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COMPARATIVE STUDY ON FREEDOM OF EXPRESSION AND INFORMATION (HUNGARY-LITHUANIA-SWEDEN)



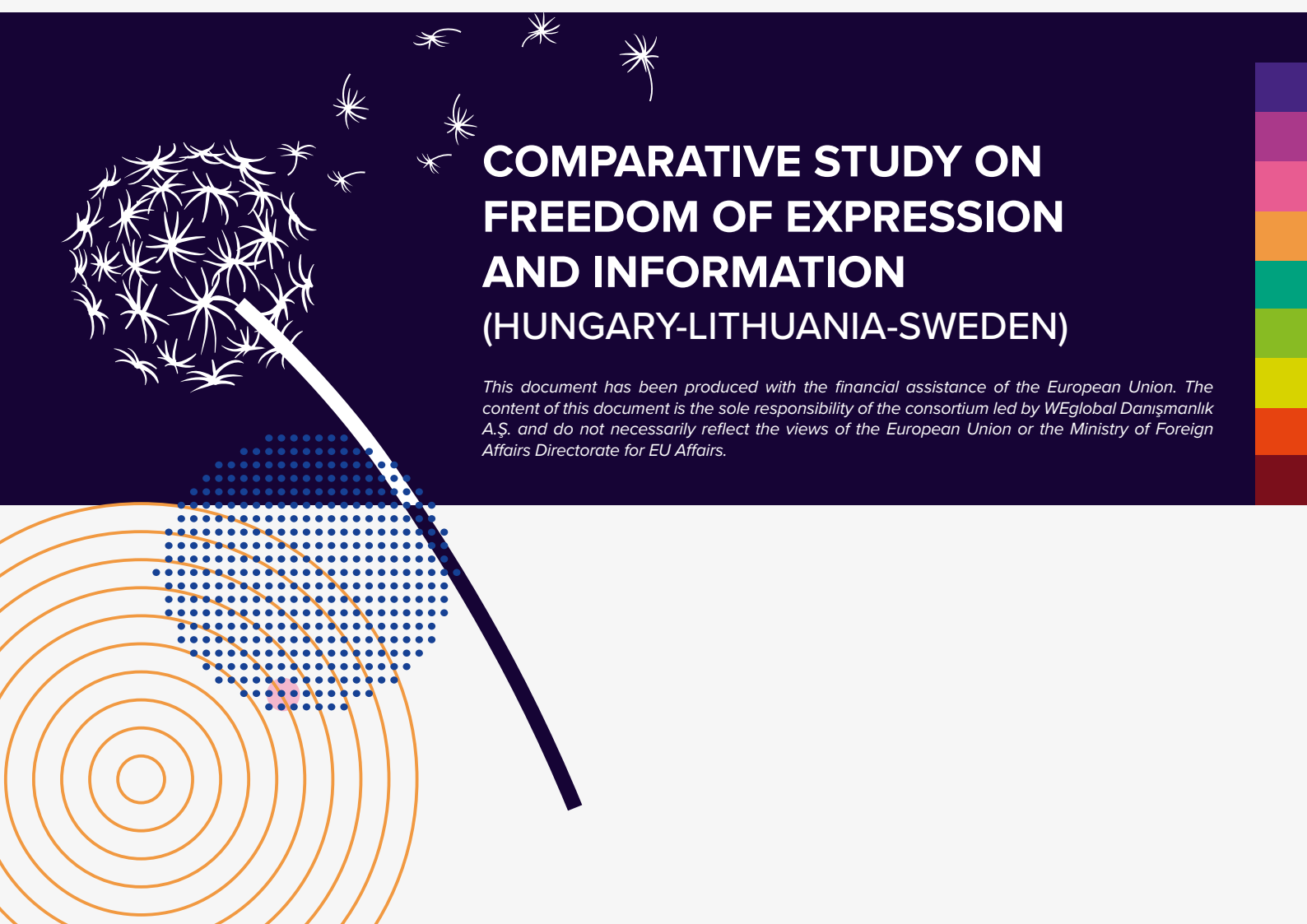
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**COMPARATIVE STUDY ON
FREEDOM OF EXPRESSION
AND INFORMATION
(HUNGARY-LITHUANIA-SWEDEN)**

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LIST OF ABBREVIATIONS

CDCT	Council of Europe Committee on Counter-Terrorism
COE	Council of Europe
DSA	Digital Services Act
ECHR	European Convention on Human Rights
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
IFCN	International Fact-Checking Network
NATO	The North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations



Introduction



This study examines several prominent topics within the realm of freedom of expression, namely disinformation, counter-terrorism, and hate speech. Each of these subjects is explored as distinct chapters in this analysis. Each chapter of the study includes a list of international instruments pertaining to the subject matter, followed by an examination of the legislation and practices related to the issue in three EU Member States. Ultimately, an assessment of the topic is provided.

This study examines the legislative and practical measures implemented by three EU Member States (Hungary, Lithuania, and Sweden) in relation to freedom of expression. The main factor for selecting Hungary is its significant exposure to scrutiny for freedom of expression in recent years. Hungary currently ranks 5th among the EU Member States in terms of the number of violations of freedom of expression found by the European Court of Human Rights (ECtHR).¹ Furthermore, it occupies the 72nd position in the press freedom index for the year 2023, as determined by Reporters Without Borders.²

Lithuania was selected due to its status as one of the relatively new member of the Union. Following its attainment of independence, Lithuania proceeded to join numerous international intergovernmental organisations and acceded to a multitude of international conventions. Lithuania currently has a total of 3 violations before the ECtHR concerning freedom of expression.³ Furthermore, in the Reporters Without Borders' press freedom index for the year 2023, Lithuania holds the 7th position.⁴ Lithuania appears to have embraced more robust principles of freedom of expression despite its relatively recent transition to a democratic system.

Sweden was selected as the third country due to its longstanding membership in EU since 1995, as well as its constitutional framework that affords the utmost safeguarding of freedom of expression. Sweden currently has faced only 2 violations before the ECtHR as regards freedom of expression.⁵ Furthermore, in the Reporters Without Borders' press freedom ranking for the year 2023, Sweden has the 4th position.⁶ Another aspect that is considered is the recent amendment of Sweden's legislation in relation to counter-terrorism.

The legislation and practice of these three countries are regarded as valuable sources of information pertaining to the three topics highlighted in the study. Regarding the research, it is important to acknowledge that while counter-terrorism and hate speech have been longstanding concerns, the association between disinformation and freedom of expression has gained increasing attention in recent years. However, reaching reliable sources pertaining to this relatively novel phenomenon within the three countries under examination has proven to be a challenging endeavour.

On the other hand, it is worth noting that legal framework as regards hate speech and counter-terrorism, which are often seen as 'conventional' concerns, exhibit considerable constraints. It should also be noted that there is no significant problem with regard to terrorism in the three countries analysed in this study. Consequently, it can be inferred that there is no noteworthy concern regarding the domain of freedom of expression in relation to this matter. Nevertheless, there exist discrepancies between international human rights laws and the benchmarks established in EU law. Last but not least, it should be noted that this study aims to examine not just positive instances but also inconsistencies to the possible extent.

1 See, https://www.echr.coe.int/documents/d/echr/stats_violation_1959_2022_eng (last access: 15.06.2023).

2 See, <https://rsf.org/en/index> (last access: 15.06.2023).

3 See, https://www.echr.coe.int/documents/d/echr/stats_violation_1959_2022_eng (last access: 15.06.2023).

4 See, <https://rsf.org/en/index> (last access: 15.06.2023).

5 See, https://www.echr.coe.int/documents/d/echr/stats_violation_1959_2022_eng (last access: 15.06.2023).

6 See, <https://rsf.org/en/index>, (last access: 15.06.2023).

1. Freedom of Expression in General



1.1. Definition and Scope of Freedom of Expression

Beginning with the Universal Declaration of Human Rights (UDHR) in 1948, freedom of expression has been an integral part of international human rights law: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' With the adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the first binding universal instrument covering freedom of expression in Article (Art.) 19, it has become a binding norm for all ratified states. Art. 10 of the European Convention on Human Rights (ECHR) which was adopted in 1950 and is the most influential instrument on human rights, regulates freedom of expression as well.

Although the text of these provisions only offers some clues about the concept, it does not fully cover the scope of the right at stake. As for Europe, the jurisprudence of the European Court of Human Rights (ECtHR) on freedom of expression enabled this relatively summary provision to be applied to different forms and means of expression through interpretation. The scope of the right has developed beyond the current text which was drawn up in 1950 and has become flesh and bone with jurisprudence.

Freedom of expression encompasses three different freedoms: freedom to hold opinion (e.g., the dismissal of a public official due to membership of a political party⁷ or a refusal to take office⁸ is considered as an interference with the freedom to hold opinion), freedom of access to information and ideas, and freedom to disseminate information and ideas. Freedom of expression means that individuals are able to freely access news and information, the ideas of others, not be condemned for their thoughts and opinions, and freely express, tell, defend, transfer and disseminate them, by oneself or together with others, by various means.

Freedom of access to information and ideas includes access to the printed or audio-visual contents which media organs present to the public, access to contents available on the Internet and access to means such as books, newspapers, magazines, radio or television etc. With this freedom, it is aimed to allow the public to access information and ideas within the scope of public debates, and participation in public debates is seen as indispensable for democratic pluralism. The most common aspect of freedom of expression is the right to disseminate information and ideas. Freedom of the press, which is a special aspect of the right to disseminate, has been given special importance as it ensures the transmission and circulation of ideas and informs both individual and society.

1.2. Restriction of Freedom of Expression

While the first paragraph of Art. 10 of the ECHR protects freedom of expression, the second paragraph regulates how and for what legitimate reasons this right can be restricted. Possible interferences by public authorities with the exercise of this right can only be considered legitimate and lawful when it complies with the stated limitation criteria. The ECtHR uses an examination method called the 'three-part test' when evaluating the legality of restrictions. Accordingly, in order for an interference to be considered lawful, interferences with freedom of expression must have a legal basis, it is expected that the intervention should be in response to a pressing social need, that the intervention should be carried out as a last resort, and that the means used in the intervention should be proportionate to the aim to be achieved. Given the focus of this study on hate speech, disinformation, and counter-terrorism, it is anticipated that interventions targeting these issues may potentially infringe onto freedom of expression. Consequently, it is crucial for the restriction regime to be implemented with careful consideration in each specific instance.

⁷ ECtHR, *Vogt v. Germany*, Appl. No. 17851/91, 26.09.1995.

⁸ ECtHR, *Glaserapp v. Germany*, Appl. No. 9228/80, 28.08.1986.

1.3. Subject of Freedom of Expression

Everyone has the right to freedom of expression. Distinctions such as being a natural person or a legal person (association, foundation, political party, trade union etc.), a citizen or a foreigner are merely important in terms of limiting the right, not being the subject of the right. It is not possible to justify an interference with the freedom to expression of any person solely on the basis of his personality. Everyone, including convicts and detainees, soldiers, law enforcement officers, other state officials is entitled to exercise freedom of expression. Such titles possessed by individuals do not abolish the possibility of exercising their rights, but they may be taken into account for restrictions. It may be possible that the freedom of expression of some individuals may be restricted more in comparison with others in certain situations. In the case of hate speech, disinformation and the fight against terrorism, which are emphasised in the study, within the framework of freedom of expression, it may be justifiable to impose more limits or impose more stringent penalties on individuals who possess the ability to shape public opinion.

1.4. Content of Freedom of Expression

Freedom of expression protects all kinds of expression and there is no content-based restriction provided in international law. Accordingly, political, artistic, academic, commercial etc. any expression remains within the scope of protection of this right. Freedom of expression includes the freedom to express and disseminate ideas even that are deemed 'worthless' or 'useless' to others. However, it is accepted that some expressions should not benefit from the protection of freedom of expression. Today, especially in the European context, fascist, racist, discriminatory expressions, war propaganda or hate speech are regarded as beyond the protection afforded by this right. A limitation in this direction can be accepted as a 'positive' limitation of freedom of expression. As a matter of fact, the ECtHR finds the restriction of freedom of expression on issues such as glorification of Nazi ideology, fascism, racism, xenophobia, anti-Semitism, Islamophobia and homophobia in certain situations compatible with the ECHR. Certainly, while acknowledging some nuanced distinctions, it is plausible to assert a comparable approach towards counter-terrorism or disinformation.

1.5. Forms or Means of Freedom of Expression

The protection brought by the freedom of expression also includes the different forms and means by which information and ideas are expressed, communicated and imparted. Expressions can be used in media such as television, radio, internet, in public, in official buildings or private places reserved for public service, in any indoor or outdoor place, in writing, petition, hunger strike, press release, slogan, picture, book, movie, poem, brochure, musical work, sculpture, installation, performance etc. can be expressed in any way. It should be added that freedom of the press is given special importance in terms of tools and the internet, which has entered our lives for the last decades, is now regarded as the most important medium where freedom of expression is used.⁹ It is worth noting that the internet and social media platforms have become prominent venues of expressions in relation to issues like as hate speech, disinformation, and counter-terrorism, thus counter-measures aimed at restricting freedom of expression are predominantly focused on these channels. Given the significance of the Internet in relation to the protection of freedom of expression, it is imperative to adhere rigorously to the principle of proportionality when undertaking interventions on the above-mentioned grounds.

