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## **COMBATING ONLINE HATE SPEECH IN THE CZECH REPUBLIC**

Legal analysis and litigation strategies

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## **1. Introduction**

The present legal analysis is to identify most suitable litigation strategies against hate speech committed in the online environment. The geographical space covered by this report is the Czech Republic. The report is dedicated to lawyers who will proceed with representing victims of hate speech committed in the online environment and who will seek justice in this specific human rights area. It is meant as a practical tool that will assist lawyers in assessing the case at hand and choose the most appropriate litigation strategy.

Legal protection against hate speech in the Czech Republic is scattered across different legal instruments and there is not one remedy dedicated for victims of hate speech. The first part of the report identifies the substantial and procedural legislation framework applicable to online hate speech and describes legal avenues that could be taken in online hate speech cases. Relevant national case-law is also briefly described. The selection of the appropriate avenue needs to be tailored to each individual case depending on a number of factors identified in this study. There is not one recommended path that should be taken in each hate speech case. Nonetheless, the report contains analysis of legal remedies that could be considered effective and appropriate in hate speech cases committed online.

The second part of the report covers international and European standards in the area of online hate speech, notably by the UN treaty bodies, Council of Europe, in particular the case-law of the European Court of Human Rights, and the EU. Non-legal alternative international avenues such as complaint mechanism of selected social media are also briefly described to offer a full picture of the existing protection against hate speech. The purpose of this part is to arm lawyers with arguments based on the international human rights law that could be used in the national litigation.

The final part of the report contains practical tools for lawyers representing victims of online hate speech in choosing the most suitable legal strategy. Namely, the factors necessary for the assessment of the case, including template questions, most frequent scenarios of hate speech cases and how to address them, and recommendations of litigation strategies that could bring the best results for the victims considering various risk factors that each remedy inherently contains.

The report is based on desk research and adopts a human rights approach to hate speech. Its authors are experienced lawyers in the national and international human rights law. Bearing in mind certain unclarity surrounding the concept of hate speech in international human rights law, as well as domestic practice, it is important to introduce definitions which would serve as a basis for this report. According to the United Nations Strategy and Plan of Action on Hate Speech hate speech is understood as „any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the

basis of who they are.”<sup>1</sup> However, as the organisation Article 19 pointed out, such definition may be too broad and captures a very broad range of expression, including lawful expression, and is, therefore, too vague for use in identifying expression that may legitimately be restricted under international human rights law.<sup>2</sup> Similarly than the organisation Article 19, this report adopts a more nuanced approach to hate speech, based on a typology for identifying ‘hate speech’ according to the severity of the expression and its impact.<sup>3</sup> This typology differentiates between three categories of hate speech:

- ‘Hate speech’ that *must* be prohibited. Especially Article 20(2) of the ICCPR requires States to prohibit certain severe forms of “hate speech,” including through criminal, civil, and administrative measures;
- ‘Hate speech’ that *may* be prohibited: States may prohibit other forms of “hate speech,” provided they comply with the requirements of Article 19(3) of the ICCPR;
- *Lawful* ‘hate speech’ which should be protected from restriction under Article 19(2) of the ICCPR, but nevertheless raises concerns in terms of intolerance and discrimination and merits a critical response by the State.<sup>4</sup>

Defining hate speech two other terms need to be clarified: hate and speech. Relying on Article 19 definitions, *hate* can be defined as the intense and irrational emotion of opprobrium, enmity and detestation towards an individual or group, targeted because of their having certain - actual or perceived – protected characteristics (recognised under international law). Hate is more than mere bias and must be discriminatory. Hate is an indication of an emotional state or opinion, and therefore distinct from any manifested action. *Speech* is any expression imparting opinions or ideas – bringing an internal opinion or idea to an external audience. It can take many forms, written, non-verbal, visual or artistic, and can be disseminated through any media, including internet, print, radio, or television.

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<sup>1</sup> UN, United Nations Strategy and Plan of Action on Hate Speech, May 2019.

<sup>2</sup> <https://www.article19.org/resources/hate-speech-explained-a-summary/>

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

## **2. National framework of protection against online hate speech**

### **2.1. Substantive protection against online hate speech**

#### **2.1.1. Constitutional protection**

The Charter of Fundamental Rights and Freedoms (constitutional act No. 2/1993 Coll.) is a part of the Czech constitutional order. It sets out rights and freedoms of persons under Czech jurisdiction. The following provisions are particularly relevant for hate speech:

- prohibition of discrimination – Article 3(1): Fundamental rights and freedoms are guaranteed to everyone without distinction of sex, race, colour of skin, language, faith, and religion, political or other opinion, national or social origin, membership of a national or ethnic minority, property, birth or other status.
- right to human dignity, personal honour and good reputation – Article 10(1): Everyone has the right to demand that his or her human dignity, personal honour, and good reputation be respected, and that his or her name be protected.
- protection of private and family life – Article 10(2): Everyone has the right to be protected from any unauthorized intrusion into her private and family life.
- protection of personal data – Article 10(3): Everyone has the right to be protected from the unauthorized gathering, disclosure, or other misuse of personal data.
- freedom of expression and the right to information – Article 17:
  - (1) The freedom of expression and the right to information are guaranteed.
  - (2) Everyone has the right to express his or her opinion in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the State.
  - (3) Censorship is not permitted.
  - (4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public safety, public health, and morals.
  - (5) State bodies and local authorities are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation shall be provided for by law.

#### **2.1.2. Criminal law**

Hate speech is regulated by the Criminal Code (Act No. 40/2009 Coll.) in chapters II, IX, X and XIII. There is not one single provision regulating hate speech, the regulation is split between different provisions, each encompassing a particular aspect of hate speech. The most relevant provisions criminalizing different forms of online hate speech are:<sup>5</sup>

- § 181 The infringement of rights of another
- § 184 Defamation
- § 312e Support and promotion of terrorism
- § 345 False accusation
- § 352 Violence against group of people and individuals
- § 353 Dangerous threatening
- § 355 Defamation of nation, race, ethnic or other group of people
- § 356 Instigation of hatred towards a group of people or of suppression their rights and freedoms
- § 357 Spreading of alarming news
- § 364 Incitement to criminal offence
- § 365 Approval of criminal offence
- § 403 Establishment, support and promotion of movements aimed at a suppression of human rights and freedoms
- § 404 Expression of sympathies for movements aimed at suppression of human rights and freedoms
- § 405 Denial, impugnation, approval and justification of genocide

The prosecution of hate crimes under the Criminal Code is based on the so-called **three-track system**. Prejudicial motive is part of the basic facts of certain crimes (e.g., sections 352, 355 and 356), and perpetrators of such crimes face up to three years' imprisonment. In addition, for selected offences, premeditated motive appears as a circumstance conditioning the application of a higher criminal rate, the so-called qualified offence (e.g., section 140/3/g murder, section 146/2/e bodily injury or section 175/2/f extortion). Hateful motive is also included in the Criminal Code as a so-called general aggravating circumstance, which applies if the facts of a particular offence do not contain a specific aggravating factor, so called qualified facts (section 42/b). The general aggravating circumstance is taken into account when deciding on the penalty to be imposed within the basic criminal rate. Across the three-track system, the Criminal Code explicitly protects persons attacked on the grounds of race, ethnicity, nationality, religion, political opinion, class membership and membership of a so-called other group of persons.<sup>6</sup>

The survey conducted by the Public Defender of Rights in 2020 showed that 60% of cases concerning online hate speech dealt with by Czech criminal courts was directed against whole groups of people based on their nationality, ethnicity, skin colour,

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<sup>5</sup> Public Defender of Rights, [Hate speech on the Internet and decision-making of Czech courts](#), 2020.

<sup>6</sup> Ibid.

religion, sexual orientation, etc. Most of these decisions dealt with hate speech directed **against Roma** and Muslims minorities (49% and 23% of decisions, respectively).<sup>7</sup>

In almost all cases concerning online hate speech heard by Czech courts, the perpetrators were male (94%), with no indications of being members of a minority (94%) and with no history of convictions (91%). Most incidents adjudicated by the Czech courts in the analysed period took place **on Facebook** (83%).<sup>8</sup>

Where a case was heard before a court, the perpetrator was convicted, at least in the first-instance proceedings in 43 out of 47 cases (91%). The most frequent punishment was a suspended sentence (10 months on average) with a probationary period (24 months on average), followed by a fine (10 decisions; CZK 15,800, i.e. approximately EUR 640, on average) with specification of an alternative sentence (two months on average). In some of the cases, the courts also ordered community service or forfeiture of an object.<sup>9</sup>

The **most prosecuted** crimes in connection with online hate speech, according to the said survey, are:

- § 356 - Instigation of hatred towards a group of people or of suppression their rights and freedoms
- § 355 Defamation of nation, race, ethnic or other group of people
- § 352/2 and 3 Violence against group of people and individuals
- § 404 Expression of sympathies for movements aimed at suppression of human rights and freedoms

The crime defined in section 356 is the most frequently prosecuted crime in connection of online hate speech. According to the research by the Czech Public Defender of rights, it featured in almost half of the analysed court decisions.<sup>10</sup>

#### § 356

##### Instigation of Hatred Towards a Group of People or of Suppression their Rights and Freedoms

(1) Whoever publicly instigates hatred towards any nation, race, ethnic group, religion, class or another group of people or instigates suppression of rights and freedoms of their members, shall be sentenced to imprisonment for up to two years.

(2) The same sentence shall be imposed to anyone who conspires or assembles to

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

commit the act referred to in sub-section (1).

(3) An offender shall be sentenced to imprisonment for six months to three years, if he/she

a) commits the act referred to in sub-section (1) by press, film, radio, television, publicly accessible computer network or in another similarly effective way, or

b) actively participates in activities of a group, organisation or association that promotes discrimination, violence, or race, ethnical, class, religious or other hatred by such an act.

Cases of defamation of nation, race, ethnic or other group of people occurred frequently in the decisional practice of Czech courts. In the period examined by the Public Defender of Rights, such cases accounted for one fifth of the analysed court decisions.

### § 355

#### Defamation of Nation, Race, Ethnic or other Group of People

(1) Whoever publicly defames

a) any nation, its language, any race or ethnic group, or

b) a group of people for their true or presupposed race, belonging to an ethnic group, nationality, political or religious beliefs or because they are truly or supposedly without religion, shall be sentenced to imprisonment for up to two years.

(2) An offender shall be sentenced to imprisonment for up to two years, if he/she commits the act referred to in sub-section (1)

a) with at least two persons, or

b) by press, film, radio, television, publicly accessible computer network or in another similarly effective way.

Section 352 prohibits threatening a group of people with death, bodily harm or causing extensive damage. A commitment of such an act by press, film, radio, television, publicly accessible computer network or in another similarly effective way is considered a qualified offence with higher possible sentence.



§ 352

Violence against Group of People and Individuals

(2) Whoever uses violence against a group of people or against an individual or threatens them with death, bodily harm or causing extensive damage for their true or presupposed race, belonging to an ethnic group, nationality, political or religious beliefs or because they are truly or supposedly without religion, shall be sentenced to imprisonment for six months to three years.

(3) The same sentence as in sub-section (2) shall be imposed to anyone who  
a) conspires or assembles for the purpose of committing such an act, or  
b) commits the act referred to in sub-section (1) by press, film, radio, television, publicly accessible computer network or in another similarly effective manner.

The crime under section 404 accounted for 19% of the analysed cases. One example of such prosecution were hateful expression on social media directed at the Romani singer Radek Banga. These expressions displayed sympathies for neo-Nazism.<sup>11</sup>

§ 404

Expression of Sympathies for Movements Aimed at Suppression of Human Rights and Freedoms

Whoever publicly expresses sympathy for the movements referred to in Section 403 (1)\* shall be sentenced to imprisonment for six months to three years.

*\* 403(1) ... movement that demonstrably aims at the suppression of human rights and freedoms or advocates racial, ethnic, national, religious or class resentment or resentment against another group of persons.*

The other crimes that relevant for prosecuting hate speech are:

**Section 405 Denial, Impugnation, Approval and Justification of Genocide** criminalizes public denial, impugnation, approval, or attempts to justify Nazi, Communist or any other genocide, or Nazi, Communist or other crimes against humanity or war crimes or crimes against peace, with imprisonment for six months to three years.

**Section 181 Infringement of Rights of Another** prohibits misleading someone and taking advantage of someone's mistake, which causes a serious detriment on rights of the person.

Under the **section 184 Defamation**, the act of making a false statement about another capable of significantly threaten her reputation among fellow citizens,

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<sup>11</sup> Ibid.

especially her in employment, disrupt her family relations or cause another serious detriment, is prohibited. A commitment of such an act by press, film, radio, television, publicly accessible computer network or in another similarly effective way is considered a qualified offence, which is characterised by harsher penalty.

Under the **section 312e** the act of **support and promotion of terrorism** is proscribed as follows: *Whoever publicly incites to commit a terrorist offence, or who publicly approves the commission of a terrorist offence or publicly praises its perpetrators for it, shall be punished by imprisonment for two to ten years.* A commitment of such an act by press, film, radio, television, publicly accessible computer network or in another similarly effective way is considered a qualified offence. **Section 312f** regulates the crime of **threatening a terrorist offence**. A commitment of such an act by press, film, radio, television, publicly accessible computer network or in another similarly effective way is considered a qualified offence.

**Section 345** of the Criminal Code prohibits falsely accusing another of an offence (**False Accusation**).

**Section 353** defines **dangerous threatening** as an act of threatening another with death, grievous bodily harm, or other serious harm in such a way as to cause reasonable apprehension. A qualified act is one that is committed against a child, a witness, a health care worker in the performance of a health care occupation or profession aimed at saving life or protecting health, etc.

**Section 357** regulates **spreading of alarming news**. Intentional spreading of untrue news, which causes a threat of serious concernment of at least a portion of population of a certain area is prohibited. Communication of such information or other untrue news capable of causing precautions leading to a risk of serious concernment of at least a portion of population of a certain place or an unfounded rescue operation of the integrated emergency system to a police authority, to a legal person, natural person who is an entrepreneur or a mass communication media etc. is considered a qualified offence.

**Section 364** prohibits public incitement to commit a criminal offence (**Incitement to Criminal Offence**). **Section 365** regulates **the approval of criminal offence**. Public approval of a committed criminal offence and public praising an offender for his crime is prohibited.

**Section 403** prohibits **establishment, support and promotion of movements aimed at a suppression of human rights and freedoms**. And defines those movements as ones provably aimed at suppression of human rights or that proclaims racial, ethnic, national, and religious or class hatred or hatred against another group of people. A commitment of such an act by press, film, radio, television, publicly

accessible computer network or in another similarly effective way, or during a state of national peril or a state of war, or by an offender as a member of an organised group, as a soldier is considered a qualified offence.

