

ARTICLE19

A stylized map of Europe is shown in a light yellow color against a darker yellow background. A black location pin is placed over the country of Austria. The text 'Austria: Responding to 'hate speech'' is overlaid on the map in white.

# Austria: Responding to 'hate speech'

2018

Country Report

## ARTICLE 19

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## Executive summary

This report examines legislation and practices related to ‘hate speech’ in Austria, with a particular focus on the media. It examines how relevant legislation complies with international standards on freedom of expression and offers recommendations for improvement.

Although the problem of ‘hate speech’ in Austria is by no means new, finding effective ways to tackle the issue is now much-discussed in Austrian society, in particular as it relates to the online world. Although the main targets of ‘hate speech’ in recent years have been migrants and refugees, ‘hate speech’ and hate crime, as well as prejudice and discrimination more generally, target other minority groups in society. These attitudes are reflected in the media, particularly in certain tabloid newspapers.

Although Austria is typically understood to have strong protections to the right to freedom of expression, reports do show concerns around media pluralism. Also, despite the fairly robust protection afforded both to the right to freedom of expression and equality by Austrian law, the existing legal framework on ‘hate speech’ does not fully comply with international human rights standards.

Relevant protections against ‘hate speech’ are found in a range of laws, which contribute to confusion about this topic. Criminal law provisions, including those on incitement, are predominantly applied when responding to ‘hate speech’ – with varying levels of effectiveness. There is a lack of clarity on the distinctions between levels of ‘hate speech,’ depending on the degree of severity, and the need to adapt responses accordingly. Higher courts have often issued contradictory decisions in comparable ‘hate speech’ cases, creating legal uncertainty about how relevant provisions should be interpreted by the lower courts. Austrian criminal law also contains a number of speech-related provisions which do not comply with international standards (e.g. criminal defamation or blasphemy), which are often conflated with ‘hate speech,’ leading to further confusion on what speech can be legitimately restricted.

There is no evidence that victims of ‘hate speech’ find recourse in remedies other than criminal law – in particular, administrative or civil law. There are several equality bodies with mandates to protect individuals from discrimination in the workplace, particularly on the grounds of disability. However, Austria lacks clarity on the role of these institutions in addressing the systemic roots of discrimination, and their role in addressing ‘hate speech’ is minimal. None of these institutions is tasked with systematic collection and documentation of the forms and roots of ‘hate speech,’ nor with providing effective assistance to victims of ‘hate speech.’

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The Austrian media regulation framework is not sufficient to address ‘hate speech’ in the media. The self-regulatory institution, the Press Council, does not appear to be an effective mechanism either to provide remedies or deter future incidents of ‘hate speech’ in the media.

**Summary of recommendations:**

- All relevant legislation – in particular criminal law provisions – should be revised into compliance with the international human rights standards applicable to ‘hate speech;’
- The applicable provisions of the Criminal Code and related legislation should undergo comprehensive review: all offences that are not compatible with international freedom of expression standards should be abolished, including criminal defamation, insult, and blasphemy prohibitions;
- The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);
- The government should consider merging various anti-discrimination acts at the federal and provincial levels into a single piece of legislation in order to make the complex legislation accessible and to improve the protection of victims;
- All equality bodies – at both federal and provincial levels – should be made fully independent from other state authorities, at institutional, political, and functional levels. They should be equipped with a more robust mandate to address problems of discrimination and intolerance. In particular, their mandate should be extended to cover monitoring of instances of ‘hate speech’ with a view to addressing root causes of the problem and looking towards tackling structural discrimination. They should also be tasked with providing comprehensive support to victims in courts, including legal representation and legal aid;
- The government should ensure that victims of ‘hate speech,’ as well as other forms of discrimination, have an easily accessible set of civil and administrative remedies to ensure the protection of their rights, including adequate financial compensation for violations;
- The government should develop a comprehensive policy on ‘hate speech’ in the media in cooperation with public broadcasters and media regulators;

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- Public officials, including politicians, should acknowledge that they must play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of ‘hate speech.’ This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions run high, or are susceptible to being escalated, and when political stakes are high, such as in the run-up to elections;
  - Media organisations and media outlets should recognise that they play an important role in combatting ‘hate speech,’ intolerance, and prejudice in public discourse. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect relevant ethical codes, as well as ensuring that ethical codes of conduct on ‘hate speech’ are effectively implemented, and that effective measures are undertaken to address any violations. Ethical codes of conduct should be incorporated into practice by journalists and media outlets in order to ensure full compliance. Media outlets should increase ethnic, religious, and gender plurality amongst journalists, editors, media workers, and other employees of public service broadcasters; and
  - The Austrian Press Council should increase its internal diversity and, in particular, ensure that it includes members from minorities and other groups who are subject to discrimination. Effective measures should be taken to address violations of ethical codes of conduct. The Press Council should also organise regular training courses and updates for professional and trainee journalists on human rights standards on ‘hate speech’ and freedom of expression, and on the relevant ethical codes of conduct.

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# Introduction

The issue of responding to ‘hate speech’ has become increasingly prominent in Austria during the last couple of years, and is currently much-discussed at various levels in society.

The current approach to ‘hate speech’ in Austria stems from experience under Nazi rule and extremist politics during World War II. Historically, Austria has been a country of immigration, with large numbers of immigrants and refugees from different countries,<sup>1</sup> and a high level of acceptance of these groups. This situation changed markedly towards the end of the 20<sup>th</sup> century and during the recent ‘refugee crisis;’ when the public discourse on immigration became dominated by populist rhetoric and the rise of a new generation of right-wing extremist organisations. In this recent period, different migrant groups began to be portrayed (often in the media) as a threat to economic stability and social systems in the country. Immigrants of Islamic faith are particularly targeted; and anti-Muslim incidents and attacks have been on the rise,<sup>2</sup> though reports do also show positive responses by law enforcement in the investigation of these incidents.<sup>3</sup> This discourse has been particularly intense during election periods. In 2017’s nationwide election, the Freedom Party of Austria (FPÖ),<sup>4</sup> a right-wing national conservative populist party which is openly hostile migrants, refugees, and asylum seekers as well as to historical ethnic, religious, and linguistic minorities in Austria, gained 26 per cent of votes and entered the federal government as a junior partner.<sup>5</sup>

Although the main targets of ‘hate speech’ in Austria in recent years have been immigrants, a rise in anti-Semitism has also been documented,<sup>6</sup> as well as prejudices and discrimination against the Roma population.<sup>7</sup> Austria has also been criticised for the lack of any comprehensive approach to LGBTI issues at federal level, given that “homophobic statements by politicians and high-ranking church officials are still quite common.”<sup>8</sup>

Austria is often rated highly in terms of its protection of the right to freedom of expression, though reports show a problem with media pluralism in the country.<sup>9</sup> However, prejudicial and hostile attitudes to migrants and refugees and to minorities are prevalent in the Austrian media. Publishing hateful, prejudicial, and stereotypical content is regularly the practice of certain tabloid media, and reports show an increase in ‘hate speech’ online.

In terms of responses to ‘hate speech’ in Austria, relevant protection can be found in a number of different laws, which contributes to confusion on this topic. There have been several legislative proposals to reform the relevant legislation, and the *Bundesrat* (the Upper House of the Austrian Parliament) also issued a Green Paper

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on the topic.<sup>10</sup> Discussions often focus on appropriate responses to ‘hate speech’ on the Internet,<sup>11</sup> especially on social media, such as Facebook<sup>12</sup> or Twitter. There have been several high profile court cases concerning Facebook, and strong calls to create a dedicated institution to deal with ‘hate speech’ on social media.<sup>13</sup>

The police and prosecution services have invested considerable resources in investigating ‘hate crime’ and incitement cases.<sup>14</sup> The Austrian courts follow the guidelines and jurisprudence of the European Court of Human Rights in freedom of expression-related cases; the Constitutional Court (VfGH) has confirmed this in several recent decisions.<sup>15</sup> There is not, however, much guidance from the Constitutional Court, as ‘hate speech’ cases are not brought to that Court.

There is also a complex set of laws, as well as numerous equality institutions, prohibiting discrimination; however, the engagement of these institutions in responding to ‘hate speech’ has been limited.

ARTICLE 19 believes that in order to respond to growing concerns about ‘hate speech’ in Austria, it is important that legislation, policies, and practices fully comply with international human rights standards, in particular the right to freedom of expression. This report examines these areas,<sup>16</sup> in regard to ‘hate speech’ in Austria, with a particular focus on the media. It examines the compliance of relevant legislation with international freedom of expression standards, and offers recommendations for its improvement.

The report is a part of a broader project by ARTICLE 19, carried out in six EU countries (Austria, Germany, Hungary, Italy, Poland, and the United Kingdom) to identify commonalities and differences in national approaches to ‘hate speech,’ specifically in the media, recommend good practices for replication, and identify concerns which should be addressed.



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# International human rights standards

This review of the Austrian framework on ‘hate speech’ is informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.

## The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)<sup>17</sup> and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>18</sup>

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person’s choice. The United Nations (UN) Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States’ compliance with the ICCPR, has affirmed the scope extends to the expression of opinions and ideas that others may find deeply offensive,<sup>19</sup> and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law**, so any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals; or
- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>20</sup>

Thus, any limitation imposed by the State on the right to freedom of expression, including limiting ‘hate speech’, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law (see below).

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At the European level, Article 10 of the European Convention on Human Rights (European Convention)<sup>21</sup> protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).<sup>22</sup> Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

## **The right to equality**

The right to equality and non-discrimination is provided in Articles 1, 2, and 7 of the UDHR.<sup>23</sup> These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression and equal protection of the law.

At the European level, the European Convention prohibits discrimination in Article 14 and, more broadly, in Protocol No. 12.

## **Limitations on ‘hate speech’**

While ‘hate speech’ has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:<sup>24</sup>

- Severe forms of ‘hate speech’ that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of ‘hate speech’ that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or
- ‘Hate speech’ that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

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## *Obligation to prohibit*

Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).<sup>25</sup>

The Rabat Plan of Action,<sup>26</sup> adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) of the ICCPR.<sup>27</sup>

- **Incitement.** Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.
- **Six-part threshold test.** To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
  - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework, and the media landscape;
  - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
  - **Intent** of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
  - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
  - **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
  - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.

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- **Protected characteristics.** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.
  - **Proportionate sanctions.** The term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.<sup>28</sup> Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on this test.<sup>29</sup>

At the European level, the European Convention does not contain any obligation on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.<sup>30</sup> The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.<sup>31</sup> Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council's framework decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"<sup>32</sup> requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties". It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting", implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.<sup>33</sup>

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### *Permissible limitations*

There are forms of ‘hate speech’ that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility, or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

### *Lawful expression*

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to the denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

## **Freedom of expression online**

### *International law*

At the international level, the UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online”.<sup>34</sup> The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or ‘offline’ communications, as set out above.<sup>35</sup>

While international human rights law places obligations on States to protect, promote, and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.<sup>36</sup> Importantly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FoE) has long held that censorship measures should never be delegated to private entities.<sup>37</sup> In his June 2016 report to the HRC,<sup>38</sup> the Special Rapporteur on FoE enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality”,<sup>39</sup> and

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reiterated criticism of notice and take-down frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation,” i.e. the danger of “self- or over-removal.”<sup>40</sup>

The Special Rapporteur on FoE recommended that demands, requests, and other measures to take down digital content must be based on validly-enacted law, subject to external and independent oversight, and must demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.<sup>41</sup>

In their 2017 Joint Declaration on “freedom of expression, ‘fake news’, disinformation and propaganda”, the four international mandates on freedom of expression expressed concern at “attempts by some governments to suppress dissent and to control public communications through [...] efforts to ‘privatise’ control measures by pressuring intermediaries to take action to restrict content”.<sup>42</sup> The Joint Declaration emphasises that intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it, and they have the technical capacity to do so. They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.

### *European law*

At the EU level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.<sup>43</sup> The E-Commerce Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services.<sup>44</sup> The regulatory scheme under the E-Commerce Directive has given rise to so-called ‘notice-and-takedown’ procedures, which have been sharply criticised by the special mandates on freedom of expression for their lack of clear legal basis and basic procedural fairness.

The limited shield from liability for intermediaries provided by the E-Commerce Directive has been further undermined by the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the European Court found no violation of Article 10 of the European Convention where a national court imposed civil liability on an online news portal for failure to remove “clearly unlawful” comments posted to the website by an anonymous third party, even without notice being provided.<sup>45</sup> A joint dissenting opinion highlighted that this “constructive

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notice” standard contradicts the requirement of actual notice in Article 14 para 1 of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.<sup>46</sup>

Decisions subsequent to *Delfi AS* appear to confine the reasoning to cases concerning ‘hate speech’.<sup>47</sup> More recently, the European Court rejected as inadmissible a complaint that the domestic courts had failed to protect the applicant’s right to privacy by refusing to hold a non-profit association liable for defamatory comments posted to their website by a third party. The Court noted that the comments were not ‘hate speech’ or direct threats and were removed upon notice (though a formal notice-and-takedown procedure was not in place).<sup>48</sup> The position and resources of the intermediary were also relevant factors.<sup>49</sup>

Lastly, the 2016 European Commission’s Code of Conduct on Countering Illegal Hate Speech,<sup>50</sup> developed in collaboration with some of the major information technology companies, constitutes a (non-legally binding) commitment to remove “illegal hate speech,” defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,<sup>51</sup> within 24 hours. While the Code of Conduct is ostensibly voluntary, it is part of a concerning trend whereby States (including through intergovernmental organisations) are increasing pressure on private actors to engage in censorship of content without any independent adjudication on the legality of the content at issue.<sup>52</sup>

In short, the law on intermediary liability remains legally uncertain in Europe, with tensions between the European Court’s jurisprudence and the protections of the E-Commerce Directive, as well as the guidance of the international freedom of expression mandates.

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# Basic legal guarantees

## Enabling environment for the rights to freedom of expression and equality

Austrian constitutional law guarantees both the right to freedom of expression<sup>53</sup> and the right to equality.<sup>54</sup> Rather than being enshrined in one constitutional document, the guarantee of these rights can be found in several constitutional laws.<sup>55</sup>

Though Austrian constitutional law is split between many different acts, the Federal Constitutional Act is its centrepiece, containing key federal constitutional provisions. Under the Federal Constitutional Act, “the generally recognised rules of international law are regarded as integral parts of federal law” and do not need further implementing in Austrian legislation.<sup>56</sup> Hence, the European Convention on Human Rights is indirectly part of the Austrian constitution.<sup>57</sup> The ICCPR is also a part of domestic law but does not have the status of constitutional law.<sup>58</sup>

### *Legal protection of the right to freedom of expression*

Under the Federal Bill of Rights, the right to freedom of expression is guaranteed only to Austrian citizens; the respective provisions are thus not compatible with international human rights law. The right to freedom of information is not explicitly recognised in constitutional law, but has been recognised in the case law of the Constitutional Court.<sup>59</sup> The Constitution also grants legal immunity to members of parliaments and regional councillors against civil or criminal liability for any opinions expressed during the exercise of their functions.<sup>60</sup>

The independence of broadcasting media is guaranteed in the constitutional law.<sup>61</sup> The Constitution also provides for the establishment of an independent regulatory authority for regulating and subsidising media organisations.<sup>62</sup>

Austrian constitutional law does not contain explicit provisions on ‘advocacy of hatred’ that constitute incitement to discrimination, hostility, or violence, or any provisions equivalent to Article 20 para 2 of the ICCPR.