1.6. Interpretation of Freedom of Expression

The points highlighted so far show the breadth of the subjects of freedom of expression, the content of expressions and the means by which information and ideas can be expressed. Considering the above-mentioned general principles, it seems that there is no ready-made legal formula to be applied in every situation as to whether the right has been violated or not and it is possible to reach different results in each and every case. The identity of the individual making the expression or the addressee; the place and time which the expression is made;

⁹ ECtHR, Pedersen and Baadsgaard v. Denmark, Appl. No: 49017/99, 17.12.2004, § 71; Times Newspapers Limited v. the United Kingdom (No. 1 and 2), Appl. No. 3002/03, 23676/03, § 27.

how public the expression becomes; the content, style and context of expression may play an essential role in determining the limits of freedom of expression. It should also be noted that not all expressions are equally protected in terms of individuals. For instance, criticism of politicians and public officials may receive greater protection, while criticism of ordinary citizens and judicial bodies may receive less protection. However, this does not mean that there is an absolute arbitrariness in freedom of expression, and it reveals that restriction is only possible in exceptional cases. The jurisprudence and standards that have emerged in international law and domestic jurisdictions so far not only provide guidance on how abstract legal regulations should be applied in concrete situations, but also emphasize that freedom of expression should be interpreted very broadly. Hence, while it is possible to enforce limitations on the exercise of freedom of expression within the domains of hate speech, counter-terrorism, and disinformation, such restrictions should be construed in a manner that upholds and prioritises the principle of freedom of expression. This approach is justified by the fact that curtailment of this freedom should be viewed as an exceptional measure, with the preservation of freedom serving as the overarching guiding principle.

1.7. EU Law and Freedom of Expression

Prior to the enactment of the Charter of Fundamental Rights, the EU lacked a specific provision pertaining to the protection of freedom of expression within its legal framework. The Court of Justice of the European Communities, in one of its early rulings definitively affirmed that the overarching fundamental principles of the Community's legal framework, which the Court of Justice is obligated to protect, encompass the observance of fundamental rights.¹⁰ The Court proceeded to establish its protective measures for basic rights by drawing upon various clauses found within the foundational treaties such as the provisions outlined in the Treaty on the Functioning of the European Union (TFEU) encompass various aspects of non-discrimination and equal treatment. These include the prohibition of discrimination based on nationality (as stated in Article 18 TFEU), the equal treatment of goods and individuals in relation to the freedom of movement of goods (Article 34 TFEU), the freedom of movement of persons (Article 45 TFEU), the right of establishment (Article 49 TFEU), and the freedom to provide services (Article 57 TFEU). Additionally, the principle of equal pay for men and women (as articulated in Article 157 TFEU) is also addressed within these provisions.

The Charter of Fundamental Rights of the European Union consolidates the essential rights and freedoms that are afforded to EU citizens, encompassing them inside a legally binding instrument. The Charter was proclaimed in the year 2000 and subsequently became effective in December 2009, coinciding with the implementation of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in 2007. The Charter is not explicitly incorporated into the Treaty of Lisbon, but it acquires the same legal force as the Treaties through Article 6(1) Treaty of the European Union.

Freedom of expression is now a part of the *Acquis Communautaire* and enshrined in Art. 11 (Freedom of expression and information) of the Charter of Fundamental Rights of the European Union which is addressed to the institutions and bodies of the EU in all their actions and national authorities when they are implementing EU law: '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. 2. The freedom and pluralism of the media shall be respected.'

The Charter does not provide the European Commission any general authority to act in matters pertaining to fundamental rights. It is only able to step in when EU law comes into play (for instance, when EU legislation is adopted or when a national measure uses EU law in a manner that is incompatible with the Charter), at which point it has the authority to intervene. The Member States of the EU each have their own constitutional and judicial frameworks in place to safeguard rights and freedoms. They must also uphold the principles of the ECHR and other international human rights documents. They are not superseded by the Charter. Accordingly, it is the responsibility of national courts to protect citizens' rights to freedom of expression.

¹⁰ CJEU, *Erich Stauder v City of Ulm – Sozialamt*, Case 29-69, 12.11.1969.

2. Freedom of Expression and the Fight Against Disinformation



2.1. Legal Framework

The concept of disinformation refers to false, inaccurate, or misleading information designed, presented and promoted intentionally to cause public harm or make a profit.¹¹ Disinformation is also defined as ‘verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public and may cause public harm’.¹²

The proliferation of disinformation poses a threat to democratic discourse as well as freedom of expression. According to a study, lies spread ‘further, faster, deeper, and more broadly than the truth,’ and falsehoods are ‘70% more likely to be retweeted than the truth’.¹³ It is possible that the scale and speed of the distribution of online content that is not in and of itself illegal, such as disinformation and conspiracy theories, may result in polarising debates, have an effect on democratic discourse, trust in institutions, and, as was observed in the aftermath of the COVID-19 outbreak, health and safety. The ability of individuals to make judgments that are informed and are based on accurate facts can also be hindered by disinformation. While the State’s primary obligation stemming from freedom of expression is to refrain from interference and censorship, the State also has a set of positive obligation among others to foster inclusive and pluralistic public debate, most particularly in relation to elections, and the exercise of media freedom. These measures extend beyond content moderation and are linked to more fundamental education and information initiatives.

Expressions that take the shape of sarcasm, satire, parody, or humour; expressions that erroneously interpret facts or events; and statements that question society standards are all examples of the types of expressions that fall under the purview of freedom of expression.

As to the joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples ‘the human right to impart information and ideas is not limited to ‘correct’ statements, that the right also protects information and ideas that may shock, offend and disturb’.¹⁴

Under the pretence of preventing the spread of misinformation, such expression should not be subject to undue restrictions. In certain instances, disinformation comprises speech that the government are allowed to restrict (such as racist and xenophobic speech and incitement to terrorism). Save that, it is frequently protected by the right to freedom of expression, even if it lacks scientific evidence or a factual basis. States should abstain from censoring protected speech. To be effective, actions to limit the spread of disinformation and conspiracy theories must be accompanied by the promotion of an environment conducive to inclusive and diverse public discourse.¹⁵ Instead of imposing limits, states are encouraged to promote and preserve free and independent media and to enhance transparency and access to information in order to establish trust in public institutions, governance, and processes. This is done in order to build trust in public institutions, governance, and processes. They should also make it possible for meaningful talks and debates to take place, as well as encourage public participation on all levels. Implementing digital and media literacy programmes to enable more resilient and meaningful participation online, thereby fostering critical thinking skills that enable individuals to recognize, dispute, and counteract disinformation. Additionally, states should invest in tools and mechanisms that support independent fact-checking with journalist and civil society participation.

11 Carme Colomina, Héctor Sanchez Margalef, Richard Youngs, The impact of disinformation on democratic processes and human rights in the world, European Parliament, EP/EXPO/DROI/FWC/2019-01/LOT6/R/02, Brussels, European Union, 2021, p. 2.

12 European Commission, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Action Plan against Disinformation, JOIN(2018) 36 final, 2018.

13 Soroush Vosoughi, Deb Roy and Sinan Aral, The spread of true and false news online, *Science*, Vol. 359(6380), 2018, pp. 1146-1151.

14 OSCE, Joint declaration on freedom of expression and ‘fake news’, disinformation and propaganda, 03.03.2017, <https://www.osce.org/files/f/ documents/6/8/302796.pdf> (last access: 15.06.2023).

15 European Commission, Protecting Fundamental Rights in the Digital Age-2021 Annual Report on the Application of the EU Charter of Fundamental Rights, COM(2021) 819 final, Brussels, 10.12.2021, p. 15-16.

2.1.1. International Law on Freedom of Expression and Disinformation

The relevant international instruments concerning freedom of expression and disinformation are, inter alia, as follows:

- **Universal Declaration of Human Rights**, Art. 19
- **International Covenant on Civil and Political Rights**, Art. 19

As regards to the UN, Art. 19 of the Universal Declaration on Human Rights and Art. 19 (1) of the International Covenant on Civil and Political Rights guarantee individuals the right to freedom of expression and the right to seek, receive, and distribute information without interference. Only in very limited circumstances are restrictions on freedom of expression acceptable. Restrictions, if enforced, must be authorized by law, required to preserve people's rights or national security, and reasonable in scope. In practice, limitations should not suffocate the right to express oneself freely. The UN General Assembly and the Human Rights Council have both called for responses to the spread of disinformation to promote and protect these rights. According to the report of the Secretary General, '[a]pproaches that seek simple solutions to this complex problem are likely to censor legitimate speech that is protected under international human rights law. Such overbroad restrictions are likely to exacerbate societal ills and increase public distrust and disconnections, rather than contribute to the resolution of underlying problems'¹⁶ Additionally it is also stated that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression and should be abolished.¹⁷

States should encourage companies to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights,¹⁸ which call for companies to engage in human rights due diligence, increase transparency around their policies and practices relating to disinformation, engage with civil society, grant access to researchers, and give users greater control over their online experiences.

In reference to the Countering Disinformation Report of UN Secretary General, States should:

- Protect, respect and promote freedom of expression, ensuring access to information and promoting media pluralism;
- Avoid regulating based on vague definitions, imposing disproportionate sanctions and never criminalize legitimate content;
- Refrain from Internet shutdowns/blocking of websites and outlets;
- Ensure public officials share accurate information and hold accountable authorities who spread false information;
- Involve civil society in the design of policies and other efforts aimed at countering disinformation.

Tech enterprises should:

- Avoid causing or contributing to adverse human rights impacts through their activities and address adverse impacts;
- Disclose policies and practices relevant to countering disinformation;
- Review their business models to make sure they are in line with human rights principles;
- Ensure greater transparency and provide access to relevant data and information;
- Ensure that their content moderation practices are consistent and sufficiently resourced in all locations where they operate and in all relevant languages.

¹⁶ Countering disinformation for the promotion and protection of human rights and fundamental freedoms, Report of the Secretary-General, A/77/287, 12.08.2022, § 41.

¹⁷ OSCE, Joint declaration on freedom of expression and 'fake news', disinformation and propaganda, 03.03.2017, <https://www.osce.org/files/f/documents/6/8/302796.pdf> (last access: 15.06.2023).

¹⁸ See, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (last access: 15.06.2023).

2.1.2. EU Law on Freedom of Expression and Disinformation

The relevant legal instruments as regards freedom of expression and disinformation are as follows:

- **European Media Freedom Act** (Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU)
- **Digital Services Act** (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC)
- **Action Plan against Disinformation** (Joint Communication to the European Parliament, the European Council, the Council, The European Economic and Social Committee and the Committee of the Regions)
- **The 2022 Code of Practice on Disinformation**
- **Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union** (Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union)

In the context of the EU, civil society organizations have recognized disinformation as a threat to health and safety, in addition to the democratic discourse in a number of Member States. Concerns about a lack of openness in respect to incorrect or dishonest information (labels, sharing alerts, exposure notifications), as well as media illiteracy, were widespread. In light of this, the European Commission devised a number of actions aimed at making the online environment more transparent and its actors more accountable, empowering users, and promoting open democratic debate online which are support for independent fact-checkers and academic researchers, particularly through the European Digital Media Observatory, measures to improve media literacy, and the monitoring of a self-regulatory Code of Practice on Disinformation.¹⁹

One of the first steps taken by the EU to address disinformation was adoption of Code of Practice in 2018 and strengthened in 2022. It was regarded as a novel self-regulatory mechanism designed to enhance transparency and accountability of online platforms, alongside a framework for monitoring and enhancing regulations pertaining to disinformation on these platforms. The Commission has issued recommendations based on the findings of these monitoring activities for how signatories to the Code of Practice, such as messaging apps, the advertising industry, and other relevant stakeholders, can expand the Code's reach and make it more effective.²⁰

The European Commission calls on the European Parliament, the Council and Member States to use 'Protecting Fundamental Rights in the Digital Age - 2021 Annual Report on the Application of the EU Charter of Fundamental Rights' on the Application of the EU Charter of Fundamental Rights to engage in exchanges about the challenges and opportunities for protecting fundamental rights in the digital age.²¹ The Digital Services Act²² (DSA) adopted in 2022 seeks to create a safer digital environment in which users' fundamental rights are protected and is regarded as a ground-breaking regulation regarding internet security and platform accountability since digital platforms will be held accountable for their part in the dissemination of misinformation and other types of online harm, and they will be compelled to share additional information with both the research community and the general public.²³

The DSA sets obligations for how digital services deal with illegal content that has societal risks and violations of their terms of service in which disinformation fits. According to the DSA, it is imperative for platforms to incorporate a system that enables users to report illegal content and promptly respond to such complaints and platforms must do an analysis of the unique dangers they face and implement appropriate measures to mitigate these risks. One such strategy is to effectively combat the dissemination of disinformation and the fraudulent utilisation of their services. Platforms are required to conduct risk assessments and address various systemic hazards. These risks encompass the amplification of illegal content and disinformation on their services, as well as the potential consequences for freedom of expression and media freedom. Platforms must undertake the tasks of identifying, analysing, and mitigating these risks. Although the regulation has been widely welcomed by

19 European Commission, Protecting Fundamental Rights in the Digital Age-2021 Annual Report on the Application of the EU Charter of Fundamental Rights, COM(2021) 819 final, Brussels, 10.12.2021, p. 10.