### 2.1.3. Misdemeanours

Law on misdemeanours is regulated in two main laws:

- The Act on Liability for Offences and Proceedings Thereon (Act No. 250/2016 Coll.)
- Act on Certain Offences (Act No. 251/2016 Coll.)

Misdemeanour is defined as a socially harmful unlawful act that is expressly designated as a misdemeanour in the above laws and that exhibits the characteristics provided for by law, unless it is a criminal offence. It is characterised by its lower social harmfulness.

The cases of hate speech will typically be processed under Section 7 of the Act on Certain Offences which covers the **offences against civil coexistence**. Offences under Section 7 can be committed by:

- natural person
- legal entity
- natural person conducting business activity.

Section 7(1)(a) defines the offence of **defamation** as ridiculing or otherwise grossly insulting another person.

Section 7(1)(c) covers the offence of **intentional disruption of civil coexistence** that can rest in (1) threatening another with bodily harm, (2) falsely accusing another of an offence, (3) committing a malicious act against another, or (4) committing any other gross act against another.

Article 7(3)(b) includes the offence of **causing harm to another** due to one of the protected grounds: belonging national minorities or for her ethnic origin, race, skin colour, gender, sexual orientation, language, faith or religion, age, disability, political opinion and activities within political movements, membership of trade unions or other associations, social origin, property, clan or health and marital status.

Section 7(4) sets the amount of the **fine** that could be imposed for the offence of defamation up to CZK 10,000 (ca. EUR 400), and for the offences of intentional disruption of civil coexistence and causing harm to another due to protected ground up to CZK 20 000 (ca. EUR 800). The amount of the fine is decided in the context of

the misdemeanour proceedings. These fines may be increased if the perpetrator commit the offence repeatedly.

The offences of defamation and causing harm to another are punishable by imposing a so-called **restrictive measure**, if committed by a natural person. Restrictive measure is regulated in section 52 in Act No. 250/2016 and may rest in:

- a ban on visiting designated public places or places where sports, cultural or other social events are held,
- an obligation to refrain from contact with a specific person or a defined group of persons, where appropriate; or
- an obligation to undergo an appropriate programme for the management of aggression or violent behaviour.

There must be a direct link between the offence committed and the restrictive measure to be imposed. The measure must be proportionate to the nature and gravity of the offence and to the personal circumstances of the offender. It may only be imposed together with an administrative penalty for a maximum period of 1 year. Compliance with this measure shall be monitored by the administrative court which imposed it or by the Police of the Czech Republic.

When dealing with the offence of defamation, the administrative authority shall attempt to reconcile the parties. If reconciliation is achieved, the administrative authority shall discontinue the proceedings by a decision against which no appeal may be lodged.

#### **2.1.4. Civil law**

The Civil Code (Act No. 89/2012 Coll.) includes the protection of personality which has its basis in the Charter of Fundamental Rights and Freedoms, a part of the constitutional order. Section 81 of the Civil Code defines more generally what should be understood by the **protection of personality**. Personality refers, in particular, to life, dignity, health, honour, and privacy. Section 82(1) provides for an action for the protection of personality (see more in procedural part of this analysis).

##### Section 81

- (1) The personality of the individual, including all his or her natural rights, is protected. Everyone is obliged to respect the free choice of an individual to live as he or she pleases.
- (2) Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy, and expressions of personal nature enjoy particular protection.

Only a human being, that is, a natural person, can claim protection of personality (not legal entities). According to Section 82(1), the following can be claimed:

- to refrain from unlawful interference; and
- removal of consequences.

#### Section 82

- (1) An individual whose personality rights have been affected has the right to claim that the unlawful interference be refrained from, or its consequence remedied.
- (2) After the death of an individual, the protection of his personality rights may be claimed by any of his close persons

In addition, a person may also claim compensation for **non-pecuniary damage**, which is regulated in section 2951(1) and (2) of the Civil Code. Non-pecuniary damage can be generally considered to be any damage that does not involve a direct loss of property for the victim. Typically, it is an interference with health, honour, privacy, etc. Non-pecuniary damage shall be compensated by adequate compensation. Compensation can be awarded in money if no other means of compensation can provide real and sufficiently effective reparation for the damage caused. Such compensation may be claimed in civil proceedings, and it may take a form of a financial compensation but also a public apology.

Section 82(2) then guarantees protection of personality rights even after the death of the person. The close persons may bring an action for the protection of personality on behalf of the deceased.

### 2.1.5. Antidiscrimination legislation

The prohibition of discrimination is regulated in a separated Act on Equal Treatment and Legal Means of Protection against Discrimination and on Amendments to Certain Acts (Act No. 198/2009 Coll.) - Anti-Discrimination Act

Section 4(1) defines **harassment** as unwanted conduct in connection with differential and less favourable treatment on the grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, faith or world view, and in legal relations in which directly applicable European Union legislation on the free movement of workers applies, also on grounds of nationality.

#### Section 4 (1)

Harassment shall mean any unwanted conduct associated with the grounds specified in Section 2 (3),

a) taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment, or

b) which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

The intention or consequence of this conduct then falls into two categories:

- the lowering of a person's dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment; or
- which may reasonably be perceived as a condition for a decision affecting the exercise of rights and obligations arising from legal relations.

The individual may defend herself by means of an **anti-discrimination action** (Section 10) in which he or she may seek:

- an injunction against discrimination,
- removal of the effects of the discriminatory interference or
- adequate compensation for non-pecuniary damage determined by the court considering the seriousness of the damage suffered and the circumstances of the particular case.

#### **2.1.6. Other relevant legislation**

The Public Defender of Rights can also provide certain protection against hate speech. His competences are governed by the Act on the Public Defender of Rights (Act No 349/1999 Coll.). He offers protection to persons from the actions of authorities and other institutions if their procedures are contrary to the law, do not comply with the principles of the democratic rule of law, as well as from their inaction, and thus contributes to the protection of fundamental rights and freedoms, including protection against hate speech.

In the context of hate speech, the Public Defender of Rights may:

- examine how a municipal or regional authority has dealt with an offence
- advise victims of discrimination – assess whether hate speech amounted to discrimination (in the form of harassment) and recommend an appropriate course of action
- make recommendations on issues related to discrimination and suggest changes in practice, for example, advising the website operator (only if it is a public law entity) to take down objectionable content.

In addition, media are regulated by the Act on the Regulation of Advertising (Act No. 40/1995 Coll.). Article 2(3) states that advertising must not be contrary to good morals

and again refers similarly to the prohibition of violating dignity, honour, must not attack religious minorities and so on.

Television and radio broadcasting are supervised by the Council for Radio and Television Broadcasting. Its competences are regulated in the Act No. 231/2011 Coll.

## 2.2. Procedural protection against online hate speech (legal avenues)

### 2.2.1. Criminal procedure

Criminal proceedings are initiated whenever a police authority becomes aware of facts that a crime may have been committed. Police authority should proceed *ex officio* (§ 158, Criminal Procedure Code, Act No. 141/1961 Coll.). The police may become aware of a crime through their own activities or through a crime notification.

Crime notification is not formalized, however, according to the recommendation published by the Czech police every notification should include the following information:<sup>12</sup>

- Who has committed the offence?
- What has happened?
- When did it happen?
- How did it happen?
- Why did it happen according to the notifier?

After filing a crime notification, police will launch first phase of the criminal procedure – **the inquiry**. Inquiry phase is the first phase of the criminal proceedings, it is also a prejudicial phase and first phase before criminal prosecution. An official record is made of the initiation of criminal proceedings and the public prosecutor is informed within 48 hours. The aim of this phase is to determine whether the facts examined indicate that a crime has been committed.

In May 2020 Police created **new specialized team** dedicated to hate speech crimes investigation. Besides the online hate speech, the team will also investigate prejudice-based hatred. The police team is created under the 9<sup>th</sup> Department of General Crime dedicated to the investigation and prosecution of extremism.

Crime notification can be filed at any police department or public prosecution service office regardless of the fact, where the crime has been committed. Both police departments and public prosecutor offices have duty to settle the matter without delay. For citizens with electronic identity,<sup>13</sup> there is also option to file a crime notification through the [citizens portal](#) (portal občana). However, police organs have duty to investigate every possible crime, even though crime notification has not been filed in recommended format. Therefore, it is possible to contact police organs by phone or email published on the [website](#).

Inquiry phase ends with:<sup>14</sup>

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<sup>12</sup> <https://www.policie.cz/clanek/postup-pri-podani-trestniho-oznameni.aspx>

<sup>13</sup> E. g. banking identity, International I. D. Gateway etc.

<sup>14</sup> See § 159, criminal procedure code, trestní řád.



- Discontinuation of the case (if there is no suspicion, that a crime has been committed; if facts have not been established)
- Temporary discontinuation of the case
- Transferring of the case to another body (facts have been established and there is suspicion that administrative delict rather than crime has been committed)
- Initiation of the criminal persecution

If the police organ decides to discontinue/transfer the case, a **complaint** may be filed within three days after the notification of the decision. The complaint is to be filed with the police organ which decided about the discontinuation of the case. The complaint is then reviewed by the public prosecutor. Every person affected by the decision can file the complaint, including the victim.

The decision to initiate criminal persecution is issued by the police or public prosecutor. By the initiation, criminal proceedings move to another prejudicial phase – **the investigation**. The prosecution (and therefore investigation) is always directed against a particular person charged with a specific crime. The investigation ends with:<sup>15</sup>

- The indictment<sup>16</sup>
- The suspension of the criminal proceedings
- Transferring the case to another body such as the misdemeanor proceedings, (see below)
- Returning the case to the police authority for completion

Before the indictment is to be filed, the accused and her defense counsel have right to right to examine the file. After the filing of the indictment, criminal procedure moves from prejudicial phase to the **judicial phase**.

After the indictment, the judge will order the main hearing. From this point, person accused of crime is called defendant. Every case should be heard on the main hearing; however. During the **main hearing**, defendant and witnesses are interrogated, and other evidence is presented. Main hearing ends with the final defense speech. After the final deliberation of the court, the verdict is presented. Both public prosecutor and the defendant have right to appeal within 8 days after the delivery of the judgement. If only defendant appeals, *reformation in peius* is forbidden. The victim may appeal against the judgement only in respect of damages (not in respect of determination of guilt or sentence).

When the maximum penalty does not exceed five years, the case may be decided without the main hearing by a single judge in a simplified procedure. Single judge may issue a criminal order which replaces the courts verdict. However, the defendant has

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<sup>15</sup> See § 166, Criminal Procedure Code.

<sup>16</sup> The indictment must contain a statement of the charge, the proposed punishment, a designation of the accused, and a statement of the evidence. See § 177, Criminal Procedure Code.

right to file special form of appeal, which instantly cancels the criminal order and the main hearing is required.

Criminal proceedings				
Criminal prosecution				
Inquiry	Investigation	Main hearing	Appeal proceeding	Sentence execution
Prejudicial phase		Judicial phase		

Besides the Criminal Procedural Code, the rights of the victims of crime are set out in a separate law: Act on the victims of crime.<sup>17</sup> A victim is defined as natural person who has been or should have been harmed by the offence, or who has suffered material or non-material damage. Any person who feels that he or she has been the victim of a crime is to be considered a victim unless the contrary appears.

The Act on the victims of crimes anchors special category of victims – **particularly vulnerable victims**. According to law, particularly vulnerable victims consist of children, elderly, victims with physical, mental, psychological disabilities. Particularly vulnerable victims are also victims of several crimes, including victims of human trafficking, rape and abuse. Victims are considered particularly vulnerable also if the crime was committed because of belonging to a nation, race, ethnic group, religion, class, or other group of persons.<sup>18</sup> Therefore, victims of hate speech can potentially fall within this category.

Every particularly vulnerable victim has the right to free legal and other aid, before, during and even after the criminal proceedings. However, the victim must ask for the aid (for example during the police investigation; a verbal request is sufficient). The aid will be provided by a provider from the register of providers of the Ministry of Justice of the Czech Republic. Legal aid may be provided only by attorney of the Czech Bar Association.

The victim can also request the court to order the defendant to compensate her for the pecuniary or non-pecuniary damage caused by the offence.<sup>19</sup> The criminal courts can, however, refer the victim for civil proceedings with the claim for compensation.

### 2.2.2. Procedure on misdemeanours

<sup>17</sup> See Act No. 45/2013 Coll. on the victims of crimes, § 2.

<sup>18</sup> The overall list of conditions for the status of a particularly vulnerable victim is broader; only the circumstances relevant to hate speech are listed.

<sup>19</sup> See § 43, Criminal Procedure Code.

Criminal law is governed by the principle of subsidiarity of criminal repression and some deeds may be punishable only under administrative law. First phase of the criminal proceedings, the inquiry, can end by the transfer of the case to another body. The organ with subject matter jurisdiction to hear misdemeanours is the **municipal office**.

Misdemeanour proceedings are initiated only *ex officio*. However, organs have duty to investigate every misdemeanour of which they become aware. Every person may file a misdemeanour notification to the municipal office (not only the damaged person but anybody who is aware of the misdemeanour). The offence of defamation can, however, be investigated only with the consent of the victim. The misdemeanour notification shall clear that the notifier seeks initiation of the proceedings or, at least, that the notifier points to some deeds that she considers unlawful. However, as well as the crime notification, it is better, when a misdemeanour notification includes the same basic information about the allegedly committed misdemeanour as the criminal notification (see in previous section). It is also advisable to attach the relevant evidence such as documents, pictures or videos.

In case of the online hate speech, local jurisdiction belongs to the district municipal office, where the suspected offender lives or where the offence came to light.

The municipal office may ask the parties to submit oral or written explanation and may hold an oral hearing of the case. The proceedings are concluded by issuing a decision on the misdemeanour in which either guilt or innocence is pronounced. Alternatively, misdemeanour proceeding can also be discontinued (for example when criminal proceedings are pending for the same offence). The misdemeanour decision may also include a verdict on damages. Nevertheless, only material damage can be compensated.<sup>20</sup>

In the misdemeanor proceedings, the victim has several rights including the right to be notified of the initiation of the proceedings, the right to propose evidence and make other proposals throughout the proceedings, the right to be provided with information about the proceedings, the right to express one's opinion in the proceedings, the right to inspect the file, the right to participate in the oral hearing and to be present at all acts in the proceedings, the right to express one's opinion on the grounds for the decision before the decision is issued, and the right to be notified of the decision.<sup>21</sup>

### **2.2.3. Civil proceedings**

Another possibility to defend against the online hate speech is through the civil procedure. Main disadvantage for victims of online hate speech crimes lies in the fact, that civil proceedings take longer, and the plaintiff bears the burden of proof. In the

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<sup>20</sup> See Judgment of the Supreme Administrative Court, 30 September 2009, file No. 8 As 39/2009-67.