### *Legal protection of the right to equality*

Legal protection against discrimination in Austria is contained in a number of federal and provincial laws: currently, there are five anti-discrimination laws at federal level and more than 30 at provincial level. The key federal laws are:



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- **The Equal Treatment Act<sup>63</sup>** applies to the private sector, and protects against discrimination in employment on the grounds of gender, so called ‘ethnic affiliation,’<sup>64</sup> religion or belief, sexual orientation and age. Additionally, protection against discrimination on the grounds of ‘ethnic affiliation’ extends to the provision of social protection, including social security, health care, social benefits, education, and access to goods and services which are available to the public, including housing;
  - **The Federal Equal Treatment Act<sup>65</sup>** applies to all persons employed by federal authorities or applying for employment or training with federal authorities. It forbids discrimination on grounds of gender, age, sexual orientation, ethnicity, religion, or beliefs. The Act also contains regulations for specialised institutions (Federal Equal Treatment Commission and Officers for Equal Treatment and Contact Women) for the federal civil service;
  - The **Act on the Equal Treatment Commission and the National Equality Body<sup>66</sup>** provides for the establishment and functions of the Equal Treatment Commission<sup>67</sup> and the National Equality Body; and
  - The **Act on the Employment of People with Disabilities<sup>68</sup>** provides for protection against discrimination on the grounds of disability in, *inter alia*, work and employment, including the concept of reasonable accommodation. It also contains a compulsory quota regarding the employment of people with disabilities. Additionally, the **Federal Disability Equality Act<sup>69</sup>** provides protection against discrimination on the grounds of disability in access to and supply of goods and services available to the public, including housing.

At the provincial level, all provinces (except those of Lower Austria) provide protection against discrimination on all grounds in employment, access to and supply of goods and services, including housing, social security, benefits, and health.

Additionally, protection of recognised, so-called “autochthonous,” national minorities<sup>70</sup> (or “*Volksgruppen*”) - Slovenes, Croatians, Hungarians, Czechs, Slovaks and the Roma – is provided for in the 1919 and 1955 state treaties. Their legal status and rights are guaranteed by various constitutional laws and partly implemented by the **Federal National Minorities Act** of 1976.<sup>71</sup> The National Minorities Act provides for specific measures (such as financial contribution, education, and assistance) to ensure the continuing existence of ethnic minority groups, their characteristics and rights.<sup>72</sup>

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# Criminal law restrictions on ‘hate speech’

## Criminal restrictions directly restricting ‘hate speech’

Austrian legislation contains criminal prohibitions of the most serious forms of ‘hate speech’ in two laws.

The 1947 **National Socialism Prohibition Act** (the Prohibition Act)<sup>73</sup> banned the Nazi Party (NSDAP), its paramilitary organisations, and affiliated associations – and forbade any re-establishment and support to them (including by maintaining or re-establishing them, founding them, promoting them, supporting them financially or through other means). In relation to ‘hate speech,’ *inter alia*:

- Article 3d of the Act, included in 1992, states that “whoever incites or tempts to an action [stipulated in the Act], publicly, in front of several people, in printed media, writings or pictures, specifically in order to praise the goals of the NSDAP, its institutions or measures, shall be punished with imprisonment of five to ten years; if the perpetrator is very dangerous, up to 20 years.” All cases should be tried by a jury; and
- Additionally, Article 3h threatens to sanction “whoever attempts to deny, grossly downplay, condone or justify the National Socialist genocide or other National Socialist crimes against humanity in a printed work, in the broadcast media, through another medium, or through any other public channel, and does so in a manner that is accessible to many people.” These provisions thus prohibit not only denial but also downplaying, appreciation, or justification of the crimes of the Nazi regime.

**The Criminal Code**<sup>74</sup> contains several provisions directly restricting some forms of ‘hate speech.’ The main provisions are prohibitions of incitement in Article 283 of the Criminal Code, introduced in 2011.<sup>75</sup> Article 283 para 1 stipulates that a sentence of up to two years’ imprisonment should be imposed on:

- Whoever “publicly, in a manner suited to jeopardise public order, or in a manner perceivable to the general public incites or instigates to violence against a church, religious denomination or any other group of persons defined by criteria of race, colour of skin, language, religion or ideology, nationality, descent or national or ethnic origin, sex, a disability, age or sexual orientation or a member of such a group, explicitly on account of his/her belonging to such a group;”<sup>76</sup>
- Whoever “in a manner perceivable to the general public, stirs up hatred against one of such groups [as per above] or who verbally harasses such groups in a manner violating their human dignity and who thereby seeks to decry them;”<sup>77</sup> and

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- Whoever denies, grossly mitigates, or justifies specific crimes,<sup>78</sup> “which were legally established by a national court, and which were directed against one of the groups identified above or against a member of such group in a manner that is likely to incite violence or hatred against a member of this group or this group as a whole.”<sup>79</sup>

Additionally, the term of imprisonment can be increased:

- Up to three years if the prohibited acts are committed in “printing, broadcasting or in another medium which makes these acts accessible to a broader public;”<sup>80</sup> or
- Up to five years (with a minimum of six months) in cases of incitement of violence against protected groups or a member of these groups.<sup>81</sup>

When assessing these provisions on incitement offences in the light of international freedom of expression standards, the following key features should be mentioned:

- **Key terms:** Key terms of the provisions are not defined in the Criminal Code. However, some terms have been defined in jurisprudence. In particular:
  - ‘Incitement’ is defined as any statement intended to directly cause a decision by another person to carry out the proscribed act. It denotes a strong form of influence, the passionate provocation of irrational and uncontrollable emotions.<sup>82</sup> These emotions must be responsible for the action undertaken by other person. It is not, however, adequate simply to inspire ‘passion’ within the other person. The decisive factor in establishing this offence is not a successful accomplishment of the proscribed action, but only the action as such.<sup>83</sup>
  - ‘Violence’ is defined as an application of physical strength, or mechanical or chemical tools against persons or things, in order to overcome an obstacle.<sup>84</sup>
  - ‘Violating human dignity’ of a protected group has been interpreted as denying that members of the group are human beings, both directly or indirectly. This can mean, for example, that they are presented as less worthy members of society,<sup>85</sup> or are treated in an inhuman or humiliating way.<sup>86</sup> If the offence is directed against individual personal rights (i.e. honour), this is not sufficient to ‘violate human dignity’: the offence requires that the affected members of the group are targeted at the core of their personality. According to Supreme Court jurisprudence, this includes a person being named a “subhuman creature,”<sup>87</sup> or if the perpetrator compares them to animals, or incites people to “gas” other people.<sup>88</sup>
- **Intent:** Article 283(1) of the Criminal Code requires no more than conditional intent (*dolus eventualis, bedingter Vorsatz*) as per Article 5(1) of the Criminal Code. This means that the intent must attach to each and all of the objective elements of the crime (i.e. the perpetrator

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must intend each element), such as the public nature of the statement, and its capacity to endanger public order. The conduct prohibited by Article 283(1) para 2 also requires “deliberateness:” the perpetrator must purposefully make the group contemptible, must be consciously aware of it, and must know that the statement may be received by a broader public. According to jurisprudence, the intent of the perpetrator cannot be deduced from the mere fact that the targeted person belongs to a protected group.<sup>89</sup>

- The list of protected grounds is exhaustive (i.e. a closed list). Regarding hatred against a ‘church,’ the provisions apply both to churches and religious groups which are legally recognised in Austria, as well as those that are not recognised legally but “have the same attributes as legally recognised ones.” However, the provisions are only applicable if the group has multiple members who believe in a deity and they are targeted because of their belief.<sup>90</sup> Additionally, these provisions protect both individuals and groups which have protected characteristics. The term ‘group’ has been interpreted as “a majority of persons that are associated with one another through the respective attributes and, by this, stand out from others.”<sup>91</sup> A geographical or organisational relationship between these persons is not required, and society does not have to recognise these groups. However, they must be characterised by a common “feeling of belonging,” and not only by the fact that one person in an attacked group belongs to the group.<sup>92</sup>
- **Prohibited conduct**, in the provisions of the Criminal Code, goes beyond the provisions of Article 20 para 2 of the ICCPR. Prohibited action includes incitement to “hatred with intention of harming human dignity,” incitement to “violence,” and denial of certain crimes.
- Austria’s criminal law does not outline a **specific test for assessing incitement cases**. However, the following issues have been considered by Austrian courts:
  - The incitement must be capable of endangering the public order. ‘Public order’ is interpreted broadly: the term refers to political, economic, and societal order within Austria (not abroad).<sup>93</sup> The capacity of the act to endanger public order has to be evaluated by a court in every single case from an *ex ante* viewpoint.<sup>94</sup> However, it is not necessary that actual danger by a proscribed action occurs, or that a proscribed act is committed as a consequence of the incitement.
  - The incitement must be perceivable by a broader public (or “a greater number of persons”)<sup>95</sup> in an actual manner.<sup>96</sup> According to the jurisprudence of the Supreme Court, the condition of “a broader public” is met if the act is perceived by at least 30 persons.<sup>97</sup>
  - The communication of the message and its reception by the public do not have to happen at the same time.<sup>98</sup> The provisions of Article 283(1) of the

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Criminal Code are not only applicable to speeches in front of large audiences but also to sending letters or other publications, the distribution of flyers, or placing posters in public spaces.<sup>99</sup> When the message is intended to be confidential (e.g. for close relatives), the criterion of ‘broader’ public is not met, as long as such confidentiality is “objectively guaranteed.”<sup>100</sup>

- Incitement can be committed via various forms of expression. It can be through words, but can also be through, for example, pantomime, drawings, or film.<sup>101</sup>
- “Explicitly on account of belonging to protected a group:” ‘explicitly’ being “by words or generally recognised signs.”<sup>102</sup>

### *Interpretation of criminal provisions directly restricting ‘hate speech’*

As noted above, Austrian courts do not follow any specifically enumerated tests to assess cases under these provisions, such as, for example, the test outlined in the Rabat Plan of Action. However, the scope and several aspects of provisions of Article 283 of the Criminal Code have been examined in jurisprudence in recent years. The following cases are of particular relevance.

- In the **‘Turkish Joke’ case**, the defendant posted on Facebook, “Why there are no sperm donors in Turkey? Because all of these jerk-offs are with us,” accompanied by a ‘smiley’ emoticon. In the first instance, the court found the defendant guilty under the provisions of Article 283(2) for publicly insulting Turkish citizens (an ethnic group) in a way which harms human dignity; he was sentenced to a conditional fine. The court based its decision on the following criteria:
  - **Intent:** Although the defendant claimed that he did not want to offend anyone, and it was just a ‘bad taste’ joke, the court concluded that the defendant had the required ‘intent’ in order for it to establish guilt, as he wanted to post the text on Facebook, knew that the term ‘jerk-off’ was derogatory, and had already tried the joke in another context. Therefore, he had at least had a ‘conditional intent’ when posting it on Facebook.<sup>103</sup>
  - **Content:** The court found that the term ‘jerk-offs’ was abusive, and that people of Turkish origin would be presented as an inferior part of society and considered as not worth being humans;
  - **Public nature:** The court also found that the defendant “took it as possible, and accepted that this statement was publicly perceivable by many persons” as he was ‘friends’ with more than 400 people on Facebook.

The High Regional Court in Innsbruck overturned the first court’s decision.<sup>104</sup> In particular, it considered the context of the message, which was posted in

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reaction to a xenophobic discussion on Facebook. It found that although the expression was ‘insulting,’ its purpose was not to harm human dignity. The court also distinguished between ‘insult’ (denigration of another person) and violation of human dignity. It concluded that human dignity is violated when a targeted person is treated like he/she is not a human being. However, ‘insult’ is only directed against specific personal rights (e.g. personal honour), and does not harm human dignity. In order to meet this criterion, the targeted group must be offended at their core rights, i.e. called ‘minor human beings,’ or a call for those individuals to be ‘gassed,’ or an equation with animals, or praise of violations of human dignity that happened in the past (praising historical atrocities).<sup>105</sup>

- The **‘FPÖ Parliamentarian’ case** concerned a parliamentary member of FPÖ who was accused, along with others, of operating a national-socialist forum from 2009 to 2010. The posts on the forum incited violence and promoted right-wing, racist, and extremist thought. The defendant had editorial and administrative responsibilities on the website: he was able to block certain users, moderate posts, establish rules for the forum, and implement sanctions in case of non-compliance. The defendant also allegedly used a burning Star of David as an avatar for his user profile and had posted various messages over the years, such as “gas the Jews,” “the Jews and the Gypsies should be put into a camp,” “the Jews have biological inherited criminality,” and that Jews were “a half-percent human beings.” He was charged under a number of provisions of the Criminal Code and in May 2017, the first instance court, the Provincial Court for Criminal Cases Vienna, found him guilty under Article 283(2) of the Criminal Code.<sup>106</sup> The defendant appealed to the Supreme Court,<sup>107</sup> arguing that it had not conclusively been proven that he actually posted these messages. The Supreme Court approved the appeal and returned the case to the first instance.<sup>108</sup> It found that the first instance court had not sufficiently established the required level of intent by the defendant – which, for Article 283(2) of the Criminal Code, is ‘deliberateness’ (*Absichtlichkeit*). At the time of publication, the proceedings in the case are pending.
- In the **‘Danish Student Facebook’ case**, the defendant posted a link on Facebook which led to a national socialist website ([nasjonalsamling.blogspot.de](http://nasjonalsamling.blogspot.de)), together with a flyer which contained national socialist content. In his Facebook posts, he called Muslims a “carcinoma,” alleged that “the Turkish and Negroid race” were primitive, and that people belonging to the “Negroid race” were less intelligent. The first instance court, the Provincial Court in Vienna, found him guilty under *inter alia* Article 283(2) of the Criminal Code.<sup>109</sup> The defendant referred to his right to freedom of expression under Article 10 of the European Convention. He argued that the jurors in the first instance court did not consider intent of repeating National Socialist behaviour, and also that he was not an Austrian citizen (he was Danish student) and was not familiar with the relevant law. The Supreme Court confirmed the first instance court decision.<sup>110</sup> In the decision, it, *inter alia*, concluded that the

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relevant law was generally known in Austria and that the defendant should have made himself familiar with this law.

- The **‘National Socialist Statements’ case** concerned a defendant who managed an online forum and posted a number of National Socialist statements, including “Heil Hitler,” a sign for radioactivity together with the words “Take action and kill niggers,” and “Go to hell Jewish parasite.” The Regional Court in Wels found him guilty under Article 283 of the Criminal Code.<sup>111</sup> The Supreme Court cancelled the sentence and returned the case to the first instance court, but confirmed the central verdict.<sup>112</sup> The Supreme Court specifically addressed the issue of the defendant’s intent: it found that the first instance court was correct to find that the defendant intended to repeat National Socialist acts. However, the Supreme Court did not elaborate on reasons for this conclusion.
- In the **‘Sniper Picture’ case**, the defendant was prosecuted under Article 283(1) of the Criminal Code for posting on Facebook a picture of a sniper with the words, “The fastest asylum procedure in Germany.” The Regional Court in Leoben acquitted him,<sup>113</sup> and the decision was confirmed by the High Court in Gratz, concluding that asylum seekers were not a protected group. However, the Supreme Court found the defendant guilty, finding that the targeted persons (i.e. those who seek asylum) do belong to a group in the sense of Article 283 of the Criminal Code; the Court specified that group identity is a crucial element in establishing the existence of this criminal offence.<sup>114</sup>
- In 2016’s **‘Anti-Semitic Facebook Posts’ case**, a number of individuals made anti-Semitic and anti-Israel statements on Facebook, including messages such as: “Fucking Jews, Hitler should have killed you all,” “May Allah help our siblings in Gaza ... the new scapegoat is the Muslim!! In truth, the number 1 terrorist in the world is America and Israel ... I hate those fucking Zionists and I hope they all die and I hope the Land of Israel will not give those dogs sons,” “It shall simply disappear from the map, then there is more peace.” The Regional Court in Gratz<sup>115</sup> found them guilty under Article 283(1) and (2) of the Criminal Code, but acquitted them on the charges brought under Article 3 of the Prohibition Act. In the appeal, the defendants claimed that the Jews were not a protected group under Article 283 of the Criminal Code; however, the Supreme Court found that the Jews were a protected group.<sup>116</sup> The court also confirmed that the defendants were not guilty under Article 3 of the Prohibition Act, as they only intended to incite to hatred and violence, but not to repeat the National Socialist crimes.<sup>117</sup>
- In a 2015 case, the defendant uploaded an image of Adolf Hitler on Facebook with statements such as, “I could have killed all Jews, but let some of them live in order to show you why I have killed them,” and that it was “really sad” for the whole world to watch the “fucked-up Jews overwhelmingly

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kill children with pleasure, that Allah was great and that he wanted a just punishment of Israel.” The Regional Court in Salzburg found the defendant guilty under Article 283(2) of the Criminal Code, finding that he “acted out of racist motives,” which was an aggravating circumstance in the case.<sup>118</sup> The Supreme Court rejected the subsequent appeal, but found that establishing “the motive for the incriminated behaviour” was not a requirement under Article 283(2) of the Criminal Code.<sup>119</sup>

- There have also been several cases<sup>120</sup> trying to establish criminal liability of hosting-providers for users’ posts, relating in particular to Facebook, with claims that Facebook is responsible for a ‘contribution’ to crimes, in reference to Article 12 of the Criminal Code.<sup>121</sup>

From the case law, it can be concluded that Austrian courts do consider a number of factors outlined in the Rabat Plan when deciding incitement cases, in particular: the intent of the speaker, the context, and (in some cases) the way in which the expression is understood by the audience.

