for Mass Media (CMM, *Julkisen sanan neuvosto*). This organisation is tasked with interpreting good journalistic practice and defending freedom of expression and freedom of publication through the press, radio, television and online¹³⁶². The CMM is not a court, nor does it have public powers, however, it can investigate alleged breaches of good professional practice by the news media organisations affiliated with it¹³⁶³. The CMM uses its Ethical Code for Journalists (*Journalistin ohjeet*) to judge good professional practice, which relates to issues such as misrepresentations of reality¹³⁶⁴. The sanction applied by the CMM is a 'remark' (*huomautus*), which must be published by the relevant media. In theory, such misrepresentations could also relate to matters considered 'sacred'. However, to date there have been no cases related to blasphemy or religious insult.

3 Effectiveness of Legal Framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of legislation on blasphemy and/or religious insult

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
Offence Provision 1	Freedom of expression:
Breach of religious peace	<i>Court judgment on RL 17 luku 10 § is KKO:2012:58 (Halla-aho)</i> ¹³⁶⁵
	Facts:
	An aspiring politician published a blog post, stating his opinion that prosecutors were disproportionately targeting those criticising immigration, for accusations of censorship. To prove this, he made a generalised statement about the prophet Mohammed (related to his marriage to an underage girl) in which he associated Islam, as a religion, with paedophilia.

¹³⁶¹ Act 460/2003, Law on the exercise of freedom of expression in mass media (*Laki sananvapauden käyttämisestä joukkoviestinnässä*), section 13 (*päätoimittajarikkomus*).

¹³⁶² The Council for Mass Media in Finland: http://www.jsn.fi/en/Council_for_Mass_Media/the-council-for-mass-media-in-finland.

¹³⁶³ *ibid*.

¹³⁶⁴ The Council for Mass Media, 'Journalists' instructions' (*Journalistin ohjeet*), http://www.jsn.fi/journalistin_ohjeet/.

¹³⁶⁵ Judgment KKO:2012:58 (*Halla-aho*) of 6 June 2012.

	<p>Court decision: The criminal conviction was upheld.</p> <p>Court reasoning: In applying RL 17:10§, the Court discussed the relationship between freedom of expression and freedom of religion, stating that freedom of expression allows criticism of religion. However, freedom of expression may be limited where its exercise includes inappropriate attacks on religion. The Court also clarified that such limitations on freedom of expression must be fully justified¹³⁶⁶ by the facts of the case. While it is possible to criticise religions, even sharply, the Court concluded that the highly derogatory language used by the accused, and his generalised statement about the entire religion, demonstrated a clear intention to cause offence¹³⁶⁷.</p> <p>Freedom of thought; conscience and religion: In the case KKO:2012:58 (see above) the Court stated that one of the aims of RL 17:10§ is to contribute to protect the religious feelings of individuals¹³⁶⁸. This aspect is not, however, discussed by the Supreme Court in detail, apart from the Court stating that conflicts between fundamental freedoms, such as freedom of religion and freedom of expression, have to be assessed on a case by case basis¹³⁶⁹.</p>
<p>Indicator 2 Quantitative evidence</p>	
<p>Offence Provision 1 Breach of religious peace</p>	<p>Number of cases investigated (cases 'reported' to the police; it can be assumed that the police investigate all reported cases, as long as the report is not manifestly unfounded):¹³⁷⁰</p> <p>2010 (3), 2011 (9), 2012 (4), 2013 (6), 2014 (2).</p> <p>Number of cases prosecuted (the number of cases the police investigated and then transferred to the prosecutorial authorities; -no figures are available for actual prosecutions)¹³⁷¹</p> <p>2010 (0), 2011 (6), 2012 (1), 2013 (2), 2014 (3).</p>

¹³⁶⁶ KKO:2012:58, paragraph 18.

¹³⁶⁷ KKO:2012:58, paragraphs 21-23.

¹³⁶⁸ KKO:2012:58, paragraph 7.

¹³⁶⁹ KKO:2012:58, paragraphs 8-9.

¹³⁷⁰ Information collected through consultation with national stakeholders (police), 25 May 2015.

¹³⁷¹ *ibid.*

	<p>Number of cases adjudicated (penalties associated with 'findings of guilt', which is the closest relevant available figure; figures for 2014 are not yet available):¹³⁷²</p> <p>2010 (0), 2011 (0), 2012 (0), 2013 (0).</p>
Indicator 3 - Bottlenecks of practical implementation	
<p>Offence Provision 1</p> <p>Breach of religious peace</p>	<p>Clarity of offence provision:</p> <p>The definition is considered sufficiently precise¹³⁷³. The Supreme Court's judgment made it clear that it is permissible to sharply criticise religious doctrines. However, it is not acceptable to denigrate the religion through the use of highly derogatory language that would not form part of a reasonable discussion.</p> <p>Suitability of offence provision to cover online crime:</p> <p>The provision is suitable to cover online crime within its scope¹³⁷⁴.</p> <p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>Some stakeholders hold that RL 17:10§ is too restrictive on freedom of expression¹³⁷⁵. Although the Court stated that limitations on freedom of expression must be justified and that it is permissible to criticise religions, it also stated that the tone of the criticism must be 'appropriate'. As some of the immigration debate tended to use very provocative language regarding Islam, it has been argued that having to tone down the debate in order to avoid criminal liability, might have a limiting effect on such discussion.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>No issues were identified. One of the stakeholders interviewed, however, affirmed that the 'blasphemy' offence (RL 17:10§) might, in theory, be used against atheists who polemically criticise religious doctrines¹³⁷⁶.</p> <p>Other shortcomings of applicable offence provision:</p> <p>One of the issues raised relates to the fact that the Prosecutor General (rather than any state prosecutor, as is normally the</p>

¹³⁷² Office of National Statistics 'Penalties by Crime 2010-2013' (*Tilastokeskus – Rangaistukset rikoksittain, 2009-2013*)
http://pxnet2.stat.fi/PXWeb/pxweb/fi/StatFin/StatFin_oik_syyttr/010_syyttr_tau_109_fi.px/?rxid=34858ea2-6cb0-46a8-af58-1cdfde52ec4e.

¹³⁷³ Information collected through consultation with national stakeholders (judge), 28 May 2015.

¹³⁷⁴ *ibid.*

¹³⁷⁵ Information collected through consultation with national stakeholders (NGO), 30 May 2015.

¹³⁷⁶ Information collected through consultation with national stakeholders (NGO), 30 May 2015.

	case) is responsible for deciding on prosecutions that involve crimes (or other infringements) that are based on the content of a message ¹³⁷⁷ . While this practice ensures consistency in prosecutorial decisions, it also risks becoming bureaucratic, meaning that some matters might not get prosecuted, in order to avoid the associated bureaucracy involved in the process ¹³⁷⁸ .
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
Offence Provision 1 Breach of religious peace	There have been no legislative changes (nor proposals for amendments) since 2011. KKO:2012:58 was a high profile case that made the general public aware of the provision. One stakeholder suggested that the current law ensures the generally preventative aim that the criminal law provisions should have, according to the Finnish criminal law system ¹³⁷⁹ .

3.2 Effectiveness of rules regulating media responsibility for blasphemy and/or religious insult

As mentioned in Section 2.3, the Ethical Code for Journalists (*Journalistin ohjeet*) does not specifically address blasphemy and religious insult, and has never been applied in such cases. Its effectiveness cannot therefore be assessed.

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
Provision 1 Breach of religious peace	Freedom of expression: No Supreme Court judgments were identified.
	Freedom of thought, conscience and religion: No Supreme Court judgments were identified.
Indicator 2 - Quantitative evidence	
Provision 1 Breach of religious peace	There are no disaggregated numbers on how many cases investigated, prosecuted or adjudicated related to the media.
Indicator 3 - Bottlenecks of practical implementation	
Provision 1 Breach of religious peace	See Section 3.1
Indicator 4 - Drivers of the adoption of new legislation/amendment to existing legislation	
Provision 1 Breach of religious peace	There have been no legislative changes (nor official proposals for amendments) since 2011.

¹³⁷⁷ Act 460/2003, Law on the exercise of freedom of expression in mass media (*Laki sananvapauden käyttämisestä joukkoviestinnässä*), section 24.

¹³⁷⁸ Information collected through consultation with national stakeholders (prosecutor), 28 May 2015.

¹³⁷⁹ Information collected through consultation with national stakeholders (judge), 28 May 2015

IRELAND

1 National context

According to the Constitution of Ireland¹³⁸⁰, freedom of expression and freedom of conscience, and the free profession and practice of religion are fundamental principles which are constitutionally protected. The Roman Catholic Church was granted 'special recognition' in the Constitution of Ireland when it was drawn up in 1937, although other religions were also mentioned. This remained the case until 1972, when the Constitution was amended by plebiscite. There are numerous references to God in the Constitution¹³⁸¹, therefore, the Church and the State are not separated in Ireland. No information was identified to suggest that the lack of separation of the Church and the State has had an influence on the criminalisation of blasphemy in Ireland.

While blasphemy is a criminal offence, regulated by Article 40 (6)(1)(i) of the Constitution and Article 36 of the Defamation Act 2009, no provision exists which makes religious insult a criminal offence in Ireland. Frequently, it is those groups who express dissent towards the established church, that are accused of blasphemy¹³⁸². The National Public Broadcaster (RTE, *Raidió Teilifís Éireann*) has for example, been threatened with prosecution for blasphemy on several occasions, usually in response to satire or comedy shows. No such prosecution has ever been taken¹³⁸³.

There are no specific administrative or civil law rules applying to blasphemy¹³⁸⁴, nor is it subject to disciplinary measures¹³⁸⁵. Blasphemy committed by or through the media is punishable under Article 40(6)(1)(i) of the Constitution and Article 36 of the Defamation Act 2009. The online commission of blasphemy remains untested under Article 36 of the Defamation Act 2009¹³⁸⁶. However, it would seem that online publications are treated as publications in the same sense as paper publications¹³⁸⁷.

As Article 36 of the Defamation Act 2009 has not been used in practice, there are no court decisions which assess the relationship between the provision and freedom of expression, thought, conscience and religion. Despite this, Article 36 has been described as restricting the right to freedom of expression as guaranteed in Article 40(6)(1)(i) of the

¹³⁸⁰ Constitution of Ireland 1937, available at: <http://www.irishstatutebook.ie/en/constitution/>.

¹³⁸¹ The Preamble of the Constitution states: "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial," Articles referring to God in the Constitution are: 6.1 (" All powers of government, legislative, executive and judicial, derive, under God, from the people"); 44.1 ("The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion."); and the oaths prescribed for the President (12.8), the Council of State (31.4), and the Judiciary (34.5.1).