<sup>21</sup> See § 71 Act No. 250/2016 Coll.

criminal and misdemeanour proceedings, investigation and prosecution are carried out by authorities *ex officio*. Civil procedure lays bigger responsibility on the plaintiffs.

Civil court proceedings are commenced by an action filed with the court. The court must have subject matter and territorial jurisdiction.<sup>22</sup>

- Subject matter jurisdiction: district courts, regional courts (in matters concerning the protection of the name and reputation of a legal entity).
- Territorial jurisdiction: the general court of the defendant (that is, the court where the defendant is domiciled)

Unlike the criminal or misdemeanour notification, civil action has formalities that must be complied with. Formalities are:

- Identification of the court
- Identification of the parties to the dispute (plaintiff and defendant)
- Cause of action
- Description of the relevant facts
- Identification of evidence
- Draft verdict
- Signature and date

There type of civil action relevant for the cases of online hate speech is the **action for the protection of personality rights**, governed by Section 82 of the Civil Code. Such action is filed with the private party, and the plaintiff may seek, in particular:

- refraining from unlawful interference,
- removing the consequences,
- adequate compensation,
- compensation for non-pecuniary damage

Another type of civil action that could be used in cases of online hate speech is the **antidiscrimination action**, governed by Section 10 of the Antidiscrimination Act.<sup>23</sup> The one whose rights on equal treatment have been violated, has right take legal action to a court and seek:

- refraining from discrimination,
- removing the consequences of a discriminatory measure,
- the award of adequate compensation.

In civil proceedings, it must be remembered that new facts (as well as evidence) may be introduced only until the end of the preparatory proceedings or until the end of the first hearing in the case. The plaintiff is obliged to pay the **court fee** and other **costs** of the proceedings, including legal cost of the defendant in case of dismissal of the action. On the other hand, legal costs may be reimbursed if the case is successful. Alternatively, they may be partly compensated if the success is partial.

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<sup>22</sup> See § 9, § 84 of the civil procedure code, občanský soudní řád.

<sup>23</sup> Act No. 198/2009 Coll. on Equal Treatment and Legal Remedies Against Discrimination.

For an action for compensation for non-pecuniary damage up to the amount of CZK 200,000, the court fee is CZK 2,000 (ca. EUR 80); for amounts exceeding CZK 200,000, the court fee is 1% of that amount. In other cases, without seeking monetary compensation, the court fee is CZK 2,000.

During civil proceedings, the plaintiff must be represented by a licensed attorney only during the proceedings before Supreme Court.

#### **2.2.4. Constitutional complaint**

According to Article 89(1), point (d), of the Czech Constitution the Czech Constitutional Court decides on constitutional complaints. Detail and formalities are set out in the Act on the Constitutional Court.<sup>24</sup> Constitutional complaint can be filed by any natural or legal person if her human rights have been violated. However, several requirements and necessities must be met. Firstly, all possible legal and procedural remedies need to be exhausted.<sup>25</sup> Secondly, constitutional complaint must be filed within **two-month time limit**. Lastly, the complainant must be represented by a licensed attorney.<sup>26</sup>

A constitutional complaint must also meet general requirements of who is making it, what it concerns and what it seeks, and it must be signed and dated. The decision on the last legal remedy (appeal to the Supreme Court of cassation to the Supreme Administrative Court) must be attached to the complaint.

The Constitution Court decides upon violation of rights and freedoms set out in the Charter. It has no competence to award compensation of pecuniary or non-pecuniary damage to the victims of human rights violations.

#### **2.2.5. Other semi-legal avenues**

One of the semi-legal avenues which can be used when seeking protection against online hate speech is submitting complaint to a Public Defender of Rights. Although not every problem connected to the online hate speech will fall within the competence of the Public Defender of Rights, the office will always respond within 30 days and always will at least try to outline possible ways to seek remedies. The complaint can be filed [online](#); public defender of rights operates in Czech as well as English language.

When the perpetrator of the online hate speech is TV or radio station, a complain may be filed to the Council for Radio and Television Broadcasting. [Online](#) form for filing complaints can be found on its website.

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<sup>24</sup> Act No. 182/1933 Coll. Act on the Constitutional court.

<sup>25</sup> All ordinary and extraordinary legal remedies (depending on the procedure: appeal, appeal to the Supreme Court, cassation complaint to the Supreme Administrative Court).

<sup>26</sup> See § 30, § 34 and § 72 of Act on the Constitutional court.

Often online hate speech is present on the social media platforms. Social media platforms usually provide ways to report inappropriate and illegal posts. This way is often the easiest and the most effective when hateful posts are publicly available.

## 2.3. Domestic case law and other developments

### 2.3.1. Case law of Constitutional Court

The following section outlines the most important judgments of the Czech Constitutional Court in matters concerning hate speech.

- *Private/public nature of Facebook, print screen as evidence*

The case concerned hateful expression against a police officer on Facebook for which the applicant was imposed a fine by the police in the administrative proceedings. The hateful expression appeared in a post on the private profile of the perpetrator and in the comments below the post. The police submitted the print screens of the post evidencing this conduct while questioning a witness who had given them access to his own profile. The Constitutional Court stated that the nature of Facebook is not clearly private or public. It is always up to individual users to determine how they wish to measure of privacy they set on their profile or directly on individual posts. The Constitutional Court further addressed the applicability of print screens as evidence in hate speech proceedings. According to the Constitutional Court, the provisions of the Criminal Procedure Code on interception and recording of telecommunications traffic, which requires a prior court order must be followed, shall be followed in such cases. The decision on the fine was quashed.<sup>27</sup>

The use of print\_screens from social media was also addressed by the Constitutional Court in its judgement No. III. ÚS 3564/18. Here, the evidence of an act of hate speech was obtained with the help of an informant (§ 72 of the Police Act, No. 273/2008 Coll.) who had infiltrated the Facebook community of opponents of the Prague Pride march. Obtaining evidence in this way does not require a court order, according to the Constitutional Court. The applicant in this case was prohibited from approaching the route of the Prague Pride march. This prohibition was found unconstitutional by the Court because the police did not have a reasonable presumption, based on sufficient findings, that the applicant had intended to violently oppose the march, threaten the participants with violence or otherwise prevent them from exercising their freedom to peacefully assemble.<sup>28</sup>

- *Hate speech against Jewish community*

The applicant was found guilty of committing the crime of defamation of nation, race, ethnic or other group of people (§ 355(1)(a) and (2)(b) of the Criminal Code) and the crime of instigation of hatred towards a group of people or of suppression their rights and freedoms (§ 356(1) and (3)(a) of the Criminal Code) by posting anti-Jewish text

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<sup>27</sup> Judgment of the Constitutional Court, 30 October 2014, Case No. III ÚS 3844/13.

<sup>28</sup> Judgment of the Constitutional Court, 28 May 2019, No. III. ÚS 3564/18.

in a public space, both physically and on a social network. The Constitutional Court stated that it is the duty of a democratic state to defend itself against attacks by those who deny and challenge fundamental democratic values, such as the principle of equality in this case. In deciding hate speech cases, it is necessary to assess the context of the hate speech. In this case, it was the applicant's political and literary activities that contributed to the conclusion of there was a criminal intent to incite hatred and lower the dignity of a group of persons.<sup>29</sup>

- *Hateful election campaign, means of combating hate speech*

Here the Constitutional Court addressed the case of a hateful election campaign targeting Romani people. It ruled that the use of racist slogans during the campaign is not a ground for declaring the election invalid. This is because the slogans used were not directed against other candidates and could not have otherwise distorted the will of the voters. The Court further stated that the fact that a candidate decides to win votes by inciting fear and appealing to the baser instincts of voters is certainly morally and socially despicable, but it is not within the power of the courts, to correct such behaviour under the current legal framework. To combat such tendencies, civil law can be used through a personality protection lawsuit or criminal law by filing a criminal complaint for the crime of incitement to hatred against a group of persons (§ 356 of Criminal Code).<sup>30</sup>

- *Immunity of MPs*

In this significant ruling, the Constitutional Court defined the conditions and scope of immunity of MPs in the Czech Republic in connection with hate speech directed against Romani people posted by an MP on a social networking site. According to the Constitutional Court, the immunity of members of parliament has two functions. Firstly, it ensures the operational capacity of parliament and secondly, guarantees its members the possibility of freely expressing their opinion. It belongs to the parliament as a whole and protects its members indirectly; it is not a personal privilege of MPs and senators. Therefore, the immunity cannot cover private speech by Members of Parliament. Hate speech was therefore not protected and the MP was sentenced to a six-month suspended sentence.<sup>31</sup>

### **2.3.2. Case law of the criminal courts**

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<sup>29</sup> Decision of the Constitutional Court, 11 December 2018, Case No. IV ÚS 1070/18.

<sup>30</sup> Decision of the Constitutional Court of 27 November 2018, Case No. II ÚS 3602/18.

<sup>31</sup> Judgment of the Constitutional Court, 16 June 2015, Case No. I. ÚS 3018/14.



In 2020 the Public Defender of Rights published a survey about the case law of the Czech courts deciding in cases concerning online hate speech.<sup>32</sup> According to the survey, since 2015 Czech district courts decided 47 criminal cases on the online hate speech. One of the conclusions of the survey is, that online hate speech is more likely to get prosecuted when the case appears in media.<sup>33</sup> From the 47 cases, majority of perpetrators were Czech males. On the other hand, victims were members of the Roma minority (49%), Muslims (23%), refugees (9%) and other groups (people of colour, Jews, LGBTQ+, Czechs, politicians). In 91% of cases, the perpetrator was convicted.<sup>34</sup>

In following paragraphs, summaries of two court decisions related to the online hate speech will be presented. Both decisions (and committed crimes) are linked to the publication of a photo of first grade students at the primary school in Teplice. The class consisted mainly of members of minority groups.

The first case involved the perpetrator, who posted Nazi symbols and propaganda on social media, and he indirectly called for gassing in the discussion under the photo of the first-grade primary school in Teplice. He was found guilty of two crimes: expressing sympathy for a movement aimed at the suppression of human rights and freedoms (§ 404) and incitement to hatred against a group of persons or to restriction of their rights and freedoms (§ 356). The courts at all levels up to the Supreme Court refused the argumentation of the perpetrator that social media posts were “historical analysis” of the past, despite the fact, that these posts expressed direct support for Nazism and neo-Nazism. In courts view, both elements of the crime - incitement and hatred - were present. By incitement to hatred, the court meant speech by which the offender intends to arouse in others hatred of a nation, ethnic group, race, religion, class or other group of persons and the perpetrator's speech must be capable of causing, at least potentially, such a strong negative emotion towards the protected group in the persons who will perceive it. The perpetrator was sentenced to 16 months' imprisonment, the execution of which was suspended for a probationary period of 3 years.<sup>35</sup>

In the second case, a criminal order issued by the district court in Tachov, found the perpetrator guilty of crime of incitement to hatred against a group of persons or to restriction of their rights and freedoms (§ 356). The perpetrator posted to the commentary section under the photo on social media an image of a gun and attached words “on sight”. This case shows that the incitement to hatred can be demonstrated also by images; expressions in words are not necessary.<sup>36</sup>

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<sup>32</sup> Public *Defender of Rights, Hate speech on the Internet and decision-making of Czech Courts*, 2020.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Decision of the Supreme Court of 24 June 2021, file no. 3 Tdo 564/2021.

<sup>36</sup> Criminal order of the Tachov District Court of 10 September 2018, file no. 9T 76/2018.

In 2017 member of academic staff of the Charles University Faculty of Arts became victim of online hate speech after an interview, where he positively evaluated some aspects of migration. One of the perpetrators posted following: *"For me, the only good Muslim is a dead Muslim. I hope that I will meet you somewhere so that I can spit in your face. And if there is a terrorist attack in the Czech Republic, I shall take care of you personally. For being a traitor to your own country, I will hang you on a tree."* and *"I already know how to meet (...the historian's name...) – tick-tock – a tree, branch and a rope, a swing for one."* He committed crimes incitement to hatred against a group of persons (§ 356) and dangerous threats (§ 353) and was sentenced to imprisonment of 30 months suspended for a probationary period of 4 years. Also, a psychological program was imposed upon the perpetrator. However, the sentence was specific, due to the previous criminal activity to the convict.<sup>37</sup>

Another criminal order dealt with perpetrator who repeatedly (over 50 comments) commented articles and videos. Comments were like the following: *"We must exterminate this fucking inferior scum"* and *"Worthless gypsy vermin, anywhere they go, they freeload like parasites!!!! What normal person would let a parasite live in their body? No one"*. By posting these statements, the perpetrator committed crime defamation of a nation, race, ethnic or another group of persons (§ 355). Second category of posts consisted of posts such as: *"Bloody gypsy carcass, only producing more whores and parasites"* and *"Not even God's power can do anything about the gypsies, only way is a 9mm"* and therefore crime incitement to hatred against a group of persons or to restriction of their rights and freedoms (§ 356). Perpetrator was sentenced to 12 months imprisonment suspended for a probationary period 36 months.<sup>38</sup>

In 2018 district court in Jindřichův Hradec issued criminal order and fined perpetrator with sum 8000 CZK for following statement: *"It's about time we stem the tide of this ...We're Czechs, for Christ's sake, so let's bring out our Hussite blood and drive and wipe out these f\*cking unadaptable Muslim monkeys!! C'mon, we can't wait for the politicians, they won't do a sh\*t about it anyway! We won't let anyone to take away from us what we and our ancestors have built here over the centuries!! So, let's grab pitchforks, flails etc. and let's chase away the stinkin' vermin to where it came from..."* Under criminal code, the statement was classified as incitement to hatred against a group of persons or to restriction of their rights and freedoms (§ 356).

In 2017 district court in Liberec and regional court in Ústí nad Labem, were dealing with perpetrator who posted on twitter this statement: *"...hopefully shoot these Islamist and gypsy rats as well as thieving and traitor politicians together with their families, ...I wonder what would ordinary people say if someone started shooting politicians, would they consider this person a murderer, a terrorist, a hero?, @Slavek S undermines democracy and according to Article 2, 1, I'm supposed to protect democracy by any means, i.e. including by shooting these motherfuckers, @ Slavek S is a thief and traitor to the nation deserving to be executed together with his family,*

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<sup>37</sup> See Judgment of the District Court in České Budějovice of 20 June 2018, File No. 31 T 64/2018.

<sup>38</sup> See Criminal Order of the District Court in Příbram of 20 September 2018, File No. 2 T 20/2018.

