

Online Hate Speech and the European Court of Human Rights

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Abstract

This research analyses to what extent the ECtHR treats online hate speech as being protected by freedom of expression. First, by reviewing how the ECtHR interprets the notion of freedom of expression. Second, by reviewing the ECtHR's approach in cases that concern incitement to hatred and freedom of expression. Third, by analysing the case of *Delfi* and the case of *MTE* and *Index* when it comes to liability and fourth, by examining the role of Internet media in the dissemination of hate speech online. Finally, this research concludes that the ECtHR treats online hate speech as being protected by freedom of expression to the extent that the Internet news portal in question can be held liable for user-generated comments without this violating the news portal's right to freedom of expression.

Key words: European Court of Human Rights (ECtHR), liability, *Delfi AS*, *MTE* and *Index*, freedom of expression, Internet media

Chapter 1 Introduction

An important part of European society is the safeguarding of human rights protection and in particular the safeguarding of the rights to freedom of expression. Bleich (2014) points out that the European Court of Human Rights (ECtHR) plays a pivotal role in the safeguarding of these rights and freedoms. Up to this very day the ECtHR aims to protect the right to freedom of expression on the European continent from evil speech and malicious speech acts even though, it held in *Handyside v. the United Kingdom* (application no. 5493/72) (*Handyside*) that freedom of expression protects ideas and information that shock, offend or disturb the State or other sectors of the population. Breckheimer (2002) argues that upholding and protecting the right to freedom of expression became a challenge for the ECtHR with the rise of the Internet and the increasing presence of hate groups and hate speech online. Where the United States Supreme Court (U.S. Supreme Court) realised that the content on the Internet is as diverse as human thought in the case of *Reno v. ACLU* (U.S. 844 870) in 1997, the ECtHR learned of this notion when it issued its first ruling on this matter in the case of *Delfi AS v. Estonia* (application no. 64569/09) (*Delfi*) in 2015.

Scholars wonder how the ECtHR will uphold the right to freedom of expression offline and online after they read the ECtHR's judgement in the case of *Editorial Board of Pravoye Delo and Shetkel v. Ukraine* (application no. 33014/04). In this case the ECtHR states that "it is true that the Internet is an information and communication tool that is distinct from the printed media [...]. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulation and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, [...], is certainly higher than those posed by the press. [...]. Therefore, [...] the printed media and the Internet may differ. The latter undeniably has to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned." (*Editorial Board of Pravoye Delo and Shetkel v. Ukraine* (application no. 33014/04), 2011, para. 63). Scholars are particularly curious on how the ECtHR will treat cases that involve freedom of expression and online hate speech because the phenomenon of online hate speech and the field of cyberspace are relatively new to the ECtHR. The fact that online hate speech is not mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR) or in any of the other major international Conventions or Covenants protecting human rights and combatting hate speech underline the former (Tseis, 2009). The reason that the field of cyberspace is relatively new to the ECtHR is

because the ECtHR is subsidiary to national courts. Hence, cases that originate at domestic courts appear only some ten years later in the courtroom of the ECtHR in Strasbourg. As a result of this legal system the first cases involving cyberspace (i.e. Internet cases) came to the ECtHR late 2000s. In light of the above, the question that this research will try to answer is: “To what extent does the European Court of Human Rights treat online hate speech as being protected by freedom of expression?” The hypothesis of this research is that it is case dependent whether or not the ECtHR treats online hate speech as being protected by freedom of expression. This hypothesis is based on the information that the ECtHR is known to make use of a case-by-case approach when it deals with cases that concern hate speech and freedom of expression (Oetheimer, 2009; Tulkens, 2015).

The theory on the marketplace of ideas and the remedy of more speech were invented by two U.S. Supreme Court judges. Both theories play an extremely crucial role in the Supreme Court’s case law on freedom of expression and hate speech from the moment they have been applied in these cases by subsequent U.S. Supreme Court judges. The literature on freedom of expression and hate speech always links the theory of the marketplace of ideas and the remedy of more speech to the case law of the U.S. Supreme Court not only *because* they were created by U.S. Supreme Court judges but also because they fit into how the U.S. Supreme Court interprets and protects the notion of free speech.

The literature on freedom of expression and hate speech has not linked the theory of the marketplace of ideas and the remedy of more speech to the ECtHR because the ECtHR interprets and protects the notion of freedom of expression differently than its American counterpart. Therefore, this research will not apply both approaches in the traditional fashion but in an unconventional manner. This applies that when the ECtHR would apply both approaches in its case law on freedom of expression and hate speech, it will have a negative effect on the protection of freedom of expression in Europe instead of the presumed positive one.

Parts of this research are based on the paper *hate speech: a prohibited or protected from of freedom of expression* that I wrote for my course *Human Rights Protection in Europe* during my premaster European Union Studies in 2018.