However, they do not consider the imminence or likelihood of a proscribed act actually happening, or its potential harm. Courts also often find an intent to incite a proscribed action, despite inconclusive evidence of it. Moreover, the courts do not consider the position of the speaker and their influence over their audience, or their capability of influencing the actions of the audience.

## **Criminal provisions indirectly restricting ‘hate speech’**

The **Austrian Criminal Code** contains several offences which might indirectly criminalise some instances of ‘hate speech.’<sup>122</sup> Some of these provisions raise concerns regarding their compatibility with international standards on freedom of expression. These are:

- Three “private accusation” crimes – i.e. can only be pursued on the action of the person concerned – <sup>123</sup> **defamation** (Article 111 of the Criminal Code),<sup>124</sup> **insult** (Article 115 of the Criminal Code),<sup>125</sup> and **slander** (Article 297 of the Criminal Code).<sup>126</sup> However, in some cases, the perpetrator can be prosecuted only with the authorisation of the victim; this includes cases of targeting a member of one of the protected groups (as per Article 283(1) of the Criminal Code), or when a threat of maltreatment, insult, or mockery is capable of disparaging the injured party in public opinion.<sup>127</sup> The applicability of these crimes to ‘hate speech’ cases is limited, however: the action must target individuals, and not groups. At the same time, criminal defamation cases are often wrongly conflated with ‘hate speech’ cases in public understanding. An example of this is the case of Dr Eva Glawischnig-Piesczek, former leader of the Austrian Green Party, who pursued prosecution in a case where someone posted a picture of her on Facebook, with the text, “Refugees must have the right to grab the girls. Everything else would be racist against refugees.”<sup>128</sup> In



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a separate case, she sought an injunction against Facebook (see below); the case has also been mistakenly reported as a ‘hate speech’ case in the international media.

- Continued harassment by means of telecommunications or a computer system, i.e. ‘cyber mobbing’, (Article 107c of the Criminal Code) is an offence introduced in 2016<sup>129</sup> to address, *inter alia*, ‘hate speech’ on the Internet.<sup>130</sup> “The offence is an ‘official offence’ (*Offizialdelikt*)” which can be pursued *ex officio*, i.e. without a complaint from a victim.<sup>131</sup> Article 107c imposes up to one year’s imprisonment, or a fine for, *inter alia*, violating the personal honour of a person, if it is perceivable for a wider public by means of telecommunications or computer systems. The key aspects of these prohibitions are as follows:
  - The prohibited act must be capable of continuously affecting the victim negatively in her/his daily life in an “unbearable fashion.” This means that an average person would have changed her/his lifestyle because of these actions.
  - “Violation of honour” means a reduction of respect and the minimisation of a person’s status in their environment, as per personal honour offences (Articles 111, 113, and 115 of the Criminal Code).<sup>132</sup> The subjective feeling of violation of honour of a victim is not sufficient to meet the threshold of the crime; it must be the honour of the person in “its objective meaning.”<sup>133</sup>
  - The prohibited act must be receivable by a “greater number of persons” – which is at least ten people.<sup>134</sup> Therefore, they would not be applicable to private messages via e.g. Facebook or WhatsApp. At the same time, the possibility that more than 10 people could potentially perceive the behaviour is not sufficient to meet the threshold.<sup>135</sup>
  - The behaviour must be “continuous.” This includes a situation where content is not deleted for a long time, despite the perpetrator having the option to do so.<sup>136</sup>
  - The perpetrator has to act intentionally with regard to the objective elements of the crime.<sup>137</sup> When evaluating whether the perpetrator continued her/his behaviour in the prohibited manner, courts evaluate the types, intensity, content, number, and continuity of the actions.<sup>138</sup>

The application of these provisions to ‘hate speech’ seems to be limited: there have been no cases initiated under them yet. They only apply to expressions targeting a single individual on the basis of protected characteristics – they are not applicable if a group is targeted. The effects would also have to be of sufficient magnitude to make the daily life of a targeted person unbearable, e.g. leading to withdrawal of the victim from online life.<sup>139</sup>

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Additionally, the Criminal Code prohibits “degradation of religious teachings” or **blasphemy** (Article 188).<sup>140</sup> These provisions are sometimes conflated with incitement provisions. For example, in 2011’s **‘Mohammed case,’** the defendant was convicted under Article 188 of the Criminal Code, and fined 480 EUR, after initially being charged with incitement to hatred under Article 283 (on which she was acquitted). The case originated from a series of lectures on Islam, organised by the FPÖ Education Institute, in which the defendant criticised the treatment of women and the practice of jihad in the Middle East. In particular, she said that the Prophet Mohammed would be considered a “paedophile” today as he married Aisha bint Abu Bakr when she was six years old. The District Court in Vienna granted the conviction as it found that this statement was “unreasonable” and constituted an illegal denigration of Mohammed.<sup>141</sup> The conviction was later upheld in the appeal,<sup>142</sup> and also by the Supreme Court.<sup>143</sup> The Supreme Court concluded that the primary purpose of the lectures given by the defendant was not to improve factual knowledge of Islam, but to defame the Prophet, an icon in a legally recognised religion.<sup>144</sup> Thus, the lectures were not considered in the public interest as they made no meaningful contribution to the discussion on the topic.<sup>145</sup>

## **Efforts to amend existing criminal legislation on ‘hate speech’**

There are currently no legislative efforts to amend existing criminal law provisions applicable to ‘hate speech.’ However, there have been a number of initiatives exploring ways to curb ‘hate speech’ online. For example, in December 2016, the Federal Council (*Bundesrat*), the second chamber of the Austrian Parliament, issued a Green Paper called ‘Digital Courage,’ following a parliamentary inquiry on the subject.<sup>146</sup> The report discussed various legal, ethical, and societal aspects of ‘hate crime’ on the Internet. The Federal Council subsequently issued a resolution<sup>147</sup> to provincial governments, asking them to introduce new measures against ‘hate crimes’ on the Internet, on the basis of the Green Paper’s conclusions: in particular, preventive measures, educational activities, and the improvement of media literacy.<sup>148</sup>

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# Measures against ‘hate speech’ in administrative law

There are currently no administrative provisions directly restricting ‘hate speech’ in the Austrian legislation. ‘Hate speech’ is addressed in media regulation legislation (which forms part of administrative law); this is analysed in a dedicated section on media regulation below.

Administrative law contains further provisions which apply indirectly to ‘hate speech’ cases. These include:

- The **Introductory Act on Administrative Procedures** (the EGVG) prohibits discrimination on a number of grounds (race, skin colour, ethnicity, religious belief, and disability) in relation to accessing public services.<sup>149</sup> These provisions have not been applied to ‘hate speech’ cases.<sup>150</sup>
- The **E-Commerce Act**,<sup>151</sup> which provides “notice and take down” procedures for hosting providers. It obliges hosting providers to remove “unlawful” content on notice; they are not obliged to monitor the third-party content otherwise.<sup>152</sup> “Unlawful” content may cover ‘hate speech’ as per relevant provisions of the law, as well as other speech offences, such as degradation of religious teachings/blasphemy. The E-Commerce Act is only applicable to hosting providers, and not to content providers who are covered by the Media Act (see below).<sup>153</sup> However, in June 2017, the Association of Austrian Private Broadcasters (VÖP)<sup>154</sup> proposed that host providers should be excluded from the liability privilege in the E-Commerce Directive.<sup>155</sup>

The provisions of the E-Commerce Act have been subject to extensive interpretation in the jurisprudence of the Supreme Court,<sup>156</sup> but these cases did not directly concern ‘hate speech’ online.

It should be mentioned that in January 2018, the Supreme Court, in the case of Dr Glawischnig-Piesczek, referred a set of questions to the Court of Justice of the European Union (CJEU) for clarification on the scope of Article 15(I) of the E-Commerce Directive and the host provider privilege (set out in Article 14 of the E-Commerce Directive, which in certain situations shields host providers from being held responsible for the actions of its users).<sup>157</sup> This case has been confusingly referred to as a ‘hate speech’ case in domestic and international media. In July 2016, Dr Glawischnig-Piesczek requested that Facebook remove a picture with various offensive comments made by a user about her (e.g. including an allegation that she was a “member of a Fascist party”). After Facebook failed to do so, she obtained a preliminary injunction against Facebook, which obliged Facebook to delete the content worldwide, as well as deleting any future uploads of the picture if it was accompanied by comments that were identical or similar in meaning to

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the original comments. Facebook subsequently blocked access to the original image and comments in Austria, but appealed the decision. The Appellate Court upheld the injunction, asking Facebook to delete any future uploads of the image if it was accompanied by comments that were identical to the original wording or if the comments were similar in meaning, provided Facebook had actual knowledge of these comments. The Supreme Court found the statements defamatory and that Facebook was required to delete the image and the comments upon obtaining actual knowledge of the post on July 2016.<sup>158</sup> As for “similar statements,”<sup>159</sup> the Supreme Court decided that the broad injunction could be in conflict with Article 15 of the E-Commerce Directive (as implemented in Article 18 of the E-Commerce Act) as it might impose a general obligation on providers to monitor the content of their users for potential unlawful activity and referred a series of questions to the CJEU. The case is pending at the CJEU.

- The **Act on the Responsibility of Associations** creates criminal liability for some legal entities under certain circumstances, e.g. if the act is committed “for the benefit of the organisation.”<sup>160</sup> The Act applies, *inter alia*, if a “decision maker” in the legal entity has committed the crime unlawfully and was culpable,<sup>161</sup> or if an employee has committed the crime intentionally, in cases when intent is required.<sup>162</sup> Theoretically, these provisions could be applied in ‘hate speech’ cases, e.g. against a media outlet or a social media provider. The likelihood of extending these provisions to such cases is, however, quite low, given the conditions set in the Act.
- **Equal treatment legislation**, at federal<sup>163</sup> and provincial levels,<sup>164</sup> prohibits *inter alia* harassment and instructions to discrimination:
  - For example, the **Equal Treatment Act** defines harassment as “unwanted conduct related to one of [the protected grounds] with the purpose or effect of infringing a person’s dignity, is unacceptable, undesirable and offensive (indecent) to the person affected, and has the purpose or effect of creating an intimidating, hostile, or humiliating environment for the person affected.”<sup>165</sup> Since harassment can target both individuals and groups of individuals, it can theoretically be applied in ‘hate speech’ cases.
  - Instructing or inciting a person to discriminate against another person is also deemed to constitute discrimination, and is prohibited.<sup>166</sup>

There is also an option to initiate proceedings at equality bodies, depending on the type of discrimination: the bodies can also impose some limited sanctions in these proceedings (see below for more details). As already noted, these provisions could also be applied to ‘hate speech’ cases; however, to date there have not been any decisions in which this has occurred.

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# Civil actions against ‘hate speech’

Victims of ‘hate speech’ have three types of remedies available to them. They can initiate:

- **Civil action under the provisions of the Media Act;**<sup>167</sup>
- **Civil action under equality legislation;**<sup>168</sup> or
- **Tort action under the Civil Code**<sup>169</sup> for protection of personality rights.

Under the **Media Act**, victims of criminal defamation, insult, or slander have a right to financial compensation if the crime was committed by the media.<sup>170</sup> The amount of compensation depends on “the effects and the scope of publishing, as well as the distribution range of the medium,” but cannot be higher than 20,000 EUR and, in cases of defamation, not more than 50,000 EUR.

Victims can also demand the deletion of statement(s) after a criminal conviction is issued, or if “the author is not reachable, or the prosecution and conviction is not possible,”<sup>171</sup> can demand the publication of the court judgement in the criminal case by the media outlet. The Media Act provides a number of defences, including the defence of truth<sup>172</sup> or public interest defence.<sup>173</sup>

Importantly, cases under these provisions can only be initiated by individuals (not on behalf of groups or legal entities). The statute of limitation is one year. Various aspects of the provisions of the Media Act have been extensively interpreted by the Austrian Courts.<sup>174</sup> However, there is no jurisprudence on the applicability of these provisions in ‘hate speech’ cases.

Under **the Equal Treatment Act**, depending on the type of discrimination, victims can initiate civil proceedings requesting cessation of the discrimination, and/ or payment of material damages (both pecuniary and non-pecuniary). As noted earlier, the Equal Treatment Act covers the private sector and protects against discrimination in employment on grounds of gender, ‘ethnic affiliation’ (*ethnische Zugehörigkeit*), religion or belief, sexual orientation, and age. Protection against discrimination on the grounds of ‘ethnic affiliation’ also covers access to public services. Civil action can be initiated by both the victim and the Equal Treatment Commission.<sup>175</sup> There is no available jurisprudence on ‘hate speech’ under these provisions; even regarding discrimination, the case law is limited and the term ‘ethnic affiliation’ has been a subject of confusion.<sup>176</sup>

The **Civil Code** provides for tort action in cases of defamation in Article 1330.<sup>177</sup> It protects against various types of violation of human dignity by verbal abuse, hurt, or mockery.<sup>178</sup> A victim can demand financial compensation if the insult caused

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damage or a loss of profit for the victim, as well as the retraction of the statement. At present, there is no jurisprudence available which would show that the victims of ‘hate speech’ rely on these provisions of the civil law to seek remedies in ‘hate speech’ cases.

Austrian legislation also allows associations, organisations, and non-governmental organisations (NGOs) to submit class actions (*actio popularis*) without a specific victim in cases of discrimination on grounds of disability, providing that discrimination “affects adversely, severely and permanently the general interests of the protected group of people [people with disabilities].”<sup>179</sup> Since the Federal Disability Act also provides a number of conditions for such action,<sup>180</sup> this legal option has not yet been used, and also has not been applied to ‘hate speech’ on grounds of disability.