*@Slavek S you shall soon be singing: "Hang him higher so he can swing", @CSSD I thought you were only thieves, insatiable, greedy pigs and traitors to the nation and the only thing every politician deserves is a bullet in the liver, not in the head."* District court dismissed the prosecution on the basis that no misdemeanor was committed. However, the regional court did not share districts court view. According to the regional court expressions calling for shootings of certain persons and their families cannot be protected under the freedom of speech. Considering nature and seriousness of the crime, regional court referred the case to the Liberec city hall, stating that not crime but administrative delict may have been committed.<sup>39</sup>

In the Facebook discussion group, the perpetrator posted comments on the Czech state award laureate: *"Kill the Jew finally :-) Pity that the Germans didn't finish him off and they fucked around when dealing with his family :-)"* and *"Should I meet XY in person, I would kill him as well; I'll finish what the Germans began and haven't finished :-)"* Comments were seen at least by 20 000 people. Perpetrator was convicted of crime denying, disputing, approving and justifying a genocide (§ 405) and sentenced to six months imprisonment suspended for probationary period of two years.<sup>40</sup>

Perpetrator participated in the Facebook commentary section under photography of newborn baby. Name of the child indicated that child's ethnicity is not Czech. Perpetrators comment: *"It's trash, it's in the genes. It'll only continue to reproduce itself, how many offspring will a nigger like this have in 25 years? So, if you ask me, stamp on the neck"* Court assessed, that perpetrator made public indictment to hatred against an ethnic group (§ 356) and committed the act through a publicly accessible computer network; the court sentenced him to 100 hours of community service. Perpetrator was also obliged to pay to the mother of the child 5000 CZK.<sup>41</sup>

Boundaries of the freedom of political expression were examined in the case of perpetrator, who posted many comments regarding minorities, particularly Jews and immigrants of Muslim faith. The perpetrator stated for example the following: *"How to avoid doom? Shoot at the intruders (meaning refugees)! 10 out of 10 national democrats recommend this"* or *"We've been saying this for a long time. Shoot at them. This has nothing to do with refugees."* However, the final list of comments was around three pages long. Besides the comments, the perpetrator also offered for sale books expressing for example denial of Holocaust. The perpetrator was prosecuted for several including the denying, disputing, approving and justifying a genocide (§); approving a criminal offence (§). District Court in Prague has stated that the perpetrators freedom of expression came into conflict with the article 3 of the Charter of Fundamental Rights, which guarantees the same fundamental rights regardless of the nationality, race, religion etc. Due to the violent character of the perpetrator's statements which contradicts the human rights and democratic system, the court held, that the

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<sup>39</sup> See Resolution of the District Court in Liberec of 29 May 2017, File No. 3 T 71/2017; Resolution of the Regional Court in Ústí nad Labem, Liberec Branch, of 29 August 2019, File No. 7 To 312/2019.

<sup>40</sup> See Criminal Order of the District Court for Prague 6 of 21 November 2018, File No. 2 T 98/2018.

<sup>41</sup> See Criminal Order of the District Court for Prague 6 of 21 November 2018, File No. 2 T 98/2018.

perpetrator abused the freedom of expression. Both second instance and supreme court confirmed the decision of the first instance court.

### **2.3.3. Case law of the civil courts**

There is no comprehensive research of the civil court's case law related to online hate speech. At the same time, it is still challenging to conduct the research of the civil courts' decisions, especially on the lower levels of jurisdiction, as not all court decisions are published. However, several decisions of civil courts exist.

In 2019 the Supreme Court decided in a case of vulgar insults made within the online conversation. The plaintiff sued for monetary compensation for non-pecuniary damage. Due to the anonymization of the decision, we do not have the full account of the insulting statement. The statement consisted of several vulgar expressions directed against other participant of the online debate in the commentary section under the news post on social media. The Supreme Court concluded, that although sexist overtones can be seen, in the terms of seriousness, the requirements for awarding monetary compensation were not met and an apology is sufficient. The seriousness of the insult was questioned primarily because of the small outreach of the post in a discussion with a small number of users and the lack of intent to directly discredit the plaintiff.<sup>42</sup>

### **2.3.4. Activities of the Public Defender of Rights**

#### *a) Comprehensive research of the national jurisprudence*

In 2020, the Public Defender of Rights issued a report called [Hate speech on the Internet and decision-making of Czech courts](#). It includes a unique overview of the jurisprudence of Czech courts and its development in the area of hate speech. In the monitored period from 2016 to June 2019, only a minority of district courts (25 out of 86, i.e. 29%) dealt with cases concerning hate speech on the Internet. Furthermore, for most of these twenty-five courts, this constituted a rare experience. Prosecution of hate speech in the on-line environment often follows on from specific cases publicized in the media and does not seem to be a result of regular and systematic monitoring of illegal on-line content. The research also presents several examples of court decisions, some of which have been highly publicized.

#### *b) Working with public*

The Ombudsperson published also the [information leaflet](#) describing what hate speech is and how to defend against it. The leaflet advice what can be done if I come across a hateful post. It also highlights the need to secure evidence and describes how. It

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<sup>42</sup> Judgment of the Supreme Court of 10 July 2020, file no. 25 Cdo 167/2019.

explains whether and how the ombudsman can help with defending against such speech.

### *c) Recommendations towards public bodies*

As part of the conclusion of the activities related to hate on the Internet, in January 2020 the Ombudsman issued recommendations addressed to the Ministry of the Interior, the Ministry of Justice, the Supreme State Prosecutor's Office, the Ministry of Education, Youth and Sports, the Police Presidium of the Czech Republic, the Supreme Court, the Union of State Attorneys, the Judges' Union, the Judicial Academy, the Institute for Criminology and Social Prevention, the Grant Agency of the Czech Republic and the Technology Agency of the Czech Republic.

The above recommendations are intended to lead to an overall improvement of the situation. These are measures that should prevent hate speech or at least mitigate its impact. For the authorities concerned, the recommendations are intended to be a guide for further action in this area rather than an exhaustive manual.

Brief overview of recommendations:

- Unify crime databases.
- Conduct an analysis of related misdemeanour cases.
- Conduct analysis of related case law.
- Ensure the same level of protection for vulnerable groups from hate crime under the Criminal Code.
- Organize a national campaign on online hate crime with a target group of primary and secondary school pupils and students.
- Strengthen training of law enforcement authorities on hate crime issues.
- Ensure that the topic is included in the research of the Institute for Criminology and Social Prevention.
- Support the development of a tool for searching for hate comments on the networks.
- Promote the online form for filing criminal reports on the Citizen's Portal.
- Edit the Ministry of the Interior's website in the sections on extremism and prejudicial hatred.

### *d) Other activities*

In October 2019, the Ombudsperson held a high-profile conference on [How to prevent the spread of hate on the internet](#). The conference was triggered by the fact that the defence against the spread of hate speech on the internet has so far been slow and not very effective. It has been co-organized by the President of the Constitutional Court, the Ombudsman and the Chief State Prosecutor and aimed primarily at police officers, prosecutors, and judges on how to effectively counter and prevent the spread of hate speech on the internet.

The participants of the conference dealt not only with the issues of defining hate crimes on the Internet, distinguishing between extremism and hate speech, but also with the problems of practice in the field of evidence, the "transition" between a crime and a misdemeanour, the role of experts, and the removal of objectionable content from the Internet.

In March 2018 the Ombudsperson organized [a high-profile meeting](#) between the EU Commissioner Věra Jourová, Interior Minister Lubomír Metnar, Chief State Prosecutor Pavel Zeman, Police President Tomáš Tuhý and representatives of the Ministry of Justice discussing hate speech. The participants in the meeting agreed that it is particularly alarming that hate speech is increasingly coming from "ordinary citizens" and not from members of extremist groups whose themes are now being taken up by populists.

According to the participants, it would also help to make the public more aware of the criminality of such behavior, i.e. publishing information about closed cases with a description of the behavior and how the perpetrator was punished, pointing out that there is a lack of relevant data on hate crimes in the Czech Republic. The statistical databases of the police, the Supreme State Prosecutor's Office and the courts are not linked, nor do they track the same categories.

### **2.3.5. Other relevant developments**

Combating hate speech is subject to various kind activities of public bodies and NGOs. Below are mentioned the most relevant activities in the field of hate speech that took place in the recent years.

#### [HateFree Culture](#)

As the name of this government initiative suggests, HateFree Culture seeks to combat violence and hatred between people, both offline and online. It does so through articles, podcasts and videos. It brings and shares information, It provides a space for the stories of people from marginalized groups whose voices are often missing from mainstream media. It debunks rumours and responds to hateful attacks against different groups of people.

#### [Hejtomat](#)

One such project is Hejtomat, a website where we can find several frequently repeated and misleading statements about minorities, most often about Roma or Muslims. If

we click on the statement in question, we will see an explanation of how the matter really is and why the statement is nonsense.

### [We're in this together](#)

A 2015 campaign in which more than 40 celebrities drew attention to the variety of reasons for hateful comments, known as "hits". As well as belonging to a religious, sexual or ethnic group, this can include appearance, opinion, life experience and much more. For an example from this campaign, see the [link](#).

### [Hate speech in online and offline spaces](#)

In this 2016 project, the People in need (*Člověk v tísni*) sought to highlight the risks associated with the spread of racism, xenophobia and hate speech on social media and to educate young people in this regard. The project explains concepts such as hate speech or what can be done about hate speech on the internet. The project also included a public debate on the topic with experts. One of the outputs of this project is also an [analysis](#) of hate speech in the online space and on social networks. The analysis described the basic features of hate speech against migrants or refugees on Czech social networks and other selected internet platforms, including a description of the social background of their producers and the main channels of their dissemination. One of the findings of the analysis is, for example, the fact that the largest representation of producers of hate speech was found among men in the age category of about 35-50 years, mostly with secondary education.

### [Hej ty! Nehejtuj!](#) (Hey you, do not hate!)

This campaign, aimed primarily at primary and secondary school students and their teachers, explains terms such as "hater" and "hate speech". It also describes the phenomenon of hate speech on the Internet in general. It also contains teaching tips for teachers or useful links to organisations working on the subject (e.g. HateFreeCulture or the Czech Safer Internet Centre).

### [Hate spread on the internet](#)

The report by Transparency International ČR of 2019 looks at how the digital nature of communication systems relates to the societal changes that are driving explosions of hate online. The report includes information on the causes of hate speech, some trends in hate speech and some examples of hate speech from the Czech environment. A [video](#) has been produced to accompany this report.

After Russian Federation launched invasion to Ukraine, Czech internet domain administrator blocked several websites spreading Russian propaganda and disinformation. This step was carried out after consultations with Czech government and National Institute for Cybersecurity, nevertheless, it is still very extraordinary step and legal

basis is not clear. Czech Minister of Interior denied providing further comments.<sup>43</sup> In reaction to the war in Ukraine, the Public Prosecution issued a statement about the “possible limits of freedom of speech from criminal law perspective” warning that any public agreement with the Russian aggression of Ukraine or praising Russian political elite in connection with the war may, under certain circumstances, be qualified as approval of the criminal act under Section 365 or denying, questioning, endorsing and justifying genocide under Section 405 of the Criminal Code.<sup>44</sup>

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<sup>43</sup> <https://zpravy.aktualne.cz/domaci/na-osm-proruskych-webu-se-lide-nedostanou/r~abd0faac963911ecbdb0ac1f6b220ee8/> (accessed 8 March 2022)

<sup>44</sup> <https://verejnazaloba.cz/nasz/informace-k-moznym-trestnepravnim-limitum-svobody-projevu-ve-vztahu-k-situaci-na-ukrajine/> (accessed 8 March 2022)



### 3. International framework of protection against hate speech

#### 3.1. The European Court of Human Rights (ECtHR)

Unlike the provisions in UN Treaties such as the ICCPR, or in the CERD, the European Convention on Human Rights (ECHR) does not contain a specific prohibition of hate speech. The term is not enshrined in the ECHR, and the court appears to prefer to “analyse each case submitted to it on its own merits and to ensure that its reasoning – and its case-law – is not confined within definitions that could limit its action in future cases.”<sup>45</sup>

The ECtHR primarily uses **two approaches** to deal with the issue of hate speech:

1. The narrower approach of restrictions on protection provided by the freedom of expression provision, Article 10, paragraph 2 of the Convention.
2. The broader approach of exclusion from the protection of the ECHR, as provided by Article 17.

#### **Article 10**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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.

The use of article 10 is applied where the speech in question, although it is hate speech, “is not apt to destroy the fundamental values of the convention.”<sup>46</sup>

Article 10 of the Convention applies to the internet as a means of communication (*Nix v Germany*).

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<sup>45</sup> Françoise Tulkens, “When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights”, in Josep Casadevall, Egbert Myjer, Michael O’Boyle & Anna Austin, Eds., *Freedom of Expression: Essays in honour of Nicolas Bratza* (Oisterwijk, The Netherlands, Wolf Legal Publishers, 2012), pp. 279-295, at 281

<sup>46</sup> European Court of Human Rights Factsheet on Hate Speech  
[https://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf)

In the Article 10 approach, the ECtHR strikes a balance between the right to freedom of expression enshrined in 10 (1) and the interests in 10 (2), whereas in the broader article 17 approach, there is no need for such a balancing process. Whenever it has been established that there has been an interference with the right to freedom of expression, the interference must be prescribed by law, must pursue a legitimate aim, and must be necessary in a democratic society and be proportionate to the legitimate aim pursued.

### **i. Provided by law**

Hate speech legislation, therefore, needs to be clear, foreseeable, precise and accessible in order to meet the criteria of prescription by law.

### **ii. Pursue a legitimate aim**

There are six legitimate aims in limiting freedom of expression which are exhaustively enumerated in paragraph 2 of Article 10. These are: a) Protection of national security, territorial integrity or public safety, b) Prevention of disorder or crime, c) Protection of health or morals, d) Protection of reputation or rights of others, e) Preventing of disclosure of information received in confidence, and f) Maintaining the authority and impartiality of the judiciary

In *Handyside v the United Kingdom*, the ECtHR held that the right to freedom of expression as outlined in Article 10 protects not only expressions that are favourably received but also those that “offend, shock, or disturb.” An existence of a “pressing social need” is required for States to justify intervention. (*Savva Terentyev v Russia*).

However, the court has affirmed in cases such as *Gündüz v Turkey* (§ 38): “There can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.”

Incitement to hatred does not necessarily mean (only) incitement to violence or other criminal acts. Attacks committed by insulting, ridiculing, or defaming certain groups may be sufficient grounds for the State authorities to give priority to combating racist speech (*Vejdeland and Others v Sweden*, § 55).