This research is structured as follows: chapter two will address the case law of the ECtHR concerning freedom of expression and hate speech. Furthermore, it will review the notion of freedom of expression in the relevant case law of the ECtHR. Chapter three will review the available academic literature on the notion of freedom of expression and hate speech. In addition, it will describe the scope and possible limitations of both the freedom of expression

and hate speech. Chapter four will explain the theory of the marketplace of ideas and the remedy of more speech. It will also explain which research method is applied in this research. Chapter five will analyse the role of liability of Internet news portals to the extent that the ECtHR treats online hate speech as being protected by freedom of expression. The structure of chapter six is comparable to the structure of chapter five but it will focus on the role of Internet media instead of the liability of Internet news portals. Chapter seven will answer the question to what extent the ECtHR treats online hate speech as being protected by freedom of expression.

Chapter 2 The ECtHR's case law on freedom of expression and hate speech

2.1 Introduction

In the case of *Vejdeland and Others v. Sweden* (application no. 1813/07), judges Villiger and Yudkivska wrote in their joined concurring opinion that “this appears to be the American approach, where hate speech is protected until it threatens to give rise to imminent violence. This is a very high threshold, and for many well-known political and historical reasons today’s Europe cannot afford the luxury of such a vision of the paramount value of free speech.” (*Vejdeland and Others v. Sweden* (application no. 1813/07), 2012, para. 7). Both judges speak about the protection of hate speech within the scope of freedom of expression. They indicate that ECtHR, unlike the U.S. Supreme Court, cannot afford to give a high level of protection to hate speech within the scope of freedom of expression. This raises the question of what level of protection the ECtHR can give to hate speech within the scope of freedom of expression. Furthermore, it asks what level of protection the ECtHR can give to hate speech when it falls outside the scope of freedom of expression. It also asks of how the ECtHR portrays the notion of freedom of expression in its case law.

This chapter will first review the notion of freedom of expression in the relevant case law of the ECtHR. After that it will first aim to review the level of protection that the ECtHR can give to hate speech when it falls *inside* the scope of freedom of expression and then it will aim to review the level of protection that the ECtHR can give to hate speech when it falls *outside* the scope of freedom of expression.

2.2 The ECtHR: freedom of expression

Freedom is an important aspect of democratic societies. Citizens of democratic societies expect to live in freedom and expect that their rights to freedoms are upheld. This becomes evident through citizens’ beliefs that they can say or write anything that is on their minds based on their right to freedom of expression. Orally or written statements on- or offline can be made in the name of freedom of expression to mock or harm other people’s appearance, speech, social position, ethnic background or to simply inform people. In my paper on *hate speech: a protected or a prohibited form of freedom of expression* (2018), I wonder if this could still be considered freedom of expression or if this could be considered a violation of this particular right.

In 1970 Richard Handyside, the owner of a publisher firm named “Stage 1” in London, published a book called *The Little Red Schoolbook*. The book was designed for youngsters and contained chapters on sexual intercourse (Richard Handyside v. the United Kingdom (application no. 5493/72), 1976). Richard Handyside received a lot of criticism on the contents of his book. The criticism and the number of complaints made to the Office of the Public Prosecutor resulted into Richard Handyside being summoned before the British Court on the charge that he possessed obscene books for publication for gain. The British Court found Richard Handyside guilty of this charge. He was ordered to pay a fine and all the confiscated books were destroyed by the police, on orders of the British Court (Richard Handyside v. the United Kingdom (application no. 5493/72), 1976). Richard Handyside paid the fine but was, nevertheless, of the opinion that his right to freedom of expression as laid down in the Convention was violated. Therefore, Richard Handyside appealed to the ECtHR which examined his case and concluded that the British Court had violated Richard Handyside’s right to freedom of expression.

In *Handyside*, the ECtHR states that freedom of expression is one of the essential foundations of a democratic society. Furthermore, in this case the ECtHR states that freedom of expression is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. [That] are the demands of [that] pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’ This means that, among other things, every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed on this sphere must be proportionate to the legitimate aim pursued. (Richard Handyside v. the United Kingdom (application no. 5493/72), 1976). The ECtHR concludes its *Handyside* ruling with “from another standpoint, whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses.” (Richard Handyside v. the United Kingdom (application no. 5493/72), 1976). In other words, the ECtHR clarifies that when people wish to make use of their right to freedom of expression, they should be aware that this right carries duties and responsibilities. People thus cannot completely express themselves in the manner they wish when engaging with their right to freedom of expression, despite the fact that in the *Handyside* case, the ECtHR holds that freedom of expression represents ideas that shock, disturb or offend the State or any sector of the population.

The ECtHR re-emphasises the significance of the duties and responsibilities that come with exercising the right to freedom of expression in the case of *Otto Preminger Institut v. Austria* (application no. 13470/87) (*Otto Preminger*) (Pégorier, 2018). In the case of *Otto Preminger*, the ECtHR clarifies that “duties and responsibilities of this right include an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate or furthering progress in human affairs.” (*Otto Preminger Institut v. Austria* (application no. 13470/87), 1994, para. 49). In *Otto Preminger*, the ECtHR thus holds that people can exercise their right to freedom of expression and that this right may shock, offend or disturb the population but if the expressions of freedom go beyond that (i.e. discriminate others) and no longer contribute to any form of public debate, people should not exercise their right to freedom of expression.