¹³⁸² The Anglican Church of Ireland was the established church from 1536 to 1871. After disestablishment and the creation of the Irish Free State in 1922, the Catholic Church was effectively re-founded as the state church under the Free State.

¹³⁸³ Information collected through consultation with national stakeholders (Press Ombudsman) May 2015.

¹³⁸⁴ Ibid.

¹³⁸⁵ Ibid.

¹³⁸⁶ Information collected through consultation with national stakeholder (academic) May 2015 .

¹³⁸⁷ Ibid.

Constitution¹³⁸⁸. Furthermore, it has been described as having a chilling effect upon normal freedom of expression and leading to self-censorship by certain defenders¹³⁸⁹.

No court decision has assessed the relationship between blasphemy and freedom of expression, however, one case did assess the relationship between blasphemy (under the old Defamation Act of 1961) and freedom of thought, conscience and religion. In *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484, the Supreme Court stated that, 'It is difficult to see how the common law crime of blasphemy, related as it was to an established Church and an established religion could survive in [...] a Constitution guaranteeing freedom of conscience, and the free profession and practice of religion¹³⁹⁰. It added, 'It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern State which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion'¹³⁹¹.

Blasphemy laws have not been recently amended but amendments are planned following the introduction of Article 36 of the Defamation Act 2009 and the Charlie Hebdo attacks in Paris in 2015¹³⁹². These attacks led to the publication and sale of around 1,500 copies of the Charlie Hebdo cartoons in the context of the Paris attacks. However, there were no other blasphemy and/or religious insult incidents in the aftermath of this year's terrorist attacks¹³⁹³. Therefore, the main driver behind these legislative changes is the fact that the Article is considered vague and unused, and that blasphemy laws are no longer appropriate in modern society.

¹³⁸⁸The Convention on the Constitution, 'Sixth Report on the Constitution - The removal of the offence of blasphemy from the Constitution' (January 2014), available at: <https://www.constitution.ie/AttachmentDownload.ashx?mid=b96d3466-4987-e311-877e-005056a32ee4>, at section 4.2 'Implications/option for change and a comparative study - Dr Eoin O'Dell'; Information collected through consultation with national stakeholders (NGO) May 2015.

¹³⁸⁹ United Nations Office of the High Commissioner for Human Rights, 'Statement by the United Nations Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, at the end of her visit to Ireland (19-23 November 2012)' (23 November 2012), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12823&LangID=E>.

¹³⁹⁰ *Corway v. Independent Newspapers (Ireland) Ltd*, [1999], 4 I.R. 484 at para 31.

¹³⁹¹ *Ibid* at para 36.

¹³⁹² Information collected through consultation with national stakeholder (academic) May 2015.

¹³⁹³ *Ibid*.

2 Legal framework

2.1 General description of the legislation applicable to blasphemy and/or religious insult

Blasphemy was a common law offence under Irish law when the 1937 Constitution¹³⁹⁴ (Article 40(6)(1)(i)) made it an offence punishable by law¹³⁹⁵. Subsequently, Article 13 of the Defamation Act 1961 also made it a statutory crime, but, in practice, this law was difficult to enforce as it did not contain any definition of what blasphemy consisted of¹³⁹⁶. This deficiency was filled in 2009 by the inclusion of a new offence, 'Publication or utterance of blasphemous matter' which provides a definition of blasphemy (Defamation Act 2009). The 2009 Act repealed the earlier 1961 Defamation Act and continues to regulate blasphemy as a criminal offence.

In Ireland blasphemy is not punishable under administrative and/or civil law schemes¹³⁹⁷, nor is it subject to disciplinary measures in the media field¹³⁹⁸. The ill-defined terms in the offence provision, as well as the difficulty in proving the *mens rea* of blasphemy¹³⁹⁹ make the bringing of a private action very difficult.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Publication or utterance of blasphemous matter	Article 36 of the Defamation Act 2009 ¹⁴⁰⁰ .
Definition of offence	
Offence provision 1 Publication or utterance of blasphemous matter	(1) A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding EUR 25,000 [...] (2) For the purposes of this section, a person publishes or utters blasphemous matter if- (a) He or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any

¹³⁹⁴ Constitution of Ireland, 1937, available at: http://www.irishstatutebook.ie/en/constitution/index.html#article40_6_1.

¹³⁹⁵ 'The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law' Article 40(6)(1)(i) of the Constitution of Ireland, 1937, available at: http://www.irishstatutebook.ie/en/constitution/index.html#article40_6_1.

¹³⁹⁶ 'History: Repeal the Irish Blasphemy law by Atheist Ireland', Atheist Ireland website, available at: <http://www.blasphemy.ie/history-of-irish-blasphemy-law/>.

¹³⁹⁷ Information collected through consultation with national stakeholder (academic) May 2015.

¹³⁹⁸ Ibid.

¹³⁹⁹ Ibid.

¹⁴⁰⁰ Defamation Act 2009 (No. 31 of 2009), available at: <http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0036.html#sec36>.

	<p>religion, thereby causing outrage among a substantial number of the adherents of that religion, and</p> <p>(b) He or she intends, by the publication or utterance of the matter concerned, to cause such outrage.</p> <p>(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates.</p> <p>(4) In this section 'religion' does not include an organisation or cult-</p> <p>(a) The principal object of which is the making of profit, or</p> <p>(b) That employs oppressive psychological manipulation-</p> <p>(i) Of its followers, or</p> <p>(ii) For the purpose of gaining new followers.</p>
Penalties foreseen	
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	A fine not exceeding EUR 25,000.
Online crime	
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	The offence provision does not explicitly state that it extends to online criminal behaviour. However, it would seem that online publications are treated as publications in the same way as paper publications and therefore the provision applies to online criminal behaviour ¹⁴⁰¹ .

2.3 Media responsibility for blasphemy and/or religious insult

The regulatory framework applicable to blasphemy and/or religious insult committed by or through the media is provided for in primary legislation (Article 40(6) (1) (i) of the Constitution and Article 36 of the Defamation Act 2009)¹⁴⁰² (see section 2.2).

The Censorship of Films Act 1923 also provides for the withholding of a certificate from a blasphemous film. According to Section 7.2 of the Act, 'Whenever any such application as is mentioned in the foregoing sub-section is made to the Official Censor, he shall certify in the prescribed manner that the picture to which the application relates is fit for exhibition in public, unless he is of opinion that such picture or some part thereof is unfit for general exhibition in public by reason of it being indecent, obscene or blasphemous, or because the exhibition thereof in public would tend to inculcate principles contrary to public morality or would be otherwise subversive of public morality'¹⁴⁰³. Media self-regulations do not deal with blasphemy¹⁴⁰⁴.

¹⁴⁰¹ Ibid.

¹⁴⁰² Information collected through consultation with national stakeholders (NGO and academic) May 2015.

¹⁴⁰³ Section 7.2 of the Censorship of Films Act 1923 (No. 23), available at: <http://www.irishstatutebook.ie/1923/en/act/pub/0023/>.

¹⁴⁰⁴ Information collected through consultation with national stakeholder (academic) May 2015.

3 Effectiveness of the legal framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of the legislation on blasphemy and/or religious insult

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
Only one case was found and it applied the old blasphemy law according to Section 13.1 of the Defamation Act 1961	<p>Freedom of expression:</p> <p>No court decision has assessed the relationship between blasphemy and/or religious insult and freedom of expression.</p> <p>Freedom of thought; conscience and religion:</p> <p><i>Corway v. Independent Newspapers (Ireland) Ltd [1999] 4 I.R. 484</i></p> <p>Facts</p> <p>On the 26 November 1995, the Sunday Independent Newspaper, in the wake of the divorce referendum, published an article by Dr. Conor Cruise-O'Brien, on the implications of that referendum. Associated with the article was a cartoon which depicted a caricature of a priest. The priest appeared to be offering the host to three caricatures of prominent politicians, who are turning away and appear to be waving goodbye. The caption read, 'Hello progress-bye bye Father' followed by a question mark. The words at the top of the cartoon are clearly meant to be a play upon a phrase used during the referendum campaign by some of the anti-divorce campaigners (which campaign used the phrase, 'Hello divorce-bye bye daddy'). The applicant maintained that the cartoon was calculated to insult the feeling and religious conviction of readers generally, by treating the sacrament of the Eucharist and its administration as objects of scorn and derision. The applicant brought a complaint based on section 13.1 of the Defamation Act 1961.</p> <p>Court decision</p> <p>The High Court concluded that as the publication in question was unlikely to result in a breach of the peace, there were no grounds for granting the leave sought.</p> <p>Court reasoning</p> <p>The Supreme Court, on the other hand, took the view that the constitutional crime of blasphemy could not be applied by the courts because the concept of blasphemy evaded judicial definition. Thus the Court essentially called for legislative clarification of the term, and, in the absence thereof, took the view that the constitutional offence of blasphemy, while remaining intact, had become, in practical terms, unenforceable without legislation.</p> <p>The Supreme Court stated that:</p> <p>'It is difficult to see how the common law crime of blasphemy, related as it was to an established Church and an established religion could survive in [...] a Constitution guaranteeing freedom of conscience, and the free profession and practice of religion"¹⁴⁰⁵. It refused to allow the prosecution, stating "in the absence of any legislative definition of the constitutional</p>

¹⁴⁰⁵ Corway v. Independent Newspapers (Ireland) Ltd [1999] 4 I.R. 484 at para 31.

	<p>offence of blasphemy, it is impossible to say of what the offence of blasphemy consists [...] In the absence of legislation and in the present uncertain state of the law the Court could not see its way to authorising the institution of a criminal prosecution¹⁴⁰⁶.</p> <p>It added: 'It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern State which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion'¹⁴⁰⁷.</p> <p>The Supreme Court concluded by stating, 'The cartoon may indeed have been in very bad taste. But the Court having studied the cartoon and the article by Dr. Conor Cruise-O'Brien which it accompanies, is convinced that no insult to the Blessed Sacrament was intended and that no jury could reasonably conclude that such insult existed or was intended to exist. The theme of Dr. Conor Cruise-O'Brien's article, whether well-founded or not, was that the politicians had resisted the guidance of the Roman Catholic Church on the issue of divorce but that it was not equally clear that they would resist such guidance on future occasions. It appears to the Court that the cartoon was meant to illustrate this theme and no more. That is why the question mark is placed after the phrase "Hello progress - bye bye Father"¹⁴⁰⁸.</p>
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	<p>Freedom of expression:</p> <p>No court decision has assessed the relationship between blasphemy and/or religious insult and freedom of expression.</p>
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	<p>Freedom of thought, conscience and religion:</p> <p>No court decision has assessed the relationship between blasphemy and/or religious insult and freedom of thought, conscience and religion.</p>
<p>Indicator 2 Quantitative evidence</p>	
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	<p>Number of cases investigated: There have been no investigations since 2009¹⁴⁰⁹. This seems to be due to the fact that the 2009 legislation imposes a chilling effect on the media, in that they self-censor potentially contentious material, in order to avoid legal cases and investigations¹⁴¹⁰.</p> <p>Number of cases prosecuted: There have been no prosecutions since 2009¹⁴¹¹.</p> <p>Number of cases adjudicated: No cases have been adjudicated since 2009.</p>

¹⁴⁰⁶ Ibid at para 32.