20 European Commission, Protecting Fundamental Rights in the Digital Age-2021 Annual Report on the Application of the EU Charter of Fundamental Rights, COM(2021) 819 final, Brussels, 10.12.2021, p. 10.

21 European Commission, Protecting Fundamental Rights in the Digital Age-2021 Annual Report on the Application of the EU Charter of Fundamental Rights, COM(2021) 819 final, Brussels, 10.12.2021, p. 35.

22 See, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065>

23 Claire Pershan; Rita Jonusaite, User-Guide to the EU Digital Services Act, EU DisinfoLab, October 2022, p. 3, https://www.disinfo.eu/wp-content/uploads/2022/11/20221020_DSAUserGuide_Final.pdf (last access: 15.06.2023).

human rights NGOs,²⁴ it has also seen scrutiny with regards to its potential impact on the freedom of expression.²⁵ Given that the DSA has recently come into effect, its effects on freedom of expression will only become evident in the forthcoming years.

2.2. EU Member States on Freedom of Expression and Disinformation

2.2.1. Legislation of Member States

Hungary

Hungary does not have a specific law against disinformation. Under Art. 19 of the Constitution of Hungary, everyone shall have the right to freedom of expression; and state shall recognize and protect the freedom and diversity of the press and shall ensure the conditions for the freedom to receive and impart information as is necessary in a democratic society.

The Art. 337 of the Hungarian Criminal Code was '[a]ny conduct of uttering or publishing before the public at large a statement one knows to be false or with a reckless disregard for its truth or falsity at the scene of some emergency by which to violate public order or disturb the public peace at a place of public danger is guilty of a felony punishable by imprisonment not exceeding three years.' and following the amendment initiated in 2020, the dissemination of 'any untrue fact or any misrepresented true fact with regard to the public danger that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger' or 'any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection.' were added to the provision along with an aggravation of the penalty to up to five years imprisonment.²⁶ Accordingly, the Criminal Code provides penalty for, among others, misleading authorities or consumers, when they may cause harm to society in a state of public danger, or when they infringe on individual rights. This amendment was repealed three months later and it was criticized for having a phrase that was too ambiguous, as well as for having the potential to stifle freedom of expression.²⁷ It is acknowledged that criminal sanctions have proven to be less effective in combating disinformation and misinformation than the unfettered flow of information from diverse sources, including independent media, unimpeded by threats of prosecution and penalties.²⁸ Commissioner for Human Rights of the Council of Europe stated in 2021 that Hungary should ensure that the relevant Criminal Law provisions are compliant with the requirements of legality, necessity and proportionality enshrined in Art. 10 of the ECHR.²⁹ A set of other offences in the Criminal Code, namely false accusation (Art. 268), perjury (Art. 272) and misleading the authority (Art. 271), are also applicable to cases of disinformation.³⁰

24 See, Human Rights Watch, <https://www.hrw.org/news/2022/01/07/eu-put-fundamental-rights-top-digital-regulation>; Amnesty International, <https://www.amnesty.eu/news/amnesty-international-position-on-the-proposals-for-a-digital-services-act-and-a-digital-markets-act/> (last access: 15.06.2023).

25 See, Article 19, <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/> (last access: 15.06.2023).

26 Joris v. Hoboken; Ronan Ó Fathaigh, Regulating Disinformation in Europe: Implications for Speech and Privacy, UC Irvine Journal of International, Transnational, and Comparative Law, Vol. 6, No. 1, 2021, p. 20.

27 Konrad Bleyer-Simon, Disinformation Landscape in Hungary, EU DisinfoLab, June 2023, p. 7, https://www.disinfo.eu/wp-content/uploads/2023/06/20230521_HU_DisinfoFS.pdf (last access: 30.06.2023).

28 Visit to Hungary-Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/50/29/Add.1, 11.05.2022, § 50, <https://documents.un.org/doc/undoc/gen/g20/111/59/pdf/g2011159.pdf?token=3WnkJWJZXvSDt4bMlb&fe=true> (last access: 15.06.2023).

29 Memorandum on freedom of expression and media freedom in Hungary, Commissioner for Human Rights of the Council of Europe, 30.03.2021, § 41, <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e> (last access: 15.06.2023).

30 Gábor Polyák, Freedom of Expression and the Regulation of Fake News Legal fight against state-generated disinformation?, Hungary Report, p. 6.

Lithuania

Lithuania does have legal provisions against disinformation.³¹ Arts. 25³² and 44³³ of the Constitution of the Republic of Lithuania³⁴, recognise freedom of expression and prohibits censorship and monopolisation of the mass media. According to Art. 25, '[f]reedom to express convictions and to impart information shall be incompatible with criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation.' Thus, disinformation is deemed as not compatible with the freedom of expression. Art. 2 of the Law on the Provision of Information to the Public, which was adopted in 1996 and amended in 2021, defines disinformation as 'intentionally disseminated false information' and Art. 19 prohibits the dissemination of disinformation in the media.³⁵

Sweden

As to specific legislation focusing upon disinformation, Sweden does not have any laws targeting it. Exceptionally, Sweden's Constitution is comprised of four fundamental laws: The Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Sweden was the first nation in the world to enact press freedom legislation, enacting it in 1766. The freedom of the press is the right to disseminate information in printed form, subject to legal accountability. The Freedom of the Press Act also protects the right of citizens to examine public documents, based on the principle of public access to official documents. The current Freedom of the Press Act was adopted in 1949. The Fundamental Law on Freedom of Expression was adopted in 1991. The last two fundamental laws provide a constitutional basis and guarantee for freedom of expression. Freedom of expression is strong and highly protected in the Constitution, which gives citizens far-reaching rights to express their views. However, there are laws against defamation, inciting ethnic hatred, agitation and sedition, which could be applied against certain types of disinformation.³⁶

2.2.2. Institutional Structure and Practice

It is stated that there are three groups of actors that are involved in responses to disinformation which are legislative and regulatory bodies, private sector, namely digital platforms and civil society. Various political and regulatory traditions influence responses to disinformation. While some governments may consider how to respond to disinformation without harming pluralism and human rights, others may use legislation against disruptive content to restrict individual liberties.³⁷

31 Brock Mays, Disinformation Landscape in Lithuania, EU DisinfoLab, June 2023, p. 11, https://www.disinfo.eu/wp-content/uploads/2023/06/20230521_LT_DisinfoFS.pdf (last access: 30.06.2023)

32 Art. 25: The human being shall have the right to have his own convictions and freely express them.

The human being must not be hindered from seeking, receiving and imparting information and ideas.

Freedom to express convictions, to receive and impart information may not be limited otherwise than by law, if this is necessary to protect the health, honour and dignity, private life, and morals of a human being, or to defend the constitutional order. Freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation. The citizen shall have the right to receive, according to the procedure established by law, any information concerning him that is held by State institutions.

33 Art. 44: Censorship of mass information shall be prohibited. The State, political parties, political and public organisations, and other institutions or persons may not monopolise the mass media.

34 See, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21892> (last access: 15.06.2023)

35 See, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b90a7c321c7b11ecad9fbbf5f006237b?jfwid> (last access: 15.06.2023)

36 Jessica Giandomenico; Hanna Linderstål, Disinformation Landscape in Sweden, EU DisinfoLab, May 2023, p. 7, https://www.disinfo.eu/wp-content/uploads/2023/05/Sweden_DisinfoFactsheet.pdf (last access: 15.06.2023).

37 Carme Colomina, Héctor Sanchez Margalef, Richard Youngs, The impact of disinformation on democratic processes and human rights in the world, European Parliament, EP/EXPO/DROI/FWC/2019-01/LOT6/R/02, Brussels, European Union, 2021, pp. 23-24.

Hungary

Hungary does not have a government body to tackle with disinformation. According to international observations, Hungary is criticized for laws, policies and practices regarding disinformation.³⁸ Despite the existence of problems related to disinformation, some efforts are carried out in the civil field, albeit limited. Lakmusz³⁹ is the only significant independent fact-checking initiative in Hungary. It was introduced in January 2022 with the assistance of French AFP news agency and the European Commission. Despite being comparatively new, it has already achieved widespread recognition in Hungary. During the 2022 election campaign, the initiative fact-checked statements made by both ruling party and opposition candidates. In addition, it publishes podcasts, research articles, and guides to help Internet users recognize disinformation. Telex⁴⁰ is an autonomous newsroom founded in 2020 and routinely publishes fact-checks and also operates the Telex Akadémia media literacy initiative. Political Capital⁴¹ is one of the most influential independent think tanks in Hungary, and one of its primary thematic areas focuses on disinformation and conspiracy theories. In addition to conducting research, Political Capital also develops guidelines for identifying and countering manipulative narratives.

Lithuania

Lithuania does not have a government body to tackle with disinformation. However, Lithuanian Parliament was adopted a law establishing National Crisis Management Centre (Nacionalinis krizių valdymo centras-NKVC) in 2022. This centre will carry out continuous (24/7) monitoring, assessment and reporting of threats to the national security interests of the Lithuania, organize and coordinate state preparedness for crises and emergencies, their prevention, crisis and emergency management. As to the National Security Threat Assessment, foreign countries' disinformation campaigns is regarded as a primary national security concern in Lithuania.⁴²

Lithuania is home to a large number of disinformation-fighting experts, volunteers, NGOs, and other institutions, and is a successful example of how to combat disinformation.

Debunk.org is a disinformation analysis centre, independent think tank, and non-governmental organization (NGO) established in Lithuania. Their mission is to conduct research on disinformation. It brings together people from a variety of fields and organizes educational media literacy campaigns, promotes media literacy by teaching how to differentiate between disinformation and misinformation, gains knowledge of narratives, studies the primary strategies used in the creation of false information, develops an operational technological tool that journalists and members of civil society can use that is based on artificial intelligence to identify misinformation and prevent its spread, and carries out disinformation analysis.⁴³

The DELFI Melo Detektorius is an independent and open fact-checking unit of DELFI, which is the largest internet news portal in Lithuania. It operates in Lithuanian, Russian, Polish, and other languages. It was put forward as a candidate for the title of one of the most impressive fact-checking success stories in Europe. It brought to light a Russian propaganda network as well as a troll farm that was spreading misinformation about the Western countries and the Baltic states. This network had tens of thousands of followers and subscribers who worked together to promote propaganda, disinformation, and fake facts about Western nations and Baltic countries. In addition, it is also a component of the International Fact-Checking Network (IFCN). It gathers its information via holding meetings, attending public comment sessions, holding news conferences, and making use of specialized fact-checking technologies.⁴⁴

38 Visit to Hungary-Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/50/29/Add.1, 11.05.2022, § 18, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/338/64/PDF/G2233864.pdf?OpenElement>; Memorandum on freedom of expression and media freedom in Hungary, Commissioner for Human Rights of the Council of Europe, 30.03.2021, § 40, <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e>; Konrad Bleyer-Simon, Disinformation Landscape in Hungary, EU DisinfoLab, June 2023, p. 3, https://www.disinfo.eu/wp-content/uploads/2023/06/20230521_HU_DisinfoFS.pdf; 2022 Rule of Law Report-Country Chapter on the rule of law situation in Hungary, SWD(2022) 517 final, European Commission, Luxembourg, 13.07.2022, p. 23, https://commission.europa.eu/document/download/5ca0f861-b4d4-412d-bd7d-dbe3582af1c1_en?filename=40_1_193993_coun_chap_hungary_en.pdf (last access: 15.06.2023).

39 See, <https://www.lakmusz.hu/> (last access: 15.06.2023).

40 See, <https://telex.hu/> (last access: 15.06.2023).

41 See, <https://politicalcapital.hu/> (last access: 15.06.2023).

42 National Threat Assessment, Vilnius, 2022, <https://www.vsd.lt/wp-content/uploads/2022/04/ANGL-el-.pdf> (last access: 15.06.2023).

43 Brock Mays, Disinformation Landscape in Lithuania, EU DisinfoLab, June 2023, p. 8, https://www.disinfo.eu/wp-content/uploads/2023/06/20230521_LT_DisinfoFS.pdf (last access: 30.06.2023).