As already noted, there is no jurisprudence relating to any of the provisions of the Media Act, the Equal Treatment Act, and the Civil Code being applied to ‘hate speech’ cases. Regardless of ‘hate speech,’ the limited reliance on these laws can, according to experts, be attributed to a number of factors:

- A **lack of awareness** among victims (and among the general public) about the legislation and options to seeking damages under the legislation;
- Equality legislation is **highly complex**, scattered through a number of laws (almost 40 legal acts), which makes it difficult for victims to navigate the legal landscape without the help of specialist lawyers;
- **Litigation costs** are often prohibitive. In civil cases, legal fees for initiating cases are calculated based on the amount of non-pecuniary damages sought. Victims also face the risk of paying the legal costs of defendants if they lose the case, and may also need to pay experts. The possibility of getting legal aid is limited: equality institutions can only provide assistance in pre-trial stages (see below). Thus, many victims might not be able to afford to initiate legal proceedings, and may prefer to initiate proceedings before the Equal Treatment Commission, as those proceedings are free;
- It should be noted that NGOs and trade unions can act on behalf of victims of discrimination under the general rules of the Civil Procedure Code, with the consent of the victims, when the law does not require compulsory representation by an attorney. However, representation by attorney is often compulsory in civil proceedings so this possibility is largely theoretical. The **Equal Treatment Commission** and the **National Equality Body Act** allow all victims to represent themselves in proceedings before the Equal Treatment Commission.<sup>181</sup> Additionally, under the **Equal Treatment Act**, the Litigation Association of NGOs against Discrimination, an umbrella organisation, can intervene in discrimination cases if the victim consents.<sup>182</sup> This is, however, limited to third-party intervention, and does not extend to covering the costs of the proceedings; and

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- Lack of effective remedies in the form of **non-pecuniary damages**: it has been suggested that courts have found it difficult to award damages in a way that would be proportionate to the harm, provide victims with effective remedy, and discourage others from future violations. For example, under equality legislation, both pecuniary and non-pecuniary sanctions can be imposed, but in practice, courts rarely impose non-pecuniary sanctions. For harassment charges, the law sets a minimum of 1,000 EUR for damages – and courts strictly adhere to this minimum amount. Therefore, there is a need for further guidance on assessing the amount of compensation payable to victims under these provisions.

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# Role of equality institutions in relation to public discourse and ‘hate speech’

There are numerous equality bodies (up to 50 institutions) at the federal and provincial levels in Austria which could potentially have a role in addressing ‘hate speech’ in their respective areas, or could promote positive measures to address underlying causes of ‘hate speech.’ These institutions include:

- **The Equal Treatment Commission** (*Gleichbehandlungskommission*) at the Federal Ministry for Education and Women, with three senates,<sup>183</sup> deals with equal treatment in private sector employment. It can act in individual cases, on the request of victims and other specific institutions, and victims can be represented in these proceedings. In cases of violation of the principle of equal treatment, it can, *inter alia*, issue a written proposal on how obligations under the Equal Treatment Act can rightly be fulfilled or can demand an end to discrimination. If the responsible party does not follow the instructions, the institutions represented in the senate or the National Equality Body can file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The Commission has the right to demand from the alleged discriminator a written report concerning discrimination in question. The Equal Treatment Commission does not provide assistance to victims and does not conduct surveys, but publishes its findings and recommendations. The **Federal Equal Treatment Commission** (*Bundes-Gleichbehandlungskommission*) deals with public sector employment issues;
- **The National Equality Body** (*Anwaltschaft für Gleichbehandlungsfragen, Gleichbehandlungsanwaltschaft*), established under the Federal Chancellery, is structured similarly to the Commission’s senates. Its responsibilities include consultation on discrimination issues, providing assistance to victims, receiving and handling complaints, promoting and coordinating studies, research, training, and communication campaigns, as well as disseminating information on the means of protection against discrimination. Additionally, three ombudspersons are established under the Equality Body,<sup>184</sup> who can hold consultations across the whole federal territory, conduct independent inquiries and surveys, and publish independent reports and recommendations concerning all questions related to discrimination.<sup>185</sup> The National Equality Body can be a recourse for discrimination victims outside of the employment context;
- **The National Commission Against Discrimination**<sup>186</sup> operates under the Ministry for Health and Women. Its tasks include the consultation of and support to complainants about discrimination on the grounds of gender, ethnicity, religion, age, or sexual orientation. It can issue reports about discrimination in particular cases or provide assistance to victims of discrimination;



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- Separate institutions have been set up for discrimination based on disability. For example, **the Ombud for Persons with Disabilities** (*Behindertenanwalt*), appointed by the Minister of Labour, Social Security and Consumer Protection, is responsible for advice and support to people with disabilities; he/she can also conduct surveys on the situation of people with disabilities and produce statements on this issue; and
  - Individual Austrian provinces have set up specialised bodies to promote equal treatment in their own field of competence.<sup>187</sup> These provincial bodies are not linked to one another and have no shared responsibilities with the federal structures.

Additionally, the National Minorities Act provides for the establishment of **National Minority Advisory Councils** (*Volksgruppenbeiräte*), operating under the Federal Chancellery. *Inter alia*, the Councils must be consulted prior to adoption of legislation or policies affecting the interests of respective groups or may submit proposals for the improvement of the situation of a respective ethnic group.

As a result of the large number of institutions and their complex structures, it has been argued that many victims of discrimination find it difficult to navigate the system, unable to tell which body can provide assistance to them, thereby limiting the effectiveness of these institutions. Each institution covers a specific area of law or is limited in regional scope. Some of these institutions are also criticised for their lack of independence from the government. Additionally, the human resources of federal equality bodies are limited.

Moreover, it is not clear to what extent these institutions can or do provide assistance to victims of ‘hate speech.’ None of these entities is equipped with the resources to actively monitor ‘hate speech’ or to design specific responses.

Some other governmental bodies undertake sporadic action to address ‘hate speech.’ For example, in 2016, the Secretary for Diversity, Public Sector, and Digitalisation, Muna Duzdar, started an initiative *#GegenHassImNetz* (Against hate on the net),<sup>188</sup> which produced and distributed information and educational materials on the subject. Also, Austrian Prime Minister Christian Kern’s ‘Plan A’<sup>189</sup> proposed improved education in schools, as well as for NGOs and companies, about online ‘hate speech’ as well as ‘fake news.’ Plan A also envisioned establishing ombudspersons for online ‘hate speech.’ This proposed institution would provide information to victims about available remedies and possible legal actions under criminal, civil, and administrative law, and assist them with initiating legal proceedings.

The lack of comprehensive and coordinated responses from equality institutions in the area of ‘hate speech’ is supplemented by the work of several civil society organisations. For example, Counter Act<sup>190</sup> provides information and tools related to online ‘hate speech,’ and promotes campaigns, initiatives, and research on

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‘hate speech.’ Austria also joined the No Hate Speech Movement – an online campaign against ‘hate speech,’ funded by the Council of Europe.<sup>191</sup> The Litigation Association of NGOs Against Discrimination provides assistance to victims of discrimination and supports the strategic litigation of cases. Anti-racism NGO ZARA (*Zivilcourage und Rassismus-Arbeit*)<sup>192</sup> monitors instances of ‘hate speech’ on social media and ‘hate crimes,’ and publishes an annual report on its findings, including the most important cases.<sup>193</sup> It also often refers cases to law enforcement agencies and notifies social media about serious cases, with requests for content moderation.<sup>194</sup>

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# Media regulation and ‘hate speech’

## Government frameworks on media policy

In addition to Austria’s constitutional foundations for the protection of freedom of expression,<sup>195</sup> the **Media Act** provides safeguards to freedom of expression and information, and guarantees media freedom. It stipulates that restrictions to these freedoms are subject to conditions set out in Article 10 para of 2 of the European Convention – which is part of Austrian law.<sup>196</sup> The Media Act also provides a range of specific protections to journalists (e.g. protection of personal opinion, protection of signed articles, or no automatic right to publications),<sup>197</sup> and specification of how restrictions should be applied, such as defamation<sup>198</sup> or the right of reply.<sup>199</sup>

The Austrian federal government has not developed an overarching policy promoting plurality, diversity, and inclusion of minorities in media, neither does it have a specific policy on ‘hate speech’ in relation to the media.

For the protection of minorities, a specific legal framework has been developed in Austria over the years regarding ‘autochthonous’ minorities for historical reasons. As noted earlier, there are six officially recognised ethnic minorities in Austria: Slovenes (in the provinces of Carinthia and Styria), Croatians (in the province of Burgenland), Hungarians (in the provinces of Burgenland and Vienna), Czechs and Slovaks (in Vienna), and the Roma. They are guaranteed a set of collective rights in the Ethnic Groups Act and in the additional provincial laws on minority education in two Austrian provinces.<sup>200</sup> These rights include respect for their language and national characteristics (*Volkstum*), and a corresponding obligation on the federal state to subsidise measures which safeguard the existence of the ethnic groups and their characteristics. Also, as mentioned above, special advisory bodies comprising representatives of the different ethnic minorities were set up at the Chancellor’s office: their role includes inter alia to advise the federal government on minority policies and the distribution of subsidies for the organisations of the representative ethnic minorities. No equivalent provisions or system exists for other ethnic minorities rights.

Since 1970, Austria has been also operating a **system of media subsidies** as part of government support to the media sector. It comprises several different forms of public subsidies:

- **Press subsidies** under the 2004 Press Subsidies Act<sup>201</sup> and the Journalism Subsidies Act:<sup>202</sup> These are distributed to nearly all printed newspapers, be they tabloids or quality papers, according to the general distribution of aid, which is tied to the periodical publication of print papers<sup>203</sup>

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and subsidies for regional<sup>204</sup> and quality papers.<sup>205</sup> The Austrian Communications Authority (KommAustria) is responsible for administering the federal government's press subsidies;

- **A fund for private broadcasting** established under the KommAustria Act:<sup>206</sup> KommAustria distributes 15 million EUR annually to national, regional, and local broadcasters; and
- **A fund for non-commercial broadcasting:** This has been operating since 2009, targeting low-scale, participatory broadcasting ('community media') which includes minorities in their programmes.<sup>207</sup>

Subsidies have to be repaid if the conditions under which they were granted are not met. Furthermore, since 2014, print media and publishers are obliged to return public funding if they are convicted under Article 283 the Criminal Code (for incitement) or the Prohibition Act. Given these conditions, subsidies can have an effect on media content, and could play a role in addressing 'hate speech' in the media.

## Broadcast media

Several laws govern public and private media operations in the country, in particular:

- The **KommAustria Act**, which is the main law on media regulation in Austria;<sup>208</sup>
- **The ÖRF Act** (the Public Service Broadcasting Act)<sup>209</sup> – which provides rules on the organisation and business objectives of the Austrian Broadcasting Corporation and its subsidiaries;
- **The Audiovisual Media Services Act**, which regulates private broadcasting and audiovisual media services;<sup>210</sup>
- **The Private Radio Act**,<sup>211</sup> which contains general rules on programmes, rules on advertising, and on the protection of minors;
- **The Act on Exclusive Television Rights**;<sup>212</sup>
- **Telecommunications Act**;<sup>213</sup> and
- Subsidies regulations (as above), the **Federal Act on Transparency of Media Cooperation and Funding**,<sup>214</sup> the **Cooperation of Consumer Protection Authorities Act**,<sup>215</sup> and the **Access Control Act**.<sup>216</sup>

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Some of these laws contain provisions on positive measures, such as promotion of diversity of content and catering to the needs of various populations. In particular:

- **The ÖRF Act** states that the public remit of ÖRF, the public service broadcaster, includes *inter alia* “promotion of understanding for all questions of democratic society.”<sup>217</sup> It stipulates that ÖRF, in both programming and operations, must give “due regard [...] for all age groups” in society,<sup>218</sup> “the causes of disabled people,”<sup>219</sup> “the causes of families and children and for the equal treatment of women and men,”<sup>220</sup> “the importance of legally recognised churches and religious communities,”<sup>221</sup> and “due regard for and promotion of social and humanitarian activities, including raising awareness of the integration of disabled people into society and the labour market.”<sup>222</sup>

In order to achieve this goal, ÖRF must ensure that its programming and presentation is balanced, independent, and objective.<sup>223</sup> ÖRF must also ensure that “reasonable shares of broadcasting time” are provided for programming for ethnic groups that are represented by an ethnic group advisory board and broadcasting in their language. This includes the obligation to air programmes and news dedicated to ‘autochthonous’ minorities who live in the respective regions.<sup>224</sup>

The ÖRF Act contains several rules on derogatory treatment which may constitute a breach of the rights of others: there are requirements that all ÖRF programmes “respect human dignity and human rights of others”<sup>225</sup> and “must not incite others to hatred on grounds of race, sex, age, disability, religion and nationality.”<sup>226</sup> ÖRF must also ensure that “the diversity of opinions held in public life [is] appropriately taken into account” and that “the human dignity, personal rights and privacy of the individual [is] respected.”<sup>227</sup> There are additional provisions on protection of minors.<sup>228</sup>

- **The Audiovisual Services Act**, which regulates private-commercial TV and radio stations, and stipulates that “audiovisual media services shall respect the human dignity and fundamental rights of others with regard to the presentation and content of those services.”<sup>229</sup> It prohibits audiovisual media services to “incite others to hatred on grounds of race, sex, religion, disability, and nationality”<sup>230</sup> and requires that they “gradually be made accessible barrier free to people with a vision or hearing disability.”<sup>231</sup> It also stipulates that audiovisual commercial communication should not “prejudice respect for human dignity”<sup>232</sup> and “contain or encourage any discrimination on the grounds of sex, race or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.”<sup>233</sup>
- **KommAustria**, the regulator for all electronic audiovisual media services, is also mandated to guarantee respect in the sector for the fundamental rights of the person.<sup>234</sup> Members of KommAustria are “independent and not bound to any directions.”<sup>235</sup> The legislation does not require any representation of minorities in any part of KommAustria. KommAustria is primarily in charge of licensing and supervising private and public

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broadcasting companies as well as ÖRF. It has a monitoring function when it comes to ÖRF, including advertising content. This is done by collecting and analysing the advertising of all broadcasters and media service providers at least once a month. KommAustria also has a legal supervisory function that covers relevant programming rules.

- The **ÖRF Act** also provides a complaint mechanism for breaches of the Act and stipulates a number of entities which can initiate ‘supervision’ proceedings; the proceedings can also be initiated *ex officio* in some circumstances. Complaints can be filed by any person “directly aggrieved as a result of a violation of the law,”<sup>236</sup> “within six weeks from the alleged violation;”<sup>237</sup> this can include victims of ‘hate speech’ broadcast on ÖRF. If KommAustria finds that there has been a violation of the ÖRF Act by one of the ÖRF organs,<sup>238</sup> occurring during the time of its findings, it may demand that the concerned organ creates without delay a situation which corresponds to the legal view of KommAustria. In case of non-compliance, KommAustria can undertake some specific measures set in the Act.<sup>239</sup> KommAustria can also impose fines for violation of the programming principles, up to 58,000 EUR.<sup>240</sup>
- Under the **Audiovisual Services Act**, KommAustria can also conduct legal supervision or receive complaints from various entities, including people claiming to have been directly harmed by a violation of the Act, legally recognised interest groups, and consumer protection organisations.<sup>241</sup> Under specific circumstances and following previous warnings and consultation procedures, KommAustria can order the temporary suspension of the broadcast and retransmission of radio and audiovisual programmes originating from any EU Member States. That is possible in case of “explicit and serious violation of the ban of incitement to hatred based on the difference of race, sex, religion and nationality” committed at least twice during the previous twelve months.<sup>242</sup> KommAustria is also obliged to suspend foreign programmes that breach Article 7 of the European Convention on Transfrontier Television,<sup>243</sup> which prohibits inappropriate presentation of violence or incitement to “racist hatred.”<sup>244</sup> The Act provides specific procedures for such cases.

If KommAustria establishes that the provisions of the Audiovisual Services Act have been violated, and if the violation is still occurring at the time of the determination, it can request that the media service provider immediately creates a situation that correlates with the legal view held by KommAustria.<sup>245</sup> It can also oblige the media organisation to publish its decision.<sup>246</sup> In the case of repeated and serious violations by the media service provider, KommAustria can also initiate, *ex officio*, the procedure for withdrawal of the licence, and can eventually revoke the licence, subject to set proceedings.<sup>247</sup> KommAustria can also impose administrative fines on media services that do not comply with these rules of up to up to 8,000 EUR.<sup>248</sup>

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So far there has not been a case where broadcasting has been temporarily suspended; KommAustria tends to apply other sanctions. There are no guidelines on the respect of human dignity and the principle of non-discrimination in programming related to news, information analysis, or entertainment. There is no information available on complaints or decision-making under the ‘hate speech’-related provisions, or what criteria KommAustria uses to assess the cases.