¹⁴⁰⁷ Ibid at para 36.

¹⁴⁰⁸ Ibid at para 40.

¹⁴⁰⁹ Information collected through consultation with national stakeholders (NGO) May 2015.

¹⁴¹⁰ Ibid.

¹⁴¹¹ Information collected through consultation with national stakeholders (NGO) May 2015.

Indicator 3 - Bottlenecks of practical implementation	
<p>Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	<p>Clarity of offence provision:</p> <p>The general view among the stakeholders consulted is that the blasphemy offence provision is unclear, ill-defined and poorly drafted¹⁴¹². It seems that the following words in the offence provision are not clearly defined: 'grossly', 'outrage', 'substantial number', 'adherents', 'reasonable person', 'matters held sacred' and 'religion'¹⁴¹³. As a result, the stakeholders believe that any prosecution under the offence provision would be subject to innumerable legal and procedural problems¹⁴¹⁴.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>The general view among the stakeholders consulted is that the offence provision is suitable to cover online crime, as, while the legislation is framed in terms of speech and publication, the language is neutral as to the means of publication or broadcast¹⁴¹⁵. Therefore, someone who is tweeting, for example, would be considered a publisher¹⁴¹⁶.</p>
	<p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>The United Nations Special Rapporteur on the Situation of Human Rights Defenders, at the end of her visit to Ireland (19-23 November 2012) stated that, 'although no prosecutions have been brought under this section of the Defamation Act, its mere existence is problematic and potentially at odds with fundamental guarantees of freedom of opinion and expression. Furthermore, it could have a chilling effect and lead to self-censorship by certain defenders'¹⁴¹⁷. This position was confirmed by various stakeholders who believe that Article 36 is a restriction of the right to freedom of expression and has a chilling effect and leads to self-censorship by the media¹⁴¹⁸.</p> <p>By contrast, other stakeholders found nothing objectionable about Article 36 of the Defamation Act 2009 in relation to freedom of speech, nor did they believe it to be in any way objectionable from a human rights perspective¹⁴¹⁹. One interviewee stated that he believed the blasphemy clause to be highly respectful of free speech¹⁴²⁰.</p> <p>With such different opinions among stakeholders and the lack of examples of application in practice it is difficult to conclude whether or not the offence provision is suitable to ensure freedom of expression. It seems, however, that the provision is</p>

¹⁴¹² Information collected through consultation with national stakeholders (academics, NGO) May 2015.

¹⁴¹³ Ibid.

¹⁴¹⁴ Information collected through consultation with national stakeholders (academics, NGO) May 2015.

¹⁴¹⁵ Information collected through consultation with national stakeholders (NGO, academics) May 2015.

¹⁴¹⁶ Information collected through consultation with national stakeholders (NGO, academics) May 2015.

¹⁴¹⁷ United Nations Office of the High Commissioner for Human Rights, 'Statement by the United Nations Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekagya, at the end of her visit to Ireland (19-23 November 2012)' (23 November 2012), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12823&LangID=E>.

¹⁴¹⁸ The Convention on the Constitution, 'Sixth Report on the Constitution - The removal of the offence of blasphemy from the Constitution' (January 2014), available at: <https://www.constitution.ie/AttachmentDownload.ashx?mid=b96d3466-4987-e311-877e-005056a32ee4>, at section 4.2 'Implications/option for change and a comparative study - Dr Eoin O'Dell'; Information collected through consultation with national stakeholders (NGO, academics, May 2015).

¹⁴¹⁹ Information collected through consultation with national stakeholder (academic) May 2015.

¹⁴²⁰ Ibid.

	<p>unsuitable to ensure freedom of thought, conscience and religion, as it takes a secular western perspective on religious sensitivity¹⁴²¹.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>The offence provision is unsuitable to the current national context. While the 2009 Defamation Act is not sectarian and the law on blasphemy applies equally to all religions, about 20% of people in Ireland are atheists and the law does not offer them any protection to express their views on religious perspectives¹⁴²². In addition, the legislation provides for exemptions i.e. gestures of genuine literary, artistic, political, scientific, or academic value, however, it does not define these exemptions, making them difficult to prove in court.</p> <p>Other shortcomings of applicable offence provision:</p> <p>Many people have described the current blasphemy law as antiquated, with a high standard required to be found guilty of blasphemy under Article 36 of the Defamation Act¹⁴²³. The Irish law of blasphemy (Defamation Act 2009) seems to be substantially unwanted (there was no demand for it before its introduction)¹⁴²⁴, and critics have suggested that it has had an adverse international impact. .</p> <p>One Irish politician stated in the Irish Parliament (<i>Oireachtas</i>) that certain countries have adopted Irish arguments on blasphemy, using it to bolster prejudice against different religions, even Christian religions in Islamic countries¹⁴²⁵. Another politician stated to the <i>Oireachtas</i> that Indonesia is one of a number of Islamic states that has cited Irish blasphemy legislation in support and defence of its Constitutional Court decision to uphold its law prohibiting blasphemy in 2010¹⁴²⁶. Pakistan has also used the language of Ireland's law in its proposals to the <i>Ad Hoc</i> Committee on the Elaboration of Complementary Standards in its call for an international instrument preventing the defamation of religion.</p>
Indicator 4- Drivers for the adoption of new legislation/amendments to existing legislation	
<p style="text-align: center;">Offence provision 1</p> <p>Publication or utterance of blasphemous matter</p>	<p>There have been no legislative developments on blasphemy since the 2009 Defamation Act. While the Labour Party, in its election manifesto, stated its desire to remove the offence of blasphemy from the Constitution through a referendum, this element did not form part of its subsequent Programme for Government. The Government has suggested that it would like to see a referendum eventually, but the Prime Minister has said that it will not be addressed under the present Government¹⁴²⁷.</p> <p>Despite this, the Department of Justice's background work is ongoing. There is a consensus among all political parties that the blasphemy law needs to be removed¹⁴²⁸. The Charlie Hebdo attacks have put the abolition of Ireland's antiquated blasphemy</p>

¹⁴²¹ Ibid.

¹⁴²² Information collected through consultation with national stakeholders (NGO, academics) May 2015.

¹⁴²³ Information collected through consultation with national stakeholders (NGO, academics) May 2015.

¹⁴²⁴ Ibid.

¹⁴²⁵ Professor David Nash, 'Report to United Nations Special Rapporteur on Freedom of Religion and Belief (Professor Heiner Bielefeldt) On Visit to Ireland Regarding Blasphemy In Defamation Act of 2009', January 2012.

¹⁴²⁶ Ibid.

¹⁴²⁷ Information collected through consultation with national stakeholders (academic) May 2015.

¹⁴²⁸ Information collected through consultation with national stakeholders (NGO) May 2015.

	<p>law back on the agenda, with a recent online poll conducted by news website TheJournal.ie finding 64% in favour of removing the blasphemy laws as quickly as possible¹⁴²⁹.</p> <p>In addition, the Constitutional Convention debate in November 2013 was followed by a vote in which the Convention recommended, by a 61% majority, the removal of blasphemy from the Irish Constitution. Likewise, 53% believed it should be replaced with a general provision to include incitement to religious hatred. However, a subsequent vote on the retention of a 'legislative provision for the offence of blasphemy' produced an equally split vote, with 50% of delegates voting against it¹⁴³⁰. The Government endorsed the repeal of the constitutional prohibition (Article 40.6.1.i.), and its replacement with a prohibition on incitement to hatred¹⁴³¹.</p> <p>The main driver behind these legislative changes is the vague and unworkable Article 36, as well as the lack of relevance for blasphemy laws in modern society¹⁴³². One stakeholder suggested that Ireland is going through a period of radical post-Catholicism, with strong opposition to anything proposed by the Catholic Church¹⁴³³. Blasphemy law can only properly exist where religion is the soul of the nation, which situation simply does not exist in Ireland¹⁴³⁴.</p>
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3.2 Effectiveness of the rules regulating media responsibility for blasphemy and/or religious insult

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
<p>Offence provision 1</p> <p>Censorship of Films Act 1923</p>	<p>Freedom of expression:</p> <p>There are no High Court decisions which assess the relationship between the provision and freedom of expression.</p> <p>Freedom of thought, conscience and religion:</p> <p>There are no High Court decisions which assess the relationship between the provision and freedom of thought, conscience and religion.</p>
<p>Offence provision 2</p> <p>Publication or utterance of blasphemous</p>	<p>Freedom of expression:</p> <p>There are no High Court decisions which assess the relationship between the provision and freedom of expression.</p>

¹⁴²⁹Adam Taylor, 'After Paris shooting, Irish say it's time to finally ditch their blasphemy law' (13 January 2015), available at: <http://www.washingtonpost.com/blogs/worldviews/wp/2015/01/13/after-paris-shooting-irish-say-its-time-to-finally-ditch-their-blasphemy-law/>.

¹⁴³⁰ Professor David Nash, 'Submission to the Seanad Public Consultation Committee (SPCC) in respect of the key priorities and challenges facing the State in complying with Ireland's obligations under the ICCPR. Submission concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Ireland's current position on laws against blasphemy', 16 March 2014.

¹⁴³¹ The Irish Times, 'Blasphemy law needs to be repealed' (17 January 2015), available at: <http://www.irishtimes.com/opinion/blasphemy-law-needs-to-be-repealed-1.2068942>.

¹⁴³² Information collected through consultation with national stakeholders (academic) May 2015.

¹⁴³³ Ibid.