For example, in *Atamanchuk v Russia* the court stated “inciting hatred does not necessarily involve an explicit call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule, or slandering specific groups of the population can be sufficient for the authorities to favour combatting xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner” (§ 52).

The court has also ruled that limiting expression in the form hypothetical statements is a legitimate aim, when they are “highly insulting to members of a certain ethnic group”, and which are a “highly inappropriate form of dialogue advocating a strategy of behaviour” towards a particular ethnic group. (*Smajic v Bosnia and Herzegovina*, § 9).

However, “merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes ‘hate speech’. Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression.” The court has noted that the key concern is “whether the statements in question, when read as a whole and in their context, could be seen as promoting violence, hatred, or intolerance” (*Ibragim Ibragimov and Others v Russia*, § 115).

In assessing the risk of harm posed by online hate speech, it may be necessary to assess the “potential influence of an online publication to determine the scope of its reach to the public.” (*Kilin v Russia*, § 78.)

### **iii. Be necessary in a democratic society/proportionate to aim pursued**

Under Article 10 states enjoy a wide margin of discretion is restricting freedom of expression when it comes to statements inciting violence or hatred against an individual, a public official, or a sector of the population (*Savva Terentyev v Russia*, § 38).

In order to assess proportionality, the court must examine the context of the speech, the measures by the those disseminating the hate speech, the possibility that others would be responsible alongside the impugned speaker, and the consequences incumbent on the speaker. (*Sanchez v France*, § 80)

In several instances, in assessing whether limitations on freedom of expression were proportionate to the aim sought, the court has had to weight freedom of expression against other rights, such as the right to respect for private life under article 8. This particularly the case where threats and hate speech are published in newspapers or online forums. In this regard, the court has ruled that State’s may fail to uphold their obligations under article 8 for “allowing promotion or dissemination of the ideas of ethnic hatred and the superiority of one nation vis-à-vis other ethnic groups.” (*Aksu v Turkey*, § 10).

The court has taken into account several elements in balancing freedom of expression against the rights enshrined under Article 8, including: whether the statements bore on a matter of public interest, whether the context in which they were made were marked by heightened tensions, whether the statements affected the dignity of community members to the point of requiring a criminal response, where there are existing international law obligations, and the seriousness of the interference with the

right to freedom of expression. (*Perinçek v Switzerland*). In *GRA Stiftung Rassismus und Antisemitismus v Switzerland* that when balancing article 10 and article 8, the court should consider the public interest element, the degree of familiarity of the person concerned, the subject matter of the communication, the previous conduct of the person concerned, and assessment of the content, form, and consequences of the publication.

Positive obligations may require the state to adopt measures guaranteeing effective prevention in cases of serious interference with essential aspects of private life, requiring protection through criminal law provisions; "effective deterrence against grave acts where essential aspects of private life are at stake, requires efficient criminal-law provisions." (*Beizaras and Levickas v Lithuania* § 110).

#### **iv. ECtHR Case Law on the Liability of Internet Intermediaries**

In *Delfi AS v. Estonia*, the Court found that a commercial operator of an internet news portal may be held accountable for offensive comments posted by its users. In *Delfi*, the court identified 4 factors to assess the proportionality of the interference with freedom of expression under article 10. These four factors are:

- 1) the content of the comments,
- 2) the measures applied by the applicant company to prevent or remove the defamatory comments (these include measures such as disclaimers, a team of moderators, or notice and take down systems),
- 3) the liability of the authors of the comments as an alternative to the company's liability, and
- 4) the consequences of the domestic proceedings for the applicant company.

In *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary* the Court added a fifth step to the four-step analysis, namely, the consequences for the injured party. The Court noted that "regard must be had to the specificities of the style of communication on certain internet portals," and that the user comments were of a "low register and style," and thus was a consideration reducing the impact attributed to those expressions. The case also addressed a novel question of hyperlinking defamatory content.

In the absence of hate speech or direct threats to physical integrity in the user comments, the Court found that there was no reason to hold that, if accompanied by effective procedures allowing for a rapid response, that notice and take down systems cannot provide a viable avenue to protect an individual or entity's reputation.

In *Hoiness v. Norway*, the fact that an internet portal removed offensive comments 13 minutes after they came to their knowledge, exempted them from liability.

The Court remains open to holding an internet intermediary liable where the content posted takes the form of hate speech, incites violence, and is not removed speedily in the context of user generated content.

#### **v. Destruction of rights and freedoms in cases of hate speech (Article 17)**

##### **Article 17**

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

Article 17 of the ECHR is the most far-reaching provision available for restricting hate speech, as it can deny certain forms of expression. The ECtHR tends to invoke it in order to ensure that article 10 protection is not extended to racist, xenophobic or antisemitic speech. Within such cases, the court has routinely held such forms of expression to be manifestly unfounded and therefore inadmissible.

The decisive criterion in assessing whether certain verbal or non-verbal statements are excluded from the protection of article 10 by article 17 is “whether those statements are directed against the Convention’s underlying values, for example by stirring up hatred or violence, or whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.” (*Pastörs v Germany*, § 37).

Article 17 may only be applied exceptionally and in extreme cases: “it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.” (*Perinçek v Switzerland*, § 114).

The court has found that general and vehement attacks targeting particular ethnic groups “is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination,” and does not benefit from Article 10 protection. (*Pavel Ivanov v Russia*, § 1).

The intention or purpose of the expression is particularly important in assessing whether article 17 should be applied rather than article 10. The court has described, “the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular “hate speech” used. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be

easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used." (*Kilin v Russia*, § 73).

### 3.2. Council of Europe

The Council of Europe is one of the few bodies that has defined hate speech, which is to be understood as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."<sup>47</sup>

The European Commission against Racism and Intolerance (ECRI)'s **General Policy Recommendation no. 15 On Combating Hate Speech** has also outlined standards and definitions that have been cited by the ECtHR.

**Clear intention:** For example, as the court cited in *Kilin v Russia*, ECRI highlights that "the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used."

**Establishing whether hate speech has occurred:** Recommendation no. 15 highlights that the assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider:

- the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked).
- the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders);
- the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination).
- the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate).
- the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a "live" event); and

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<sup>47</sup> Council of Europe's Committee of Ministers Recommendation 97 (20).

- the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).

### 3.3. European Union Law

#### i. Framework Decision

In the EU legal context, the most relevant provisions regarding hate speech are the ones embedded in the Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law. The Framework Decision requires States to sanction racism and xenophobia through “effective, proportionate, and dissuasive criminal penalties.”<sup>48</sup> This document does not address the issue of online activity but does not exclude it either.<sup>49</sup>

#### **Article 1 - Offences concerning racism and xenophobia**

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

It also includes two provisions on the prohibition of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes 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.

Article 1 of the Framework Decision generally defines the notion of **racist hate speech** as the public incitement to violence or hatred against a group of persons or member of such group based on “race, colour, religion, descent or national or ethnic origin”.

In relation to Article 1, the Framework Decision states that Member States may choose only to punish conduct “which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.”<sup>50</sup> This provision serves as a tool

<sup>48</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

<sup>49</sup> Natalie Alkiviadou (2019) Hate speech on social media networks: towards a regulatory framework?, Information & Communications Technology Law, 28:1, 19-35, DOI: 10.1080/13600834.2018.1494417

<sup>50</sup> Article 1 (2), Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

for States that wish to limit the scope of expression that falls within the Framework Decision. Article 3 outlines that the prohibition of these acts needs to happen through criminal penalties spanning between 1 and 3 years of imprisonment.<sup>51</sup>

The implementation of the Framework Decision has been inconsistent as a result of differing national approaches to hate speech. For example, the implementation of the Framework Decision has been applied differently where procedural provisions in special legislation differ from provisions applicable to offences outlined in a criminal code.<sup>52</sup>

## **ii. The European Union's Code of Conduct on Illegal Hate Speech**

The EU's code of conduct constitutes a non-legally binding commitment to remove "illegal hate speech", defined in alignment with the Framework Decision, and requires companies to remove hate speech within 24 hours of them being reported. The code of conduct was signed between the European Commission and four IT Companies, namely Facebook, Microsoft, YouTube and Twitter.

The code of conduct is voluntary but can be used by NGO's to pressure private actors to remove online hate speech.

Key commitments under the code include: "Upon receipt of a valid removal notification, the IT Companies are to review such requests against their rules and community guidelines and, where necessary, national laws transposing the Framework Decision 2008/913/JHA, with dedicated terms reviewing requests."<sup>53</sup>

## **iii. Directive on e-commerce**

An important legal instrument regulating certain aspects of liability for hate speech is Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on e-commerce). In the section 4, it regulates liability of intermediary service providers which are referred to also as internet service providers (ISPs) or intermediaries. These ISPs are any natural or legal persons providing information society services, which are services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (typically platforms such as Facebook, Google or YouTube).

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<sup>51</sup> Article 3, Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

<sup>52</sup> Handbook on Techniques of Judicial Interaction in the Application of the EU Charter- Freedom of Expression and Countering Hate Speech, Available at: [https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT\\_Handbook\\_Freedom-of-expression-compresso.pdf](https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT_Handbook_Freedom-of-expression-compresso.pdf).

<sup>53</sup> European Commission Fact Sheet: Code of Conduct on countering illegal hate speech online: Results of the 3rd monitoring exercise (January 2018) [http://webcache.googleusercontent.com/search?q=cache:OQDS0SZGbYAJ:ec.europa.eu/newsroom/just/document.cfm%25253Fdoc\\_id%25253D49286+&cd=1&hl=en&ct=clnk&gl=cy](http://webcache.googleusercontent.com/search?q=cache:OQDS0SZGbYAJ:ec.europa.eu/newsroom/just/document.cfm%25253Fdoc_id%25253D49286+&cd=1&hl=en&ct=clnk&gl=cy).



Articles 12 to 14 defines conditions under which the ISPs can be held liable for the content they manage. ISPs hosting illegal content need to remove it or disable access to it as fast as possible once they are aware of its existence and of its illegal nature. They are, however, not obliged to get aware of the illegal content on their own initiative (a so called *notice-and-takedown* mechanism). In this context, it is relevant to point out Article 15, which stipulates that EU member states are not allowed to impose any general content monitoring obligation on ISPs.

The aim of this Directive is to not overburden ISPs with content control as this may have negative consequences on growth and innovation as well as on freedom of expression as a fundamental human right.

#### **iv. Digital Services Act (DSA)**

The European Commission issued a draft proposal for the Regulation on a Single Market for Digital Services (Digital Services Act or DSA) which amends certain parts of the Directive on e-commerce, including the liability of ISPs. However, the core principles are maintained, including the prohibition of general monitoring obligation. The DSA is in the last stages of the legislative process.

### **3.4. United Nations Treaty Bodies**

The UN Human Rights Council recognized in 2012 that “the same rights that people have offline must be protected online.”<sup>54</sup> Within the UN Treaties, hate speech is addressed primarily through the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD).

#### **i. ICCPR, Art. 19 and Art. 20**

States may prohibit forms of “hate speech,” provided they comply with the requirements of Article 19(3) of the ICCPR. Article 19 (3) outlines that a state might limit the right to freedom of expression under article 19 (3) of the ICCPR provided that the limitation is 1) provided for by law, 2) in pursuit of a legitimate aim, and 3) necessary in a democratic society.

#### **Article 19 (3)**

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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<sup>54</sup> HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

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|--|
| (a) For respect of the rights or reputations of others;<br>(b) For the protection of national security or of public order (ordre public), or of public health or morals. |
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Article 20 (2) outlines that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

<b>Article 20 (2)</b>
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Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
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The **Rabat Plan of Action** was created given uncertainty around the meaning of “incitement to discrimination, hostility, or violence.” The plan outlines a 6 part threshold test taking into account:

1. **The social and political context**

“Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.”

2. **Status of the speaker**

“The speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed.”

3. **Intent to incite the audience against a target group**

“Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.”

4. **Content and form of the speech**

“Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.”

5. **Extent of its dissemination**

“Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet

or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.”

#### 6. **Likelihood of harm, including imminence**

“Some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.”

#### ii. **CERD, Art. 4**

The Convention on the Elimination of Racial Discrimination does not address the issue of online hate directly, however Article 4 criminalizes the dissemination of racist ideas and the incitement to racial violence.

##### **Article 4**

States “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...”

This goes further than the ICCPR as it renders such behaviour punishable.

In discussing this provision in *Gelle v Denmark*, the CERD Committee noted that “it does not suffice, for purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 of the Convention.”<sup>55</sup>

#### iii. **GC 35 on Combating racist hate speech**

The CERD Committee introduced several indicators on the qualification of dissemination and incitement as offences punishable by law. According to the Committee, the following contextual factors should be taken into account:

- **The content and form of speech:** whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.

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<sup>55</sup> *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3. This was reiterated in *Jama v Denmark*, *Adan v Denmark* and *TBB-Turkish Union v Germany*.

- **The economic, social and political climate** prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.
- **The position or status of the speaker** in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the UN CERD and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.
- **The reach of the speech**, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.
- **The objectives of the speech:** speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.

### 3.5. Other International Developments and Actors

Company	Definition of Online Hate Speech
Facebook	As defined in their community standards: 'content that directly attacks people based on their race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender or gender identity or serious disabilities or diseases.' Further, organisations and people who are dedicated to 'promoting hatred against these protected groups are not allowed a presence on Facebook.' <sup>56</sup>
Twitter	does not refer to hate speech but, instead, warns (rather than prohibits) users that they may be exposed to content that might be "offensive, harmful, inaccurate or otherwise inappropriate ..."

<sup>56</sup> Facebook's Community Guidelines: <  
<https://www.facebook.com/communitystandards#hate-speech>

	Its terms provide that it 'may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.' The only prohibition is that of 'direct, specific threats of violence against others.' <sup>57</sup>
Google	"content that promotes or condones violence against or has the primary purpose of inciting hatred against an individual or group on the basis of their race or ethnic origin, religion, disability, age, nationality, veteran status, sexual orientation, gender, gender identity, or any other characteristic that is associated with systemic discrimination or marginalization." <sup>58</sup>
Microsoft	"content that advocates violence or promotes hatred based on: Age, Disability, Gender, National or ethnic origin, Race, Religion, Sexual orientation, Gender identity." <sup>59</sup>

While documents such as the Framework Decision result in criminal penalties, the policy, terms and conditions of social network sites result in weaker regulatory action, such as the removal of a post or the banning of a user.<sup>60</sup>

## **i. Initiatives Established to Regulate Corporate Activity**

### ***United Nations Global Compact***

The UNGC is a voluntary initiative promoting corporate social responsibility (CSR), guided by principles addressing human and labour rights, the environment, and corruption.<sup>61</sup> Regarding human rights, corporations are encouraged to refer to the International Bill of Rights to understand the scope of their obligations and are encouraged to respect "internationally recognised human rights" wherever they operate.<sup>62</sup>

Corporations participating in the UNGC must commit to meeting "fundamental responsibilities" in these areas and produce an annual publicly-available Communication on Progress (CoP) outlining efforts taken to adhere to the principles articulated in the UNGC.<sup>63</sup> Although corporations that repeatedly fail to submit an

<sup>57</sup> Twitter's Terms of Service (Content): <

<https://twitter.com/tos?lang=en#usContent>

<sup>58</sup> Terms and Policies Terms and Policies for Currents

<https://support.google.com/googlecurrents/answer/9680387?hl=en>

<sup>59</sup> <https://www.microsoft.com/en-us/concern/hatespeech>

<sup>60</sup> Natalie Alkiviadou (2019) Hate speech on social media networks: towards a regulatory framework?, Information & Communications Technology Law, 28:1, 19-35, DOI: 10.1080/13600834.2018.1494417

<sup>61</sup> "Frequently Asked Questions", online: *UN Global Compact*

<<https://www.unglobalcompact.org/about/faq>>.