The ECtHR expands its *Otto Preminger* reasoning in the case of *Erbakan v. Turkey* (application no. 59405/00) (*Erbakan*). In *Erbakan*, the ECtHR points out that “tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ..., provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.” (*Erbakan v. Turkey* (application no. 59405/00), 2006, para. 56). Again the ECtHR highlights that people can make use of their right to freedom of expression but only if that speech does not incite, promote or justify hatred based on intolerance.

The aforementioned paragraphs, indicate that the ECtHR holds freedom of expression to be one of the essential foundations of a democratic society. Furthermore, it can be said that the ECtHR interprets freedom of expression as a freedom that is not only applicable to information and ideas that, *inter alia*, are favourably received but also as a freedom that is applicable to information and ideas that shock, disturb or offend the State or any sector of the population. However, this does not mean that people have the absolute freedom to speak their minds, neither offline nor online, because the right to freedom of expression carries duties and responsibilities with it. As stated before, the duties and responsibilities clause was introduced by the ECtHR in the case of *Handyside*. The significance of this clause was re-emphasised by the ECtHR in the case of *Otto Preminger* and got expanded by the ECtHR in the case of *Erbakan*. Noteworthy about the duties and responsibilities clause in the cases of *Otto Preminger* and *Erbakan* is that the ECtHR holds that speech that is offensive or shocking and, which might

constitute an infringement of the right of others, should be avoided. This is noteworthy because it seems to contradict the ECtHR's view that the freedom of expression also applies to information and ideas that might shock, disturb or offend others. In these cases, the ECtHR holds as well that every type of speech which spreads, incites, promotes or justifies hatred based on intolerance should be sanctioned or even be prevented from being said or written.

2.3. The ECtHR: hate speech

Hate speech forms an interesting concept within the notion of freedom of expression and the ECtHR's duties and responsibilities clause for a couple of reasons. The first reason is that hate speech might consist of information and ideas that shock, offend or disturb the State or any sector of the population. The second reason is that hate speech might also be considered as a type of speech which spreads, incites, promotes or justifies hatred based on intolerance. Based on the ECtHR's clear stance on what applies to freedom of expression and the significance of the duties and responsibilities that come with this right, one would expect that when the ECtHR is presented with a case that entails hate speech, it would have a clear view on when the concept of hate speech falls *outside* the scope of freedom of expression and therefore does not enjoy any form of protection under Article 10 ECHR. When this occurs, Article 17 ECHR¹ applies to the case involved. Also, one would expect that the ECtHR would have a clear view on when the concept of hate speech falls *inside* or *outside* the scope of freedom of expression and therefore might be a justification of an interference with the scope of freedom of expression. This seems to be true for the former but not for the latter, however.

The case law of the ECtHR on hate speech in which Article 17 ECHR is applied demonstrates that the ECtHR has a clear view on when cases that involve hate speech fall inside the scope of Article 17 ECHR and therefore cannot rely on the protection of Article 10 ECHR. The ECtHR emphasised this in the case of *Seurot v. France* (application no. 57383/00) when it held that “[t] here is no doubt that any remark directed against the Convention’s underlying values would be removed from protection of Article 10 [freedom of expression] by Article 17 [prohibition of abuse of rights].” (*Seurot v. France* (application no. 57383/00), 2004, p. 1). In line with its viewpoint in *Seurot*, the ECtHR has declared all cases that fall inside the scope of Article 17 ECHR concerning hate speech manifestly ill-founded and therefore, inadmissible (European Court of Human Rights, 2019). All of these cases involve either clear ethnic, racial

¹ Article 17 ECHR is the Article on the prohibition of abuse of rights.

or religious hate or deny the existence of the Holocaust (i.e. negationism and revisionism) (European Court of Human Rights, 2019). The most seminal of these cases are the cases of *Pavel Ivanov v. Russia* (application no. 35222/04), *W.P. and Others v. Poland* (application no. 42264/98), *Garaudy v. France* (application no. 65831/01), *Glimmerveen and Hagenbeek v. the Netherlands* (application no. 8348/78 and 8406/78 (joined)) and *Norwood v. the United Kingdom* (application no. 23131/03).