¹⁴³⁴ Ibid.

matter	<p>Freedom of thought, conscience and religion:</p> <p>There are no High Court decisions which assess the relationship between the provision and freedom of thought, conscience and religion.</p>
Indicator 2 - Quantitative evidence	
<p>Offence provision 1</p> <p>Censorship of Films Act 1923</p>	<p>Number of decisions condemning the media service providers and publishers:</p> <p>No data related to the application of the Act were identified.</p>
<p>Offence provision 2</p> <p>Publication or utterance of blasphemous matter</p>	<p>Number of decisions condemning the media service providers and publishers:</p> <p>National Public Service Broadcaster (RTE) at various times received threats of prosecution for blasphemy (usually as a reaction to satire or comedy shows), but no such action was ever taken¹⁴³⁵. Therefore, there have been no decisions or cases against a broadcaster, a media service provider or a publisher for blasphemy in the past two decades¹⁴³⁶. Stakeholders suggest this is due to self-censorship by the media, in an effort to avoid such litigation¹⁴³⁷.</p>
Indicator 3 - Bottlenecks of practical implementation	
<p>Offence provision 1</p> <p>Censorship of Films Act 1923</p>	<p>The research carried out did not identify any issue.</p>
<p>Offence provision 2</p> <p>Publication or utterance of blasphemous matter</p>	<p>The stakeholders are of the opinion, generally, that the offence provision is unclear, ill-defined and therefore incapable of being enforced¹⁴³⁸. With media companies experiencing tightening profits, it appears that self-censorship is preferable to litigation¹⁴³⁹.</p>
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Offence provision 1</p> <p>Censorship of Films Act 1923</p>	<p>No changes or amendments to the legislation have been adopted, nor are any such amendments planned.</p>
<p>Offence provision 2</p> <p>Publication or utterance of blasphemous matter</p>	<p>See Section 3.1.</p>

¹⁴³⁵ Information collected through consultation with national stakeholders (Press Ombudsman) May 2015.

¹⁴³⁶ Information collected through consultation with national stakeholders (Broadcasting Authority of Ireland, NGO) May 2015.

¹⁴³⁷ Ibid.

¹⁴³⁸ Information collected through consultation with national stakeholders (Broadcasting Authority of Ireland, academics, NGO) May 2015.

¹⁴³⁹ Information collected through consultation with national stakeholders (NGO) May 2015.

ITALY

1 National context

According to the Constitution of the Italian Republic¹⁴⁴⁰, freedom of expression and freedom of thought and religion are fundamental protected principles. All citizens have equal social dignity and are equal before the law, and no distinction can be drawn *inter alia* on the ground of religion¹⁴⁴¹. The Constitution also states that all religious denominations are equally free before the law¹⁴⁴², and it also affirms the secularity of the State, stating that the State and the Catholic Church are independent and sovereign, each within its own sphere¹⁴⁴³.

Blasphemy and religious insult are criminalised by the Criminal Code¹⁴⁴⁴, including when committed online. The Criminal Code provides two types of criminal offences, namely, vilification (*vilipendio*) - which can be considered a form of religious insult - and blasphemy (*bestemmia*)¹⁴⁴⁵. Since 2006 blasphemy and religious insult are considered offences when committed against any religion, and not just the Catholic religion¹⁴⁴⁶. Rules on blasphemy and religious insult in Italy are specifically defined and are distinct from those on hate speech and hate crime, with no risk of overlap with the latter¹⁴⁴⁷. No groups can be identified as those usually committing blasphemy or religious insult, however, such acts are traditionally committed against the Catholic religion and its believers¹⁴⁴⁸.

There are no specific administrative or civil law rules applying to blasphemy or religious insult. The general civil rules concerning extra contractual responsibility¹⁴⁴⁹ and implying a compensation for damages arising from committing a crime, apply¹⁴⁵⁰.

Blasphemy is also sanctioned by self-regulatory rules applicable to football games and to the media¹⁴⁵¹. If blasphemy is committed through the media, fines or disciplinary sanctions may be applied in accordance with the rules stated in media self-regulatory codes, as well as those provided in the Criminal Code¹⁴⁵². Therefore, for both football and the media, disciplinary proceedings can run in parallel with criminal proceedings¹⁴⁵³.

No amendments to the legislation on blasphemy and religious insult have taken place, nor are any planned in the future.

Freedom of expression is protected as a fundamental principle. However, the

¹⁴⁴⁰ Constitution of the Italian Republic of 1 January 1948.

¹⁴⁴¹ Article 3, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁴² Article 8, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁴³ Article 7, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁴⁴ Criminal Code (*Codice Penale*) updated to 3 June 2013, available at: <http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

¹⁴⁴⁵ Information collected through consultation with national stakeholders (academic).

¹⁴⁴⁶ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁴⁴⁷ Information collected through consultation with national stakeholders in July 2015 (NGO).

¹⁴⁴⁸ Information collected through consultation with national stakeholders in July 2015 (NGO).

¹⁴⁴⁹ Civil Code (*Codice Civile*) updated to 28 November 2014, available at <http://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile>.

¹⁴⁵⁰ Article 2043 of the Civil Code.

¹⁴⁵¹ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 *Ecc LJ*, 182–197.

¹⁴⁵² Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁴⁵³ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

Constitutional Court¹⁴⁵⁴ stated that the insult, mockery and offence as an end in itself, which are, at once, an outrage to the ethical values of a religion and an injury to the personality of its believers, are not covered by the guarantees granted to such fundamental freedom¹⁴⁵⁵.

2 Legal framework

2.1 General description of legislation applicable to blasphemy and/or religious insult

According to the Constitution of the Italian Republic¹⁴⁵⁶, all citizens have equal social dignity and are equal before the law, and no distinction can be drawn on the ground of religion¹⁴⁵⁷. The Constitution also states that all religious denominations are equally free before the law¹⁴⁵⁸, and that the State and the Catholic Church are independent and sovereign, each within its own sphere¹⁴⁵⁹.

The Constitution also protects the individual's freedom of religion, stating that anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality¹⁴⁶⁰.

Freedom of expression is also protected, as every individual has the right to freely express their thoughts in speech, writing, or any other form of communication¹⁴⁶¹. Specific protection is also granted by the Constitution to the press, which 'may not be subjected to any authorisation or censorship'¹⁴⁶². The Constitution also states that 'seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press'¹⁴⁶³.

In 1989 the Constitutional Court¹⁴⁶⁴ also clarified that the principle of a secular State is an element defining the Italian State according to the Italian Constitution. According to the Constitutional Court this does not mean that the State is indifferent towards religions, but, on the contrary, the State must safeguard religious freedom in a regime of religious and cultural pluralism¹⁴⁶⁵.

Blasphemy and religious insult are criminalised by the Criminal Code¹⁴⁶⁶. The Criminal Code provides two types of criminal offences, namely, vilification (*vilipendio*) - which can be considered a form of religious insult - and blasphemy (*bestemmia*)¹⁴⁶⁷. Both sets of rules will be defined in detail in the table below¹⁴⁶⁸. Vilification aims at offending a

¹⁴⁵⁴ Decision n. 188/75 of the Constitutional Court.

¹⁴⁵⁵ UAAR, 'Criteria qualifying the vilification', available at: <http://www.uaar.it/laicita/vilipendio/>.

¹⁴⁵⁶ Constitution of the Italian Republic of 1 January 1948.

¹⁴⁵⁷ Article 3, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁵⁸ Article 8, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁵⁹ Article 7, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁶⁰ Article 19, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁶¹ Article 21, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁶² Article 21, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁶³ Article 21, Constitution of the Italian Republic of 1 January 1948.

¹⁴⁶⁴ Constitutional Court decision n. 203/1989 of 12 April 1989.

¹⁴⁶⁵ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁴⁶⁶ Criminal Code (*Codice Penale*) updated on 3 June 2013, available at: <http://www.altalex.com/documents/news/2013/11/25/dei-delitti-contro-il-sentimento-religioso-e-contro-la-pieta-dei-defunti>.

¹⁴⁶⁷ Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁴⁶⁸ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

religion through offending its ministers of religion, believers, sacred things and objects. Vilification therefore happens where a religion is publicly insulted by the insulting of individuals in public, by offences against property and by the disruption of religious ceremonies. For these last two, it is the use of violence or threat which characterises the offending behaviour. Although still covered by the Criminal Code, blasphemy was de-penalised in 1999 as it was considered a minor offence that would occur when someone publically blasphemes against the divinity or divine symbols¹⁴⁶⁹. Both blasphemy and religious insult are considered offences when committed against any religion, following a 2006 amendment to the provisions of the Criminal Code, to include all religions, and not just Catholicism¹⁴⁷⁰. Rules on blasphemy and religious insult in Italy are specifically defined and distinct from those governing hate speech and hate crime, with no identified risk of overlap¹⁴⁷¹.

No specific administrative or civil law rules apply to blasphemy or religious insult. The general civil rules concerning extra contractual responsibility¹⁴⁷² and implying a compensation for damages arising from committing a crime, apply¹⁴⁷³. According to the general civil and criminal procedural rules, the damaged party can ask for compensation during the criminal proceedings, or by initiating a separate civil proceeding.

Blasphemy is also sanctioned by internal rules applicable to football games. Blasphemy committed by players and others on the playing field is sanctioned by the internal rules of the Italian Football Federation (*Federazione Italiana Gioco Calcio (FIGC)*), by the rules applicable to football games and by the Sports Justice Code¹⁴⁷⁴.

According to the *FIGC's* internal rules, persons within the arena must not use offensive, abusive, threatening or profane language. If a player or person in the arena uses a blasphemous expression, this must be reported to the referee. The general rules applicable to the football game foresee that the use of blasphemous expression(s) by a player allows him or her to be sent off. The Sports Justice Code also prescribes penalties for the use of blasphemy during the football game¹⁴⁷⁵.

If blasphemy is committed through the media, fines or disciplinary sanctions can be applied in accordance with the rules stated in media self-regulatory codes¹⁴⁷⁶. The disciplinary proceedings for both football and the media can run in parallel with criminal proceedings¹⁴⁷⁷. However, in practice, disciplinary proceedings are initiated more often than the criminal proceedings¹⁴⁷⁸.

No database exists which gathers information on sanctions applicable in the field of football or to the media. It is therefore challenging to provide an estimation of how frequently such rules are applied.

¹⁴⁶⁹ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁴⁷⁰ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁴⁷¹ Information collected through consultation with national stakeholders in July 2015 (NGO).

¹⁴⁷² Civil Code (*Codice Civile*) updated on 28 November 2014, available at: <http://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile>.

¹⁴⁷³ Article 2043 of the Civil Code.

¹⁴⁷⁴ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 *Ecc LJ*, 182–197.

¹⁴⁷⁵ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 *Ecc LJ*, 182–197.

¹⁴⁷⁶ Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁴⁷⁷ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁴⁷⁸ Information collected through consultation with national stakeholders in July 2015 (NGO).

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Insulting a religion by insulting individual	Article 403 of the Criminal Code.
Offence provision 2 Insulting a religion by offending against property	Article 404 of the Criminal Code.
Offence provision 3 Disrupting religious ceremonies	Article 405 of the Criminal Code.
Offence provision 4 Blasphemy and insulting the dead	Article 724 of the Criminal Code.
Definition of offence	
Offence provision 1 Insulting a religion by insulting individuals	Anyone who insults a religious denomination in public by offending those who profess it, shall be subject to a fine. The fine is higher if the insult is addressed to a minister of a religion.
Offence provision 2 Insulting the State religion by offending against property	Anyone who, in a place of worship, a public place or a place open to the public, insults a religion by offending against religious property, an object of religion or an object clearly associated with religious practice, or commits such an offence during a religious service celebrated in a private place by a religious minister, shall be subject to a fine. Anyone who publicly and intentionally destroys, disperses, damages or smears objects of religion or objects clearly associated with religious practice, is punished with imprisonment.
Offence provision 3 Disrupting religious ceremonies	Anyone who impedes or disrupts a religious service, ceremony or practice performed with the assistance of a religious minister, in a place of worship, a public place or a place open to the public, shall be subject to a prison sentence. Where such behaviour is coupled with violent or threatening acts towards individuals, it shall be subject to a higher prison sentence.
Offence provision 4 Blasphemy and insulting the dead	Anyone who blasphemes against the Divinity in public, by means of invective or insults, shall be subject to an administrative fine. The same penalty shall apply to anyone who publicly insults the dead.
Penalties foreseen	
Offence provision 1	EUR 1,000 to 5,000 is the fine applicable to anyone who insults a religion in public by offending those who profess it.