<sup>62</sup> "Principle One: Human Rights", online: *UN Global Compact*

<<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>>.

<sup>63</sup> "What's the commitment", online: *UN Global Compact*

<<https://www.unglobalcompact.org/participation/join/commitment>>.

annual CoP face expulsion from the UNGC, no penalty is levied for non-compliance in other areas, such as for violations of the UNGC principles.<sup>64</sup> The framework instead relies on a combination of transparency and the interest of corporations in upholding their reputation to ensure that they comply with human rights.<sup>65</sup>

### ***United Nations Guiding Principles on Business and Human Rights***

The UNGP is another soft law instrument, providing clarification and elaboration of the two human rights principles articulated in the UNGC for participating corporations.<sup>66</sup> It operationalizes the “Protect, Respect, and Remedy Framework”, according to which business entities “should respect human rights” and avoid infringing them, a responsibility which exists “over and above” compliance with national laws and regulations.<sup>67</sup> Moreover, the UNGP provides that corporations should address any adverse impact on human rights linked to their activities, which involves adopting adequate measures aimed at their prevention, and mitigation.<sup>68</sup> Like the UNGC, the UNGP refer to the International Bill of Rights as the benchmark against which corporate respect for human rights is to be measured and lacks mechanisms to address non-compliance or accountability.<sup>69</sup> The UNGC and UNGP suggest similar requirements for corporations and thus should be read together.

<b>Company</b>	<b>UNGP</b>	<b>UNGC</b>	<b>European Union Code of Conduct on Countering Illegal Hate Speech Online</b>
Facebook	Uses Public Reporting Framework	Yes	Yes
Twitter	No	No	Yes
Google	Uses Public Reporting Framework	No	Yes
Microsoft	Uses Public Reporting Framework	Yes	Yes

<sup>64</sup> “UN Global Compact Expels 657 Companies in 2014”, online: *UN Global Compact* <<https://www.unglobalcompact.org/news/1621-01-14-2015>>.

<sup>65</sup> Oliver F Williams, “The UN Global Compact: The Challenges and the Promise” (2004) 14:4 *Bus Ethics Quarterly* 755 at 760.

<sup>66</sup> UN Global Compact & UN OHCHR, “The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments” (2014), online (pdf): <[https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2Fhuman\\_rights%2FResources%2FGPs\\_GC+note.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf)>.

<sup>67</sup> UN, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (New York: Human Rights High Commission, 2011) at 13, online: <[https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)>.

<sup>68</sup> *Ibid* at 13–16.

<sup>69</sup> The ILO’s Declaration on Fundamental Principles and Rights at Work is also named as a benchmark.

## ii. Facebook

Through its corporate Code of Conduct, Facebook commits itself to respect “all globally recognised human rights” including those contained in the International Bill of Rights.<sup>70</sup> This commitment is intended to inform its management of human rights risks, which Facebook acknowledges may include people using the platform to incite violence.<sup>71</sup>

However, Facebook has proved reluctant to act on its commitments under the UNGC and its own Code. Although Facebook claims that its Community Standards, the principles governing content moderation on the platform, were informed by human rights, the Standards themselves do not contain any explicit reference to international human rights law (IHRL).<sup>72</sup> A study on the development of the Standards revealed that Facebook employees failed to refer to IHRL in working group discussions or stakeholder engagements, while Facebook employees have admitted that there is no formal framework or procedures for content moderation.<sup>73</sup> There is thus little evidence that Facebook actually refers to IHRL instruments like the ICCPR in its operations.

In response to criticism surrounding hate speech and incitement to violence on its platform, Facebook created an independent **Oversight Board** intended to review content moderation decisions and “provide policy recommendations”.<sup>74</sup> Although the Board’s Charter provides that in reviewing decisions, particular attention should be paid “to the impact of removing content in light of human rights norms protecting free expression”, it does not *guarantee* the right to freedom of expression, nor references the applicable limitations on this right as provided by IHRL.<sup>75</sup> Moreover, the Board is not empowered to directly apply IHRL, and none of the rights of individuals enshrined therein are guaranteed; as a result, the decisions of the Board may prove to be incompatible with IHRL, and thus with the UNGPs.<sup>76</sup>

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<sup>70</sup> Facebook, “Keep Building Better: The Facebook Code of Conduct”, online (pdf): [https://s21.q4cdn.com/399680738/files/doc\\_downloads/governance\\_documents/2021/06/FB-Code-of-Conduct.pdf](https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/2021/06/FB-Code-of-Conduct.pdf).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Supra* note 34.

<sup>73</sup> Michael Lwin, “Applying International Human Rights Law for Use by Facebook” (2020) 4 Yale J Regulation 53 at 55.

<sup>74</sup> Stefania Di Stefano, “The Facebook Oversight Board and the UN Guiding Principles on Business and Human Rights: A Missed Opportunity for Alignment?” in Jonathan Andrew & Frédéric Bernard, eds, *Human rights responsibilities in the digital age: states, companies, and individuals* (Gordonsville: Hart Publishing, 2021) 93 at 102. The Oversight Board is composed of former political leaders, human rights activists, scholars, and journalists.

<sup>75</sup> “Oversight Board Charter” (2019), online: *Facebook* <[https://about.fb.com/wp-content/uploads/2019/09/oversight\\_board\\_charter.pdf](https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf)>.

<sup>76</sup> *Supra* note 39 at 112.

Facebook has also addressed concerns about alleged human rights violations by commissioning human rights impact assessments in “developing countries”. However, there is little evidence that these have yielded meaningful results, as the recommendations in the reports released have been described “as common sense,” pushing the role of IHRL-specific obligations to the wayside.<sup>77</sup>

In sum, although Facebook claims to refer to the UNGPs and has voluntarily joined the UNGC, there is little to demonstrate the application of IHRL in its operations. Furthermore, there are no avenues to hold Facebook accountable to its commitments, as both the UNGPs and the UNGC are voluntary, non-binding instruments, with no sanctions for non-compliance.

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<sup>77</sup> Evelyn Douek, "The Limits of International Law in Content Moderation" (2021) 6 UC Irvine J Intl Transnational & Comparative L 37 at 59.



## 4. Legal strategies for the Czech Republic

### 4.1. Documenting hate speech and identification of cases

Successful litigation depends on the effective documenting of hate speech and identification of cases suitable for litigation. Hate incidents in a broader sense may be documented through traditional human rights research approaches, including visiting places and interviewing victims or witnesses. We can distinguish primarily two methods which can be used for purposes of reporting and documenting hate incidents in a broader sense, especially a) content analysis, and b) interviews.

#### *a) Analysing speech and other texts*

Content analysis is a method for studying documents and communication artefacts, which might be texts of various formats, pictures, audio or video. There are five types of texts in content analysis:

- i) written text, such as books and papers, or articles,
- ii) oral text, such as speech,
- iii) iconic text, such as drawings, paintings, and icons,
- iv) audio-visual text, such as TV programs, movies, and videos,
- v) texts found on the internet.

It is recommended to especially focus on published texts, mainly articles in domestic media, speeches made typically by politicians, and various texts found on the Internet.

Not all the hate speech in use is so explicit, with some publications relying on “coded” language to disseminate prejudice and hatred. For example, reference can be made to people who “don’t work and survive on state benefits” and under this code a particular minority is attacked, and protests against such a minority are reported as being by the “good people” of the country when this is by a neo-Nazi group. Racist hate speech thus can take many forms and is not confined to explicitly racial remarks. Speech attacking racial or ethnic groups may employ indirect language to disguise its targets and objectives. In addition, it has been observed that the sensational or partial coverage of particular events can spread misinformation and give rise to fear, creating prejudice for those belonging to the minority that might be involved in them.

Relying on jurisprudence of the European Court of Human Rights in relation to Article 10 of the European Convention, several elements for considering hate speech can be identified:

- (i) the *purpose* of the author and whether the statements could concern a matter of *public interest*;
- (ii) the *addressee* and *context* in which the statement is made, and the *truthfulness* of the remarks in question making a distinction between statements of fact and value judgments;

(iii) the *context* of the statement, particularly considering the special protection given to public debate and political discourse or journalism (and the status of the person targeted).

Practical indicators for documenting hate speech are listed below:

<b>The statement</b> Describe the statement in as much detail as possible. If possible, insert link, quote or print screen.
<b>Purpose of the statement</b> Did the author want to shock? Did he want to incite hatred? Did he want to influence public opinion?
<b>Could the statement concern a matter of public interest?</b> What did the statement concern? Did the statement concern a matter of current public discussion? Or did it concern current issues, such as elections, or currently publicly discussed issues, e.g. some incident?
<b>Who was the author? Include name.</b> Is she a publicly known figure, e.g. known journalists? Is she a politician? Is she a locally known figure? What is the relation of the author to the victim?
<b>Who was the author attacking in particular?</b> Was the author attacking a community at large or particular person or persons? Was the motive of the author hateful, to incite violence or hatred towards others?
<b>What was the context of the statement?</b> Was it online, at a public meeting or elsewhere? Describe how large the audience likely was. e.g. local television, website/blog with only limited or the opposite with the great usage.
<b>Was the author stating the truth?</b> Was the author only stating the facts, e.g. rates of criminality, or was he making his opinion (I believe that, in my opinion...).

### *b. Outreach*

Cases of hate speech can be identified and documented by conducting outreach activities. These could be done by way of victim/witness interviews. These activities involve the following steps:

- Identification of victims and witness to interview

This involves, firstly, developing a list of contacts in communities potentially affected by hate. Different communication tools can be used to identify victims and witnesses to interview; however, the *word of mouth* is often the best publicity among victims, particularly among hate crime victims where one's own community (cultural, ethnic, faith, gender, sexual orientation, etc.) is often the key source of credibility and trust. To identify concrete persons to interview, initial background discussions with local contacts would be crucial. These contacts may help with the access to victims, e.g., by asking their preliminary permission with the interview and organising a meeting with the national team, or even, if necessary, conducting the interview themselves.

Using other communication channels should also be considered, such as:

- Social networks – online (highly cost- and time-effective tool, and great multiplier);
- Live – in situ (whilst more cost-demanding, this is an important tool to directly address the potential victim groups) in the locations most visited by potential victims and victim groups;
- Media and public information campaigns – best in local media, use of public education adverts, schools (public education and inclusion in school curricula), employers, public spaces such as cultural facilities, community centers, public libraries, public authorities, places of worship, pubs, stadiums, and public events.

Primarily, those who were directly involved or affected should be interviewed. Thus, a direct victim or an indirect victim (close relative of a victim, spouse of a victim, etc.) should be interviewed. Further, witnesses of a hate incident in a broader sense can be interviewed. There are direct witnesses, such a person who saw the incident, and indirect witnesses, persons who heard about the incident and are able to describe it.

#### **4.2. Litigating online hate speech**

One of the ways to combat hate speech is using the law, especially criminal law. Litigation can deter further hate speech incidents and bring cases to the attention of public authorities can also create necessary national standards through jurisprudence. Moreover, litigation can ensure redress for victims.

##### *a) How to commence litigation*

**Identify relevant domestic authorities which can deal with complaints:** typically, this will be police, prosecution authorities, or civil courts, but also other authorities may become relevant like the municipal office, the Public Defender of Rights or the Council for Radio and Television Broadcasting, etc.

**Consider the exhaustion of domestic remedies:** be prepared that national authorities may fail to properly address the issue of hate. Therefore, to be always on a safe side, commence your litigation already with a presumption that all domestic remedies will have to be properly exhausted. Remember that in case of hate speech

several types of remedies are possible, depending on the context of the case. Ideally, choose one avenue that is considered effective by the international human rights bodies (usually this involves the adjudication by a court) and make sure that you exhaust domestic remedies properly. When in doubt, always file a criminal complaint in parallel and appeal negative decision.

**Try to invoke human rights law at an early stage:** bring human rights standards into attention of all authorities already at an early stage. Do not forget to rely and refer, at minimum, to European Convention on Human Rights, typically Articles 8, 10, 14 and 17, and/or CERD.

**Be prepared to litigate the case until the end:** prepare yourself that a case can end up before the Constitutional Court or other final level. Structure your arguments and set up your mind already at the beginning as if you want the case to reach the Constitutional Court. It will help you to think about legal arguments from a different perspective. Prepare your client that obtaining justice can take a long time.

**Have all power of authorities signed at an early stage:** if agreed with the client, make sure that you have all power of authorities signed by the client empowering you to act as a representative before different domestic and international bodies, e.g. European Court of Human Rights, UN committees. At an early stage, you don't usually have the complex strategy for litigation, moreover if you lose at certain level and need to go e.g. to the Constitutional Court, you need a new power of authority. To prevent situation when the client would be difficult to reach or totally unreachable, prepare yourself before by having all set of power of authorities signed.

**Monitor responses from the authorities:** accompany your complaint with a request to be informed about the outcome of the inquiry. If not possible, submit a request for information after three months from the date you filled the complaint. Create new or use your case management system. At minimum, note the name/code of the case and relevant dates in a simple excel sheet.

### *b) What can be litigated*

First of all, two types of relations should be considered – vertical and horizontal. In other words, whether the litigation is directed against state authorities (*vertical* relation of state v. private person), or whether it is directed against another individual/legal entity (*horizontal* relation – private persons v. private person in the sense of non-state actor). This is crucial in terms of human rights arguments to be invoked in the case.