44 Brock Mays, Disinformation Landscape in Lithuania, EU DisinfoLab, June 2023, p. 8, https://www.disinfo.eu/wp-content/uploads/2023/06/20230521_LT_DisinfoFS.pdf (last access: 30.06.2023)

Sweden

Among the three Member States, only Sweden has established a governmental body, the Swedish Psychological Defence Agency, an agency under Ministry of Justice in the beginning of 2022 following a campaign criticising Swedish social services on Arab speaking Twitter and other platforms such as YouTube. In December 2021, an increasing number of individuals with a large number of followers disseminated videos of crying families who claimed to have had their children abducted by social services and crying children who claimed to have been wrongfully removed from their families by social services. Al Jazeera also aired a 45-minute report on their Arabic-language services about the alleged wrongdoing by Swedish social services, thereby enhancing the narrative's reach and legitimacy. Although began with limited visibility, influencer with more than 800.000 followers amplified the disinformation and the story evolved to include allegations that the children were seized against their will from their families in order to coerce them into abandoning their Muslim faith, to compel them to consume pork meat, to coerce girls into removing their headscarf, and other similar practices. Some of the social media forums headquartered in Sweden have organized rallies and other forms of public expression outside the offices of local social services. In addition, there have been threats of physical violence made towards the offices and the social workers who work there whom their addresses and identities have also been published online. One of the responses of the Swedish Government was to give the Psychological Defence Agency the task of monitoring the developments and to strengthen the capability to stand against such disinformation campaigns.⁴⁵

Although only limited information is available in the Swedish Psychological Defence Agency's official website, the agency's primary responsibility is to lead the coordination and development of Sweden's psychological defence in collaboration with public authorities and other societal actors. It provides assistance to other government agencies, municipalities, regions, the business sector, and organizations, and contribute to the population's resilience. It is stated that the purpose of 'psychological defence' is, inter alia, to protect Sweden's open and democratic society and the free formation of opinion. The psychological defence identifies, analyses, prevents, and counteracts foreign malign information influence activities and other forms of disinformation aimed at Sweden or Swedish interests. This could include attempts by foreign actors to malign influence aimed at altering people's perceptions or influencing their behaviours and societal decisions. The psychological defence aims to enhance the population's capacity to detect and resist malicious influence campaigns and disinformation as well as to protect vital societal functions, public health and fundamental values such as democracy, the rule of law and fundamental human rights and freedoms.⁴⁶ However, this move was interpreted as returning to 'cold war tactics to battle fake news' in the press. It is stated that the newly established agency could impact free speech and it should 'tread very carefully on controversial issues not to create the impression of the state trying to stifle critical views' which is not an easy task to fulfil.⁴⁷

There are two notable non-governmental actors, which are as follows: Källkritikbyrån and Faktajouren-Fojo. The Källkritikbyrån is a journalistic initiative that evaluates online claims in a methodical manner with the goal of assisting individuals in becoming more self-assured and knowledgeable internet users. It is a part of the Nordic Observatory for Digital Media and Information Disorders, which is a collaboration between researchers and fact-checkers in the nations that make up the Nordic region. They also participate in Meta's independent fact-checking initiative as a third party.⁴⁸

The Linnaeus University in Kalmar's Media Institute Fojo is an autonomous institute for the development of media, and they are the ones in charge of the Faktajouren project. The Faktajouren monitors research and development of strategies, techniques, and models for fact-checking and dealing with inaccurate information that can be found online in Sweden and around the world, and reports on its findings. In addition to these activities, Faktajouren engages in conversation with relevant authorities, organizations, and members of the media business; it also provides financial support to initiatives run by independent media outlets that check the accuracy of their reporting; and it coordinates training for members of the media.⁴⁹

45 Jessica Giandomenico; Hanna Linderstål, Disinformation Landscape in Sweden, EU DisinfoLab, May 2023, p. 4, https://www.disinfo.eu/wp-content/uploads/2023/05/Sweden_DisinfoFactsheet.pdf (last access: 15.06.2023).

46 See, <https://www.mpf.se/en> (last access: 15.06.2023).

47 See, <https://www.theguardian.com/world/2022/feb/06/sweden-returns-to-cold-war-tactics-to-battle-fake-news> (last access: 15.06.2023).

48 Jessica Giandomenico; Hanna Linderstål, Disinformation Landscape in Sweden, EU DisinfoLab, May 2023, p. 7, https://www.disinfo.eu/wp-content/uploads/2023/05/Sweden_DisinfoFactsheet.pdf (last access: 15.06.2023).

49 Jessica Giandomenico; Hanna Linderstål, Disinformation Landscape in Sweden, EU DisinfoLab, May 2023, p. 7, https://www.disinfo.eu/wp-content/uploads/2023/05/Sweden_DisinfoFactsheet.pdf (last access: 15.06.2023).

3. Counter-Terrorism and Freedom of Expression



3.1. Legal Framework

3.1.1. International Law on Counter-Terrorism and Freedom of Expression

The relevant international instruments concerning counter terrorism and freedom of expression, but not limited to the ones listed, are as follows:

UN

- **Universal Declaration of Human Rights**, Art. 19
- **International Covenant on Civil and Political Rights**, Art. 19
- **Human Rights, Terrorism and Counter-Terrorism**, Factsheet No 32, Office of the High Commissioner for Human Rights, July 2008
- **Ten areas of best practices in countering terrorism**, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Human Rights Council, A/HRC/16/51, 22 December 2010
- **General Comment No. 34**, Article 19: Freedoms of Opinion and Expression, Human Rights Committee, CCPR/C/GC/34, 12 September 2011

CoE

- **Guidelines on Human Rights and Fight Against Terrorism** adopted by the Committee of Ministers at its 804th meeting, H (2002) 4, 11 July 2002
- **Council of Europe Convention on the Prevention of Terrorism**, 16 May 2005

Terrorism constitutes one of the most problematic issues in terms of freedom of expression. The concept of 'counter-terrorism' should not be interpreted as a blank check that gives unlimited powers of restraint to public authorities, apart from the restraining regime. Concepts such as 'terrorism', 'terrorist organization', 'membership of a terrorist organization', 'propaganda of a terrorist organization' should be defined as clearly and distinctly as possible in the penal laws, and unnecessary or disproportionate interference with freedom of expression should not be allowed within the scope of these concepts.⁵⁰ Legal regulations should be drafted in a way that does not allow arbitrary implementation and in which case individuals can foresee criminal liability.

Measures taken by states in the name of combating terrorism led to serious and gross interventions in many human rights, especially freedom of expression. It has always been challenging to reconcile freedom of expression with the crime of public provocation to terrorism. The goal of combating terrorism constitutes a legitimate restriction on freedom of expression. However, Art. 10 of the ECHR, which is in parallel with the Art. 11 of the Charter, permits restrictions to freedom of expression only if they are necessary and proportionate 'within a democratic society' and clearly prescribed by law, which includes their accessibility and predictability.

The ECtHR has delivered many judgments relating to terrorism from the standpoint of Art. 10 of the ECHR. According to the Court, an analysis should be held of the content or context of the expressions as well as the aim of the persons involved or the general public's right to be informed of a different point of view on a situation of conflict should be considered in every case related with terrorism.⁵¹ The Court also emphasizes that whoever exercises his freedom of expression undertakes duties and responsibilities.⁵² Although the Court takes into account the problems linked to the prevention of terrorism, it considers that the difficulties raised by the fight against terrorism do not in themselves suffice to absolve the national authorities from their obligations under Art.10 of the ECHR⁵³ In order to determine whether the publication of statements from proscribed terrorist organisations poses a risk of public incitement to commit a terrorist act or vindication of terrorism, it is necessary

⁵⁰ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12.09.2011, § 46.

⁵¹ ECtHR, Gözel and Özer v. Türkiye, Appl. No. 43453/04 and 31098/05, 06.07.2010.

⁵² ECtHR, Leroy v. France, Appl. No. 36109/03, 02.10.2008.

⁵³ ECtHR, Döner and Others v. Türkiye, Appl. No. 29994/02, 07.03.2017.

to consider not only the nature of the author and the recipient of the message, but also the content of the article in question and the context in which it was published. When striking a balance between competing interests, national authorities must consider the public's right to be informed of a different perspective on a conflict situation, from the perspective of one of the conflicting parties, regardless of how unpalatable that perspective may be for them.⁵⁴ Having looked at the Court's jurisprudence, among others, glorifying and condoning criminal and/or terrorist acts,⁵⁵ incitement to violence and support for terrorist activity,⁵⁶ apology of violence and incitement to hostility,⁵⁷ condoning terrorism⁵⁸ and publishing statements by a terrorist organisation⁵⁹ propaganda for a terrorist organisation⁶⁰ are issues that came before the Court within the context of relation between terrorism and freedom of expression.

Opinions that do not incite violence, i.e., by advocating the use of violent means or by justifying terrorist acts to achieve the goals of their supporters, and that cannot be viewed as promoting violence by instilling a deep and irrational hatred of specific individuals, cannot justify any restrictions on freedom of expression. This means that, for instance, measures based exclusively on newspaper articles or pre-trial detention for making political statements against government policies are disproportionate and therefore incompatible with the ECHR. On the other hand, the ECtHR has also ruled that criminalising certain sufficiently specific acts of provocation may be justifiable and proportionate, given the context of the act.

According to the Art. 2 of the Guidelines on Human Rights and Fight Against Terrorism adopted by CoE, 'all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.'⁶¹ In addition, all measures taken by states to combat terrorism must be legal, and any restrictions on human rights must be as precisely defined as possible, necessary, and proportional to the aim pursued (Art. 3). These criteria are in conformity with the criteria used for restrictions of freedom of expression by the international human rights monitoring mechanisms such as ECtHR and UN Human Rights Committee.

Council of Europe Committee on Counter-Terrorism (CDCT) published its 'Council of Europe Counter-Terrorism Strategy (2023-2027)' on 23 February 2023.⁶² Human rights is one of the cross-cutting issues stressed in the strategy. As to the strategy, respect for human rights for all and the rule of law constitutes the fundamental basis of the prevention and fight against terrorism and states are under an obligation to respect the human rights of persons suspected of committing, accused or convicted of having committed terrorist offenses.

Countering terrorism is a legitimate objective when pursuing national security, preventing disorder, and ensuring the protection of others' rights and liberties. Nonetheless, the Convention on the Prevention of Terrorism (CETS No. 196) and human rights law require that all measures taken be non-discriminatory, prescribed by law, necessary in a democratic society, and proportional to attaining this objective.

3.1.2. EU Law on Counter-Terrorism and Freedom of Expression

The relevant instruments regarding counter terrorism and freedom of expression are as follows:

- **Directive on Combatting Terrorism** (Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA)
- **Regulation on addressing the dissemination of terrorist content online** (Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online)

As to counter-terrorism measures, the EU adopted the Directive on combating terrorism which strengthens the legal framework to more comprehensively cover conducts related to terrorism on 15 March 2017. Member states should ensure that they criminalise conduct such as training and travelling for terrorism, as well as

54 ECtHR, Gözel and Özer v. Türkiye, Appl. No. 43453/04 and 31098/05, 06.07.2010.

55 ECtHR, Rouillan v. France, Appl. No. 28000/19, 23.06.2022.

56 ECtHR, Roj TV A/S v. Denmark, Appl. No. 24683/14, 17.04.2018.

57 ECtHR, Sürek (No.1) v. Türkiye, Appl. No. 26682/95, 08.07.1999.

58 ECtHR, Stomakhin v. Russia, Appl. No. 52273/07, 09.05.2018.

59 ECtHR, Ali Gürbüz v. Türkiye, Appl. No. 43930/12, 16.11.2017.

60 ECtHR, Üçdağ v. Türkiye, Appl. No. 23314/19, 31.08.2021.

61 See, https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf (last access: 15.06.2023).

62 See, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a9ad67 (last access: 15.06.2023).

terrorist financing. These harmonised definitions of terrorist offences serve as a benchmark for cooperation and information exchange between national authorities.

The Directive No. 2017/541 strengthened the focus of EU counter-terrorism law on preparatory offenses, which are acts committed with the intent to conduct or contribute to the commission of actual terrorist offenses. Among them is the public incitement to perpetrate a terrorist offense. These crimes are defined by a combination of terrorist intent and everyday behaviour, such as the use of online communication channels.

Art. 5 of the Directive establishes the offense of inciting the public to commission a terrorist offense. It encompasses both offline and online provocation explicitly. The offense consists of two objective elements and one subjective element: the act of communicating, whether online or offline, a message advocating, directly or indirectly, the commission of terrorist offenses; creating an objective risk that an offense will be committed as a result of the act of communication; and doing so with the intent to incite the commission of terrorist offenses. Despite the requirement of danger, it is not necessary that a terrorist act be actively planned or attempted in response to the provocation.

The directive includes provisions for criminalising both direct and indirect provocation. Its scope includes explicitly the glorifying and, as stated in recital 10, the justification of terrorism. In order to differentiate between criminal behaviour and freedom of expression, Recital 10 of the Directive explains that criminalization of public provocation encompasses a variety of behaviours. In addition to direct provocation to commit terrorist crimes, it includes indirect provocation, such as the glorification and justification of terrorist acts, as well as the online and offline dissemination of content related to victims. In addition, recital 40 clarifies that the definition of the offence does not include the expression of radical, polemic, or controversial opinions during public debates on sensitive political issues.