The ECtHR's interpretation of whether or not hate speech is a justification of an interference with the scope of freedom of expression is inconsistent when it comes to cases that deal with hate speech and freedom of expression. The cases that best demonstrate the ECtHR's inconsistency in this regard are the cases of *Jersild v. Denmark* (application no. 15890/89) (*Jersild*) and *Vejdeland and Others v. Sweden* (application no. 1813/07) (*Vejdeland*). The *Jersild* case handles a Danish journalist, Jens Jersild, who works for a Danish radio station. In response to an earlier published article in which a group called 'the Greenjackets' expressed their views towards migrants in Denmark, Jens Jersild decided to interview the Greenjackets for a documentary that he was working on. During the interview the Greenjackets "made abusive and derogatory remarks about immigrants and ethnic groups in Denmark." (*Jersild v. Denmark* (application no. 15890/89), 1994, para. 10). Their remarks were broadcasted by the Danish radio and eventually led to the conviction of the Greenjackets and Jens Jersild himself. The case reached the ECtHR and it stated that "there can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 [...] It is moreover undisputed that the purpose of the applicant [Jens Jersild] in compiling the broadcast in question was not racist. Although he relied on the proceedings, it does appear from the reasoning in the relevant judgements that they took such a factor into account." (*Jersild v. Denmark* (application no. 15890/89), 1994, para. 35-36). The ECtHR ended its reasoning in *Jersild* by concluding there had been a violation of Article 10 ECHR. With its ruling in *Jersild*, the ECtHR states that hate speech *cannot* be seen as a justification of an interference with the scope of freedom of expression. However, the ECtHR came to a different conclusion in the case of *Vejdeland*. In *Vejdeland*, the ECtHR had to decide whether the circulation of leaflets in a secondary school was a violation of freedom of expression. The information on the leaflets expressed the distributors discontent for homosexuals and their behaviour. Although the ECtHR reasoned in *Vejdeland* that "attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist

speech in the face of freedom of expression in an irresponsible manner, [which] is as serious as discrimination based on ‘race, origin and colour’” (*Vejdeland and Others v. Sweden* (application no. (1813/07), 2012, para. 55), the ECtHR found that the right to freedom of expression was not violated. In *Vejdeland*, the ECtHR thus held that hate speech *can* be seen as a justification of an interference with the scope of freedom of expression.

When it comes to cases that deal with online hate speech a similar pattern is noticeable. This pattern is best demonstrated with the cases of *Delfi* and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. V. Hungary* (application no. 22947/13) (*MTE and Index*).

In *Delfi*, the ECtHR had to decide on whether or not Delfi² could be held accountable for comments posted by third parties that had been in violation of Delfi’s freedom to impart information (*Delfi AS v. Estonia* (application no. 64569/09), 2015). When the ECtHR examined the *Delfi* case, it “found that the Estonian court’s finding of liability against Delfi had been a justified and proportionate restriction on the portal’s freedom of expression, in particular, because the comments in question had been extreme and had been posted on reaction to an article published by Delfi in its professionally managed news portal run on a commercial basis; the steps taken by Delfi to remove the offensive comments without delay after the publication had been insufficient; and the 320 euro fine had by no means been excessive for Delfi, one of the largest Internet portals in Estonia.” (European Court of Human Rights, 2015, para. 7). Based on this examination the ECtHR holds that there had been no violation of Article 10 ECHR. In other words, the ECtHR rules that Delfi could be held liable for the comments posted on their website by third parties and that this did not breach its right to impart information. The ECtHR also holds that online hate speech *can* be seen as a justification of an interference with the scope of freedom of expression. Furthermore, the ECtHR holds that holding Delfi liable was a proportionate restriction on Delfi’s freedom of expression. Here, the ECtHR indicates that while Delfi may have freedom of expression, it also has duties and responsibilities concerning this right that it has to take into account. The ECtHR finds that Delfi had not sufficiently taken these duties and responsibilities into account because the comments were extreme in nature and removed six weeks after the comments were published.

The case of *MTE and Index*³ also concerns the liability of Internet news portals with regards to online hate speech and freedom of expression. In this case the ECtHR had to decide whether or not *MTE* and *Index* could be held liable for online comments that are of a rude and

² See chapter 5 section 5.2 for background information on the *Delfi* case.

³ See chapter 5 section 5.5 for background information on the *MTE* and *Index* case.

despicable nature posted by third parties on their websites. After the ECtHR examined the case presented to them, it came to the conclusion that MTE's and Index' right to freedom of expression had been violated. The ECtHR based its rulings on the consideration that the Hungarian courts had not properly balanced the right to freedom of expression and the right to reputation of others when deciding if MTE and Index could be held liable for the online comments posted on their website by third parties. Furthermore, the ECtHR held that there had been a violation of freedom of expression because the "notice-and-take-me-down-system" of both news portals functions as an appropriate tool in the majority of the cases for balancing the interests and rights of all of those involved. For this reason, the ECtHR finds that this system is able to provide adequate protection for the reputation of others (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), 2016). With its reasoning in *MTE* and *Index*, the ECtHR states that online hate speech *cannot* be seen as a justification of an interference with the scope of freedom of expression.

The aforementioned cases indeed demonstrate that the ECtHR's interpretation on whether or not hate speech is a justification of an interference with the scope of freedom of expression is inconsistent. The ECtHR's inconsistent view makes it difficult to review how the ECtHR interprets hate speech. However, what can be argued is that when speech amounts to Holocaust denial or clear ethnic, racial or religious hate speech, this speech does not benefit from protection under Article 10 ECHR because the ECtHR interprets this as hate speech.