If we first zoom on vertical relations, several possible legal avenues for litigating hate speech can be distinguished: criminal, administrative or civil. All of these prospective

remedies in general terms have something in common, that is the question of what kind of specific obligation on the side of the state authorities enter the scene. Relying on jurisprudence of the Strasbourg Court, we can distinguish, though understanding that this distinction is not comprehensive, negative and positive obligations. Considering existing jurisprudence, the issue usually arises in relation to *positive obligations* of states to prevent and protect victims of hate speech. There is not a single positive obligation but rather a complex net of different obligations which relate to one another, and they can be litigated independently or jointly, considering circumstances of the particular case:

- **Existing regulatory framework.** It concerns regulation of hate speech and duty to prevent, taking from the perspective of existing norms. It contains two particular obligations: (i) to criminalise hate incidents, as required expressly by Article 4 CERD, or Article 20 ICCPR, and also by jurisprudence of the European Court of Human Rights, and (ii) to put in place a regulatory framework. While this obligation is clearly present in Article 3 cases, it has appeared also in Article 8 cases where the ECtHR required protection through criminal law provisions to ensure “effective deterrence against grave acts where essential aspects of private life are at stake, requires efficient criminal-law provisions.” (*Beizaras and Levickas v Lithuania* § 110).
- The second positive obligation relates to the **duty to protect** which corresponds with a concrete obligation to take reasonable steps to prevent hate crime of which the authorities knew or ought to have known. The applicability of this positive obligation to hate speech will need to be clarified.
- Following positive obligation is an **obligation to investigate** a possible racist motive. Thus, if in principle, there are adequate legal mechanisms to afford an acceptable level of protection to the applicants in the circumstances, it can be further examined whether the manner in which the criminal-law mechanisms were implemented was adequate.

In terms of horizontal relations, the case can be directed either against the perpetrator (the author of hate statement) or against the online media operator where the statement has appeared. In case of the latter, the ECtHR has evolving case-law assumed *liability of internet operators* placing certain obligations on them, to e.g., put in place an effective notice and take down systems (*Delfi AS v. Estonia* and other cases identified above).

### 4.3. Case selection

To make the client intake process and litigation as effective as possible, the following criteria should be followed to identify characteristics of a prospective client.

- **Relevance**

Selected case must be relevant for the subject matter of the project, i.e., the case must include hate speech in the online space. It is not an easy task to diagnose hate speech and it may sometimes be questionable whether a particular statement amounts to hate speech or not. The borderline cases may be more difficult to argue but they may help to create positive jurisprudence or clarify the existing case law on the matter. In case of doubt whether the case involves hate speech, and is therefore relevant for the project, the matter should be raised with senior lawyers and the coordinator of the project.

- **Potential**

In case of a large amount of hate speech statements identified by the volunteers, selection will have to be made in terms of potential of a case to be taken up for litigation. Many factors may also impact the potential of the case, notably the impact of the case for the victim, but also potential legal impact on the existing jurisprudence, whether the case involves legal questions that have not yet been addressed by Czech/international bodies, whether it involves questions that need to be overthrown in the case-law, whether the case attracted already public attention to the case or whether public attention needs to be attracted to this particular aspect of hate speech. Factors of relevance may also involve the personality of the victim and the place where the incident has happened – mainstream media, larger or smaller social media, private accounts, etc.

- **Strength**

A strong case presents many advantages for litigation. The following qualities, when met in a case, make it stronger and safer, and hence, ensure that litigation is beneficial for the target group and the individual client:

- The motivation of the client is compatible with the project, i.e., the client wish is to advance the rights and protection of people against hate speech in the online space and is not seeking primarily a solution to her particular problem.
- The client's situation is stable, i.e., the client is not currently facing any substantial risks regarding their life, which can be worsened by litigation.
- The client is well connected within the network grassroots and support organisations.
- The evidence in the client's case is feasible to collect and convicting for the authorities.

- **Resources**

Another important criterion is that the organisation, in fact, has the resources to undertake the litigation of the selected case. Some cases may be strong, relevant, and having potential but may surpass personal or financial resources of one organisation – due to media attention, possible costs, number of affected people, high-profile or high-maintenance cases, possible massive hate response/pushbacks, security reasons, etc. It is crucial, before taking-up the case, to assess the organisational resources,

personal and financial, to handle the litigation. In case of cases demanding large resources, it is advisable to engage more actors who will support the organisation thorough the litigation. These could be other national or international NGOs activate in the field, the Public Defender of Rights, public figures or online influencers, who can support the case in the form of advocacy, legal briefs or to shift public opinion. In case of potential high litigation costs, additional funding may need to be found for the victim (additional donor, public collections).

- **Ethical**

Naturally, during litigation, several issues can come up which can compromise clients' situation and, in some cases, involve security risks. The client also may need adequate support from her family or the surroundings throughout the litigation, including psychological support if need be. These needs to be taken in consideration together with the client, before taking any legal steps, but also throughout the litigation process.

#### **4.4. Recommendations for legal strategies in hate speech cases**

There are many different situations in which hate speech case may arise and each situation calls for different legal avenues. Such situation can include:

- a hate post on social media in a private profile of the victim
- a hate comment on news portal under an article
- a hate video on Youtube or other social media
- viral sharing of hateful content/hoaxes on social media

The following and final part of this report includes concrete steps and considerations that need to be made when assessing each individual case and recommendations as for the most effective and appropriate legal strategy for different types of cases.

##### *1. DOCUMENTING EVIDENCE*

To initiate any kind of litigation, it is important to gather evidence of hate speech. The following steps shall be taken as soon as possible after the hate speech took place:

i) **Recording all important information about the incident.** This should include the website or social media app it was posted on (website address), who posted it (real name, username, or email address, if possible), the date and time of the upload, and any comments.

ii) **Recording the feelings of the victims** (e. g. why they thought the content was hate speech).

iii) If possible, **keeping the original message**, comment, photo, etc. that was sent.

iv) If possible, **copying the original item**. Posts, images, or videos may be removed before the police can see it; copying the content can make sure police can see it. Screenshots can be taken on a computer or mobile phone. Images can also be copied and saved. Videos or music can be downloaded and saved.

v) It is also important **not to respond or engage** with the person or group creating or sharing the hateful content. Often, responding to hate messages only encourages the abuser to continue the abuse.<sup>78</sup>

## 2. ASKING FOR DELETION

Once the evidence is carefully documented, it is viable to **report** the hate speech to the platform (e. g. Facebook or online magazine) and ask them to delete the content, since the longer it stays online, the more damage it can cause to the victim or the group they belong to. Moreover, reporting can have impact on determining liability of platforms for hate speech of its users, as will be shown later. Some platforms have tools designed specifically to report online hate speech.

Contacting the platforms could be the fastest way to get the content removed as they have tools to moderate the content. If the platform refuses or stays passive, there are alternative ways, such as asking the public defender of rights to issue a recommendation to remove the illegal content or asking the court to order the removal. These procedures will take, of course, more time.

It is also advisable to document the act of reporting hate speech to the relevant platforms (via screenshots, saving e-mail communication etc.). This is important evidence that will be used in the potential proceedings against the platforms, as already indicated.

## 3. IDENTIFYING POTENTIAL DEFENDANTS

i) In all the above-mentioned scenarios, there is content (a comment, video etc.) that was identified as hate speech. A person that created the content is called a "**content provider**".<sup>79</sup> A content provider can be a natural person (e. g. a Czech citizen, who is

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<sup>78</sup> The Coalition for Racial Equality and Rights (CRER): *Hate Online. A guide to responding to online hate speech and hate crime*, p. 16. Available online:

<https://actiononprejudice.info/app/uploads/2018/02/Hate-Online.pdf> (cited on 01/3/2022).

<sup>79</sup> A liability can be invoked also if the person did not create the content herself, but present and handle foreign content as their own (this situation is rather rare). Another situation is **hyperlinking** illegal content. Hyperlinking is usually considered important for information sharing and it has been recognised that no control can be exercised over the linked content (which may later be altered for example). However, a hyperlink could give rise to liability under certain circumstances, and it is relevant to consider some aspects, such as if the person acted in a good faith, endorsed or repeated the impugned content etc. (see the ECtHR's landmark case *Magyar Jeti Zrt v. Hungary*, no. 11257/16, 04 December 2018 concerning hyperlinking defamatory content).



a blogger or an Instagram user posting photos and text) as well as a legal person (e. g. a company that created a fan-page on Facebook). Every content provider shall be responsible for his or her own conduct. A content provider shall be therefore considered as a potential defendant.

ii) However, it is only possible to add content online by using the “intermediaries” or “internet service providers” (**ISPs**), which are sometimes referred to as “platforms”. Relevant for us are those ISPs that host the content created by content providers, e. g. social media such as Facebook that hosts (i.e. provides a platform for) the content of its users. These ISPs are called “**host providers**” and they shall be also considered as potential defendants, because under certain circumstances, they may be held responsible for illegal content.

iii) Besides content and host providers,<sup>80</sup> it may be suitable to take legal steps against the **state** in case it has breached its negative or positive obligations to prevent hate speech and/or protect victims of hate speech.

It depends on the circumstances of every individual case, who can be considered as defendant. In certain cases, it can be none or all three of the above-mentioned actors. Moreover, there are different proceedings that can be initiated in respect of each defendant category. The next part sheds light on determining which strategy to take.

#### 4. LEGAL REMEDIES

##### i. Content provider

As regards the content provider, we shall consider whether it is *possible* and *appropriate* to take legal remedies against these persons.

It may not be possible to take legal steps against someone especially if the identity of this person is unknown, e.g., due to anonymity, untraceability or technical problems that prevent identification of the perpetrator. The platform (ISP) can be ordered by a court to reveal the identity of its users, but such litigation is not always successful. There are also cases, when the identity of the perpetrator seems to be clear, but in the end, this person cannot be linked to the illegal content beyond doubt, which may come as a surprise during the proceedings.<sup>81</sup>

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<sup>80</sup> Including also state authorities acting as a private entity in a horizontal relationship.

<sup>81</sup> See e. g. judgment of the District Court in Teplice of 29 April 2019, File No. 1 T 39/2019; Resolution of the Regional Court in Ústí nad Labem of 29 August 2019, File No. 7 To 312/2019.

In this case, the courts found that it had not been proven beyond reasonable doubt that the Facebook account containing hate speech was connected with the defendant. The profile’s name resembled the defendant’s name and the account also contained a photograph of the defendant. Yet, according to the Czech courts, technical data (e. g. IP address) were lacking, based on which the courts could not identify its user beyond doubts. Not even the operator of the Facebook network managed to obtain data leading to identification of the person using the account. The Regional Court

The second criterium encompasses various aspects, such as the financial possibilities of the content provider – if our goal is to seek damages, a poor financial situation of the defendant would discourage the victim from filing a lawsuit. Of course, the goal is often to prevent the hate speech from happening in the future and/or punishing the perpetrator, but even in that case, we need to consider many factors when choosing an appropriate remedy, including the economic factor (some cases may be strong, but surpass financial possibilities of the claimant party).

In the next part, we identify the available remedies, highlight their advantages and disadvantages and provide recommendations. For the purpose of clarity, they will be presented in three categories, namely civil proceedings, criminal proceedings and administrative proceedings (a general description of all these proceedings and remedies is provided in the previous chapters).

### *i) Civil proceedings*

Possibility to file an action with the court to protect personality rights or the anti-discrimination action.

#### Advantages

- lower evidentiary threshold - not beyond reasonable doubt
- possibility to claim compensation for pecuniary and non-pecuniary damage
- high enforceability in case of success
- possibility to ask for interim measures

#### Disadvantages

- timeframe
- burden of proof upon claimant
- court fees and litigation costs
- necessity to know the identity and residence of the defendant

### *ii) Criminal proceedings*

Possibility to file a crime notification with a police department or public prosecution office.

#### Advantages

- timeframe
- burden of proof upon prosecution

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in Ústí nad Labem quashed the decision of the district court and referred the case back to a new hearing. One of the reasons was that the district court had not exhausted all the options to eliminate doubts as to the identity of the perpetrator, e. g. by summoning Facebook friends of the defendant.

- perpetrators mostly convicted (if the judicial phase is reached)<sup>82</sup>

#### Disadvantages

- high evidentiary threshold - *in dubio pro reo*
- possible referral to civil proceedings with the claim for damages
- little experience of judges and prosecutors with hate speech<sup>83</sup>
- limited control over the case due to position of victim in criminal proceedings

As for the last point, after the adoption of the Act on Victims of Crime, the Criminal Code was updated in 2013 to enhance protection for victims. Victims, or rather their attorneys, also have the new option of participating at every step of the criminal proceedings, which is significant for asserting their claims and receiving compensation for damages. Previously victims participated only by being interrogated as witnesses and then not until the main hearing, which frequently had the consequence of losing their entitlement to compensation for damages.<sup>84</sup>

#### *iii) Administrative proceedings*

Possibility to file a misdemeanour notification with a municipal office.

#### Advantages

- timeframe
- variety of possible sanctions

#### Disadvantages

- *in dubio pro reo*
- only material damage
- legal uncertainty - no data on how municipal offices handle hate speech cases<sup>85</sup>

When the perpetrator of the online hate speech is TV or radio station,<sup>86</sup> a complaint can be filed to the *Council for Radio and Television Broadcasting*.<sup>87</sup> The Act on the operation of radio and television broadcasting<sup>88</sup> contains provisions on hate speech. §

<sup>82</sup> Public Defender of Rights, [Hate speech on the Internet and decision-making of Czech courts](#), 2020.

<sup>83</sup> Walach V. et al.: *Lifecycle of a Hate Crime*, p. 114. Available at <https://www.iccl.ie/wp-content/uploads/2018/04/Life-Cycle-of-a-Hate-Crime-Country-Report-for-Czech-Republic-English.pdf> (cited 01/3/2022)

<sup>84</sup> Walach V. et al.: *Lifecycle of a Hate Crime*, p. 25. Available at <https://www.iccl.ie/wp-content/uploads/2018/04/Life-Cycle-of-a-Hate-Crime-Country-Report-for-Czech-Republic-English.pdf> (cited 01/3/2022)

<sup>85</sup> Public Defender of Rights: Doporučení veřejné ochránkyně práv k nenávisným projevům na internetu, 67/2018/DIS/JV, p. 6. Available at: [https://www.ochrance.cz/uploads-import/DISKRIMINACE/Doporuceni/67-2018-DIS-doporuceni\\_nenavistne-projevy.pdf](https://www.ochrance.cz/uploads-import/DISKRIMINACE/Doporuceni/67-2018-DIS-doporuceni_nenavistne-projevy.pdf) (cited 01/03/2022).

<sup>86</sup> Even if they are not content providers, they are responsible for the published content.

<sup>87</sup> A complaint can be filed online on the webpage of the Council: <https://www.rrtv.cz/cz/static/rada-on-line/dotazy-a-stiznosti/index.htm> (cited 03/03/2022).