According to Directive's Recital 35, the directive must be carried out in conformity with the rights outlined in the Charter while taking duties under other EU and international human rights treaties into consideration including freedom of expression and information (Art. 11) and freedom of arts and sciences (Art. 13).

As to the FRA, a preventive approach that criminalizes certain activities based on their potential to lead to future terrorist offenses can also affect lawful conduct and may even discourage individuals from pursuing certain activities out of concern for how the government will interpret them. This has implications for freedom of expression and information, freedom of arts and sciences, and freedom of movement, in particular. It can also lead to the investigation of journalists, researchers, artists, and humanitarian organizations who have legitimate reasons for engaging in activities such as traveling to conflict zones or researching terrorism-related information.

Although EU Member States should ensure the criminalization of preparatory offenses like public incitement to terrorism, such efforts should not have an effect on the lawful exercise of individual rights or have a chilling effect on such rights, especially freedom of expression, information, and the arts and sciences. To prevent the involvement of professionals like journalists or researchers in terrorism investigations, practical precautions should be put in place and guidance should be given to investigative agencies.

The mitigation of terrorist content on the internet constitutes a crucial aspect in the efforts to counter-terrorism. The act of requesting the removal or blocking of content, reporting content to service providers for examination, or implementing steps to prevent the uploading of specific content all have significant implications for basic rights and necessitate robust safeguards. Regulation (EU) 2021/784 was adopted in 2021, with the aim of effectively dealing with the proliferation of terrorist content on the internet. As stipulated in Art. 23 of the Regulation, the European Commission is mandated to conduct an assessment of the Regulation, encompassing an examination of its effects on fundamental rights, specifically the freedom of expression and information. This evaluation is to be completed by June 2024.

3.2. EU Member States on Counter-Terrorism and Freedom of Expression

3.2.1. Legislation of Member States

Hungary

The rules concerning terrorism-related offenses are set out in the Criminal Code, however there is no specific provision that cause a restriction on freedom of expression.⁶³

As a response to the terrorist attacks and the threats thereof in Europe in the first few months of 2016, the Hungarian Government announced a plan for a proposed legislative package on combatting terrorism. The Hungarian Parliament adopted the package on 07 June 2016 and neither of the measures were directly related with freedom of expression.⁶⁴

Lithuania

There is no specific law in Lithuania governing the application of criminal liability for terrorist offences. In accordance with the Criminal Code, the Criminal Procedure Code, and the Criminal Intelligence Code, all terrorism-related crimes and the rules governing the investigation and prosecution of such cases are specified. Lithuania places special emphasis on striking an equilibrium between the legal framework for combating terrorism and the protection of human rights. The Criminal Code and Criminal Procedural Code pertain to the suppression of terrorism in Lithuania, which lacks a specific anti-terrorism statute. As part of the process of implementing Council Framework Decision 2008/919/JHA and Directive 2017/541, Lithuania, in 2013, 2017, and 2018, added new crimes to the list of terrorist offences that were already established in the Criminal Code. These new crimes significantly expanded the scope of criminal law in order to ensure effective, proportionate, and dissuasive liability for the commission of terrorism, which is one of the most dangerous crimes.⁶⁵

Sweden

According to the most recent information available, in 2010, a new law went into effect which permits additional measures to be taken against terrorism. The act contains implementation provisions for the Council of Europe Convention on the Prevention of Terrorism and the 2008 Council Framework Decision amending the Framework Decision on combating terrorism. The act, among other things, imposes special criminal liability on those who, in a public message, exhort or otherwise attempt to entice people to commit a particularly severe crime (public provocation).⁶⁶ As to an FRA Report, very few or no cases of public provocation to commit a terrorist offence in Sweden.⁶⁷

Since 2022, Sweden has initiated a shift in its legal framework pertaining to counter-terrorism in response to its request for NATO membership. On 16 November 2022, the Swedish Parliament voted in favour of a constitutional proposition that would enhance the capacity to curtail freedom of association through ordinary legislation for organisations implicated in or endorsing terrorism. This amendment came into effect on 1 January 2023. The amendment enables the Swedish Parliament to propose and enact laws that proscribe terrorist groups or criminalise involvement in their illegal activities.⁶⁸ Before the amendment was adopted, the constitution provided that freedom of association could be limited only if the association related to military matters or if membership in the association involved persecuting a group of people on the basis of ethnic background, race, or similar conditions.

63 See, Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Hungary, 2022.

64 Short Thematic Report, National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies, Legal update. Country: Hungary, Fundamental Rights Agency, 2016, pp. 3-4, https://fra.europa.eu/sites/default/files/fra_uploads/hungary-study-data-surveillance-ii-hu.pdf (last access: 15.06.2023)

65 See, Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Lithuania, 2021, p. 1.

66 Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Sweden, 2014, p. 2.

67 FRA Report, p. 52.

68 See, <https://www.government.se/press-releases/2022/12/constitutional-amendment-offers-greater-possibilities-to-combat-terrorism/> (last access: 15.06.2023)

The Council on Legislation did not endorse the legislation for adoption; rather, it contended that the proposed law exceeds the necessary measures to comply with the EU directive.⁶⁹

On 03 May 2023, an amendment was passed by the Swedish Parliament in the Terrorist Offences Act, which introduced a novel criminal offence: involvement in a terrorist group. The newly introduced criminal offence, which came into force on 01 June 2023, entails specific legal responsibility for individuals who engage in the actions of a terrorist group with the intention of advancing, reinforcing, or endorsing the organisation. The amendment additionally imposes penalties for the provision of financial support towards engagement in a terrorist organisation, the public promotion or recruitment of individuals, as well as the act of travelling abroad with the intention of committing said offence.⁷⁰ The Council on Legislation, an independent body that scrutinizes bills presented to parliament, on 01 March 2023 expressed scepticism regarding the proposed amendment, asserting that the act of criminalising affiliation with a terrorist organisation should be limited to what is strictly necessary in light of its underlying purpose. Furthermore, the Council emphasised the importance of avoiding excessive measures that could potentially undermine the democratic principle of free expression of opinions.⁷¹

Yet again, on 24 May 2023, an additional amendment was enacted, which came into force on 01 June 2023 and includes supplemental requirements to the EU's regulation on measures aimed at combating the transmission of terrorist content on the internet. In accordance with the EU regulations, competent authorities, specifically the Police Authority in Sweden, possess the authority to give directives to hosting service providers, compelling them to eliminate any terrorist content present on their hosting service. The service provider is obligated to fulfil the order within a one-hour timeframe upon its receipt.⁷²

The revisions were adopted with the intention of aligning with the 2018 Directive. However, the newly introduced regulations within the Act may give rise to challenges, particularly in relation to the protection of freedom of expression.⁷³ The Legislative Council (Lagradet), an independent body comprised of jurists responsible for reviewing legislative proposals upon request from the government or a parliamentary committee, expressed scepticism towards the amendment in question. Specifically, the Council on Legislation highlighted that the criminalization of membership in a terrorist organisation should be limited to what is essential for addressing the underlying purpose, without posing a risk to the democratic principle of free expression of opinions. It stated that proposed legislation exceeds the necessary measures to comply with the EU Directive (2017/541), so transforming it from a legal matter into a political one.⁷⁴

3.2.2. Institutional Structure and Practice

Hungary

Terrorism does not pose a threat to or target Hungary, and the majority of the revisions to the law are in response to terrorist actions that have taken place in other countries. After the terrorist attacks in Madrid on 11 March 2004, the Hungarian government reaffirmed the need for a National Action Plan to Combat Terrorism, which had been initially approved in May 2004 (Government Decision 2112/2004 on the current tasks related to counter-terrorism activities of 7 May 2004). At the same time, a Counter Terrorism Committee was established.

First implemented in 2005 (Government Decision 2151/2005 updating the National Action Plan to Combat Terrorism, issued 27 July 2005), the grading of the national terror threat level on a scale from A to D took place that year for the first time. The National Action Plan had several primary goals, the most important of which were

69 See, <https://www.loc.gov/item/global-legal-monitor/2023-06-13/sweden-new-terrorist-crimes-legislation-enters-into-force/#:~:text=Anyone%20who%20participates%20in%20the,a%20maximum%20of%20four%20years> (last access: 15.06.2023)

70 See, https://www.riksdagen.se/en/news/articles/participation-in-a-terrorist-organisation-will-be_cms2ba47018-8789-4bbf-9ff5-4223aa3d6015en/ (last access: 15.06.2023)

71 See, <https://www.lagradet.se/wp-content/uploads/2023/03/En-sarskild-straffbestammelse-for-deltagande-i-en-terroristorganisation.pdf> (last access: 15.06.2023)

72 See, https://www.riksdagen.se/en/news/articles/more-effective-measures-against-the-dissemination_cmsb554a066-4798-424f-a01b-72782f64a6a1en/ (last access: 15.06.2023)

73 See, <https://www.reuters.com/world/europe/new-anti-terror-law-should-convince-turkey-back-nato-bid-swedish-minister-says-2023-05-31/>; <https://www.brusselstimes.com/545866/sweden-amends-anti-terrorism-legislation-to-pave-the-way-for-nato-membership>; <https://www.loc.gov/item/global-legal-monitor/2023-06-13/sweden-new-terrorist-crimes-legislation-enters-into-force/#:~:text=Anyone%20who%20participates%20in%20the,a%20maximum%20of%20four%20years> (last access: 15.06.2023)

74 See, <https://www.lagradet.se/wp-content/uploads/2023/03/En-sarskild-straffbestammelse-for-deltagande-i-en-terroristorganisation.pdf>, pp. 6-8 (last access: 15.06.2023)

to improve the sharing of intelligence and cooperation between police forces around the world, adopt domestic legislation that would make it possible to freeze the assets of people who are suspected of being terrorists, and make changes to the provisions that are already in place regarding the freezing of financial assets.

The National Action Plan to Combat Terrorism underwent an assessment and revision in the year 2007 (Government Decision 2046/2007 on the revision of Government Decision 2112/2004, dated 19 March 2007). The National Security Strategy of Hungary for the Year 2020 comprises concrete features and strategies for countering terrorist organisations and acts of terrorism.

After the terrorist attacks that occurred in Paris on 13 November 2015, the Hungarian government decided to re-establish the Counter Terrorism Committee (Government Decision 1824/2015 on the cohesive implementation of counter terrorism measures, which went into effect on 20 November 2015).

Following the terrorist attacks that took place in Brussels on 22 March 2016, the government of Hungary began the process of developing and adopting a new Counter Terrorism Action Plan. This process resulted in the change of the Fundamental Law as well as thirteen other legislations (including the National Security Act, the Police Act, and the Criminal Code). The law proposal had to be written in conjunction with opposition parties in order to comply with the requirement requiring a majority of two-thirds in order for it to be presented to Parliament on 27 April 2016; it was ultimately approved on 07 June 2016.⁷⁵

There is currently no evaluation that has been carried out by the international human rights monitoring mechanisms etc. that focuses on the effect of counter-terrorism measures adopted by the Government of Hungary. According to an FRA Report, very few or no cases of public provocation to commit a terrorist offence in Hungary.⁷⁶ Distinguishing between lawful and illegal forms of expression is challenging in practice and in Hungary, where there is less experience of such cases, it is stated that the absence of universal criteria and judicial practice makes differentiating lawful from unlawful expression particularly difficult.⁷⁷

Lithuania

The Parliament passed Resolution No. XII-1682 on 07 May 2015, which gave its approval to the Public Security Development Programme for the Years 2015-2025. The third aim of the Programme is to lessen and remove potential dangers that raise the prospect of terrorist activities being committed. The mitigation and removal of potential dangers is accorded a significant amount of focus within the scope of the Programme; hence, particular activities geared towards achieving this aim are outlined within the Programme itself: 'prevent the views of the population from becoming extreme, i.e. so extreme that individuals become recruited for terrorist activities; create unfavourable conditions for terrorist activities in Lithuania and contribute to the efforts of the international community in combating terrorism; strengthen the protection and resilience of potential terrorist targets.'

In addition, this programme includes other objectives and tasks that directly and indirectly effect the reduction and elimination of terrorism risk factors. The third objective of the Programme is to prevent the financing of terrorism. To attain this objective, the Department of State Security has established an inter-institutional working group to address issues related to the fight against terrorism and financing of terrorism.⁷⁸ Regarding the results of international monitoring, there are few criticisms that are largely unrelated to counter-terrorism and freedom of expression. As an example, the UN Human Rights Committee was concerned that the State party has not fully and comprehensively investigated the complicity of the State party and State officials in human rights violations in counter-terrorism operations, including secret detention.⁷⁹ On the other hand, Lithuania was criticised for its policy of publishing the names of associations, news agencies, journalists, human rights defenders, and other individuals in the annual Assessment of Threats to National Security by the State Security Department, without disclosing the criteria and procedures for such publication or its justification. It is recommended that Lithuania stop publicly referring to individuals and organisations that exercise their freedom of expression as 'threats to national security' and ensure that all of its initiatives, legislative and otherwise, guarantee that authors, journalists, human rights defenders, and other individuals and organisations can exercise their right to freedom of expression without hindrance.⁸⁰

75 Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Hungary, 2022, p. 1-2.