2.4 Conclusion

The first aim of this chapter was to review the level of protection that the ECtHR can give to hate speech when it falls *inside* the scope of freedom of expression. The second aim was to review the level of protection that the ECtHR can give to hate speech when it falls *outside* the scope of freedom of expression. Based on its case law, it can be said that the level of protection that the ECtHR can give to hate speech is unclear and case dependent when hate speech falls *inside* the scope of freedom of expression. This is unclear because the ECtHR is inconsistent in its interpretation whether or not the hate speech in question is a justification of an interference with the scope of freedom of expression. However, based on the relevant case law, it is clear that the level of protection that the ECtHR can give to hate speech that falls *outside* the scope of freedom of expression is non-existent. Additionally, this chapter reviewed how the ECtHR interprets the notion of freedom of expression. Based on the case of *Handyside*, it can be concluded that the ECtHR interprets the notion of freedom of expression as being applicable to information and ideas that are, *inter alia*, regarded as inoffensive but also to those

that offend, shock and disturb. Furthermore, it can be concluded that the ECtHR interprets the notion of freedom of expression as a right that is not absolute because this right has duties and responsibilities that should be taken into account by its users.

Chapter 3 Literature review

3.1 Introduction

Many aspects of the digital society that people live in today are welcomed, as they are perceived as innovative and efficient. People can make payments with their smartphones or watches, houses are being secured via applications on digital devices, friends and family are updated via social media whenever and wherever the person in question wishes and Skype seems to become redundant with the numerous video call possibilities on applications such as WhatsApp, FaceTime, Facebook Messenger, Google Hangout and Instagram Video Chat. Despite the fact that the rise of the Internet and the advantages of technology are becoming more and more intertwined with everyday life, they are also the cause of many different problems. One of these problems is the dissemination of hate speech online. The wide availability of technology and strong presence of social media in everyday life allows people to speak their minds online without interference or immediate monitoring. This can range from complementing on how adorable a baby looks to completely denigrating a person for their appearance, faith or cultural background. Often when people speak their minds online, they do not think about the consequences for themselves nor the people or entities their comments are addressed to. Presumably the act of posting comments online is part of the belief that is justified, because they are entitled to freedom of expression. Given the fact that in *Handyside*, the ECtHR held that freedom of expression also applies to information and ideas that shock, offend or disturb *and* given the fact that the World Wide Web is a rather new realm⁴ in the domain of freedom of expression, scholars wonder if placing hateful comments online falls within the scope of freedom of expression. Furthermore, scholars wonder: to what extent are interferences with online hate speech, insofar as it does fall under the scope of freedom of expression, justified?

This chapter will review the relevant academic literature on the notion of freedom of expression and hate speech and it will aim to describe the scope and possible limitations of both notions.

⁴ The World Wide Web was invented in 1989 by British scientist Tim Burners-Lee but was introduced to the public in 1993 (CERN, 2019).

3.2 Freedom of expression

In *Handyside*, the ECtHR held that freedom of expression constitutes one of the essential foundations of a democratic society. Bleich (2011) agrees and points out that the right to freedom of expression together with the right to freedom of opinion have been the core of liberal democracies for thousands of years. Bangstad (2014) adds that freedom of expression plays a central role in any democratic, liberal and secular society. To understand these statements fully, it is necessary to clarify what the right to freedom of expression entails, and what the scope and limitations of this are. Article 10(1) ECHR clarifies that everyone has the right to freedom of expression and that this right entails the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [Article 10(1)] shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, p. 6). In other words, the right to freedom of expression entails that people may have thoughts and opinions which they are able to express and that they may receive and impart information and ideas without interference of the government. Article 10(1) ECHR can be regarded as the scope of freedom of expression. However, as has been pointed out by the ECtHR in its case law on freedom of expression, the right to freedom of expression does not mean that people can express their thoughts, opinions or ideas wherever they are and whenever they please because the right to freedom of expression carries with it duties and responsibilities. These duties and responsibilities should be taken into account when exercising the right to freedom of expression. Flaus (2009) highlights that the duty of the people who have the right to freedom of expression and who need to take into account the accompanying duties and responsibilities was put into the Convention for the reason to make people aware of the distinctive identity of freedom of expression and to prevent the dangerous and irresponsible use of democracy. The duties and responsibilities of the right to freedom of expression are set out in Article 10(2) ECHR. It reads that “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 disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.” (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, p. 6). The fact that the right to freedom of expression has duties and responsibilities which may be subject to certain limitations as are prescribed by law and are

necessary in a democratic society demonstrates that the right to freedom of expression is not absolute, which is underlined by Eberle (2004), Rorive (2009) and Bangstad (2014). This means that, as stipulated in the Article 10(2) ECHR, the right to freedom of expression can be limited if the alleged interferences are prescribed by law and necessary in a democratic society. McGonagle (2013) highlights that the ECtHR justifies this approach by connecting the permissibility of limitations to the right to the existence of duties and responsibilities which govern its exercises.

So, when citizens of democratic societies in Europe engage with their right to freedom of expression, they should take into account that this right carries duties and responsibilities. Moreover, they should be aware of the fact that these duties and responsibilities can limit their right to freedom of expression because this right may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society.