Insulting a religion by insulting individuals	EUR 2,000 to 6,000 is the fine applicable to anyone who insults a minister of a religion.
Offence provision 2 Insulting the State religion by offending against property	EUR 1,000 to 5,000 is the fine applicable to anyone who, in a place of worship, a public place or a place open to the public, insults a religion by offending against religious property, an object of religion or an object clearly associated with religious practice, or commits such an offence during a religious service celebrated in a private place by a religious minister. Imprisonment of up to two years is the penalty applicable to anyone who publicly and intentionally destroys, disperses, damages or smears objects of religion or objects clearly associated with religious practice.
Offence provision 3 Disrupting religious ceremonies	Imprisonment of up to two years is applicable to anyone who impedes or disrupts a religious service, ceremony or practice performed with the assistance of a religious minister, in a place of worship, a public place or a place open to the public. Imprisonment from one to three years is applicable to anyone who performs such behaviour with violent or threatening acts towards individuals.
Offence provision 4 Blasphemy and insulting the dead	A fine of EUR 51 to EUR 309 is applicable to anyone who blasphemes against the Divinity in public, by means of invective or insults.
Online crime	
Offence provision 1 Insulting a religion by insulting individuals	No specific reference to online crime is made in the provision. However, such provision also applies to online crime.
Offence provision 2 Insulting the State religion by offending against property	Such offence involves physical violence and violence against property, and it is not, therefore, possible to commit such offences online.
Offence provision 3 Disrupting religious ceremonies	Such offence involves physical violence and violence against property, and it is not, therefore, possible to commit such offences online.
Offence provision 4 Blasphemy and insulting the dead	No specific reference to online crime is made in the provision. However such provision also applies to online crime.

2.3 Media responsibility for blasphemy and/or religious insult

The Constitution guarantees freedom of the press and states that the press may not be subjected to any authorisation or censorship. There is no specific criminal legal framework applicable to blasphemy and/or religious insult committed by or through the media (written, online, video broadcast). The general rules stated in the Criminal Code apply in such a context¹⁴⁷⁹. The Constitutional Court, in fact, stated that the

¹⁴⁷⁹ Judgment of the Criminal Court of Padova of 14 June 2005, sanctioning a vilification committed during a television programme.

offence covered by the Criminal Code rules must be committed in public, through the press or through other propaganda tools, in the presence of more people and not in a private meeting¹⁴⁸⁰.

However the 'Single Act on the radio-television'¹⁴⁸¹ states that radio and television programmes should respect personal dignity and fundamental rights, including freedom of expression and freedom of opinion, including with regard to different religions¹⁴⁸². It also states that, with regard to teleshopping, any kind of public insult to religious feeling is forbidden¹⁴⁸³.

The 'Code on the self-regulation of programmes commenting on sports events'¹⁴⁸⁴ also states that commentary on sports events should be performed with respect for personal dignity, and all parties involved must avoid offences and insults against individuals or groups such as athletes, teams, team supporters, religious groups, etc¹⁴⁸⁵. When this rule is violated, an administrative fine of EUR 25,000 to EUR 350,000 is applied to the television channel or production channels, or to the programme publishers. For more serious cases, the penalty applied can be the suspension of the broadcasting authorisation for a period of one to ten days¹⁴⁸⁶. Such penalties also apply in cases where the sanctioned behaviour is a crime, and are applied independently of the initiation of a criminal proceeding. Broad dissemination of the information about the penalty imposed must be guaranteed through news broadcast during peak hours with maximum audiences. If a penalty is imposed, sports federations and sports journalist organisations must be informed in order for them to take adequate measures¹⁴⁸⁷. If journalists are involved, the Journalist Order will apply specific sanctions¹⁴⁸⁸.

Self-regulations exist for the media, some of which have rules related to blasphemy or religious insults, and which are also applied in these cases.

¹⁴⁸⁰ UAAR, 'Criteria qualifying the vilification', available at: <http://www.uaar.it/laicita/vilipendio/>.

¹⁴⁸¹ Legislative Decree n. 177 of 31 July 2005, 'Single Act on the radio-television' (*Testo unico della radio televisione*) published on Official Journal (*Gazzetta Ufficiale*) n. 208 of 7 September 2005.

¹⁴⁸² Article 3, Legislative Decree n. 177 of 31 July 2005, 'Single Act on the radio-television' (*Testo unico della radio televisione*) published on Official Journal (*Gazzetta Ufficiale*) n. 208 of 7 September 2005.

¹⁴⁸³ Article 40, Legislative Decree n. 177 of 31 July 2005, 'Single Act on the radio-television' (*Testo unico della radio televisione*) published on Official Journal (*Gazzetta Ufficiale*) n. 208 of 7 September 2005.

¹⁴⁸⁴ Decree of the Ministry of Communication n. 36 of 21 January 2008, 'Code on the self-regulation of programmes commenting sport events' (*Codice di autoregolamentazione delle trasmissioni di commento degli avvenimenti sportivi*) published on Official Journal (*Gazzetta Ufficiale*) n. 58 of 8 March 2008.

¹⁴⁸⁵ Article 2(2), Decree of the Ministry of Communication n. 36 of 21 January 2008, 'Code on the self-regulation of programmes commenting sport events' (*Codice di autoregolamentazione delle trasmissioni di commento degli avvenimenti sportivi*) published on Official Journal (*Gazzetta Ufficiale*) n. 58 of 8 March 2008.

¹⁴⁸⁶ Article 6(2), Decree of the Ministry of Communication n. 36 of 21 January 2008, 'Code on the self-regulation of programmes commenting sport events' (*Codice di autoregolamentazione delle trasmissioni di commento degli avvenimenti sportivi*) published on Official Journal (*Gazzetta Ufficiale*) n. 58 of 8 March 2008.

¹⁴⁸⁷ Article 6(3), Decree of the Ministry of Communication n. 36 of 21 January 2008, 'Code on the self-regulation of programmes commenting sport events' (*Codice di autoregolamentazione delle trasmissioni di commento degli avvenimenti sportivi*) published on Official Journal (*Gazzetta Ufficiale*) n. 58 of 8 March 2008.

¹⁴⁸⁸ Article 6(5), Decree of the Ministry of Communication n. 36 of 21 January 2008, 'Code on the self-regulation of programmes commenting sport events' (*Codice di autoregolamentazione delle trasmissioni di commento degli avvenimenti sportivi*) published on Official Journal (*Gazzetta Ufficiale*) n. 58 of 8 March 2008.

For example the National Communication Authority (*Autorita' per le Garanzie nelle Comunicazioni (AGCOM)*) approved an 'Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes'¹⁴⁸⁹, stating that radio and television programmes must respect personal dignity and fundamental rights, including those related to religious feeling¹⁴⁹⁰. This Act seems to be a soft law instrument, in that it serves as a guideline that is not enforced through penalties.

The Institute for Commercial Advertisement (*Istituto dell'Autodisciplina Pubblicitaria (IAP)*) approved a 'Self-regulatory Code on the Commercial Communication'¹⁴⁹¹ stating that commercial communication has to respect personal dignity and cannot offend moral, civil and religious sensibility¹⁴⁹². Whoever suffers any disadvantage from a commercial advertisement contrary to the rules stated in the code, can file a complaint to the *Giuri'*. The *Giuri'* is an independent committee competent to make decisions with regard to violations¹⁴⁹³. If the *Giuri'* finds that the advertisement violates the Code, it can order the parties involved (e.g. advertisement agencies, advertisement and marketing consultants) to cease the broadcasting or publication of the advertisement¹⁴⁹⁴. The *Giuri'* can also decide to publish its order through the most suitable information channels¹⁴⁹⁵.

Individual contracts set up for individual participation in specific programmes (e.g. reality shows) usually include clauses providing for fines or exclusion from the programme if blasphemy or religious insult are committed by the participant¹⁴⁹⁶.

¹⁴⁸⁹ AGCOM Decision n. 165/06/CSP, 'Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes' (*Atto di indirizzo sul rispetto dei diritti fondamentali della persona, della dignità personale e del corretto sviluppo fisico, psichico e morale dei minori nei programmi di intrattenimento*).

¹⁴⁹⁰ Article 1, AGCOM Decision n. 165/06/CSP, 'Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes' (*Atto di indirizzo sul rispetto dei diritti fondamentali della persona, della dignità personale e del corretto sviluppo fisico, psichico e morale dei minori nei programmi di intrattenimento*).

¹⁴⁹¹ IAP, 'Self-regulatory Code on the Commercial Communication', 59th edition of 1 January 2015 (*Codice di Autodisciplina della Comunicazione Commerciale*).

¹⁴⁹² Article 10, 'Self-regulatory Code on the Commercial Communication', 59th edition of 1 January 2015 (*Codice di Autodisciplina della Comunicazione Commerciale*).

¹⁴⁹³ Article 36, 'Self-regulatory Code on the Commercial Communication', 59th edition of 1 January 2015 (*Codice di Autodisciplina della Comunicazione Commerciale*).

¹⁴⁹⁴ Article 39, 'Self-regulatory Code on the Commercial Communication', 59th edition of 1 January 2015 (*Codice di Autodisciplina della Comunicazione Commerciale*).

¹⁴⁹⁵ Article 40, 'Self-regulatory Code on the Commercial Communication', 59th edition of 1 January 2015 (*Codice di Autodisciplina della Comunicazione Commerciale*).

¹⁴⁹⁶ Information collected through consultation with national stakeholders in July 2015 (NGO).