## Print media

Print media in Austria is entirely self-regulated. The only provisions related to press are guarantees to media freedom in the Media Act<sup>249</sup> and legislation on media subsidies (containing specific requirements for print media receiving press subsidies);<sup>250</sup> these do not set any content requirements. The Broadcasting and Telecommunication Regulation Company (RTR GmbH)<sup>251</sup> has issued guidelines for the granting of press subsidies;<sup>252</sup> however, these do not contain any specific content requirements, such as on ‘hate speech.’

The press self-regulatory body, the National Press Council (Presserat),<sup>253</sup> is a voluntary membership organisation, established by the industry in 2010. Its members are the most important journalists and publishers’ associations in Austria. There are no specific requirements for becoming a member of the Press Council; there are also no requirements for the Council to represent minority groups within their structure.

The Press Council’s objectives are to provide editorial quality assurance, guarantee the freedom of the press, and to “highlight and counteract grievances in the press.”<sup>254</sup> The Press Commission issued a Code of Ethics,<sup>255</sup> which has been signed by a large number of daily newspapers and magazines. The Code stipulates *inter alia* that everyone has the right to dignity and protection of personality rights, and that “denigration and ridicule violate journalistic ethics.”<sup>256</sup> It also states that “any discrimination on grounds of age, disability, sex or any ethnic, national, religious, sexual, ideological or other grounds is inadmissible.”<sup>257</sup>

The Code of Ethics also stipulates that “as soon as an editorial office is advised of the fact that it has published an incorrect statement, professional ethics and common decency demand that a correction of that statement be published voluntarily.”<sup>258</sup> It also orders that “any justified statement on the part of a reader or readers calling for correction of a report shall be published as soon as possible and as extensively as required.”<sup>259</sup>

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In terms of violations of the Code of Ethics, there are two possible procedures before the Press Council:<sup>260</sup>

- The **independent procedure**, which the Press Council can start *ex officio*. It can be initiated to examine any potential violation of media ethics in any print outlet or on a related website by anyone – even by those who are not members of the Press Council. The Press Council can then issue an opinion as to whether the material complies with the principles of the Code of Ethics. Although the media concerned do not have to comply or publish the decision, relevant decisions are regularly published by the Press Council on its website; or
- The **complaints procedure** can be initiated based on a complaint from a reader who is individually affected by the material in question. The complaints and communications may be assigned to an ombudsperson to seek mutually agreed settlement. If no acceptable solution can be reached, the Press Council Senate will decide on the matter. According to the procedures of the Press Council, in order to lodge a complaint, the offended person must declare that he or she will not commence legal action at a court and will accept the Press Council arbitration proceedings. Consequently, it is not then possible to demand any financial compensation before a national court. In return, the media organisation must also accept the Press Council for dispute resolutions. The publication of the Press Council decision on the case by the media outlet in question can be imposed as a remedy, according to this procedure.

The number of complaints to the Press Council for violations of Code of Ethics has been on the increase.<sup>261</sup> The Press Council has also reported a number of breaches of ‘hate speech’ provisions, in particular related to reporting on asylum seekers and migrants, often also linked to accuracy of the reporting. Recent cases include:

- **‘Fake’ hate posts on Facebook for ‘research purposes.’** In December 2015, the Council found that there had been a violation of the Code of Ethics by Johann Oberauer GmbH, the owner of the journal *Der Österreichische Journalist*,<sup>262</sup> for publishing an article entitled, “The journalist as a Nazi in making.” The article’s author posted several messages on Facebook (e.g. “Heil Hitler,” “Gas all refugees”) for seven days. He created a ‘fake’ Facebook account through which he created Facebook events such as “Dispense gas syringes to Syrians for self-ignition!!” or “Drop Til Schweiger [a German actor] from a plane over Syria,” which he and his girlfriend then reported on their own profiles. Furthermore, he published articles on the refugee crisis, proposing, for example, that “refugees who order at Zalando and not pay should be shot as a deterrent.” Facebook did not delete any of this content, despite notifying him that the content was in violation of Facebook’s Community Standards. The journalist allegedly also created a ‘fake’ pornography profile which was deleted by Facebook within a few hours. *Der Österreichische Journalist* argued that these methods were employed for the purpose of reporting and for testing Facebook’s reactions to the content. The Press Council found the methods unjustified and not supported by public interest considerations. The Press



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Council acknowledged the problem of ‘hate’ posts on Facebook, and that Facebook’s moderation procedures are problematic. However, it concluded that posting messages which called for murder or incited proscribed actions against protected groups was disproportionate to the aim of the research. As such “damage of postings outweighs the information provided to the readers of the article.” The media owner of *Der Österreichische Journalist* was asked to publish the decision in the magazine.

- **Discrimination against victims of Mauthausen concentration camp.**<sup>263</sup> In March 2016, the Press Council decided that Aula Verlags Ges.m.b.H, owner of the magazine *Die Aula*, had violated anti-discrimination Code of Ethics provisions by publishing the article, “Mauthausen liberated mass murderers.” The article contained a review of a book on events following the liberation of Mauthausen concentration camp, and inter alia alleged that some liberated prisoners were “robbing and plundering, murdering and vandalising the land,” and were a “land plague” for a country “suffering under ‘liberation’.” It also criticised “concentration camp fetishists.” The Press Council admitted that there had been some criminal attacks by prisoners liberated from the concentration camp and that it was legitimate to report about it. However, it found that the presentation was problematic, in particular the passage in which the author “stigmatised” the concentration camp victims as criminals, “much as the Nazi regime tried to before the end of World War II.” It also found it problematic that the article did not mention the fact that state-organised mass murder had taken place in this concentration camp. The Press Council requested that the owner of *Die Aula* publish the decision in the magazine.
- **Exaggerated description of the refugee situation.**<sup>264</sup> In December 2015, the Press Council found a violation of non-discrimination and accuracy provisions of the Code of Ethics by Ganz WOCHE GmbH for publishing the article, “Asylum seekers may steal from us,” on both the newspaper website and in the weekly newspaper. It alleged that in St. Georgen, Upper Austria, asylum seekers had “license to steal,” as they had been behind many thefts from a particular chain of stores, but nobody in the company had dared to take action against perpetrators, reporting that even criminal prosecutions had no consequences. The Press Council found that the media outlet had misrepresented the actual interview with the Mayor of St. Georgen, and had exaggerated and presented in a very problematic way the crime statistics from the Ministry of Interior.
- **Discrimination against refugees.** The 2016 case against the tabloid *Kronen Zeitung*<sup>265</sup> concerned a story about a Tyrol family who was not able to buy new ‘leisure tickets’, as they had not been able to show their family pass. The article alleged that the family was “furious” about the requirements, while noting that asylum seekers were losing their passports (though not their mobile phones) while fleeing their countries, and were still considered more trustworthy than an Austrian family. The Press Council Senate found a Code of Ethics violation, and concluded that a bureaucratic procedure at a leisure centre had nothing to do with refugees, and that the author had “played refugees against Austrians,”

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which could arouse “prejudices and resentment in some readers.” Although *Kronen Zeitung* is not a member of the Press Council, the media owner was asked to voluntarily publish the decision.

- **Misinformation about asylum seekers.**<sup>266</sup> In June 2016, the Press Council, in independent proceedings against *Kronen Zeitung*, found a violation of the anti-discrimination and accuracy provisions of the Code of Ethics. The case concerned the article “Social assistance for knives,” which reported a “gang war” between Afghans and Chechens, in which “70 young men and teenagers” allegedly stabbed each other with knives. The article concluded that “nearly 8,000 asylum seekers have committed criminal offences” in 2015, and that “many of the suspects receive social assistance from our taxpayers’ money,” comparing the amounts of social assistance given to refugees as compared to pensions and costs of living in Austria. The Press Council found that the article was “deliberately misleading” in its presentation of the facts concerning the actual amount of social assistance and cost of living. This misrepresentation constituted “discrimination and blanket denigration of asylum seekers and refugees.” The publisher was requested to voluntarily publish the decision.
- **Distorted reporting on unemployment benefits.** In February 2017, the Press Council found a violation of the provisions on discrimination in the case against Medien24 GmbH, owner of the *wochenblick.at* website, after a misrepresentation of legislation in an article about discrimination against migrants.<sup>267</sup> The site published the article “AMS donates holidays to migrants!” in which it claimed that a “special treat” of “two weeks of Christmas vacation for the unemployed” was provided only to foreign workers and Austrian citizens with a migration background, under unemployment benefit regulations. The Press Council found both a violation of standards on accuracy (regarding the information about the regulations of the Unemployment Insurance Act), as well as violations of anti-discrimination provisions. It stated that the misleading interpretation of legislation in the article “apparently served to arouse resentment towards people with a migrant background.”
- **Racist letter to editor.** In October 2017, the Press Council found the violation of the provisions of the Code of Ethics in another case against *Kronen Zeitung*,<sup>268</sup> who published a letter from a reader entitled “Migration from Africa.” In the letter, the author stated the Austrians were “rightly afraid and anxious” of the “thousands of dark-skinned young men from Africa” who Austria “voluntarily lets into the country on a daily basis,” called on the state “to put an end to this practice,” and complained that “no politician was willing to declare how to do it.” The letter also contained statements about “the repression of invaders,” and choosing whether “our children and grandchildren will be those victims or the advancing black armada,” and stated that “Europe could mutate into an impoverished black continent” while Africa would be “the empty

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continent.” The Press Council found that the publication of the letter to the editor highly problematic; it was “a blanket denigration of refugees and black people,” and the editors of *Kronen Zeitung* should have refrained from publishing it. The publisher was requested to voluntarily publish the decision.

- **False statistics about criminal behaviour among asylum seekers.** In March 2018, the Press Council found that Crown Multimedia GmbH & Co KG, the owner of website krone.at, violated both the provisions on accuracy and on discrimination of the Code of Ethics by publishing the article “45.9% of the criminal foreigners are asylum seekers.”<sup>269</sup> The article alleged that the Austrian government’s 2016 safety report stated that 45.9 per cent of foreigners who committed crime in Austria were asylum seekers. The Press Council found that the media outlet misrepresented the data and that this false reporting “led to an outright denigration of asylum seekers.” Krone.at, despite being contacted by several readers about the incorrect information, failed to correct it. The publisher was asked to publish the decision on krone.at.
- In some cases, although the Press Council did not initiate proceedings, it instructed the press outlet to refrain from publishing similar material in the future. For example, in November 2011, a letter was sent to the editor-in-chief of Medien24 GmbH in response to a communication from a reader about the online articles “What is coming to Austria?” and “Rape in Rimini: Mainstream conceals perpetrator origin!”<sup>270</sup> The Press Council Senate pointed out that the articles’ references to the skin colour of certain people had a “problematic racist undertone” and called on the editor-in-chief to “refrain from such discriminatory undertones in the future and approach the issues of asylum seekers and refugees with more sensitivity.” The letter was also published on the Press Council site.

A review of these and other Press Council decisions indicates that it does not use any consistent and explicit test for evaluating compliance with the Code of Ethics’ anti-discrimination provisions. Although the Press Council often refers to the importance of the right to freedom of expression and of balancing various interests, its reasoning is not usually specified. The review of the Press Council’s decisions also shows that most of its ‘hate speech’ related decisions or opinions are issued against a small number of (mostly tabloid) outlets that are not members of the Press Council. The Council’s sanctions largely consist of publishing its decisions, or a mere declaration on the case. As such, self-regulation is largely ineffective in addressing the concerns of potential victims of ‘hate speech’ in the media, or the concerns of groups subject to stigmatisation by media outlets. It can be assumed – given the nature of the Press Council process – that victims would rather report cases to law enforcement.

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## Approaches to media convergence

The Austrian regulatory environment for print and broadcast media has partly acknowledged the process of media convergence, and in some cases has extended coverage of existing provisions to online editions of respective media.

- The **Media Act**, laws for broadcasting, and the laws on press subsidies are also applicable to the online news websites of these outlets. There is a discussion about considering online media as broadcasters.<sup>271</sup> Although they are not covered by the provisions of the **Audiovisual Media Services Directive**, incorporated by Austrian legislation through the Audiovisual Media Services Act, online intermediaries and online platforms for distribution and publication of content are considered *de facto* as media actors by KommAustria, though the latter does not have any regulatory or controlling powers over them. KommAustria has no power or authority to regulate content on social media platforms which are not based in Austria, such as Facebook.
- The provisions of the **Audiovisual Media Services Act** apply not only to traditional broadcasting programmes but also to any audiovisual media service that these broadcasters provide on their websites – in particular, content regulations and administrative fines.<sup>272</sup>
- The **Media Act**, in particular provisions on civil actions and financial compensation, is applicable to “periodical electronic media.”<sup>273</sup> Therefore, the Media Act is applicable not only to traditional mass media with editorial purposes but also to news websites. It does not, however, apply to social media providers if a traditional media organisation does not host that site.

Otherwise, in terms of content regulation, under the **E-Commerce Act** Internet providers are subject to ‘notice-and-takedown’ procedures. The legislation on ‘hate speech’ is generally applicable to online content.

## Advertising self-regulation

The self-regulatory body for advertisement in Austria is the Advertising Council, established as a private organisation in 2008.<sup>274</sup> Its members<sup>275</sup> are obliged to comply with its self-regulatory Code of Ethics.<sup>276</sup>

The Code of Ethics states that advertising must not “violate human dignity, especially through a degrading representation of sexuality or otherwise discriminatory representations.”<sup>277</sup> It prohibits “discriminat[ing] against anyone directly or indirectly or promoting discrimination, in particular on grounds of gender, ethnic origin affiliation, skin colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or political other view,

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belonging to a national minority, the citizenship, social status, disability, age, sexual orientation or other reasons.”<sup>278</sup> Further, it states that advertising must “avoid the presentation of violence or promoting violence.”<sup>279</sup> The Code also contains ‘Special Conduct Rules’ for gender discrimination in advertising; here, the Code specifically states that advertising must not include “incitement of hatred.”<sup>280</sup>

The Advertising Council also provides a complaint procedure<sup>281</sup> that can be initiated by individuals or consumer associations. The Council can also initiate a procedure ex officio. However, the responsibility of the Advertising Council is “commercial advertising” only,<sup>282</sup> not, for example, for the area of competition law. It also deals with cases only if the matter is not already covered by separate proceedings (e.g. administrative law). The Rules of the Procedure of the Council also provide for actions the Council can take; if, for example, it finds the complaint well-founded, it can ask the concerned company to “be more sensitive in the future when designing promotional activities or individual subjects or demand to stop the campaign immediately.”<sup>283</sup>

A review of available Advertising Council decisions shows that it deals with a large number of complaints under the gender discrimination provisions (e.g. 32 per cent in the first half of 2017).<sup>284</sup> These mostly concern the representation of women in advertising. There was only one ‘hate speech’ case, which was a complaint against the unzensuriert.at website, concerning incitement to violence against foreigners. However, the Council declared the complaint inadmissible, as it did not concern commercial advertising, and was therefore outside its scope of authority.<sup>285</sup>

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## Conclusions and recommendations

Austria has robust legislation protecting the right to freedom of expression, and numerous laws on prohibition of discrimination in various areas.

However, when responding to ‘hate speech,’ it appears that the provisions of criminal law, including those on incitement, are applied with varying levels of effectiveness. There is a lack of clarity around the different levels of severity ‘hate speech’ and the required responses, tailored to their severity. Additionally, Austrian criminal law contains a number of speech related provisions which do not comply with international standards (such as criminal defamation or blasphemy); these criminal offences are often conflated with ‘hate speech,’ which leads to further confusion on what speech can be legitimately restricted.

There is no evidence that the victims of ‘hate speech’ could find recourse in other remedies – in particular civil and administrative law. Analysis of the decisions of the self-regulatory Press Council shows that it does not appear to be an effective mechanism – either to provide remedies or to deter future violations of ‘hate speech’ in the media.

A more concerted effort is needed at government level – in law, policy, and practice – to ensure that measures are effective and in line with international obligations, striking a balance between the protection of freedom of expression and the prohibition of incitement to discrimination, hostility, and violence.