3.3 Hate speech

3.3.1. Definitions of hate speech

In *Handyside*, the ECtHR states that freedom of expression is not only applicable to information and ideas that are favourably received or regarded as inoffensive but also applies to those that offend, shock or disturb others. The interpretation of the ECtHR on freedom of expression implies that hate speech is also included in the ECtHR's perception of freedom of expression because, as mentioned in the previous chapter of this research, hate speech can also contain information or ideas that shock, offend or disturb others. While the ECtHR itself does not shed a clear light on this assumption, it can be said that hate speech is a remarkable concept within the notion of freedom of expression because it seeks for a balance between this right and the prohibition of discrimination (Van Vaals, 2018). While Boyle (2001) claims that hate speech is criticised in all democratic societies, Álvarez-Benjumea and Winter (2018) argue that hate speech might install fear which could result into people excluding themselves from public debate. The question remains: what is hate speech, and what are the scope and limitations of hate speech?

Álvarez-Benjumea and Winter (2018) define hate speech as speech that intends to promote hatred on the basis of race, religion, ethnicity or sexual orientation. Knechtle (2008) sees hate speech as speech that can take the form of fighting words, defamation and incitement or actual imminent violence. Boyle (2001) adds that hate speech describes a difficult category of speech and comparable freedoms in that it involves the advocacy of discrimination and hatred against groups based on their race, colour, ethnicity, sexual orientation, religious beliefs or other

status. An example of Boyle's definition of hate speech are the statements of the Polish governing party Law and Justice on how gay people pose an imminent threat to the traditional Polish family and how these people pose a threat to Polish society in general in early April 2019 (Berendt, 2019). Boyle (2001) highlights that hate speech can also be expressed in other manners than racial and ethnic hate speech. One of these ways is online hate speech. The European Commission (2018) typifies online hate speech, illegal online hate speech in particular, as the public incitement to violence or hatred directed to groups or individuals on the basis of certain characteristics, including race, colour, religion, descent and national or ethnic origin. Additionally, Brown (2018) sees this sub-category of hate speech as heterogeneous and dynamic: it can take many different forms and shapes and those forms and shapes can change and expand over relatively short amounts of time. As mentioned in the introduction (see section 3.1), online hate speech proves to be a problem on the Internet. One problem with online hate speech, as I (2018) point out in my paper on *hate speech*, is that people taking part in online hate speech can remain anonymous. Brown (2018) confirms the problem of anonymity as he clarifies that anonymity, or even the perception of it, can lessen the threshold for people to be more outrageous, hateful or rude in what they express than they would have ever been in reality. Brown (2018) also categorises invisibility, the sense of having or belonging to an online community and the instantaneousness of the Internet as reasons why online hate speech proves to be a problem in the online world. In my paper on *hate speech*, I (2018) argue that the rapid digitalisation of today's society and the increasing influence of social media in everyday life are two other reasons why disseminating hate speech online proves to be an issue in the online world. The issues of online hate speech are confirmed by the results of the *2016 Eurobarometer on media pluralism and democracy*. The results of the *Eurobarometer (2016)* show that 75 per cent of the participants taking part in online discussions have witnessed threats, abuse or hate speech aimed at bloggers, people active on social media or journalists. 50 per cent of the participants indicated that these instances were reasons for them to no longer participate in online discussions. In my *hate speech* paper, I (2018) argue that the results of the *2016 Eurobarometer* are telling because it might restrict the participants right to freedom of expression online. Álvarez-Benjumea and Winter (2018) underline this by highlighting that hate speech can install fear which can result into people excluding themselves from participating in public debates. This in turn can have a negative effect on their freedom of expression online and can contribute to a toxic online environment.

3.3.2. The ECtHR's approach towards assessing hate speech

Despite the fact that European countries have limited hate speech, Oetheimer (2009) holds that it is hard to determine whether or not hate speech is covered by the scope of Article 10 ECHR. The ECtHR is known not to use precise categorisations on what is covered by the scope of Article 10 ECHR and what is not. Tulkens (2015) highlights that the ECtHR prefers to work on a case by case basis in which it examines each case individually to see whether or not the case in question is admissible and if so, if there has been a violation of the rights set out in the Convention. Another reason why the ECtHR favours to work on a case by case basis is that, in this manner, the ECtHR is not constrained by its own reasoning and its own case law definitions. This means that the ECtHR's power or line of reasoning is not constrained or set for future cases with similar topics (Tulkens, 2015). Additionally, Tulkens (2015) points out that the ECtHR favours the meaning of an autonomous conception of certain notions. Oetheimer (2009) argues that this is visible in the ECtHR's case law on hate speech.

The fact that the ECtHR prefers the use of an autonomous conception of certain notions might explain why the ECtHR itself has not yet defined the concept of hate speech. Tulkens (2015) indicates that in the case of *Gündüz v. Turkey* (application no. 35071/97) the ECtHR did explicitly refer to the definition of hate speech set out in Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech". In this Recommendation, the Committee of Ministers defines hate speech as speech "covering all forms of expressions which spread, incite, promote or justify racial hatred, xenophobic, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." (Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech", 1997, p. 107).