76 FRA Report, Directive (EU) 2017/541 on Combating Terrorism: Impact on Fundamental Rights and Freedoms, European Union Agency for Fundamental Rights, Luxembourg, 2021, p. 52.

77 FRA Report, p. 53.

78 Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Lithuania, 2021, p. 1.

79 Human Rights Committee, Concluding observations on the fourth periodic report of Lithuania, CCPR/C/LTU/CO/4, 29.08.2018, § 23, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/262/27/PDF/G1826227.pdf?OpenElement> (last access: 15.06.2023).

80 Human Rights Committee, Concluding observations on the fourth periodic report of Lithuania, CCPR/C/LTU/CO/4, 29.08.2018, §§ 27-28, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/262/27/PDF/G1826227.pdf?OpenElement> (last access: 15.06.2023).

Sweden

In a communication to the Swedish Parliament (Govt. Com. 2011/12:73) dated February 2012, the Swedish government adopted an updated national counter-terrorism strategy. In the Communication, the government lays out a national strategy for preventing the emergence of terrorism, pursuing terrorist attacks, and preparing for the eventuality of a terrorist attack. In the strategy, the Swedish government lays out its perspective on the counterterrorism's origins, goals, and direction. In addition, the government provides an overview of the measures that have been taken, begun, or are planned to address future challenges.

The national strategy for combating terrorism takes a comprehensive approach and involves a wide variety of government institutions in addition to other sectors of society. In addition, the policy addresses any and all manifestations of terrorism and violent extremism, regardless of the reasons for their actions or any other contextual aspects. Threats to Sweden, principles for the fight against terrorism, and objectives and tactics make up the three main sections of the plan. The goals and actions taken in response to the terrorist threat can be broken down into three primary categories: preventing the occurrence of terrorism, pursuing terrorist attacks, and preparing for the eventuality of an attack occurring.⁸¹

However, this strategy faced with criticism on a couple of reasons. The UN Human Rights Committee, while acknowledging the policy principles in the national counter-terrorism strategy and noting Sweden's intention to conduct a comprehensive evaluation of criminal law regulations pertaining to terrorism, was concerned about allegations of the de facto practice of 'branding of persons' of foreign and minority background, unfairly targeting Muslims in counter-terrorism-related law enforcement and investigations. The Committee recommends that Sweden should move forward with its plans to conduct a comprehensive review of the anti-terrorism legislation and ensure that any existing and future anti-terrorism legislation and practices are in full conformity with the State party's obligations under the Covenant, including with the principle of non-discrimination. In addition, the State party should ensure that any existing and future anti-terrorism legislation and practices are consistent with international human rights standards.⁸² The UN Committee on the Elimination of Racial Discrimination was also voiced its concerns about the reports that the Terrorism Act disproportionately targets Muslims, while crimes committed by other groups, such as neo-Nazi groups, are not investigated as terrorism. The Committee, recommends that Sweden should ensure that measures to combat terrorism are undertaken in such a way as to protect fundamental human rights, including the right to equality.⁸³ The criticisms expressed by international mechanisms to date do not apply to the alterations made to the law in 2022 and 2023. However, similar criticisms are likely to be levelled against the most recent amendments.

81 Council of Europe Committee on Counter-Terrorism (CDCT), Profiles on Counter-Terrorism Capacity, Sweden, 2014, p. 1.

82 Human Rights Committee, Concluding observations on the seventh periodic report of Sweden, CCPR/C/SWE/CO/7, 28.04.2016, §§ 22-23, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/087/83/PDF/G1608783.pdf?OpenElement> (last access: 15.06.2023).

83 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden, CERD/C/SWE/CO/22-23, 06.06.2018, §§ 20-21, <https://www.ohchr.org/en/documents/concluding-observations/cerdcsw-co22-23-committee-elimination-racial-discrimination> (last access: 15.06.2023).

4. Hate Speech and Freedom of Expression



4.1. Legal Framework

4.1.1. International Law on Freedom of Expression and Hate Speech

The relevant international instruments regarding freedom of expression and hate speech, although not limited to those listed, are as follows:

UN

- **Universal Declaration of Human Rights**, Art. 19
- **International Covenant on Civil and Political Rights**, Arts. 19, 20
- **International Convention on the Elimination of All Forms of Racial Discrimination**, Arts. 4 and 6
- **Rabat Plan of Action** (Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by the OHCHR in 2011 ('the Rabat Plan'), adopted in Rabat, Morocco, on 5 October 2012)
- **UN Strategy and Plan of Action on Hate Speech**

CoE

- **Recommendation No. R (97) 20 on hate speech** (Recommendation No. R (97) 20 of the Committee of Ministers to Member States on 'hate speech')
- **Recommendation CM/Rec(2022)16 on combating hate speech** (Recommendation CM/Rec(2022)16 of the Committee of Ministers to Member States on combating hate speech)
- **General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Racial Discrimination**, European Commission against Racism and Intolerance, (CRI(2003)8 Rev.
- **General Policy Recommendation No. 15 on Combating Hate Speech**, European Commission against Racism and Intolerance on 8 December 2015, European Commission against Racism and Intolerance, CRI(2016)15
- **Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems**, 2003
- **Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred**, European Commission for Democracy through Law (Venice Commission), adopted at its 76th Plenary Session held in Venice on 17-18 October 2008, CDL-AD (2008)026

Hate speech is one of the most controversial categories of expression. There are categories of expression such as incitement to violence, hate speech, incitement to hatred and hostility, denial of genocide and crimes against humanity which are controversial. As a result of this situation, some expressions may fall within the scope of freedom of expression, while others may not. Once it is decided that an expression falls within the scope of freedom of expression, it is then assessed whether the expression can be restricted or not. Today, it is controversial whether expressions of fascism, racism, discrimination, war propaganda or hatred fall within the scope of the norm of freedom of expression in terms of human rights law. A restriction on such expressions is generally not controversial and can be accepted as a 'positive' restriction of freedom of expression.

It is accepted that hateful expressions may provoke acts of violence against the victims, may cause the victims to react in a way that may lead to violence, and even if no damage is caused in this way, the expressions themselves may cause harm to the persons who are the addressees of such expressions. However, it is necessary to determine the boundary between hateful expressions and expressions of harsh criticism. Expressions that constitute hate speech are not considered harsh criticism and are therefore not protected.

Hate speech is defined as ‘...all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as ‘race’, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation.’⁸⁴ However, there lacks a consensus over a unified definition throughout Europe.

ECtHR gives significant weight to the severity of a criminal penalty in defamation cases, especially when a matter of public interest is at stake. In this regard, it has reaffirmed that the imposition of a prison sentence for a press offence will be compatible with the freedom of expression of journalists as guaranteed by Art. 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been gravely violated, as in the case of hate speech or incitement to violence.⁸⁵ The Court put considerable weight to proportionality of the conviction, thus a prison sentence of two years and six months imposed on the applicant as ‘grossly disproportionate’,⁸⁶ on the other hand a criminal conviction of a businessman for hate speech against ethnicities, accompanied by a fine and two-year ban on journalistic or publishing activities has found proportionate.⁸⁷

When the discourse is disseminated through the distribution of pamphlets belonging to a political party in the context of an election campaign⁸⁸ or via the Internet, which amplifies the potential influence of the words, the medium that is utilised may have a certain degree of significance. This is especially true in situations in which the Internet is employed. The Court is of the opinion that communication that is clearly unlawful, including speech that incites violence and speech that promotes hatred, can be transmitted faster than ever before, on a global scale, and in a matter of seconds, and can occasionally continue to be made available online.⁸⁹ This is the case even when the speech is not defamatory. This indicates that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press; consequently, it is essential for the evaluation of the potential influence of an online publication to determine the extent to which it is accessible to the general public.⁹⁰

Due to the extreme nature of the comments, which amounted to either hate speech or incitements to violence, the ECtHR decided that it was permissible under Art. 10 of the ECHR to order an Internet news portal to pay damages for insulting anonymous comments placed on its site. This decision was made in light of the fact that the comments had been uploaded anonymously.⁹¹ The Court determined that the objective liability of Internet portals for third-party comments was not compatible with Art. 10 of the ECHR because the user comments in question did not contain any hate speech or any direct threats to the physical integrity of the individual.

Along with the legal approach to hate speech, other measures also should be considered for an effective response to such an essential threat to human rights of others. The specific measures against the use of hate speech that ECRI considers to be necessary include efforts that involve: raising public awareness; countering any use of hate speech; providing support to those targeted by such use; promoting self-regulation; taking regulatory action; imposing administrative and civil liability; withdrawing support from particular organisations and prohibiting others; and imposing criminal sanctions in some very specific and limited circumstantial circumstances.⁹²

84 Recommendation CM/Rec(2022)16 of the Committee of Ministers to Member States on combating hate speech adopted by the Committee of Ministers on 20 May 2022.

85 ECtHR, *Cumpănă and Mazăre v. Romania*, Appl. No. 33348/96, 17.12.2004, § 115.

86 ECtHR, *Fatullayev v. Azerbaijan*, Appl. No. 40984/07, 22.04.2010.

87 ECtHR, *Atamanchuk v. Russia*, Appl. No. 4493/11, 11.02.2020.

88 ECtHR, *Féret v. Belgium*, Appl. No. 15615/07, 16.07.2009, § 76.

89 ECtHR, *Delfi AS v. Estonia*, Appl. No. 64569/09, 10.12.2013, § 110.

90 ECtHR, *Savva Terentyev v. Russia*, Appl. No. 10692/09, 28.08.2018, § 79; *Delfi AS v. Estonia*, § 133.

91 ECtHR, *Delfi AS v. Estonia*, Appl. No. 64569/09, 10.12.2013.

92 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, European Commission against Racism and Intolerance, CRI(2016)15, 21.03.2016, p. 13, § 4.

4.1.2. EU Law on Freedom of Expression and Hate Speech

The relevant international instruments concerning freedom of expression and hate speech are as follows:

- **Council Framework Decision 2008/913/JHA on Combatting Racism and Xenophobia** (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)
- **The EU Code of conduct on countering illegal hate speech online 2016**

The 2008 Framework Decision, which is main instrument in the EU context, provides for the approximation of laws and regulations of EU countries on offences involving certain manifestations of racism and xenophobia and aims to the suppression of specific manifestations of racism and xenophobia mandates the enactment of laws that criminalise the public instigation of violence or animosity towards individuals on the basis of their race, colour, religion, descent, or national or ethnic origin. It is imperative that all Member States establish legislation that deems certain and severe instances of racism and xenophobia as criminal offences. These offences should be subject to sanctions that are both effective and proportionate, with the aim of discouraging such behaviour. As per the provisions outlined in the Framework Decision, the subsequent actions are to be deemed as criminal offences and subject to legal sanctions within the realm of criminal law:

- The act of publicly inciting violence or promoting hatred towards a specific group of individuals or a member of said group, based on their race, colour, descent, religion or belief, or national or ethnic origin;
- The aforementioned offence when executed through the public dissemination or distribution of written materials, images, or other forms of media;
- Publicly endorsing, denying, or significantly downplaying the severity of crimes such as genocide, crimes against humanity, and war crimes, as defined in the Statute of the International Criminal Court (Articles 6, 7, and 8), and crimes outlined in Article 6 of the Charter of the International Military Tribunal. This conduct is deemed as likely to incite violence or promote hatred towards the aforementioned group or a member of said group;
- Instigating, aiding or abetting in the perpetration of the aforementioned offences.

In May 2016, the European Commission reached an agreement with Facebook, Microsoft, Twitter, and YouTube to establish a 'Code of Conduct on countering illegal hate speech online' as a means to proactively prevent and address the dissemination of such content. To date, Instagram, Snapchat, Dailymotion, Jeuxvideo.com, TikTok, LinkedIn, Rakuten Viber, and Twitch have all declared their intention to adhere to the Code of Conduct. The Code of Conduct is established through a collaborative effort involving the European Commission, IT companies, NGOs, and national authorities. Regular meetings are held by all relevant parties under the framework of the High-Level Group on combatting hate speech and hate crime, with the purpose of engaging in discussions regarding the various difficulties and advancements in this area. The evaluation of the implementation of the Code of Conduct is conducted through a systematic monitoring process established in partnership with a consortium of organisations situated throughout several EU Member States. These institutions employ a widely accepted approach to assess the implementation of the obligations outlined in the Code by IT firms.

Furthermore, it is worth noting that the EU has adopted various legal instruments to address the problem of hate speech in specific domains, such the Audiovisual Media Services Directive (2010/13/EU) and the e-Commerce Directive (2000/31/EC). In contrast to the Framework Decision, the two directives exhibit a broader scope in terms of prohibiting incitement to hatred.