This report proposes that, at a minimum, Austria should take the following measures to improve the current situation:

- All relevant legislation – in particular criminal law provisions – should be revised to comply with the international human rights standards applicable to ‘hate speech;’
- The applicable provisions of the Criminal Code and related legislation should undergo comprehensive review: all offences which are not compatible with international freedom of expression standards should be abolished, in particular, criminal defamation, insult, and blasphemy prohibitions;
- The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the ICCPR, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);

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- The government should consider merging various anti-discrimination acts at federal and provincial levels into a single piece of legislation in order to make the complex legislation accessible, in order to improve the protection of victims;
  - All equality bodies – at both federal and provincial levels – should be made fully independent at institutional, political, and functional levels from other state authorities. They should be equipped with a more robust mandate to address issues of discrimination and intolerance. In particular, their mandate should be extended to cover monitoring of instances of ‘hate speech,’ with a view to addressing root causes of the problem and tackling structural discrimination. They should also be tasked to provide more comprehensive support to victims in courts, including legal representation and legal aid;
  - The government should ensure that victims of ‘hate speech,’ as well as other forms of discrimination, have an easily accessible set of civil and administrative remedies to ensure protection of their rights, including through adequate compensation;
  - The government should develop a comprehensive policy on the media and ‘hate speech,’ in cooperation with public broadcasters and media regulators;
  - Public officials, including politicians, should acknowledge that they must play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of ‘hate speech.’ This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing such incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions run high, or are susceptible to being escalated, and when political stakes are high, such as in the run-up to elections;
  - Media organisations and media outlets should recognise that they play an important role in combatting ‘hate speech,’ intolerance, and prejudice in public discourse. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect relevant ethical codes, as well as ensuring that ethical codes of conduct on ‘hate speech’ are effectively implemented, and that effective measures are undertaken to address any violations. Ethical codes of conduct should be incorporated into practice by journalists and media outlets in order to ensure full compliance. Media outlets should increase ethnic, religious, and gender plurality amongst journalists, editors, media workers, and other employees of public service broadcasters; and

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- The Austrian Press Council should increase its internal diversity, and in particular ensure that it includes members from minorities and other groups subject to discrimination. Effective measures should be taken to address violations of ethical codes of conduct. The Press Council should also organise regular training courses and updates for professional and trainee journalists on human rights standards on 'hate speech' and freedom of expression, and on relevant ethical codes of conduct.



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# Endnotes

- <sup>1</sup> These were in particular refugees from former communist countries after the 1950s, immigrants from Turkey and the former Yugoslavia in 1960s, and refugees from the former Yugoslavia in early 1990.
- <sup>2</sup> See US State Department, Report on International Religious Freedom, 15 August 2017. The report states that the Documentation Center for the Islamic Faith Community reported a gradual increase of anti-Muslim incidents since mid-2014, when it started to collect the statistics, especially an increase of incidents after terrorist attacks in Europe. See also, ZARA, Racism Report 2016, available from <https://bit.ly/2KTK9Is>.
- <sup>3</sup> The US State Department Report, *Ibid*.
- <sup>4</sup> For more information about the Freedom Party of Austria (*Freiheitliche Partei Österreichs* or FPÖ), see, e.g. DW, Freedom Party of Austria - what you need to know, 12 October 2017, available from <https://bit.ly/2Mm5J00>.
- <sup>5</sup> See, e.g. The Guardian, Austrian president approves far-right Freedom party joining coalition government, 16 December 2017, available from <https://bit.ly/2GZCQUK>.
- <sup>6</sup> See, e.g. European Network of Legal Experts in Gender Equality and Non-Discrimination, Austria, 2017, available from <https://bit.ly/2urPA1s>.
- <sup>7</sup> See, e.g. Romano Centro, Antigypsyism in Austria, 2016, available from <https://bit.ly/2N4P2Gg>.
- <sup>8</sup> See ILGA Europe Annual Review 2016, Austria profile, available from <https://bit.ly/2NNrOWi>.
- <sup>9</sup> Seethaler, Beaufort & Dopona, Media Pluralism Monitor 2016, available from: <http://bit.ly/2qczVPy>.
- <sup>10</sup> Green Paper: Digital Courage, issued on behalf of the President of the Federal Council, Mario Lindner, November 2016, available from <http://bit.ly/2fqVGJq>.
- <sup>11</sup> *Ibid.*, Hate on the Internet: Criminal Law Classification and Criminal Policy Assessment, p. 14ff.
- <sup>12</sup> See, e.g., A. Gebesmair et al, The economic and social significance of Youtube-Channels in Austria, 2017, p. 5, available from <https://bit.ly/2t7fjhH>.
- <sup>13</sup> For example, the minister for media, Thomas Drozda, has demanded such a new institution.
- <sup>14</sup> See, e.g. ECRI, Report on Austria, 5th monitoring cycle, adopted on 16 June 2015.
- <sup>15</sup> See the Decision of the Constitutional Court (*Verfassungsgerichtshof*) of 30 June 2017, VfGH G53/2017. This decision concerned the Government's compulsory purchase of the apartment complex where Adolf Hitler was born. The Constitutional Court stated that the expropriation was legal, as it was necessary in a democratic society and the owner received a proportionate compensation. Hence, the Constitutional Court placed the public interest of preventing the symbolic appeal of the Hitler's birthplace to neo-Nazi above the individual interest of the owner.
- <sup>16</sup> The report is based on a review of existing legislation and its application by relevant authorities, analysis of information provided by public bodies at the author's request, and interviews with key stakeholders (in particular, human rights activists and experts). All the analysis in the report is made on basis of the German version of the respective laws; all translations of respective laws in this report are unofficial translations. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.
- <sup>17</sup> Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit

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Court of Appeals, 2<sup>nd</sup> circuit).

<sup>18</sup> The ICCPR has 167 States parties, including Austria.

<sup>19</sup> See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

<sup>20</sup> See, e.g. European Court, *The Sunday Times v. UK*, App. No. 6538/7426 (1979), para. 49.

<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950 (European Convention).

<sup>22</sup> Article 10(1) of the European Convention on Human Rights reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; Article 10(2): “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>23</sup> Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights”; Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind;” and Article 7 requires protection from discrimination.

<sup>24</sup> For a full explanation of ARTICLE 19’s policy on ‘hate speech,’ see Hate Speech Explained: A Toolkit; available from <http://bit.ly/1UvUQ9t>.

<sup>25</sup> General Comment 34, *op.cit.*, para 52.

<sup>26</sup> The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available from <http://bit.ly/2fTNMG6>.

<sup>27</sup> The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council; see, for example, the Report of the Special Rapporteur on FoE on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

<sup>28</sup> HR Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2.

<sup>29</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating racist hate speech, 26 September 2013, paras 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

<sup>30</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.

- <sup>31</sup> European Court, *Jersild v. Denmark*, App. No. 15890/89 (1992), para 35.
- <sup>32</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; available from <http://bit.ly/2nTmRAi>.
- <sup>33</sup> For a full analysis, see ARTICLE 19, Submission to the Consultations on the EU Justice Policy, December 2013; available from <http://bit.ly/2APKRZ9>.
- <sup>34</sup> HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.
- <sup>35</sup> General Comment No. 34, *op cit.*, para 43.
- <sup>36</sup> Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The HRC endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.
- <sup>37</sup> Report of the Special Rapporteur on FoE, 16 May 2011, A/HRC/17/27, paras 75-76.
- <sup>38</sup> Report of the Special Rapporteur on FoE, 11 May 2016, A/HRC/32/38; para 40 – 44.
- <sup>39</sup> *Ibid.*
- <sup>40</sup> *Ibid.*, para 43.
- <sup>41</sup> *Ibid.*
- <sup>42</sup> Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda, adopted by the UN Special Rapporteur on FoE, 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’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017; available from <http://bit.ly/2meFQ6g>.
- <sup>43</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).
- <sup>44</sup> *Ibid.*, Article 5.
- <sup>45</sup> Grand Chamber of the European Court, *Delfi AS v. Estonia*, App. No. 64569/09 (2015) .
- <sup>46</sup> *Ibid.*, Judges Sajó and Tsotsoria’s Joint Dissenting Opinion. See also ARTICLE 19, *Delfi AS v Estonia* Case Comment: Strasbourg Undermines Freedom of Expression, 1 October 2015; available from <http://bit.ly/2zQTEur>.
- <sup>47</sup> For example, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No. 22947/13 (2016), the European Court found a violation of Article 10 of the European Convention where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice.
- <sup>48</sup> European Court, *Pihl v. Sweden*, App. No. 74742/13 (2017).
- <sup>49</sup> For further analysis, see D. Voorhoof, *Pihl v. Sweden*: non-profit blog operator is not liable for defamatory users’ comments in case of prompt removal upon notice, Strasbourg Observers, 20 March 2017, available from <http://bit.ly/2zMUQB8>.
- <sup>50</sup> European Commission, Code of Conduct on Countering Illegal Hate Speech, signed on 31 May 2016; available from <http://bit.ly/1XLcJVo>.
- <sup>51</sup> Council Framework Decision, *op.cit.*
- <sup>52</sup> For the criticism of the Code of Conduct, see ARTICLE 19, EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision, June 2016, available from <http://bit.ly/29BVUJh>.
- <sup>53</sup> Article 13 of the Federal Bill of Rights guarantees the right to freedom of expression as follows: “Everyone shall have the right, within legal limits, freely to express his thoughts orally, in writing, through the

press, or by pictorial representation. The press shall not be placed under censorship, nor restrained by the system of licenses. Administrative prohibitions of the use of the mail are not applicable to matter printed within the country.” See Constitution of 21 December 1867, Constitutional Act on the General Rights of Citizens for the Kingdoms and Countries Represented in the Parliament of the Empire (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* StGG 1867), first published in the Federal Gazette. Nr. 142/1867 idF BGBl. Nr. 684/1988, available from <http://bit.ly/1yp5yDO>.

<sup>54</sup> The Federal Constitutional Act (*Bundes-Verfassungsgesetz, B-VG*) guarantees right to equality in Article 7 para 1 which stipulates: “All nationals are equal before the law. There shall be no privileges based upon birth, sex, estate, class or religion. No one shall be discriminated because of his disability. The Republic (Federation, provinces and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life.” Further, Article 7 para 2 stipulates: “The Federation, provinces and municipalities subscribe to the de-facto equality of men and women. Measures to promote factual equality of women and men, in particular by eliminating actually existing inequalities, are admissible.” See, The Federal Constitutional Act, consolidated version, published in the Official Bulletin No. 1 of 19 December 1945; available (in English) at <http://bit.ly/2fjqjiv>.

<sup>55</sup> E.g. the Constitution and the Federal Constitutional Act, *op.cit.*

<sup>56</sup> The Federal Constitutional Act, *op.cit.*, Article 9 para 1.

<sup>57</sup> Austria has ratified the European Convention in 1958 (BGBl. No. 210/1958) which became a part of the constitutional law in 1964; see The Federal Constitutional Act of 4 March 1964, with which the provisions of the Federal Constitutional Act in the version of 1929 on state contracts are amended and supplemented, Federal Law Gazette No 59/1964, Article II para 7.

<sup>58</sup> See, e.g., H. Mayer, G. Kucsko-Stadelmayer, K. Stöger, Federal Constitutional

Act, p. 1322.

<sup>59</sup> Constitutional Court, 23 June 1989, B990/87.; 30.09.1999 (B2272/98); 02.12.2011, B3519/05.

<sup>60</sup> The Federal Constitutional Act, *op.cit.*, Article 57 para 1 and Article 96 para 1.

<sup>61</sup> Federal Constitutional Act of 10 July 1974 on the Protection of the Independence of the Broadcasting, StF: Federal Law Gazette No. 396/1974. In Article I para 2, it guarantees objectivity, impartiality, diversity and balanced broadcasting programs as well as independence of participating persons (journalists) as central features of such a law. In Article 1 para 3, broadcasting is declared a “public task.”

<sup>62</sup> See Article 20 para 2, as amended by BGBl. I Nr. 2/2008.

<sup>63</sup> The Equal Treatment Act (*Gleichbehandlungsgesetz*), Federal Law Gazette I Nr. 66/2004 as subsequently amended, adopted on 26 June 2004, in force since 01 July 2004.

<sup>64</sup> The use of term “ethnic affiliation” in Austria has been the cause of confusion, but it is often used to refer to “race and ethnic origin.” For example, in practice, the ground of skin colour is covered by the ground of ethnic affiliation; it is a deliberate decision not to use the term “race.” See ECRI Report on Austria, *op.cit.*

<sup>65</sup> The Federal-Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*) BGBl. I Nr. 65/2004, Federal Law Gazette I Nr. 65/2004, as subsequently amended, adopted on 23 June 2004, in force since 1 July 2004.

<sup>66</sup> The Act on the Equal Treatment Commission and the National Equality Body (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*), BGBl. I Nr. 66/2004, Federal Law Gazette I Nr. 66/2004 as subsequently amended, adopted on 23 June 2004, in force since 1 July 2004.

<sup>67</sup> Equal Treatment Commission (*Gleichbehandlungskommission*), based

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on the Federal Act on the Equal Treatment Commission and the Ombuds Office for Equal Treatment (ETC/OOEC Act, Federal Law Gazette No. 108/1979 as amended i; for more information, see <https://bit.ly/2v4WL39>.

<sup>68</sup> The Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*), Federal Law Gazette Nr. 22/1970, as subsequently amended, adopted on 10 August 2005, in force since 11 August 2005.

<sup>69</sup> The Federal Disability Equality Act (*Behindertengleichstellungsgesetz*), BGBl I Nr. 82/2005, Federal Law Gazette I Nr. 82/2005, as subsequently amended, adopted on 10 August 2005, in force since 11 August 2005.

<sup>70</sup> “National minority” is defined as “an ethnic group that comprises Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory;” see Federal National Minorities Act (*Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich* or *Volksgruppengesetz*), adopted on 5 August 1976.

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

<sup>72</sup> *Ibid.*, Article 8f.

<sup>73</sup> The National Socialism Prohibition Act 1947 (*Verbotsgesetz*), StF: StGBI. Nr. 13/1945.

<sup>74</sup> The Federal Act of 23 January 1974 on the Acts Subject to Judicial Punishment (Criminal Code, *Strafgesetzbuch* - StGB), Federal Law Gazette No. 60/1974 as amended by Federal Law Gazette I No. 154/2015.

<sup>75</sup> The amendments were specifically introduced to tackle “hate speech;” see BGBl I 2011/103, Government program for the 24th legislative period. See also, Ebensperger, The dissemination of Nazi ideas on the Internet and their criminal consequences, *ÖJZ* 2002, 132.

Decision of the Supreme Court (*Oberster Gerichtshof*, OGH) of 29 November 2016, OGH 14 Os 88/16x.

<sup>76</sup> The Criminal Code, *op.cit.*, Article 283(1) para 1.

<sup>77</sup> The Criminal Code, *op.cit.*, Article 283(1) para 2.

<sup>78</sup> These crimes are those stipulated in Articles 321 to 321f and Article 321k and include genocide, crimes against humanity, war crimes against persons, war crimes against property and other rights, war crimes against international missions and misuse of protection and nationality marks, war crimes of the use of prohibited methods of warfare, war crimes of the use of prohibited means of warfare, and crimes of aggression.

<sup>79</sup> The Criminal Code, *op.cit.*, Article 283(1) para 3.

<sup>80</sup> The Criminal Code, *op.cit.*, Article 283(2).

<sup>81</sup> The Criminal Code, *op.cit.*, Article 283(3).

<sup>82</sup> *Ibid.*, Rz 11.

<sup>83</sup> See Fabrizy, StGB Criminal Code and selected subsidiary laws 12 (2016), § 283 Rz 2.

<sup>84</sup> Jerabek, StGB Criminal Code, StGB § 74 Rz 35 ff.

<sup>85</sup> Explanatory Remarks to the Government Bill of the Criminal Code, EBRV 1971, 427.