Tulkens (2015) points out that when the ECtHR is presented with a case that deals with the incitement to hatred and freedom of expression, it can either make use of the broader approach of exclusion or of the narrower approach of restrictions. The exclusion approach entails that hate speech is excluded from the protection of the Convention provided for by Article 17 which prohibits the abuse of rights. The narrower approach means that hate speech can be restricted because of the limitations of freedom of expression set out in Article 10(2) ECHR (Tulkens, 2015). Oetheimer (2009) confirms that the ECtHR indeed has two approaches when it comes to cases that deal with the incitement to hatred and freedom of expression. Oetheimer (2009) holds that the ECtHR refuses to make use of the guarantees of Article 10 ECHR if the Court is presented with a case that involves Holocaust denial or outright

xenophobic or racist speech. Oetheimer (2009) also states that when the ECtHR is presented with a case in which it is not certain if the hateful character of the impugned speech constitutes a violation of Article 10 ECHR, it will apply a proportionality test. Kiska (2012) explains that with this test the ECtHR analyses whether the alleged violation of Article 10 ECHR serves a legitimate aim, is necessary in a democratic society and is prescribed by law. Both approaches and the proportionality test are illustrated in the ECtHR's case law that deals with incitement to hatred and freedom of expression. It should be noted that when the ECtHR applies Article 17 ECHR, Article 10 ECHR can no longer be used because Article 17 ECHR excludes the use of Article 10 ECHR (Tulkens, 2015).

3.4 Conclusion

The aim of this chapter was to review the notion of freedom of expression and hate speech in order to answer the question whether or not online hate speech would fall into the scope of Article 10 ECHR. Based on the relevant academic literature it can be concluded that freedom of expression entails that everyone has the freedom to have opinions and to receive and impart information and ideas without public authorities having a say in this. The scope of freedom of expression is found in Article 10(1) ECHR. Furthermore, the relevant academic literature shows that the right to freedom of expression can be restricted because of the duties and responsibilities it carries. The restrictions on the right to freedom of expression are set out in Article 10(2) ECHR. Many academics have shown that it is difficult to define hate speech. Yet all definitions on hate speech mention that hate speech is speech designed to promote hatred on the basis of religion, national origin, race or ethnicity (Rosenfeld, 2003). In this paper hate speech is connected to freedom of expression and therefore, hate speech does not have a scope of its own but is linked to the scope of freedom of expression. Nevertheless, it remains difficult to determine whether or not hate speech, and therewith online hate speech, falls within the scope of freedom of expression. This is confirmed in the ECtHR's approach in dealing with cases that are concerned with the incitement of hatred and freedom of expression. However, the ECtHR's approach on cases dealing with hate speech and freedom of expression confirms that it is crystal clear that when hate speech qualifies as speech that is outright xenophobic or racial or denies the existence of the Holocaust, it falls outside the scope of freedom of expression.

Chapter 4 Research design

4.1 Theory

4.1.1. The theory of the marketplace of ideas

Bleich (2014) points out that the U.S Supreme Court and the ECtHR both hold a considerable amount of power in the United States and in Europe for drawing the line between free speech and hate speech. This means that both Courts can regulate free speech and freedom of expression. The U.S. Supreme Court and the ECtHR hold the power to determine whether or not hate speech falls within or outside the scope of free speech and freedom of expression. Therefore, both Courts can decide whether or not hate speech is or is not protected by the First Amendment of the American Constitution or the Convention or can decide whether or not an interference with the right to free speech and freedom of expression is justified. Bleich (2014) highlights that the ECtHR has issued very important judgments on freedom of expression from the 1960s onwards, but the U.S. Supreme Court regulates free speech since the 1920s. According to Blocher (2008), the U.S. Supreme Court regulates free speech by making use of the theory of the marketplace of ideas, which will be discussed in the next paragraph.

The theory of the marketplace of ideas finds its origin in the case of *Abrams v. the United States* (250 US 616). In this case Supreme Court Justice Holmes dissented from the main conclusion and stated that “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best of the truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” (*Abrams v. the United States* (250 US 616), 1919, para. 630). Coase (1977) explains Holmes’ words in the following manner: “the rationale of the First Amendment is that only if an idea is subject to competition on the marketplace can it be discovered (through acceptance or rejection) whether it is false or not.” (Coase, 1977, p. 27). In other words, the marketplace of ideas is about a market where good and bad ideas compete for the truth and where one of the two will prevail based on what is believed to be true or false. Blocher (2008) adds that in the marketplace of ideas theory people should not be afraid of bad ideas much like they should not be afraid of bad products or services because they will not win from better competitors, as long as all are freely available. Blocher (2008) continues to add that John Milton’s *Areopagitica* can be seen as an intellectual predecessor to Holmes’ theory of the

marketplace of ideas. In *Areopagitica*, John Milton (1644) wrote “let [truth] and falsehood grapple; who ever knew Truth put to worse in a free and open encounter.” (quoted from Blocher, 2008). Both Holmes and Milton hold that truth is best achieved by the free and competitive exchange of ideas (Blocher, 2008). Oster seems to agree as he (2015) argues that the argument from truth safeguards freedom of expression for the reason that truth is best reached and falsehoods best undermined, when they face each other through free expression.