3 Effectiveness of the Legal Framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of the legislation on blasphemy and/or religious insult

Indicator 1	
Relevant case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
<p style="text-align: center;">Offence Provision 1</p> <p>Insulting a religion by insulting individuals</p>	<p>Freedom of expression:</p> <p><i>Decision of the Court of Cassation n. 10535 of 11 December 2000.</i></p> <p>Facts:</p> <p>An association called Aduc published, through an internet blog, messages that violated Article 403 of the Criminal Code as they were insulting a religion by insulting individuals belonging to that religion. These webpages were seized by the first instance court. Aduc appealed the decision and the second instance court partially ruled in favour of Aduc. The court suspended the seizure on the condition that the messages violating Article 403 of the Criminal Code were removed and were not further disseminated. Aduc appealed this decision to the Court of Cassation, stating that this interpretation of Article 403 of the Criminal Code violates the freedom of expression protected by Article 21 of the Constitution.</p> <p>Court decision:</p> <p>The appeal was rejected.</p> <p>Court reasoning:</p> <p>According to the court, the crime described in Article 403 of the Criminal Code is not only committed in cases where the vilifying messages are addressed to specific individuals, but also when they are addressed to generic believers. Article 403 protects religious feeling by criminalising public offences of such religious feeling through the vilification of believers and religious ministers. The religious feeling of numerous, or less numerous, groups of people are constitutionally protected, therefore the criminalisation of a behaviour aimed at vilifying believers or religious ministers can legitimately limit the freedom of expression (Article 21 of the Constitution) of those who perform such behaviour. The court specified, however, that it is considered vilification (and therefore not covered by the guarantee of Article 21 of the Constitution), the mockery and the offence an end in itself, which is at once an injury to the believer (and therefore aimed at damaging his/her personality) and an outrage to the religious ethical values. By contrast, scientific or popular discussion on religious issues, the criticism and rebuttal – even when lively – polemic or religious ideas, the expression of radical dissent from any conception of transcendent religious values, are not considered vilification, and therefore fall under the protection of Article 21 of the Constitution.</p> <p>Freedom of thought, conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>
<p style="text-align: center;">Offence Provision 2</p> <p>Insulting the State religion by offending</p>	<p>Freedom of expression:</p> <p>No relevant higher court decisions were identified.</p>

<p>against property</p>	<p>Freedom of thought, conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>
<p>Offence Provision 3</p> <p>Disrupting religious ceremonies</p>	<p>Freedom of expression:</p> <p>No relevant higher court decisions were identified.</p> <p>Freedom of thought, conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>
<p>Offence Provision 4</p> <p>Blasphemy and insulting the dead</p>	<p>Freedom of expression:</p> <p><i>Decision of the Court of Cassation n. 7979 of 27 March 1992.</i></p> <p>Facts:</p> <p>An individual appealed against a decision sanctioning him/her for committing blasphemy by the use of an outrageous expression being used in a public place, in the presence of two policemen recording a fact. No further information on the facts is provided in the decision of the Court of Cassation.</p> <p>Court decision:</p> <p>The appeal was accepted and the judgment was quashed.</p> <p>Court reasoning:</p> <p>According to the court, Article 724 of the Criminal Code penalises blasphemy committed by the use of invective and outrageous words. It does not, therefore, punish the expression of one’s own thoughts, but rather punishes the public expression of a vulgarism. According to the reasoning of the court, blasphemy does not fall under the protection guaranteed by the Constitution to freedom of expression, as the same Constitution limits freedom of expression where it offends public morality (Article 21(3) of the Italian Constitution).</p> <p>Freedom of thought, conscience and religion:</p> <p>No relevant higher court decisions were identified.</p>

Indicator 2 Quantitative evidence	
<p style="text-align: center;">Offence Provision 1</p> <p>Insulting a religion by insulting individuals</p>	<p>Number of cases investigated:</p> <p>No database is available on the number of cases investigated for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases prosecuted:</p> <p>No database is available on the number of cases prosecuted for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases adjudicated:</p> <p>Court judgments are not available to the general public, making it difficult to gather data on the number of cases adjudicated. However, according to the estimation provided by the stakeholders interviewed, the number of cases adjudicated since 2006, for all offences covering religious insults (see Section 2.1), do not number more than ten. This estimation is based on stakeholders' professional research experience¹⁴⁹⁷.</p>
<p style="text-align: center;">Offence Provision 2</p> <p>Insulting the State religion by offending against property</p>	<p>Number of cases investigated:</p> <p>No database is available on the number of cases investigated for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases prosecuted:</p> <p>No database is available on the number of cases prosecuted for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases adjudicated:</p> <p>Court judgments are not available to the general public, making it difficult to gather data on the number of cases adjudicated. However, according to the estimation provided by the stakeholders interviewed, the number of cases adjudicated since 2006, for all offences covering religious insults (see Section 2.1), do not number more than ten. This estimation is based on stakeholders' professional research experience¹⁴⁹⁸.</p>

¹⁴⁹⁷ Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁴⁹⁸ Information collected through consultation with national stakeholders in July 2015 (academic).

<p>Offence Provision 3</p> <p>Disrupting religious ceremonies</p>	<p>Number of cases investigated:</p> <p>No database is available on the number of cases investigated for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases prosecuted:</p> <p>No database is available on the number of cases prosecuted for all offences covering religious insults (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases adjudicated:</p> <p>Court judgments are not available to the general public, making it difficult to gather data on the number of cases adjudicated. However, according to the estimation provided by the stakeholders interviewed, the number of cases adjudicated since 2006, for all offences covering religious insults (see Section 2.1), do not number more than ten. This estimation is based on stakeholders' professional research experience¹⁴⁹⁹.</p>
<p>Offence Provision 4</p> <p>Blasphemy and insulting the dead</p>	<p>Number of cases investigated:</p> <p>No database is available on the number of cases investigated for all offences covering blasphemy (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases prosecuted:</p> <p>No database is available on the number of cases prosecuted for all offences covering blasphemy (see Section 2.1). The stakeholders interviewed could not provide an estimation of the number.</p> <p>Number of cases adjudicated:</p> <p>Court judgments are not available to the general public, making it difficult to gather data on the number of cases adjudicated. However, according to the desk research¹⁵⁰⁰ and to the estimation provided by the stakeholders interviewed, there has been no case law since 1999 which specifically applies this Article¹⁵⁰¹.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Offence Provision 1</p> <p>Insulting a religion by insulting individuals</p>	<p>Clarity of offence provision:</p> <p>Article 403 of the Criminal Code protects religious denomination (<i>confessioni religiose</i>), although this concept is not defined in legislation which may give rise to inconsistency in interpretation. It is unclear whether any religious group may fall under such category or whether it includes characteristics such as institutionalised religion and organised community, or whether it also</p>

¹⁴⁹⁹ Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁵⁰⁰ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182–197.

¹⁵⁰¹ Information collected through consultation with national stakeholders in July 2015 (academic).

	<p>covers non-organised and non-institutionalised examples. The lack of a definition raises problems when trying to identify the members of such denominations. The use of such terminology seems to suggest that a believer is protected only insofar as he/she belongs to a religious denomination¹⁵⁰².</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>As the case law analysed with regard to Indicator 1 shows, the offence provision also covers online crime. No concerns were identified with regard to the suitability of the provision to cover such crimes.</p>
	<p>Suitability of offence provision to ensure freedom of expression and/or freedom of thought, conscience and religion:</p> <p>The Constitution guarantees freedom of religion as an aspect of the development of the individual's personality. However, the offences against religion as described in the Criminal Code tend to protect the institutional side of religion more than the individual dimension of religion¹⁵⁰³, with the aim of protecting public order¹⁵⁰⁴. Critics argue that such rules are obsolete, as insults against individuals might be covered by the general rules on defamation and injury¹⁵⁰⁵, while the protection of public order may be equally guaranteed by the rules on hate speech and hate crime on religious grounds¹⁵⁰⁶. Concerns also exist that these rules may have a chilling effect on freedom of expression if they lead to auto-censorship, especially in the field of media and advertisement¹⁵⁰⁷.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>According to the stakeholders interviewed, the offence provision should be better defined in order to identify the religious denominations and to cover religions that are not institutionalised or theistic beliefs (e.g. agnostic groups or atheists)¹⁵⁰⁸.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings were identified.</p>
<p>Offence Provision 2</p> <p>Insulting a religion by offending against property</p>	<p>Clarity of offence provision:</p> <p>Similarly to Article 403 of the Criminal Code, Article 404 protects religious denomination. The same issues relating to the lack of definition of religious denomination also apply to properties protected by this Article¹⁵⁰⁹.</p>
	<p>Suitability of offence provision to cover online crime:</p> <p>Such offence involves physical violence and violence against property, and cannot, therefore, be committed online.</p>
	<p>Suitability of offence provision to ensure freedom of expression and/or freedom of thought, conscience and religion:</p>

¹⁵⁰² Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁵⁰³ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁵⁰⁴ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁵⁰⁵ Information collected through consultation with national stakeholders in July 2015 (lawyer).

¹⁵⁰⁶ Information collected through consultation with national stakeholders in July 2015 (academic).

¹⁵⁰⁷ Information collected through consultation with national stakeholders in July 2015 (lawyer).

¹⁵⁰⁸ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁵⁰⁹ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

	<p>See offence provision 1.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>According to the stakeholders interviewed, the offence provision should be better defined in order to identify the religious denominations and to over religions that are not institutionalised or theistic beliefs (e.g. agnostic groups)¹⁵¹⁰</p> <p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings were identified.</p>
<p>Offence Provision 3</p> <p>Disrupting religious ceremonies.</p>	<p>Clarity of offence provision:</p> <p>Similarly to Article 403 and Article 404 of the Criminal Code, Article 405 protects religious denomination. The same issues relating to the lack of definition of religious denomination also apply to the ceremonies protected by this Article¹⁵¹¹.</p> <p>Suitability of offence provision to cover online crime:</p> <p>Such offences involve physical violence and violence against property and cannot, therefore be committed online.</p> <p>Suitability of offence provision to ensure freedom of expression and/or freedom of thought, conscience and religion:</p> <p>See offence provision 1.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>According to the stakeholders interviewed, the offence provision should be better defined in order to identify the religious denominations and to cover religions that are not institutionalised or theistic beliefs (e.g. agnostic groups)¹⁵¹².</p> <p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings were identified.</p>
<p>Offence Provision 4</p> <p>Blasphemy and insulting the dead</p>	<p>Clarity of offence provision:</p> <p>The current wording of the provision concerning blasphemy (Article 724 of the Criminal Code) remains problematic, as it uses a discriminatory approach in punishing blasphemous words against God in particular, and therefore protects only theistic beliefs¹⁵¹³.</p> <p>Suitability of offence provision to cover online crime:</p> <p>According to the stakeholders interviewed, the currently applicable offence provision is suitable to cover online crime¹⁵¹⁴.</p> <p>Suitability of offence provision to ensure freedom of expression and/or freedom of thought, conscience and religion:</p>

¹⁵¹⁰ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁵¹¹ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁵¹² Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁵¹³ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁵¹⁴ Information collected through consultation with national stakeholders in July 2015 (academic).