<sup>86</sup> See SSt 50/54 = EvBl 1980/55, available from <https://bit.ly/2LnowLc>.

<sup>87</sup> EBRV 1971, 427.

<sup>88</sup> *Ibid.*

<sup>89</sup> EBRV 674 BlgNR 24. GP 7.

<sup>90</sup> See Plöchl, Vienna Commentary on the Criminal Code (in Höpfel & Ratz), WK<sup>2</sup> StGB § 283 (Stand 1 March 2013, rdb.at).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Fuchs*, Criminal Law General Section I, I<sup>8</sup> 10/44.

<sup>94</sup> *Ibid.*

<sup>95</sup> Decision of the Supreme Court of 21 October 2008, OGH 15 Os 116/08k, SSt 55/28.

<sup>96</sup> Decision of the Supreme Court OGH 90s32/77; 120s85/80; 120s130/83; 120s128/84, published in EvBI 1977/262 = RZ 1977/100.

<sup>97</sup> Decision of the Supreme Court, 29 November 2016, OGH 14 Os 88/16x.

<sup>98</sup> Decision of the Supreme Court of 4 March 1982, OGH 13 Os 30/82, published in SSt 53/9 = EvBI 1982/180.

<sup>99</sup> Decision of the Supreme Court of 28 January 1999, OGH 15 Os 203/98, published in EvBI 1999/102 = JBI 2000, 469.

<sup>100</sup> Decision of the Supreme Court of 4 March 1982, *op.cit.*

<sup>101</sup> *Ibid.*

<sup>102</sup> C.f Article 863 of the General Civil Code which stipulates that one can express his/her will both expressly by words and generally accepted sign; but also tacitly by such acts that considering all circumstances, leave no reasonable reason to doubt it. See General Civil Code (*Allgemeines bürgerliches Gesetzbuch*), StF: JGS No. 946/1811 as subsequently amended.

<sup>103</sup> *Ibid.* The defendant claimed that he just repeated a joke he heard before and found funny and did not want to offend anyone; he was simply reacting to another person's jokes; and that an accompanying emoticon was a sign of irony. When the judge asked the defendant if he thought that Turkish people would also find it funny, the defendant responded that he tested it at his work place and that "90% of the Turkish people there found it funny as well." He also acknowledged that the description of Turkish people as "jerk-offs" was derogatory.

<sup>104</sup> Decision of High Regional Court in Innsbruck (*Oberlandesgericht Innsbruck*, OLG) of 30 April 2013, 11 Bs 110/13h.

<sup>105</sup> The court referred to decisions RS0104622, RS0104618, and RS0087248.

<sup>106</sup> Provincial Court for Criminal Cases Vienna, AZ 606 Hv 2 / 11h.

<sup>107</sup> He argued that the jury had not "taken a reasonable decision and had not elaborated on which material they were basing their decision on," complaint under Article 245(1) 1 Z 8, 10a und 11 lit b, the Code of Criminal Procedure (*Strafprozeßordnung, StPO*) 1975, StF: BGBl. Nr. 631/1975 (WV) idF BGBl. I Nr. 121/2016.

<sup>108</sup> Decision of the Supreme Court of 30 May 2017, OGH 110s20/17a.

<sup>109</sup> Decision of the Provincial Court in Vienna (*Landesgericht Wien*) of 19 January 2015, GZ 608 Hv 3/14z-85.

<sup>110</sup> Decision of the Supreme Court of 10 June 2015, 150s40/15v.

<sup>111</sup> Decision of the Regional Court Wels (*Landesgerichts Wels*) as a jury on 16 June 2016, GZ 11 Hv 127 / 15p-49.

<sup>112</sup> Decision of the Supreme Court of 29 November 2016, 14 Os88/16x.

<sup>113</sup> Decision of the Regional Court in Leoben (*Landesgericht Leoben*) AZ 34 Hv 59/16y; 22 November 2016, AZ 10 Bs 271/16b.

<sup>114</sup> Decision of the Supreme Court of 05 April 2017, 15 Os 25/17s.

<sup>115</sup> Decision of the Regional Court in Graz (*Landesgericht Graz*), GZ 14 Hv 30/15t-146.

<sup>116</sup> Decision of the Supreme Court of 13 January 2016, OGH 15 Os 141/15x.

<sup>117</sup> *Ibid.*

<sup>118</sup> Decision of the Salzburg Regional Court (*Landesgericht Salzburg*) of 22 October 2014, GZ 47 Hv 113/14i-12.

<sup>119</sup> Decision of the Supreme Court of 22 July 2015, 15 Os 75/15s.

<sup>120</sup> For example, *Tirol ORF*, Hate postings: "Profile" editor displays on Facebook, 12

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September 2015, available from <https://bit.ly/2L0027k>. See also Lendl, 'From weblogs, user forums, and other comments in the net', in Berka, Holoubek, Leitl-Staudinger, *Citizens in the Web*, p. 50; or *Der Standard*, Anti-Semitism ad for Facebook postings, 31 March 2017, available from <https://bit.ly/2ui0hn3>.

<sup>121</sup> Under Article 12 of the Criminal Code, in addition to direct perpetrator, every person that incites others to commit a crime or who participates in committing it in another way is held criminally liable.

<sup>122</sup> See Haberkamm, A differentiated view of the term 'hate speech' or 'Hate Speech' from a legal point of view, in *Bundesrat*, Digital Courage, p. 23-24.

<sup>123</sup> See Federal Act of 23 January 1974 on the actions subject to legal punishment (Criminal Code), StF: BGBl. Nr. 60/1974 as amended by Federal Law Gazette I No. 154/2015.

<sup>124</sup> These provisions impose a prison sentence of up to six months or, alternatively, a fine of up to 360 daily amounts (daily rates) for cases when "a person accuses another person of contemptuous attitudes or views, of dishonourable behaviour, or of any behaviour against good manners." The message must be 'receivable' by other persons, that is, if it is 'public.' The provisions provide a defence of truth (in para 3). The punishment is higher if the statement is published in a newspaper, broadcast, or in another way making it accessible to a wider public (para 2). Defamation is a so-called "success-crime," (*Erfolgsdelikt*) which means that danger must be successful: the behaviour must have a proscribed effect. The effect does not have to occur immediately after sending the message.

<sup>125</sup> Under these provisions, it is prohibited to "to insult, mock, ill-treat or threaten to ill-treat another person, perceivable from at least three other persons," with a sentence of up to three months imprisonment or alternatively a fine of up to 180 daily amounts.

<sup>126</sup> Slander occurs "when a person accuses another person of having committed an offence, although he or she knows that this suspicion is wrong" and can lead to a prison sentence of up to one year or alternatively

a fine of 720 daily amounts; the sentence can be increased in some cases. The scope of the article is narrow as it only concerns accusing another person of a crime and the accusation must be capable by this person to be pursued by authorities. *C.f. Pilnacek/Šwiderski* in Höpfel/Ratz, WK<sup>2</sup> StGB § 297 (Stand 1.8.2015). Action has to be directed against a "determinable natural person who the authorities can search for" (OGH 12 Os 44/89OGH; 15 Os 89/96, 15 Os 88/96, 12 Os 137/94), although the person does not have to be explicitly named; it is sufficient if the victim is "described according to his or her central attributes" (Decision of the Supreme Court, 15 Os 134/87).

<sup>127</sup> Article 117(3) of the Criminal Code, *op.cit.*

<sup>128</sup> Mrs Glawischnig pursued a prosecution under Article 111 of the Criminal Code, and also demanded financial damages and the deletion of the message. The Regional Court in Graz acquitted the defendant, concluding that Mrs Glawischnig had neither uttered the relevant statement, nor had the required intent. It also found that an average reader would understand the message as a critique of Mrs Glawischnig's views on the country's refugee policy; see Decision of the High Court in Graz of 19 January 2016. U LGSt Graz, 5 Hv 119/15i.

<sup>129</sup> Criminal Act Amendment of 07 July 2015, BGBl I 154/2015.

<sup>130</sup> *Schwaighofer* in Höpfel/Ratz, WK<sup>2</sup> StGB § 107c (Stand 1.5.2016, rdb.at), Rz 2. See also *Pilnacek*, StGB 2015: Background, Goals and Perspectives, Yearbook of Economic Criminal Law and Corporate Responsibility, 2015, 307.

<sup>131</sup> *Schwaighofer* in Höpfel/Ratz, WK<sup>2</sup> StGB § 107c (Stand 1.5.2016, rdb.at), Rz2.

<sup>132</sup> *Kienapfel/Scholl*, StudB BT I<sup>4</sup> § 107 c Rz 4.

<sup>133</sup> See EBRV StRÄG 2015, 19.

<sup>134</sup> *Murschetz* in WK<sup>2</sup> StGB § 169 Rz 13 mN.

<sup>135</sup> *Schwaighofer* in Höpfel/Ratz, *op.cit.*

<sup>136</sup> *Kienapfel/Schroll*, StudB BT I<sup>4</sup> § 107 c Rz 12.

<sup>137</sup> *Schwaighofer* in Höpfel/Ratz, *op.cit.*, Rz 20.

<sup>138</sup> *Schwaighofer* in Höpfel/Ratz, *op.cit.*, Rz16.

<sup>139</sup> *Schwaighofer* in Höpfel/Ratz, *op.cit.*, Rz18.

<sup>140</sup> Under these provisions, a person who “publicly disparages a person or a thing which are subject of a church or religious group, a religious teaching, a legally recognised tradition or an institution of such a church or religious group under circumstances that are suitable to arouse justified indignation, can be punished with up to six months imprisonment, or alternatively a fine of up to 360 daily amounts.”

<sup>141</sup> Decision of the District Court for Criminal cases Vienna, AZ 112 E Hv 144 / 10g.

<sup>142</sup> Decision of the District Court for Criminal cases Vienna, 15 February 2011, GZ 112 E Hv 144 / 10g-30.

<sup>143</sup> Decision of the Supreme Court of 11 December 2013, 15 Os 52/12d.

<sup>144</sup> *Ibid.*

<sup>145</sup> C.f. also Lendl, ‘On weblogs, user forums and other comments in the net,’ p. 50.

<sup>146</sup> Green Paper Digital Courage, issued on behalf of the President of the Federal Council Mario Lindner, November 2016, available from <https://bit.ly/2fqVGJq>.

<sup>147</sup> Resolution 223/A€-BR/2016, submitted on the 21 December 2016.

<sup>148</sup> Digital Courage, *op.cit.*

<sup>149</sup> Article III(1) Z 3, The Introductory Act on Administrative Procedures (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*), 2008 – EGVG. StF: BGBl. I Nr. 87/2008 (WV) idF BGBl. I Nr. 33/2013.

<sup>150</sup> Hauer, Leukauf, Handbook of the Austrian administrative procedure, 75, 78.

<sup>151</sup> Federal Act governing certain legal aspects

of electronic business and legal transactions (*Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden, E-Commerce-Gesetz - ECG*), StF: BGBl. I Nr. 152/2001 idF BGBl. I Nr. 34/2015 . The Act which transposes the EU E-Commerce Directive into the Austrian law.

<sup>152</sup> *Ibid.*, Article 13.

<sup>153</sup> *Koziol*, Provider liability according to ECG and MedienG. In: Berka, Grabenwarter, Holoubek, Personality Protection in Electronic Mass Media, REM Series, p. 43.

<sup>154</sup> VOEP, Media Future Perspective, White Paper for the Media Market, available from <https://bit.ly/2tICBq0>.

<sup>155</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive).

<sup>156</sup> See e.g. Decision of the Supreme Court of 06 July 2004, 4 Ob 66/04s, Decision of the Supreme Court of 22 December 2016, 6 Ob 244/16z; Decision of the High Regional Court of Vienna (*OLG Wien*) of 17 November 2016, GZ 5 R 156/16x-9.

<sup>157</sup> Decision of the Supreme Court 6Ob116/17b.

<sup>158</sup> *Ibid.*

<sup>159</sup> Overview of the jurisprudence on defamation is available from <https://bit.ly/2J9IDHO>. In Austria, when requesting injunctions, plaintiffs can action statements that are not identical, but similar in wording or meaning, in order to prevent defendants from easily circumventing the injunctions by slightly altering their statements.

<sup>160</sup> Federal Act on the Accountability of Associations for Crime (*Verbandsverantwortlichkeitsgesetz – VbVG*) StF: BGBl. I Nr. 151/2005 idF BGBl. I Nr. 26/2016. See Article 3, para 1, Z 1.

<sup>161</sup> *Ibid.* Article 3 para 2.

<sup>162</sup> *Ibid.* para 3, Z 1.



<sup>163</sup> At the federal level, these include the Equal Treatment Act, the Federal-Equal Treatment Act, the Act on the Employment of People with Disabilities, and the Federal Disability Equality Act; *op.cit.*

<sup>164</sup> These include Viennese Anti-Discrimination Act (*Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien*) No. 35/2004 ala LGBI Nr.53/2014]; Viennese Service Order (*Wiener Dienstordnung*) LGBI No. 42/2006 ala Nr. 37/2016; Viennese Agricultural Labour Equal Treatment Act (*Wiener Land-und forstwirtschaftliches Gleichbehandlungsgesetz*) LGBI 25/1980, ala LGBI. 13/2016; Lower Austrian Equal Treatment Act (*Niederösterreichisches Gleichbehandlungsgesetz*) LGBI No. 69/1997 ala 109/2011; Lower Austrian Anti-Discrimination Act (*Niederösterreichisches Antidiskriminierungsgesetz*) LGBI No. 45/2005 ala Nr. 113/2011; Lower Austrian Agricultural Labour Relations Act (*Niederösterreichische Landarbeitsordnung*), LGBI. Nr. 185/1973 ala 102/2016; Carinthian Anti-Discrimination Act (*Kärntner Antidiskriminierungsgesetz*) LGBI. Nr. 63/2004 ala Nr. 18/2013; Carinthian Agricultural Labour Relations Act (*Kärntner Landarbeitsordnung*) LGBI. Nr. 97/1995 as of 60/2006 ala Nr. 13/2016; Upper Austrian Anti-Discrimination Act (*ÖO Antidiskriminierungsgesetz*) LGBI. Nr. 50/2005 ala Nr. 90/2013; Upper Austrian Agricultural Labour Relations Act (*Oberösterreichische Landarbeitsordnung*) LGBI. Nr. 25/1989 ala LGBI. Nr. 84/2016]; Salzburg Equal Treatment Act (*Salzburger Gleichbehandlungsgesetz*), LGBI. Nr. 31/2006 ala Nr. 49/2016; Salzburgian Agricultural Labour Relations Act (*Salzburger Landarbeitsordnung*), *LGBL. Nr. 7/1999 ala Nr. 60/2015*; Tyrolian Equal Treatment Act (*Tiroler Landes-Gleichbehandlungsgesetz*) LGBI. Nr. 1/2005 ala Nr. 81/2016; Tyrolian Anti-Discrimination Act (*Tiroler Anti-Diskriminierungsgesetz*) LGBI. Nr. 25/2005 ala Nr. 114/2013; Tyrolian Equal Treatment Act for Municipalities (*Tiroler GemeindeGleichbehandlungsgesetz*), LGBI. Nr. 2/2005 ala Nr. 81/2016; Tyrolian Agricultural Labour Relations Act (*Tiroler Landarbeitsordnung*), LGBI. Nr. 27/2000 ala 61/2005 ala 106/2015; Tyrolian

Provincial Teachers Employment Act (*Tiroler LandeslehrerDiensthöheitsgesetz*), LGBI. Nr. 74/1998, ala LGBI. 75/2014; Vorarlbergian Anti-Discrimination Act (*Vorarlberger Antidiskriminierungsgesetz*), LGBI. Nr. 17/2005 ala Nr. 45/2014]; Burgenlandian Anti-Discrimination Act (*Burgenländisches Antidiskriminierungsgesetz*) LGBI. Nr. 84/2005 ala LGBL 82/2016; Burgenlandian Agricultural Labour Relations Act (*Burgenländische Landarbeitsordnung Burgenländisches Landesgesetzblatt*) Nr.37/1977, ala LGBI. Nr. 26/2016.