4.2. EU Member States on Hate Speech and Freedom of Expression

4.2.1. Legislation of Member States

Hungary

Art. IX, Section 4 of the Hungarian constitution states that the right to freedom of expression cannot be used to violate the human dignity of others. The Criminal Code implements the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law in its Art. 216(1) and (4) (violence against a member of a community) and Art. 332 (incitement against a member of a community)⁹³ Art 332 is regarded as the main remedy against hate speech in the public sphere, however according to ECRI, the effectiveness of the legal framework on hate speech falling within criminal law remains extremely limited due to the strict judicial interpretation of legal requirements.⁹⁴ Art. 333 (public denial of genocide or crimes against humanity committed by the communist or national socialist regimes) of the Criminal Code also corresponds to the Framework Decision.⁹⁵ In December 2021, the European Commission initiated infringement procedures against Hungary due to its failure to enact legislation that criminalises the public endorsement, denial, or significant trivialization of international crimes.⁹⁶

Lithuania

Freedom of expression is addressed in Art. 25 of the Constitution, which also forbids the incitement of national, racial, religious, or social hate, violence, or discrimination, as well as the spreading of defamation or falsehoods. Freedom of thought, conscience, and religion are all guaranteed by Art. 26. The Criminal Code covers a series of provisions to address the racism and racial discrimination. Art. 60 of the Criminal Code includes racist motivation in the list of aggravating circumstances and covers also acts that have been committed in order to express hatred towards a group of persons or a person on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views.

The criminal liability for hate speech is mainly foreseen under Art. 170 (Incitement against any national, racial, ethnic, religious or other groups of persons), 170(1) (activity of groups or organizations with the aim to discriminate or incite against some group of people), 170(2) (public approval, denial or gross mitigation of international crime, crimes towards Republic of Lithuania or its residents by USSR or Nazi Germany) of the Criminal Code.⁹⁷ Inciting discrimination against the enumerated grounds in the Art. 60 is against the law, as stated in Art. 170 of the Criminal Code which lead to a punishment of a fine or an imprisonment for a term of up to two years.⁹⁸ The article also punishes the production, distribution, acquisition, transportation or storage of items that incite hatred. However, it does not criminalise public defamation or threats as well as the public expression, with a racist aim, of an ideology that claims superiority.

ECRI in its 2016 report recommended that the Criminal Code be brought fully in line with its General ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination in order to add colour and citizenship, as well as gender identity to the list of enumerated grounds, to amend Art. 170 in order to criminalise public defamation or threats, and the public expression, with a racist aim, of an ideology that claims superiority.⁹⁹

93 Franet National contribution to the Fundamental Rights Report 2021, Hungary, p. 19.

94 ECRI Report on Hungary (sixth monitoring cycle), the European Commission against Racism and Intolerance, 06.12.2022, p 6.

95 Franet National contribution to the Fundamental Rights Report 2021, Hungary, p. 19.

96 See, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (last access: 15.06.2023).

97 Franet National contribution to the Fundamental Rights Report 2022, Lithuania, p. 10.

98 A person who, by making public statements orally, in writing or by using the public media, ridicules, expresses contempt for, urges hatred towards or encourages discrimination against a group of residents or against a specific person, on account of his or her sex, sexual orientation, race, 'nationality', language, ethnicity, social status, faith, religion or beliefs, shall be punished with (a) a fine, (b) detention or (c) imprisonment for up to 3 years.

99 ECRI Report on Lithuania (fifth monitoring cycle), the European Commission against Racism and Intolerance, 18.03.2016, §§ 3-8.

On 09 June 2021, the European Commission issued decisions on infringements in ‘Combating racism and xenophobia’¹⁰⁰ where indicated that the Lithuanian legal framework ‘still fails to criminalise hate speech and hate crime when based on the grounds of ethnic origin and/or colour. Moreover, Lithuania criminalises the conduct of condoning, denial, and gross trivialisation of international crimes and the Holocaust only when public order is disrupted. Finally, the Lithuanian legal framework criminalises those conducts with regard to the Holocaust only when perpetrated in the territory of Lithuania or against Lithuanian citizens’¹⁰¹ In September 2021, the Lithuanian Government introduced amendments to the articles on hate speech of the Criminal Code supplementing the grounds.¹⁰²

On 05 May 2022, the amendments to Criminal Code Arts. 60 and 170 concerning hate speech went into effect. In addition to age, sex, sexual orientation, disability, ethnicity, nationality, language, descent, social status, religion, convictions, and viewpoints, the amendments include skin colour and ethnic origin as grounds for hate crimes and hate speech. The 05 May 2022 amendments to Art. 170(2) (Public approval, denial, or gross mitigation of international crime, crimes against the Republic of Lithuania or its residents by the USSR or Nazi Germany) address the infringements identified by the European Commission and expand the applicability of the law by applying it not only to the cases when public order is disrupted, and not only in relation to acts committed on the territory of Lithuania or against Lithuanian citizens.¹⁰³

It is against the law also to publish information that ‘instigates war propaganda, war or hatred, ridicule, or scorn, or instigates discrimination, violence, harsh treatment of a group of people or a person belonging to it on the basis of gender, sexual orientation, ethnic origin, race, ‘nationality’, citizenship, language, origin, social status, belief, convictions, views or religion’ as stated in Art. 19 of the Law on the Provision of Information to the Public.

Sweden

There is no direct or indirect reference to hate speech in Swedish Basic Laws (Constitution). However, there exists a hate speech provision in Criminal Code in Chapter 5, Art. 5(3) and (4) criminalising defamation and insults on the grounds of ethnicity, religion, sexual orientation and transgender identity. The maximum prison sentence for hate speech, as set out is two years. Chapter 16, Art. 8 criminalise the dissemination of threats or expressions of contempt (agitation) based on these grounds. The Criminal Code also covers provisions against racism, racial discrimination and racially aggravated offences. ECRI stated that the provisions of the Swedish Criminal Code reflect most of ECRI’s recommendations concerning criminal law contained in its GPR No. 7 on national legislation to combat racism and racial discrimination.¹⁰⁴

4.2.2. Institutional Structure and Practice

Hungary

According to a report by UN Special Rapporteur, it is recommended that Hungary should publicly denounce and prosecute all instances of hate speech stigmatization and discrimination against such vulnerable groups - including by strengthening efforts to eradicate stereotyping and discrimination and by providing training to law enforcement officials to tackle violence, threats and harassment, both online and offline.¹⁰⁵

The UN Human Rights Committee was concerned about the prevalence of hate crimes and about hate speech targeting minorities, notably Roma, Muslims, migrants and refugees, in political discourse, in the media, on the Internet and recommended that Hungary should regularly, publicly and effectively reaffirm that any advocacy of ethnic or racial hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law and should act promptly to bring perpetrators of hate crimes to justice. It should take effective measures to

100 Franet National contribution to the Fundamental Rights Report 2022, Lithuania, pp. 15-16.

101 European Commission (2021) ‘June Infringements package: key decisions’, 9 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743 (last access: 15.06.2023).

102 Franet National contribution to the Fundamental Rights Report 2022, Lithuania, p. 3.

103 Franet National contribution to the Fundamental Rights Report 2023, Lithuania, p. 16.

104 ECRI Report on Sweden (fifth monitoring cycle), the European Commission against Racism and Intolerance, 05.12.2017, § 3.

105 Visit to Hungary-Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/50/29/Add.1, 11.05.2022, §§ 63 and 94, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/338/64/PDF/G2233864.pdf?OpenElement> (last access: 15.06.2023).

improve the reporting, investigation, prosecution and punishment of hate crimes and criminal hate speech, in accordance with its obligations under the Covenant, and should strengthen its efforts to eradicate stereotyping and discrimination against migrants, refugees, Jews and Roma, among others, by conducting public awareness campaigns to promote tolerance and respect for diversity and to highlight the unacceptability of racial profiling.¹⁰⁶ In addition, the UN Committee on the Elimination of Racial Discrimination,¹⁰⁷ the Commissioner for Human Rights of Council of Europe¹⁰⁸ and ECRI¹⁰⁹ also brought forward criticisms that were comparable to the UN Human Rights Committee.

As to the application of legal framework against hate speech, charges were brought under Art. 332 of the Criminal Code (incitement to hatred and violence against a community) in seven cases between 2016 and 2020, however, unofficial data gathered by NGOs on racist incidents are higher than official figures.¹¹⁰ Very few cases appear to be successful in court due to the strict judicial interpretation requiring an obvious and present danger of violence. In this regard, the limited interpretation of this criminal offense renders it practically ineffective in practice. Therefore, ECRI urged the authorities to review the implementation of Art. 332 of the Criminal Code in order to ensure that hate speech is effectively prosecuted and punished.¹¹¹

Lithuania

The UN Human Rights Committee is concerned about intolerance and prejudice towards vulnerable and minority groups as well as the prevalence of hate speech against these groups, including on the Internet. The committee has noted the legislative and other measures taken by the State party to combat hate speech. Despite this, the committee remains concerned about these issues and criticizes that hate speech based on gender identity are not expressly prohibited in national legislation (Art. 170 of the Criminal Code) and at reports that the aggravating circumstance established under Art. 60 of the Criminal Code has never been applied on the ground of sexual orientation. The Committee recommended the Lithuania to strengthen its efforts to combat intolerance, stereotypes, prejudice and discrimination towards vulnerable and minority groups, including Roma, Jews, migrants, refugees, asylum seekers etc., by, *inter alia*, increasing training for law enforcement personnel, prosecutors and the judiciary and conducting awareness-raising campaigns promoting sensitivity and respect for diversity among the general public; increase its efforts to prevent hate speech, including by effectively implementing Art. 170 of the Criminal Code, and ensure that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law, including on the ground of gender identity.¹¹²

The UN Committee on the Elimination of Racial Discrimination was troubled by the strong prejudices and negative attitudes prevalent in the State party towards members of vulnerable and minority groups, especially migrants, Muslims, and Roma. It is also concerned that hate speech, incitement to hostility, and anti-Semitic speech have been used in the media, including online media, and the political arena. In addition to the recommendations of the UN Human Rights Committee, the Committee recalled to address hate speech in cooperation with civil society and representatives of the most affected communities.¹¹³

106 Human Rights Committee, Concluding observations on the sixth periodic report of Hungary, CCPR/C/HUN/CO/6, 09.05.2018, §§ 17-18, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/129/41/PDF/G1812941.pdf?OpenElement> (last access: 15.06.2023).

107 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary, CERD/C/HUN/CO/18-25, 06.06, 2019, §§ 16-17, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/152/91/PDF/G1915291.pdf?OpenElement> (last access: 15.06.2023).

The Commissioner for Human Rights of Council of Europe, Memorandum on freedom of expression and media freedom in Hungary, Com-mDH(2021)10, 30.03.2021, p. 14, <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e> (last access: 15.06.2023).

108 The Commissioner for Human Rights of Council of Europe, Memorandum on freedom of expression and media freedom in Hungary, Com-mDH(2021)10, 30.03.2021, p. 14, <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e> (last access: 15.06.2023).

109 ECRI Report on Hungary (sixth monitoring cycle), the European Commission against Racism and Intolerance, 06.12.2022, § 50.

110 ECRI Report on Hungary (sixth monitoring cycle), the European Commission against Racism and Intolerance, 06.12.2022, §§ 38-39.

111 ECRI Report on Hungary (sixth monitoring cycle), the European Commission against Racism and Intolerance, 06.12.2022, § 53.

112 Human Rights Committee, Concluding observations on the fourth periodic report of Lithuania, CCPR/C/LTU/CO/4, 29.08.2018, §§ 11-12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/262/27/PDF/G1826227.pdf?OpenElement> (last access: 15.06.2023).

113 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined ninth and tenth periodic reports of Lithuania, CERD/C/LTU/CO/9-10, 07.06.2019, §§ 11-12, <https://documents.un.org/doc/undoc/gen/g19/154/20/pdf/g1915420.pdf?token=Le26ntS6pHXDPEJaAS-&fe=true> (last access: 15.06.2023).

Sweden

As for the Sweden, the UN Committee on the Elimination of Racial Discrimination expressed its concerns concerning racist hate speech against Afro-Swedes, Jews, Muslims and Roma continues in the State party, particularly during election campaigns, as well as in the media and on the Internet. The Committee is also concerned about the gap between the number of reported cases of hate speech on the one hand, and the number of investigations, prosecutions and convictions of perpetrators, on the other. The Committee recommended that Sweden to step up its efforts to effectively implement and enforce existing legislation and continue taking the necessary measures to protect vulnerable groups such as Muslim ethno-religious minority groups, Afro-Swedes and persons of African descent; from racist hate speech, racist violence and other hate crimes; effectively identify, register and investigate cases of racist hate speech or incitement to racial hatred and racially motivated violence and hate crimes, and prosecute and sanction those responsible; provide mandatory and continuous training on preventing racist hate speech, racist violence and hate crimes to law enforcement officials at all levels, and continue addressing the issue of underreporting; publicly condemn and distance itself, including in online media, from racist hate speech and xenophobic statements made by public officials and politicians, and fully apply the relevant legislation.¹¹⁴

The UN Human Rights Committee was concerned about continued reports of hate speech, including on the Internet, racist and xenophobic violence against Muslims, Afro-Swedes, Roma and Jews, as well as the chronic negative portrayal of Muslims in the media and stated that Sweden should redouble its efforts, both through law enforcement activities and awareness-raising, to combat hate speech, including on the Internet, racist and xenophobic violence against and negative stereotyping and portrayal of ethnic or religious minorities.¹¹⁵

ECRI has been informed by civil society groups that they have observed a considerable increase in hate speech on the Internet, in particular on social media, in recent years, which includes hate speech against migrants/refugees, black persons, Roma, religious groups, such as Islamophobic and anti-Semitic hate speech.¹¹⁶

Sweden has received a formal notice from the European Commission for not transposing fully the Framework Decision on Racism and Xenophobia:¹¹⁷ *The Swedish legislation incorrectly transposes hate speech inciting to violence and fails to criminalise hate speech when addressed to individual members of a group defined by reference to race, colour, religion, descent or national or ethnic origin. In addition, Finland and Sweden fail to criminalise the specific forms of hate speech, namely the public condoning, denial or gross trivialisation of international crimes and the Holocaust.*¹¹⁸

Overall Assessment

Freedom of expression means that individuals are able to freely access news and information, the ideas of others, not be condemned for their thoughts and opinions, and freely express, tell, defend, transfer and disseminate them, by oneself or together with others, by various means.