	<p>According to the research carried out and to the stakeholders interviewed, the Criminal Code provisions addressing religious offences are drafted on the basis of theistic beliefs. This approach is not sufficient for the protection of freedom of religion, as pluralist societies require coexistence among different religions and respect for freedom of any kind of theistic or non-theistic belief¹⁵¹⁵.</p>
	<p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p>
	<p>According to the stakeholders interviewed, the offence provision should be better defined in order to identify the religious denominations and to cover religions that are not institutionalised or theistic belief (e.g. agnostic groups)¹⁵¹⁶.</p>
	<p>Other shortcomings of applicable offence provision:</p> <p>No other shortcomings were identified.</p>
Indicator 4- Drivers for the adoption of new legislation/amendments to existing legislation	
<p>Offence Provision 1</p> <p>Insulting a religion by insulting individuals</p>	<p>No legislative changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>
<p>Offence Provision 2</p> <p>Insulting the State religion by offending against property</p>	<p>No legislative changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>
<p>Offence Provision 3</p> <p>Disrupting religious ceremonies</p>	<p>No legislative changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>
<p>Offence Provision 4</p> <p>Blasphemy and insulting the dead</p>	<p>No legislative changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>

3.2 Effectiveness of the rules regulating the media's responsibility for blasphemy and/or religious insult

Indicator 1 - Relevant national case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
<p>Provisions 1</p> <p>Blasphemy and insulting the dead</p>	<p>Freedom of expression:</p> <p>No relevant higher court decisions were identified.</p>

¹⁵¹⁵ Gianfreda, A., 'Religious Offences in Italy: Recent Laws Concerning Blasphemy and Sport' [2011] 13 Ecc LJ, 182-197.

¹⁵¹⁶ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

<p>Insulting a religion by insulting individuals</p>	<p>Freedom of thought, conscience and religion: No relevant higher court decisions were identified.</p>
<p>Provisions 2</p> <p>Code on the self-regulation of programmes commenting on sports events</p> <p>Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes</p> <p>Self-regulatory Code on the Commercial Communication</p>	<p>Freedom of expression: No relevant higher court decisions were identified.</p> <p>Freedom of thought, conscience and religion: No relevant higher court decisions were identified.</p>
<p>Indicator 2 - Quantitative evidence</p>	
<p>Provisions 1</p> <p>Blasphemy and insulting the dead</p> <p>Insulting a religion by insulting individuals</p>	<p>See Section 3.1.</p>
<p>Provisions 2</p> <p>Code on the self-regulation of programmes commenting on sports events</p> <p>Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes</p> <p>Self-regulatory Code on the Commercial Communication</p>	<p>No database collecting data cases applying such self-regulatory rules exist. Stakeholders could not provide a reliable estimate of case numbers.</p>
<p>Indicator 3 - Bottlenecks of practical implementation</p>	
<p>Provisions 1</p> <p>Blasphemy and insulting the dead</p> <p>Insulting a religion by insulting individuals</p>	<p>See Section 3.1.</p>

<p>Provisions 2</p> <p>Code on the self-regulation of programmes commenting on sports events</p> <p>Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes</p> <p>Self-regulatory Code on the Commercial Communication</p>	<p>Soft law instruments, such as self-regulations, are a better informal protection for religious feeling, as they do not touch upon the legal guarantees that the penal system needs to protect. The adoption of such rules follows a bottom-up approach, as the responsibility is devolved to those sectors that need to be regulated. However, the application of such rules can still be challenging, especially when they imply the limitation of fundamental freedoms such as the freedom of expression¹⁵¹⁷.</p> <p>Although media self-regulation, or individual contracts for participation in specific types of programmes, could extend the protection to atheist or agnostic groups, they fail to do so¹⁵¹⁸.</p> <p>Stakeholders interviewed confirmed that, in practice, these rules are applied more frequently than the criminal law provisions, meaning that a case is more likely to undergo a disciplinary proceeding leading to disciplinary sanctions than a criminal proceeding leading to criminal sanctions¹⁵¹⁹.</p>
<p>Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation</p>	
<p>Provisions 1</p> <p>Blasphemy and insulting the dead</p> <p>Insulting a religion by insulting individuals</p>	<p>See Section 3.1.</p>
<p>Provisions 2</p> <p>Code on the self-regulation of programmes commenting on sports events</p> <p>Act on the respect of fundamental rights, of the personal dignity and correct physical, psychological and moral development of children in entertainment programmes</p> <p>Self-regulatory Code on the Commercial Communication</p>	<p>No legislative changes are planned, nor have any taken place recently (since 2012), or since the terrorist attacks at the beginning of 2015.</p>

¹⁵¹⁷ Gianfreda, A., *Penal Law and Religion between national models and Strasbourg case law (Italy, United Kingdom and France)* (Giuffrè, Milano, 2012).

¹⁵¹⁸ Information collected through consultation with national stakeholders in July 2015 (NGO).

¹⁵¹⁹ Information collected through consultation with national stakeholders in July 2015 (academic and NGO).

POLAND

1 National context

The Polish Constitution (*Konstytucja RP*) guarantees equal treatment of all churches and faith groups. It declares the impartiality of the State on religious matters, as well as free exercise of religion in the public sphere¹⁵²⁰. However, it explicitly mentions one church in stating that 'The relationship between the Republic of Poland and the Catholic Church is governed by the international treaty with the Holy See and by the statutes'¹⁵²¹.

In Poland, the argument in favour of the existence of rules prohibiting offences against religious sensibilities, is largely driven by the predominance of Roman Catholic Church adherents. In recent years, artists, musicians, entertainers, and journalists have all been accused of offending religious sensibilities, with media content often the target of complaints and legal prosecution. Alleged victims of such infringements are almost exclusively Catholics, with only occasional adherents to other religions¹⁵²².

Polish legislation does not clearly differentiate between blasphemy and religious insult. 'Offending religious feeling' constitutes a criminal offence and is regulated in Article 196 Penal Code (PC). There is a clear overlap between this offence and the rule forbidding hate speech (Article 257 PC) on the ground of religion. Usually, offences allegedly directed towards the Roman Catholic religion are prosecuted under the blasphemy and religious insult provision (Article 196), with offences against minority religions and cults prosecuted under the hate speech provision (Article 257). Such provisions also apply to crime committed online and thought he media. Additionally, specific provisions of the Broadcasting Act (BA) are applied in cases where such offences are committed through TV/radio broadcasts. Liberal, left-wing parliamentarian groups proposed to amend or delete Article 196 PC, however, such attempts have been unsuccessful.

In general, Polish legislation seems to give a clear priority to the protection of 'religious feeling' (understood to refer, in the main, to the religious sensitivities of Roman Catholics) over freedom of expression and the freedom of artistic creation. A recent decision of the Constitutional Court (CT) clarified that freedom of religion is prioritised and, when such freedom conflicts with other freedoms and constitutional values (such as freedom of expression), it is freedom of religion which prevails¹⁵²³. The Supreme Court (*Sąd Najwyższy*) confirmed this approach, stating that 'On the basis of the existing legal rules it is impossible to demonstrate that, as a matter of principle, freedom of expression should prevail over the freedom to have one's religious feeling respected'¹⁵²⁴.

¹⁵²⁰ Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej* Dz. U. Nr 78, poz. 483). Available (in Polish) at: <http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm> and (in English) at: <http://www.trybunal.gov.pl/index2.htm>.

¹⁵²¹ Article 25 of the Constitution.

¹⁵²² Media information, available at <http://www.polskieradio.pl/5/3/Artykul/1367366,Zarzut-obrazy-uczuc-religijnych-musulmanow-Sprawcy-sie-tlumacza>.

¹⁵²³ K 52/13, Judgment of 10 December 2014.

¹⁵²⁴ I KZP 12/12, Resolution of the Supreme Court of 29 October 2012.

2. Legal framework

2.1. General description of legislation applicable to blasphemy and/or religious insult

In Poland, freedom of religion is protected by the Constitution¹⁵²⁵. In the Polish legal framework¹⁵²⁶, criminal provisions are applicable to the 'offence of religious feeling', which prohibits blasphemy and religious insult. The CT has, in fact, declared that religious feeling deserve special legal protection because they are directly linked to freedom of conscience and religion, itself a constitutional value. An offence to religious feeling consists of conduct which both objectively, and in the eyes of the offended persons, is perceived as an insulting behavior degrading to religious feeling. The offence must be committed in public and must, therefore, be perceived by a larger, often indeterminate group of people. Relevant general provisions of the Civil Code¹⁵²⁷ on compensation for damages when personal rights are violated, can be invoked.

In cases of satirical depictions of the saints of a given religion, or ironic treatment of its holy objects, the provision concerning 'offence of religious feeling' also applies. It has often been argued that the provision regarding 'offence of religious feeling' is an instrument used exclusively by the adherents to the Roman Catholic religion. There is a possible and real overlap between prohibition of insult to religious feeling (Article 196 CC) and the general prohibition on hate speech (Article 257 PC) on grounds of religion. It is up to the public prosecutor to qualify the offence under one or other of these two provisions. In practice, the provision on blasphemy and religious insult is used only to prosecute offences against the Catholic Church, with offences against minority religious groups being qualified as cases of 'hate speech'.

2.2 Legislation on blasphemy and/or religious insult

Legal reference to provision	
Offence provision 1 Offending religious feeling	Article 196 PC
Definition of offence	
Offence provision 1 Offending religious feeling	Offending religious feeling of other persons by outraging, in public, an object of religious worship or a place dedicated to the public celebration of religious rites.

¹⁵²⁵ Andrzej Wąsek (ed.), Commentary on the Criminal Code (*Komentarz do Kodeksu Karnego*), Beck, Warszawa 2006, p. 780.

¹⁵²⁶ Polish Penal Code of 1932 contained a provision (Article 172) explicitly relating to the crime of "blasphemy against God", with up to 5 years imprisonment as punishment. Subsequent penal codes did not preserve this regulation and were limited to provisions protecting against insult of religious feelings (Dz.U. 1932 nr 60 poz. 571. *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. - Kodeks karny*).

¹⁵²⁷ Civil Code (*Kodeks Cywilny* Dz. U. 1964 nr 16 poz. 93), available (in Polish) at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093>.

Penalties foreseen	
Offence provision 1 Offending religious feeling	A fine, restriction of liberty or deprivation of liberty for up to two years.
Online crime	
Offence provision 1 Offending religious feeling	Yes. Although it is not specified in legislation, the provision is applicable to online criminal behaviour.