<sup>165</sup> The Equal Treatment Act, *op.cit.*, Article 21 (2).

<sup>166</sup> See Articles 17(1), 18 and 31(1) of the Equal Treatment Act; Article 13 of the Federal-Equal Treatment Act; Article 7b(1) of the Act on the Employment of People with Disabilities; and Article 4(1) of the Federal Disability Equality Act.

<sup>167</sup> Federal Act of 12 June 1981 on the Press and other journalistic media (*Mediengesetz - MedienG*) StF: **BGBL. Nr. 314/1981 idF BGBL. I Nr. 101/2014.**

<sup>168</sup> *Op.cit.*

<sup>169</sup> The Civil Code, *op.cit.*

<sup>170</sup> Media Act, *op.cit.*, Article 6.

<sup>171</sup> *Ibid.*, Article 2.

<sup>172</sup> The Media Act, Article 2 (2)a.

<sup>173</sup> *Ibid.*

<sup>174</sup> These included issues such as the required intent of the perpetrator or what constitutes “distribution” of the statement (see e.g. Supreme Court Decision 120s96/89 of 28 September 1989); or the extent of “journalistic care;” see Decision of the Supreme Court 150s14/15w (150s15/15t) of 29 April 2015.

<sup>175</sup> The Federal Act on the Equal Treatment Commission and the Equal Treatment Office, *op.cit.*, Article 38 (4).

<sup>176</sup> In 2007, Vienna Regional Court for Civil cases found that physically kicking out a woman of Tunisian origin from a store with

the words “we do not sell to foreigners” constituted discrimination and harassment on the grounds of “ethnic affiliation” as it was irrelevant that the victim was a foreigner and not an Austrian citizen of Tunisian origin. See Decision of the State Court for Civil Law Vienna of 30 March 2007, *Hayet B. vs. Ferdinand S*, Nrs. 35R68/07w; 35R104/07i.

<sup>177</sup> *Op.cit.*

<sup>178</sup> H. Koziol and R. Welser, *Basis of the Civil Law Volume II*, Vienna. Manz, 2008, p. 349.

<sup>179</sup> Article 13(2) of the Federal Disability Equality Act, *op.cit.*

<sup>180</sup> Under Article 8 of the Federal Disability Act, *op.cit.*, the Federal Council on Disability must recommend filing the action with a resolution backed by two-thirds of the votes.

<sup>181</sup> The Federal Act on the Equal Treatment Commission and the Equal Treatment Office, *op.cit.*, Article 12/2.

<sup>182</sup> The Equal Treatment Act, Article 62.

<sup>183</sup> These are a) senate on equal treatment of men and women in the workplace; b) senate on equal treatment within the scope of Directive 2000/78/EC excluding disability; and c) senate on equal treatment within the scope of Directive 2000/43/EC for race and ethnic origin outside employment and Directive 2004/113/EC.

<sup>184</sup> These are Ombud for Equal Treatment between Women and Men in Employment and Occupation, Ombud for Equal Treatment Irrespective of Ethnic Origin, Religion or Belief, Age or Sexual Orientation in Employment and Occupation, Ombud for Equal Treatment Irrespective of Ethnic Origin and Gender in other areas.

<sup>185</sup> The Equal Treatment Act, *op.cit.* Article 3(1).

<sup>186</sup> The Federal Act on the Equal Treatment Commission and the Equal Treatment Office, *op.cit.*

<sup>187</sup> These include, for example, Office for the Fight against Discrimination in Vienna (under the Viennese Anti-Discrimination Act *op.cit.*);

the Styrian Equal Treatment Commission, the Commissioner for Equal Treatment and Contact Person (under the Styrian Equal Treatment Act, LGBl Nr. 5/2010, paras 34-47); the Anti-Discrimination Office of Carinthia (under the Carinthian Anti-Discrimination Act, *op.cit.*, Articles 32 – 33c), Lower Austrian Commission for Equal Treatment (under Lower Austrian Equal Treatment Act, *op.cit.*), Upper Austria Office for Anti-Discrimination (under the Upper Austrian Anti-Discrimination Act, *op.cit.*, Article 14), Burgenland Anti-Discrimination Commission and Anti-Discrimination Commissioner (under the Burgenlandian Anti-Discrimination Act, LGBl Nr. 84/2005, Articles 29b – 31), Salzburg’s five Commissions for Equal Treatment (under the Salzburgian Equal Treatment Act, LGBl Nr. 31/2006, Articles 30-40), Tyrol Commissioner for Equal Treatment (Tyrolean Anti-Discrimination Act, *op.cit.*, Articles 15-17) or Vorarlberg Provincial Ombudsman (*Landesvolksanwalt*) and the Provincial Ombud for Health care (*Vorarlbergian*) (under the Provincial Anti-Discrimination Act, LGBl Nr. 17/2005, Articles 11-15.)

<sup>188</sup> The event took place in June 2016 within the Austrian Parliament; for more information, see <https://bit.ly/2u4VaYk>.

<sup>189</sup> For more information, see <https://spoe.at/Plan-A-2017.pdf>.

<sup>190</sup> *CounterAct*, for more information, see <https://bit.ly/2m2Ncui>.

<sup>191</sup> No Hate Speech movement; for more information, see at <http://www.nohatespeechmovement.org>.

<sup>192</sup> For more information, see <https://www.zara.or.at>.

<sup>193</sup> See Report on Racism 2016, Case-by-case report on racist attacks and structures in Austria, available at <https://bit.ly/2JayPNx>.

<sup>194</sup> *Ibid.*

<sup>195</sup> These are Article 20 of the Federal Constitution Act, *op.cit.*, Federal Constitutional Act Ensuring Independence of Broadcasting (*Bundesverfassungsgesetz über die Unabhängigkeit des Rundfunks*), Federal

Official Journal No. 1974/396; and Article 10 of the European Convention.

<sup>196</sup> The Media Act, *op.cit.*, Preamble. The European Convention has been incorporated to the Austrian law by F. L. G. No. 210/1958.

<sup>197</sup> *Ibid.*, Articles 2-5.

<sup>198</sup> *Ibid.*, Article 6.

<sup>199</sup> *Ibid.*, Article 9.

<sup>200</sup> The 1976 Ethnic Groups Act, *op.cit.* The minority rights of Slovenes and Croats are also guaranteed by the 1955 Austrian State Treaty (Article 7); the rights of Czechs and Slovaks in Vienna by a bilateral treaty with Czechoslovakia dating from 1920. The rights of non-German speaking Austrians are also guaranteed in Article 19 of the 1867 Constitution (*Staatsgrundgesetz*) and in Articles 66, 67 and 68 of the 1920 Austrian State Treaty of St Germain.

<sup>201</sup> Federal Act on the Promotion of the Press (Press Subsidies Act 2004), StF: BGBl. I Nr. 136/2003 idF BGBl. I Nr. 40/2014.

<sup>202</sup> Federal Act on the Promotion of Political Education and Journalism 1984 BGBl. Nr. 369/1984 (WV).

<sup>203</sup> *Ibid.*, Section II, Articles 5-7.

<sup>204</sup> *Ibid.*, Section III.

<sup>205</sup> *Ibid.*, Section IV.

<sup>206</sup> Federal Act on the Establishment of a Communications Authority of Austria (KommAustria Act), StF: BGBl. I Nr. 32/2001 idF BGBl. I Nr. 50/2016.

<sup>207</sup> *Ibid.*, Article 29.

<sup>208</sup> KommAustria Act, *op.cit.*

<sup>209</sup> The Federal Act on the Austrian Broadcasting Foundation – ORF Act (*Bundesgesetz über den Österreichischen Rundfunk*), StF: BGBl. Nr. 379/1984 idF BGBl. I Nr. 120/2016.

<sup>210</sup> The Audiovisual Media Services Act (*Bundesgesetz über audiovisuelle*

*Mediendienste - Audiovisuelle Mediendienste-Gesetz – AMD-G*), StF: BGBl. I Nr. 84/2001 idF BGBl. I Nr. 86/2015.

<sup>211</sup> The Private Radio Act (*Privatradiogesetz*), Federal Official Journal I No. 2001/20, last amended by Federal Official Journal I No. 2004/169.

<sup>212</sup> The Federal Act on the Exercise of Exclusive Television Broadcasting Rights (*Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte*) BGBl. 31/07/200, Nr. 85/2001, Teil I seite 1235.

<sup>213</sup> The Telecommunication Act 2003 (*Telekommunikationsgesetz*), BGBl I No. 70/2003.

<sup>214</sup> The Federal Act on the Transparency of Media Co-operations as well as Advertising Orders and Funding to Media Owners of a Periodic Medium (*Medienkooperations- und -förderungs-Transparenzgesetz, MedKF-TG*), BGBl. I Nr. 125/2011 (as subsequently amended).

<sup>215</sup> The Cooperation of Consumer Protection Authorities Act (*Verbraucherbehörden-Kooperationsgesetz – VBKG*) BGBl. I Nr. 148/2006 (as subsequently amended).

<sup>216</sup> Federal Act on the Protection of Access-Controlled Services (*Zugangskontrollgesetz - ZuKG*), BGBl. I Nr. 60/2000 (as subsequently amended).

<sup>217</sup> Article 4(1) para 2.

<sup>218</sup> Article 4(1) para 9.

<sup>219</sup> Article 4(1) para 10.

<sup>220</sup> Article 4(1) para 11.

<sup>221</sup> Article 4(1) para 12.

<sup>222</sup> Article 4(1) para 19.

<sup>223</sup> Article 4(5).

<sup>224</sup> The ORF Act, Article 4, para 5a.

<sup>225</sup> *Ibid.*, Article 10(1).

<sup>226</sup> *Ibid.*, Article 10(2).

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<sup>227</sup> *Ibid.*, Article 10(6).

<sup>228</sup> *Ibid.*, Article 10(11).

<sup>229</sup> The Audiovisual Services Act, *op.cit.*, Article 30(1).

<sup>230</sup> *Ibid.*, Article 30(2).

<sup>231</sup> *Ibid.*, Article 30(3).

<sup>232</sup> *Ibid.*, Article 31(3) para 1.

<sup>233</sup> *Ibid.*, Article 31(3) para 2.

<sup>234</sup> The KommAustria Act, *op.cit.*, Article 1.

<sup>235</sup> *Ibid.*, Article 6(1).

<sup>236</sup> The ORF Act, *op.cit.*, Article 36(1) para 1 a.

<sup>237</sup> The ORF Act, *op.cit.*, Article 36(3).

<sup>238</sup> As per Article 19 of the ORF Act, *op.cit.*

<sup>239</sup> The ORF Act, *op.cit.*, Article 36.

<sup>240</sup> *Ibid.*, Article 37.

<sup>241</sup> The Audiovisual Media Services Act, *op.cit.*, Article 61.

<sup>242</sup> *Ibid.*, Article 56(1) para 1 and 2.

<sup>243</sup> *Ibid.*, Article 57. See also European Convention on Transfrontier Television, ETS No.132, Strasbourg, 5 May 1989, Article 7.

<sup>244</sup> European Agreement on Border-crossing Television, Chapter II, Article 7, par 1 lit a.

<sup>245</sup> The Audiovisual Media Services Act, *op.cit.*, Article 62.

<sup>246</sup> *Ibid.*, Article 62(3).

<sup>247</sup> *Ibid.*, Article 63.

<sup>248</sup> *Ibid.*, Article 64.

<sup>249</sup> *Op.cit.*

<sup>250</sup> *Op.cit.*

<sup>251</sup> RTR GmbH is an agency authority providing operational support to KommAustria

in the fulfilment of its duties.

<sup>252</sup> Guidelines for promotion in accordance with the Press Subsidies Act, Observation period 2017, KOA 8.050/16-002.

<sup>253</sup> For more information about the Press Council, see <http://presserat.at>.

<sup>254</sup> *Ibid.*

<sup>255</sup> Principles for the journalistic work (Code of Ethics for the Austrian Press), available from <https://bit.ly/2m4YCOa>.

<sup>256</sup> *Ibid.*, Article 5 para 1-2.

<sup>257</sup> *Ibid.*, Article 7.

<sup>258</sup> *Ibid.*, Article 2 para 4.

<sup>259</sup> *Ibid.*, Article 2 para 5.

<sup>260</sup> This section is based on information provided on the Press Council website, see <https://bit.ly/2unlawd>.

<sup>261</sup> For example, in 2016, the Council dealt with 307 cases out of which 241 were initiated by readers; in these, it found 33 breaches of the Code and issued 9 recommendations. Four cases were taken over by an ombudsman. The majority of cases concerned tabloids *Kronen Zeitung* (65 cases) and *Österreich* (35). In comparison, in 2015, the Council had 235 cases and in 2013, it had 155. See The Press Council, Case statistics 2016, available from <https://bit.ly/2u9tnpC>.

<sup>262</sup> Decision of the Press Council 2015/192 of 10 December 2015.

<sup>263</sup> Decision of the Press Council 2016/S 002-III of 30 March 2016.

<sup>264</sup> The Press Council, Note 2015/122, 15 December 2015.

<sup>265</sup> The Press Council, Decision 2016/234 of 16 November 2016. The case was filed against Krone Verlag GmbH & Co, media owner of *Kronen Zeitung*.

<sup>266</sup> Decision of the Press Council 2016/060 of 06 June 2016.

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<sup>267</sup> The Press Council, Note 2016/289 of 15 February 2017.

<sup>268</sup> The Press Council, Decision 2017/188 of 10 October 2017.

<sup>269</sup> The Press Council, Decision 2018/007 of 20 March 2018.

<sup>270</sup> Letter to editor-in-chief for wordplay with racist undertone, 2017/218 of 22 November 2017.

<sup>271</sup> C.f., Decision of the Federal Administrative Court, BVwG W157 2007207-1; see also Truppe, Broadcasting fees and program fees in the digital television age: A discussion on the decision of the VwGH of 4 September 2008, 2008/17/0059, MR 2008, 323.

<sup>272</sup> As per the Articles 3.B.a. and 6.B.a. of the Audiovisual Media Services Act, *op.cit.*

<sup>273</sup> The Media Act, *op.cit.* Article 1(4) defines “periodical electronic media” as a “medium that is a) aired via electronic means, b) is available on a website, or c) is published at least four times a year in a similar way.” The word “medium” is defined (in Article 1(1) as “every means in order to distribute messages or presentations that contain thoughts in letters, pictures or sound to a broader number of persons in the means of mass distribution.”

<sup>274</sup> For more information about the Council, see <https://www.werberat.at>.

<sup>275</sup> *Ibid.* The members include advertisers’ associations, industrial companies, advertising and communication agencies, advertising dealers, Internet operators’ associations, radio and television companies and federations, publishers and editors’ associations and not-for-profit organisations active in the fields of social advertising and international development.

<sup>276</sup> Austrian Advertising Council, Ethics Code of the Commercial Industry, valid from 9 February 2018, available from <https://bit.ly/2Jhdbrb>.

<sup>277</sup> *Ibid.*, Preamble.

<sup>278</sup> *Ibid.* Article 1.2.

<sup>279</sup> *Ibid.*, Section 3. The Code refers to definition of “violence” by the World Health Organization.

<sup>280</sup> *Ibid.*, Special Conduct Rules, Gender Discrimination in Advertising, Article 1 para 1 i).

<sup>281</sup> Advertising Council, Rules of Procedure, valid from 26 January 26 2015, available from <https://bit.ly/2JgVRCh>.

<sup>282</sup> *Ibid.* Article 2, para 2.

<sup>283</sup> *Ibid.*, Article 13.

<sup>284</sup> In the first half of 2017, there have been 110 cases decided by the Council and out of those 68 were brought under the gender discrimination provisions; see <https://www.werberat.at/statistik.aspx/>

<sup>285</sup> See The Advertising Council, Communication 72/5000, Extreme violence and incitement by politicians, 22 September 2015.