<sup>88</sup> Zákon č. 231/2001 Sb. o provozování rozhlasového a televizního vysílání a o změně dalších zákonů

32 (1)(c) stipulates that the media operators must ensure that their programs do not encourage hatred due to race, colour, language, religion or belonging to a national or ethnic minority and similar. § 32(1)(i) prohibits the spreading of prejudicial stereotypes about ethnic, religious or racial minorities. The Council has, *inter alia*, the task to monitor the content of radio and television programs and make sure that the programs are in conformity with the mentioned Act. In the event of any breach, the Council should first issue a warning and provide the operator with reasonable deadline to remedy the situation. If the operator does not remedy the breach, administrative proceedings may be instituted, which may result in the imposition of a financial penalty. In the event of a violation of §32(1)(c), a fine in the range of 20 000 to 10 million CZK (approximately 720 to 360 000 EUR) can be imposed. Violation of § 32 (1)(i) can currently only lead to a warning and the requirement for the operator to remedy the breach of the Act.

An action may be filed against the Council decisions in accordance with a special legal regulation (Act No. 150/2002 Coll., Administrative Procedure Code), and the court will decide on the admissibility of the action. However, the Council appears to be reluctant in imposing fines.<sup>89</sup>

*Recommendation:*

The recommended legal strategy against a content provider to commence with is filing a crime notification. Civil proceedings carry more disadvantages, namely the length of the proceedings when compared to criminal proceedings, the evidential burden, and the financial burden. The burdens lie in i) the obligation to pay a court fee,<sup>90</sup> ii) the obligation to submit evidence and iii) unpredictable risks, such as the possibility that the court will not be able to establish the link between the defendant and hate speech due to technical reasons (see the case above). Criminal proceedings are initiated by state authorities (no court fee), state authorities are also those responsible for collecting evidence (and are in a better position to acquire it) and there is no financial risk in case of unforeseen circumstances (they will try to establish identity of the perpetrator before filing an indictment).

However, it is not a straightforward choice in general, since the difference in the length of the proceedings between the criminal and civil proceedings may, in the end, not be that big, especially if the criminal court refers the victim to the civil proceedings to seek the damages. Moreover, the standard of proof is lower in civil proceedings (does not have to be beyond any reasonable doubt) and in some cases, this lower evidentiary burden may play a crucial role in the success of the case.

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<sup>89</sup> No sanction was imposed between 2006 – 2016 (See ECRI: Report on the Czech Republic, CRI (2015)35, p. 20. Available at: <https://rm.coe.int/fifth-report-on-the-czech-republic-czech-translation-/16808b5663> (cited 01/03/2022)).

<sup>90</sup> 2 000 CZK (approx. 80 EUR) if the claimed damages is less than 200 000 CZK (approx. 8 000 EUR) or 1% of the sum if the damages is more than 200 000 CZK.

As regards the administrative (misdemeanour) proceedings, it concerns only less serious conduct and does not allow for awarding compensation for non-pecuniary damage. It is still possible that police or prosecution will decide to classify the claimed crime as misdemeanour. Therefore, it is always a "safe choice" to file a criminal notification and in case the gravity of the case does not reach the threshold of the crime, the police will refer the case to the misdemeanour proceedings. The body responsible for dealing with misdemeanours in case of TVs and radios is the Council for Radio and Television Broadcasting which is allowed to impose a fine on the perpetrator.

## **ii. Host provider**

Another potential defendant is the host provider (ISP) who can become liable for third party content (i.e. content created by the content provider discussed previously).

**EU law**, namely the Directive on e-commerce<sup>91</sup> stipulates the circumstances under which the liability could be invoked.<sup>92</sup> According to Article 14 of the directive (and § 5 of the Act No. 480/2004 Coll. on certain services of the information society which transposed the directive<sup>93</sup>), a host provider can only be held liable in two situations:

- i) if the host provider has an actual knowledge of illegal activity or
- ii) if the host provider, upon obtaining such knowledge or awareness, does not act expeditiously to remove or to disable access to information.

*Ad i)* The first situation can be difficult to prove. It shall be noted that according to the Article 15 of the directive, the ISPs are not obliged to monitor the conduct of its users and cannot be obliged to do so by member states.

*Ad ii)* Proving that the ISP did not expeditiously remove hate speech after it became aware of it is easier. The awareness condition can be reached by bringing illegal conduct to its attention. This is why it is important to report hate speech and document the ISP's response. It is advisable to explain why the content constitutes hate speech and why it is unlawful, since the "awareness/knowledge" criterium relates also to the unlawfulness of the content, not only to its existence. As regards the term "expeditiously", there is no clear guidance on its interpretation, and it must be

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<sup>91</sup>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

<sup>92</sup>The directive only applies to ISPs based in EU member states. This should be changed by the **Digital Services Act** which proposes to also cover third country-based providers active in the EU. The DSA is a current legislative proposal by the European Commission that aims to modernise the Directive on e-commerce. Further development and changes the DSA will bring shall therefore be closely monitored.

<sup>93</sup> Zákon č. 480/2004 Sb. o některých službách informační společnosti a o změně některých zákonů (zákon o některých službách informační společnosti)

assessed in each case individually. However, the more serious the nature of the content is, the faster it shall be removed.

In all other scenarios (ISP was not aware or ISP became aware and acted expeditiously), the directive exempts host providers from liability (a so called "safe harbour" concept).

Despite the safe harbour concept, the ISPs, especially big platforms such as Facebook, do monitor the conduct of its users. This stems, on the one hand, from the EU's *Code of Conduct on Illegal Hate Speech* which was signed between the European Commission and four IT Companies, namely Facebook, Microsoft, YouTube and Twitter. These companies have a non-binding commitment to remove hate speech within 24 hours of them being reported. On the other hand, the obligation to monitor illegal conduct can be deducted from the case law of the **European Court of Human Rights**. In the case *Delfi AS vs Estonia*, the Court ruled that ISPs can be held liable even if they remove hate speech expeditiously after getting knowledge of its existence, even without notice from the alleged victim or from third parties. This judgment shook the EU's safe harbour concept and was criticised as imposing a too heavy burden on ISPs, that it can lead to over-deletion of content and have a chilling effect on the freedom of expression. However, the obligation to monitor and remove illegal content only applies under certain conditions. For the Court in Delfi case, it was relevant that the ISP was a big professional newspaper established to produce income and that the nature of the content was extreme (hate speech). It was confirmed also in more recent case-law such a heavy liability would not apply to different types of platforms (e.g., non-profit organisations) or in case of less extreme kind of expression, such as defamation.

Delfi case should be interpreted narrowly, however, professional income-producing platforms (such as Facebook or YouTube) can be potentially held liable for not removing hate speech on its own initiative despite the EU law directive. Even though Czech laws do not oblige host providers to actively monitor the content of its users,<sup>94</sup> the courts could nevertheless conclude that the exemption from liability according to the directive is not applicable in a particular case, as did the Estonian courts in Delfi case. The Grand Chamber did not rule on whether Estonia had correctly interpreted EU law on host provider liability, and it is not excluded that a similar case would be again successful before the European Court of Human Rights.

#### *Recommendation:*

With reference to the above mentioned, the highest expectation of success in the litigation could have cases, where the defendant (the host provider) became aware of hate speech and did not act expeditiously to remove it or otherwise disable access to

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<sup>94</sup> Art. 6 of the Act No. 480/2004 Coll. on certain services of the information society

it. It is important to gather evidence to be used in the civil proceedings (protection of personality rights) as soon as possible, especially to document both the illegal conduct itself as well as the report to the host provider indicating the existence of hate speech and explanation of its unlawfulness.

In case when hate speech is discovered only after a considerable period of time and the host provider removes it expeditiously after becoming aware of it, its liability would still not be completely out of question, when considering the case law of the European Court of Human Rights. However, this litigation strategy has two sides. On the one hand, it could strengthen privacy and personality rights, on the other hand, this approach could lead to private censorship and disproportionate restriction of freedom of expression. To avoid liability, the ISPs would be incentivised to delete any potentially problematic content. The balance between both rights is to be set carefully by legal experts (usually judges) and not by private platforms. The new DSA proposal should amend the current directive; however, it is not expected to divert from the current mechanism in a way to oblige ISPs to monitor the content of its users.

### **iii. The state**

Whereas in horizontal relationships, where the state acts as a private person, the strategy related to the above discussed content and host provider schemes would apply, in vertical relationships, the legal remedies differ.

States have in general two types of obligations, namely negative obligations (to refrain from acting in such a way that violates rights) and positive obligations (to actively protect against violations of rights). Considering existing jurisprudence of the European Court of Human Rights, the issue usually arises in relation to positive obligations of states, namely, to prevent and protect victims of hate speech. There is not one single positive obligation but rather a complex net of different obligations which relate to one another, and they can be litigated independently or jointly, considering circumstances of the particular case.

The positive obligations include updating regulatory framework and complying with the obligation to protect victims of hate speech,<sup>95</sup> and to specifically investigate discriminatory motives of perpetrators.<sup>96</sup> In respect of the Czech Republic, it does criminalise hate speech, however there still can be deficiencies in the legal framework that can come up either in the individual case assessment or it can be deducted from reports, recommendations or decision-making of relevant international bodies, such as the European Court of Human Rights or the European Commission against Racism and Intolerance (ECRI).

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<sup>95</sup> The scope of this obligation is not clear, but it may be understood e. g. as prosecuting hate speech crimes which the state authorities are aware of.

<sup>96</sup> See e. g. *Lakatošová and Lakatoš v. Slovakia*, application no. 655/16, judgment of the European Court of Human Rights from 11/12/2018.

### *Recommendation:*

The litigation against state authorities becomes pertinent if state authorities refuse to investigate the criminal notification or their response is inadequate (in terms of time or quality). Similarly, in civil proceedings, if the response of the court is slow or inadequate, there is always a possibility to argue this before the higher and international court instances. Therefore, after exhaustion of remedies, the next logical step is to file a **constitutional complaint** and if unsuccessful the complaint with relevant international body such as the European Court of Human Rights.

One of semi-legal avenues is submitting complaint to a **Public Defender of Rights**, who has the authority, in particular, to propose these remedial measures: a) the initiation of proceedings for the review of a decision, act or procedure of public authorities, if it can be initiated ex officio, b) performing actions to eliminate inactivity, c) initiating disciplinary or similar proceedings, d) initiating prosecution for a criminal offence, misdemeanour or other administrative delicts, e) the provision of damages or to file a claim for damages.

The Public Defender of Rights can only issue recommendations to public authorities (such as to remove illegal content), however it would be helpful to rely on her authority. Moreover, it is relevant to bring hate speech cases to the attention of the Public Defender of Rights in order to put pressure on state authorities to comply with their obligations.

## *5. CROSS-BORDER ISSUES*

Internet is a global place where content is shared across borders. It is not exceptional that a case involves a foreign element (e. g. hate speech towards a Czech citizen was published by an Italian citizen). It is therefore necessary to consider the courts of which state will have the jurisdiction to decide the case and the law of which state will the courts apply. The question is provided by the norms of private international law and will concern only civil matters. The subsequent analysis concerns protection of privacy and personality rights in the online context.

### **i. Jurisdiction**

In order to determine jurisdiction in civil matters (including privacy and personality rights), the EU member states have to apply the rules contained in the *Brussels I bis Regulation*. However, if the defendant is not domiciled in the EU member state, the jurisdiction of the courts shall be determined by national law of the respective member



state (**Article 6** of the Brussels I bis Regulation). In the Czech Republic, the relevant law is the Act no. 91/2012 Coll. on private international law.<sup>97</sup>

The general rule which determines jurisdiction in the matters of violation of privacy and personality rights is **Article 4 (1)** which stipulates that person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that member state.

According to **Article 7 (2)** of the Brussels I bis Regulation, a person domiciled in a member state may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for *the place where the harmful event occurred or may occur*. In the context of infringement of personality rights by placing unlawful content online, a claimant can bring an action for liability before the courts of the member state:<sup>98</sup>

- i) in which the publisher of the content is established (in respect of all damages) or
- ii) in which the centre of his/her interests is based<sup>99</sup> (in respect of all damages) or
- iii) in the territory of which content placed online is or has been accessible (only in respect of the damage caused in the territory of this member state).

It is therefore up to the claimant, who has an option to commence proceedings at one of the afore-mentioned places.<sup>100</sup>

## **ii. Applicable law**

The *Rome II* Regulation on the law applicable to non-contractual obligations<sup>101</sup> which came into force on 11 January 2009, expressly states that it does not apply to the issues of defamation, as well as of privacy rights.

The Czech Republic governs the matter in § 101 of the Act no. 91/2012 Coll. on private international law, which states:

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<sup>97</sup> Zákon č. 91/2012 Sb. o mezinárodním právu soukromém

<sup>98</sup> CJEU, judgement of 25 October 2011, eDate Advertising GmbH v. X and Olivier Martinez and Robert Martinez v Société MGN LIMITED, joined cases C-509/09 and C-161/10.

<sup>99</sup> The CJEU explained how "centre of interests" shall be understood and ruled that *„the place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.”* (eDate Advertising, par. 49.)

<sup>100</sup> For the practical examples of applying private international law rules on social media, see Sakolciová, S. (2021). Defamation on Social Media – Challenges of Private International Law. *Bratislava Law Review*, 5(1), DOI: 10.46282/blr.2021.5.1.226 (Available at: <https://blr.flaw.uniba.sk/index.php/BLR/article/view/226> (cited 05/03/2022)).

<sup>101</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

*Non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, shall be governed by the law of the State where the violation occurred. However, the affected person may choose to apply the law of the State in which*

*(a) the affected person has his or her habitual residence or registered office,*

*(b) the offender has his habitual residence or domicile; or*

*(c) the result of the infringing operation has occurred, if the perpetrator of the infringement could have foreseen it.*

To our knowledge, there is no case law of the Czech courts providing relevant interpretation of the specified criteria in the internet context. According to some authors, it is possible to rely on the jurisprudence of the Court of Justice of the EU which the Czech courts rely on also when interpreting national procedural law.<sup>102</sup>

Cross-border litigation is of course more complicated and all the risks and disadvantages of litigating in a foreign forum and/or applying foreign legal order will have to be carefully assessed.

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<sup>102</sup> Holečková, K. (2021): Mimosmluvní závazkové poměry s mezinárodním prvkem z pohledu české autonomní úpravy. Acta Universitatis Carolinae – Iuridica 3, DOI 10.14712/23366478.2021.27, p. 103. Available at [https://karolinum.cz/data/clanek/9466/Iurid\\_67\\_3\\_0097.pdf](https://karolinum.cz/data/clanek/9466/Iurid_67_3_0097.pdf) (cited 05/03/2022).