2.3 The media’s responsibility for blasphemy and/or religious insult

In addition to the criminal provisions described in Section 2.2, blasphemy and religious insult committed through or by broadcasting media are specifically regulated by Article 18(2) BA which applies to all broadcasting media (public and private) and which states that: ‘Programmes or other broadcasts shall respect the religious beliefs of the public and especially the Christian system of values’. Article 21(2)(6) only applies to public radio and TV, and states that: ‘Programme services and other services of public radio and television should respect the Christian system of values, being guided by the universal principles of ethics’. In principle, such provisions apply to all religious beliefs, however, special protection has been reserved for the Roman Catholic religion. A judgment of the Constitutional Court confirmed the constitutionality of both provisions, stating at the same time that the requirement to respect ‘Christian values’ cannot be understood as a requirement to propagate Christian values. In interpreting the thematic range of the notion of ‘Christian values’, the CT declared that such a notion identifies ‘those values belonging to the realm of Christian culture which are at the same time fundamental universal moral principles’. The Constitutional Court thereby weakened the potentially discriminatory character of the provision.

The penalties consist of a fine imposed by the Chairman of the National Broadcasting Council (*Przewodniczący Krajowej Rady Radiofonii i Telewizji*), which may be up to 50% of the annual fee for the use of a frequency, or, where the broadcaster does not pay a frequency fee, up to 10% of the revenues of the broadcaster in the previous year (Article 53). In addition, under Article 38(1), a licence may be revoked by the Chairman of the Broadcasting Council if there is persistent activity by a broadcaster in breach of the BA (which includes the above-listed offences). The Chairman of the Broadcasting Council also has the authority to warn a broadcaster about improper content, without imposing any particular penalty.

For all other media, including print and online media, the general legal rules of the PC apply. Article 37 of the Press Law Act provides that ‘Legal liability for breach of law by a press publication is governed by the general principles of law, unless otherwise provided’. Since such law does not state any specific provision regarding blasphemy or religious insult, the general provisions of the PC apply to all media.

A system of self-regulation exists, with respect to advertising. The Advertising Council (*Rada Reklamy*, set up in 1997) and, in particular, the Commission for Ethics in Advertising (*Komisja Etyki Reklamy*) hear complaints regarding alleged non-ethical advertising. In principle,

the scope of the complaints might be broader than the scope of the criminal provision under Article 196 PC. Complaints can be filed against any commercial advertising which is considered offensive to any religion, although, in practice, complaints only concern the largest institutionalised religions rather than any religious feeling.

3 Effectiveness of the Legal Framework and its relationship with freedom of expression, freedom of thought and conscience

3.1 Effectiveness of the legislation on blasphemy and/or religious insult

Indicator 1	
National case law on blasphemy vs. freedom of expression and freedom of thought, conscience and religion	
<p>Offence Provision 1</p> <p>Offending religious feeling</p>	<p>Freedom of expression: <i>Supreme Court case III KK 274/14</i></p> <p>Facts: The Supreme Court considered Article 196 PC in the context of the conduct of a pop singer who, during a concert in 2007, had torn a Bible and uttered offensive words about it and about Christian religions. In 2012, the Supreme Court, in response to a request of the Court of Appeal in Gdansk, provided an interpretation of Article 196 PC saying that the offence may be committed either with a <i>dolus directus</i> or <i>dolus eventualis</i>. In February 2014 the Court of Appeals in Gdansk declared that while the conduct and words by the singer were 'vulgar, primitive and inconsistent with the message which should be conveyed by artistic expressions, it nevertheless did not constitute a criminal offence. The prosecutors subsequently lodged a further cassation suit to the Supreme Court.</p> <p>Court decision: The court upheld the acquittal.</p> <p>Court reasoning: The reasons for the decision have not yet been published. Based on the summary of the judgment provided in a Supreme Court press release, the Court found that the singer's conduct did not constitute an offence because his message was addressed to those who had already shared his convictions¹⁵²⁸.</p> <hr/> <p>Freedom of thought; conscience and religion:</p> <p>No Supreme Court judgments were identified.</p>

¹⁵²⁸ Supreme Court's latest information service, information on judgment on case III KK 274/14, http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemID=50&ListName=Komunikaty_o_sprawach.

Indicator 2 Quantitative evidence	
Offence Provision 1 Offending religious feeling	<p>Number of cases investigated¹⁵²⁹:</p> <p>2010 - 48 2011 - 42 2012 - 47 2013 - 51 2014 - 55</p> <p>Number of cases prosecuted:</p> <p>No data are available</p> <p>Number of cases adjudicated¹⁵³⁰:</p> <p>2010 - 7 2011 - 2 2012 - 7 2013 - 11 2014 - 8</p>
Indicator 3 - Bottlenecks of practical implementation	
Offence Provision 1 Offending religious feeling	<p>Clarity of offence provision:</p> <p>An offence to religious feeling may consist of uttering insulting words through published content, or of an insulting drawing or an insulting gesture. The offence may also be committed by damaging a sacred object or a place of religious cult. In the case of Christian churches, for example, the Crosses, liturgical tools, religious paintings and sculptures, rituals, the texts of the prayers, hymns and psalms are all considered to be sacred objects. A commentary on the PC states that 'A critique to a religious community or a critique to the views of its representatives (e.g. by saying that God does not exist) are not considered an offence to religious feeling, as long as the conduct does not contain any elements which are degrading or insulting¹⁵³¹. However, the interpretation of the Article is made difficult by the need to balance protection of religious feeling with freedom of expression, including the freedom of artistic expression.</p> <p>Some of the stakeholders interviewed affirmed that the notion of 'religious feeling' is unclear. However, such concerns were not shared by other stakeholders interviewed, who consider Article 196 PC to be clear, and raise no doubts as to its sense and meaning¹⁵³².</p>

¹⁵²⁹ Data of the Police, available at: <http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63492,Obraza-uczuc-religijnych-art-196.html>.

¹⁵³⁰ Data provided by the Ministry of Justice, 3 June 2015.

¹⁵³¹ Andrzej Wąsek (ed.), Commentary on the Criminal Code (Komentarz do Kodeksu Karnego), Beck, Warszawa 2006, p. 781-782.

¹⁵³² Data provided by the Ministry of Justice, 3 June 2015.

	<p>Suitability of offence provision to cover online crime:</p> <p>The current offence provision is suitable to cover online crimes. The only prerequisite concerns the public character of the crime, which means that it must reach a larger, often indeterminate group of people (with a minimum two persons). This condition is met when a message is disseminated online¹⁵³³.</p> <p>Suitability of offence provision to ensure freedom of expression and / or freedom of thought, conscience and religion:</p> <p>Stakeholders indicated that Article 196 PC might have a 'chilling effect' on public debate and on artistic freedom, which may lead to auto-censorship of artists¹⁵³⁴. Courts are not often very rigorous in examining a clear danger to the public order when applying such Articles, with the likelihood that the religious feeling of individuals are insulted is considered an adequate condition for the application of such rules.</p> <p>Suitability of offence provision to current national context (e.g. targets the right group of perpetrators):</p> <p>The provision strengthens the position of one particular religion and its adherents (the Catholic Church). However, there is no strong data-based evidence to suggest that Catholics (or adherents to other organised religions), demand any specific protection against blasphemy and/or religious insult.</p> <p>Other shortcomings of applicable offence provision:</p> <p>The provision seems to be vague, which may lead to unjustified restriction of freedom of expression and artistic freedoms.</p>
Indicator 4- Drivers for the adoption of new legislation/amendment to existing legislation	
<p>Offence Provision 1</p> <p>Offending religious feeling</p>	<p>Two significant attempts have been made to amend or cancel Article 196 PC.:</p> <p>1. Democratic Left Alliance (<i>Sojusz Lewicy Demokratycznej</i>) legislative proposal, February 2012¹⁵³⁵. The proposal concerned the amendment of Article 196 PC. The main aim of the proposed amendments was to balance the protection of religious feeling with the principle of freedom of expression, and freedom of 'artistic creativity.'. Article 196 was also considered too vague. The proposed new provision aimed to respect the guarantee of individual rights and freedoms, while, at the same time meeting the requirements of clarity of law by defining, in a precise way, the range of religious sensitivities protected by the Penal Code. To that end, the proposal suggested the penalisation of those acts which consist of 'publicly defaming the sites dedicated to religious ceremonies or the objects of religious cults placed in such sites'. The remaining public space should be free of such restrictions, which does not pre-empt the individual right to press a civil law suit for protection of personal rights. The proposal was withdrawn in February 2014, due to lack of government support.</p> <p>2. Your Movement (<i>Twój Ruch</i>) legislative proposal, July 2014¹⁵³⁶: 'Proposal to nullify and strike off Article 196 from the Penal Code'. The aim of the proposed Act nullifying Article 196 CP, was to safeguard the freedom of expressing one's thoughts and</p>

¹⁵³³ Information provided by the Ministry of Justice in the questionnaire returned, 3 June 2015

¹⁵³⁴ Interview with the representative of an NGO, 1 June 2015.

¹⁵³⁵ Parliamentary proposal (*druk sejmowy*) No 383 of 22 February 2012.

¹⁵³⁶ Parliamentary proposal No 2677 of 8 July 2014.

	manifesting one's beliefs without the fear of indictment for offending religious feeling. This proposal centred on the fact that the courts' judgments based on Article 196 PC predominantly protect the sensitivities of Roman Catholics, and that the law, originally intended to protect all religions and beliefs, has been applied in a highly selective way, and in particular denies protection to the more vulnerable religious groups. In September 2014 the Polish Parliament voted to reject the proposal.
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3.2 Effectiveness of the rules regulating the media's responsibility for blasphemy and/or religious insult

Indicator 1 - National case law on the interaction of the provision with freedom of expression and with freedom of thought, conscience and religion	
Provisions 1	Freedom of expression:
Articles 18, 21, 38 and 53 of the BA	No Supreme Court judgments were identified.
	Freedom of thought, conscience and religion:
	No Supreme Court judgments were identified.
Indicator 2 - Quantitative evidence	
Provisions 1	Number of decisions condemning the media service providers and publishers ¹⁵³⁷ :
Articles 18, 21, 38 and 53 of the BA	2010 – 1 2011 – 1 2012 – 0 2013 – 2 2014 – 0
Indicator 3 - Bottlenecks of practical implementation	
Provisions 1	Stakeholders indicated that the relevant provisions of the BA should be amended, as they are considered too vague, with too much scope for interpretation. This could, therefore, limit freedom of expression.
Articles 18, 21, 38 and 53 of the BA	The stakeholders also argued that the Broadcasting Council is a political body, whose members are elected by the political forces in power. This might mean that in circumstances where the ruling power represents a particular ideology, there may be a risk that the use of 'insult of religious feeling' provisions of the BA might be abused ¹⁵³⁸ .
Indicator 4 - Drivers for the adoption of new legislation/amendment to existing legislation	
Provisions 1	No new legislation was adopted and no amendment to existing legislation is planned.
Articles 18, 21, 38 and 53 of the BA	

¹⁵³⁷ All statistics are included in the Annual Reports of the Broadcasting Council, available at: <http://www.krrit.gov.pl/krrit/sprawozdania/>.

¹⁵³⁸ Based on the interview with the NGO representative, 1 June 2015.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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