Everyone has the right to freedom of expression. However, it may be possible that the freedom of expression may be restricted more in certain situations. In the case of hate speech, disinformation and the fight against terrorism, which are emphasised in the study, within the framework of freedom of expression, it may be justifiable to impose more limits or impose more stringent penalties on individuals who possess the ability to shape public opinion.

Freedom of expression includes the freedom to express and disseminate ideas even that are deemed 'worthless' or 'useless' to others. However, it is accepted that some expressions, such as hate speech, terrorist speech or disinformation should not benefit from the protection of freedom of expression. A limitation in this direction can be accepted as a 'positive' limitation of freedom of expression. Given the focus of this study on hate speech, disinformation, and counter-terrorism, it is anticipated that interventions targeting these issues may potentially

¹¹⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden, CERD/C/SWE/CO/22-23, 06.06.2018, §§ 11-23, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/154/20/PDF/G1915420.pdf?OpenElement> (last access: 15.06.2023).

¹¹⁵ Human Rights Committee, Concluding observations on the seventh periodic report of Sweden, CCPR/C/SWE/CO/7, 28.04.2016, §§ 16-17, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/087/83/PDF/G1608783.pdf?OpenElement> (last access: 15.06.2023).

¹¹⁶ ECRI Report on Sweden (fifth monitoring cycle), the European Commission against Racism and Intolerance, 05.12.2017, §§ 17-31.

¹¹⁷ Franet National contribution to the Fundamental Rights Report 2022, Sweden, p. 16.

¹¹⁸ European Commission (2021) February 2021 Infringement Package: Key decisions, Brussels, 18 February 2021.

infringe onto freedom of expression. Consequently, it is crucial for the restriction regime to be implemented with careful consideration in each specific instance.

The restriction of specific forms of expression, such as those related to counter-terrorism efforts, combating disinformation, or addressing hate speech, can be seen as a sort of interference on the freedom of expression. States are anticipated to undertake measures to restrict freedom of expression, so contradicting the endeavours made to safeguard it, while permitting such interference. By adopting measures that curtail freedom of expression, states can potentially use the authority bestowed upon them in relation to alternative forms of expression, thereby engaging in abusive practices. Consequently, it is imperative to establish clear definitions for hate speech, incitement to terrorism, terrorist propaganda, and disinformation to the greatest extent possible, ensuring that their categorization as exceptions to the principle of freedom of expression is well justified.

Firstly, with regard to hate speech, this rationale might be illustrated by conceptualising hate speech as an endeavour to undermine fundamental human rights, impede the attainment of equality, and eradicate the principles of diversity. In reality, international human rights institutions do not encompass hate speech within the parameters of freedom of expression, as per this rationale. The compatibility between the metaphor of 'freedom-security balance' and the concept of human rights in the context of counter-terrorism is questionable, as the former prioritises the security of the state over the rights and freedoms of individuals. Hence, the contention of safeguarding the rights and liberties of individuals in the combat against terrorism may serve as a foundation for such a rationale. The link between hate speech, the battle against terrorism, and freedom of expression is a topic of significant importance due to their status as 'traditional' issues. The issue of establishing a connection between freedom of expression and the relatively recent phenomena of disinformation has not received adequate emphasis thus far.

The act of limiting hate speech, disinformation, and the interference of particular manifestations in the context of counterterrorism efforts should not result in the suppression of information and ideas that are provocative, startling, and unsettling. Human rights organisations express legitimate concerns regarding the potential consequences of interventions targeting certain forms of speech, as such actions may inadvertently serve as a precedent for interventions against other forms of expression. These organisations periodically highlight this possibility to raise awareness and foster discussion.

While it is possible to enforce limitations on the exercise of freedom of expression within the domains of hate speech, counter-terrorism, and disinformation, such restrictions should be construed in a manner that upholds and prioritises the principle of freedom of expression. This approach is justified by the fact that curtailment of this freedom should be viewed as an exceptional measure, with the preservation of freedom serving as the overarching guiding principle.

The internet and social media platforms have become prominent venues of expressions in relation to issues like as hate speech, disinformation, and counter-terrorism, thus counter-measures aimed at restricting freedom of expression are predominantly focused on these channels. Given the significance of the Internet in relation to the protection of freedom of expression, it is imperative to adhere rigorously to the principle of proportionality when undertaking interventions on the above-mentioned grounds.

Freedom of expression is enshrined in Art. 11 of the Charter of Fundamental Rights of the European Union which is addressed to the institutions and bodies of the EU in all their actions and national authorities when they are implementing EU law. The Charter provides the European Commission able to step in for instance, when EU legislation is adopted or when a national measure uses EU law in a manner that is incompatible with the Charter. The Member States of the EU each have their own constitutional and judicial frameworks in place to safeguard rights and freedoms. They must also uphold the principles of the ECHR and other international human rights documents. They are not superseded by the Charter. Accordingly, it is the responsibility of national courts to protect citizens' rights to freedom of expression.

As stated above, this study examines the legislative and practical measures adopted by three EU Member States (Hungary, Lithuania, and Sweden) in relation to freedom of expression. The legislation and practice of these three countries are regarded as valuable sources of information pertaining to the three topics highlighted in the study. Regarding the research, it is important to acknowledge that while counter-terrorism and hate speech have been longstanding concerns, the association between disinformation and freedom of expression has gained increasing attention in recent years.

Disinformation

The constitutions of all three countries analysed in this study include freedom of expression. However, only the Lithuanian Constitution directly includes the concept of disinformation and recognises it as one of the reasons for limiting freedom of expression. At the legislative level, during the COVID-19 pandemic in Hungary, an amendment was made to the criminal code in order to combat disinformation, and this temporary amendment was later repealed. However, this amendment was criticised both because it was made in the field of criminal law and because the amendment included ambiguous expressions. In Lithuania, there is a regulation in the field of media law, but not in criminal law. Law on the Provision of Information to the Public, defines disinformation as ‘intentionally disseminated false information’ and Art. 19 prohibits the dissemination of disinformation in the media. As to specific legislation focusing upon disinformation, Sweden does not have any laws targeting it.

Legislation on disinformation in Hungary and Lithuania appears to be largely based on factual grounds. In Sweden, on the other hand, disinformation seems to be an issue that has been on the agenda relatively less until recently, so it is understandable that there is no legal regulation in this field. This suggests that the existence and extent of disinformation may require direct legal regulation on the issue. On the other hand, making legal arrangements in this field only in the field of criminal law may lead to serious problems in terms of freedom of expression, and for this reason, it seems more appropriate to draft criminal law regulations to be applicable in exceptional cases, and to make regulations in the field of administrative law and civil law.

Among the three member states, Sweden and Lithuania has established governmental bodies focusing on disinformation. However, those bodies are founded only with security concerns. The development of a formalised institution dedicated to addressing disinformation may not be a suitable course of action, as it has the potential to impose arbitrary limitations on the freedom of expression. In all three states, there are notable non-governmental actors combatting disinformation. In this regard, a recommended course of action to be implemented within the civic space in conversation with relevant authorities, organizations, and members of the media and bolstered by legislative provisions appears to be a more suitable resolution.

Counter-Terrorism

As stated above, the concept of terrorism presents significant challenges with regards to the protection of freedom of expression. The interpretation of the concept of ‘counter-terrorism’ should not be seen as granting public authorities a carte blanche power of restriction. Safeguarding freedom of expression requires precise definitions for terms such as ‘terrorism’, ‘terrorist propaganda’ etc. within criminal law. Although, the aim of combating terrorism constitutes a legitimate restriction on freedom of expression, restrictions to freedom of expression are permissible only if they are necessary and proportionate within a democratic society and clearly prescribed by law, which includes their accessibility and predictability. Opinions that refrain from promoting violence, such as advocating for the use of nonviolent means or justifying acts of terrorism to further the objectives of their proponents, and that do not appear to endorse violence by fostering an intense and irrational animosity towards particular individuals, cannot serve as grounds for imposing limitations on the freedom of expression.

As to EU Law, the Directive No. 2017/541 which was adopted on 15 March 2017, obliges Member States to ensure that they criminalise conduct such as training and travelling for terrorism, terrorist financing as well as public incitement to perpetrate a terrorist offense. The implementation of a preventive strategy that criminalises specific behaviours due to their potential association with future terrorist acts might have unintended consequences on lawful behaviour. This approach may inadvertently deter individuals from engaging in certain activities due to apprehension about potential misinterpretation by governmental authorities. These findings have significant ramifications for the principles of freedom of expression and information, as well as the freedoms associated with arts and sciences, and the freedom of travel, specifically. Furthermore, this practice may result in the scrutiny of journalists, academics, artists, and humanitarian organisations who possess valid justifications for partaking in endeavours such as visiting areas of war or conducting investigations pertaining to terrorism-related matters. The criminalization of incitement to terrorism should not impede the legitimate exercise of freedom of expression or have a chilling effect on it.

The analysis indicates that all three nations examined have implemented the necessary modifications in the realm of counter-terrorism in accordance with EU legislation. Given that these three nations have not been subjected to direct acts of terrorism, the aforementioned legislative modifications do not appear to exert any discernible influence on the freedom of speech. At present, there exists limited evaluations conducted by international human rights monitoring bodies specifically addressing the impact of counter-terrorism measures on the freedom of expression. Nonetheless, it is conceivable that the legislative modifications undertaken by Sweden in relation to its pursuit of NATO membership over the period of 2022-2023 could potentially exert an adverse influence on the fundamental right of freedom of expression. Nevertheless, due to the recent introduction of these restrictions, the trajectory of their development remains uncertain.

Hate Speech

As previously mentioned, hate speech is widely recognised as a highly contentious kind of expression. Controversial forms of communication encompass various categories, including incitement to violence, hate speech, incitement to hatred and enmity etc. The present circumstances may lead to certain expressions being encompassed by the realm of freedom of expression, while others may not be included. Once it has been determined that an expression falls within the purview of freedom of expression, the subsequent step involves evaluating whether limitations can be imposed on said statement. The current debate is around the question of whether the manifestation of hatred may be considered as protected forms of freedom of expression under the framework of human rights law or excluded from it.

The instrument in the EU law, the 2008 Framework Decision obliges Member States to the enact laws that criminalise the public provocation of violence or animosity towards individuals on the basis of their race, colour, religion, descent, or national or ethnic origin. It can be observed that Member States still encounter difficulties in complying with this regulation.

The analysis reveals that the constitutions of two out of the three countries under examination incorporate clauses that indicate the inadmissibility of hate speech within the framework of freedom of expression. However, it is noteworthy that the Swedish Constitution does not include any such provision. Furthermore, despite the presence of certain challenges, it is worth noting that all three countries have implemented legal frameworks that explicitly prohibit hate speech. Among these countries, Hungary was subjected to an infringement proceeding in the context of EU Law as a result of its failure to pass legislation that criminalises the public acceptance, denial, or significant trivialization of international crimes. A similar situation arose in relation to Lithuania, wherein several deficiencies in the statute were identified.

In contrast to concerns around counter-terrorism and disinformation, all three countries are subject to significant international scrutiny regarding their handling of hate speech, as highlighted by several human rights mechanisms. At present, it is evident that the critiques emerge mostly in relation to the execution of policies rather than legislative requirements. Hence, with the prescribed legal measures, it is imperative to effectively implement the pertinent rules. This scenario suggests that despite the longstanding presence of conventional legal measures against hate speech, they prove inadequate in addressing the escalating issue, particularly with the proliferation of the Internet and social media. Consequently, it is an obligation for entities such as official or social media companies, who bear responsibility in this domain, to collaborate and exert substantial efforts to combat hate speech effectively.

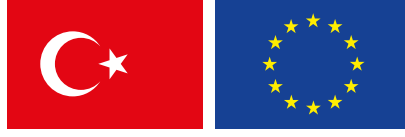
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