Often times the marketplace of ideas is compared with the market of free goods and services and just like this market, the marketplace of ideas does not always function properly. Economists describe this as market failures. Blocher (2008) explains that the market failures in the theory of the marketplace of ideas arise from the fact that the marketplace of ideas is seen as a costless, uninhibited and perfectly efficient free market, a view which is neoclassical and which is not realistic. Coase (1977) describes this view as unsympathetic to what is going on in the real world. It is, however a view that has grown on neoclassical economists and therefore they live comfortably in their world without any worries (cited from Blocher, 2008). Critics argue that the market failures lead to unfair competition on the marketplace of ideas because contesters may not see eye to eye about what constitutes a good idea or might not recognise one when good ideas are presented to them. Proponents of theory of the marketplace of ideas argue that market failures can be solved by allowing speech to be regulated. It should be noted that speech regulations are only allowed when the market fails.

4.1.2. The remedy of more speech

Another theory that features prominently in the case law of the U.S. Supreme Court on the regulation of free speech is the remedy of more speech. This remedy was introduced by U.S. Supreme Court Justice Brandeis in the case of *Whitney v. California* (274 U.S. 357). Blocher (2008) argues that Brandeis’ remedy of more speech is a ‘revisited and re-endorsed marketplace metaphor’ taken from a different angle as Brandeis holds that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,” and that when bad ideas or falsehoods appear, “the remedy to be applied is more speech and not enforced silence. Only an emergency can justify repression.” (*Whitney v. California* (274 U.S. 357 1927), 1927, para. 375-377). With his remedy, Brandeis argues that bad speech can be countered with more speech and that bad speech cannot be countered by silencing or restricting this type of speech. However, Blocher (2008) points out that when bad speech is seen as hate speech, it can be considered a market failure. The reason behind this is, according to Blocher (2008), that hate speech can cause harm which cannot be softened or

redeemed by more speech; “because hate speech disempowers those at whom it is directed, the argument goes that anti-hate speech and anti-fighting words have no real chance to “compete”.” (Blocher, 2008, p. 835). Yet, it has to be said that despite the market failures, the U.S. Supreme Court continues to use the theory of the marketplace of ideas as justification for the broad protection of free speech and does not use the market failures as limitations for free speech (Blocher, 2008).

4.1.3. The ECtHR: the theory of the marketplace of ideas and the remedy of more speech

From its case law and the literature on freedom of expression and hate speech, it becomes evident that the ECtHR has a different approach when it comes to the protection of freedom of expression and the regulation of hate speech than the U.S. Supreme Court. Yet, the applied theory in this research is the theory of the marketplace of ideas in combination with Brandeis’ remedy of more speech. It is important to note that in this research, the theory of the marketplace of ideas and Brandeis’ remedy are not applied in the traditional fashion but in an unconventional manner. This means that both approaches are deemed to have a negative effect rather than a positive effect on the regulation and protection of free speech and freedom of expression.

4.2. Methods

4.2.1. Research methods

This research will use qualitative research as a method. The primary focus of this research in terms of conducting research is to conduct legal research. Blechner (2018) explains that conducting legal research roughly consists of four steps: to get started, to consult secondary sources, to find primary authority and to update and analyse the controlling law.

Fischer and Julsing (2007) clarify that when research is conducted, it needs to be reliable and needs to have a decent score on validity. This research is reliable because it is very likely that when other researchers use the same or comparable sources, they will come to the same outcome(s). Despite the fact that both the ECtHR and the Court of Justice of the European Union (CJEU) issue judgements in the field of human rights protection, the outcome(s) of this research cannot be generalised to the CJEU or other regional human rights courts. The reason for this is that the CJEU has taken a different stance on what defines freedom of expression which becomes clear in the case of *Google Spain SL and Google Inc. v. Agencia Espanola de*

Protección de Datos (AEPD) and Mario Costeja González (Case C-131/12). The research will receive a decent score on validity because it is assumed that the sources are researched based, peer reviewed and written by well-established scholars within the field of human rights protection.

4.2.2. Research question, hypothesis and definitions

The research question that this study tries to answer is: “To what extent does the European Court of Human Rights treat online hate speech as being protected by freedom of expression?” The hypothesis of this research is that it is case dependent whether or not the ECtHR treats online hate speech as being protected by freedom of expression. This hypothesis is based on the information that the ECtHR is known to make use of a case-by-case approach when it deals with cases that concern hate speech and freedom of expression (Oetheimer, 2009; Tulkens, 2015). In other words, when the ECtHR has to issue a judgement in a case that concerns hate speech, it will look at each case individually in order to determine whether or not the harmful speech constitutes hate speech as being excluded from the scope of Article 10 ECHR by virtue of Article 17 ECHR or if that hate speech constitutes a justification of an interference with the scope of freedom of expression (i.e. whether or not the interference was necessary in a democratic society, prescribed by law and served a legitimate aim).

In order to avoid misunderstandings, two terms that are mentioned in the research question need further elaboration. These two terms are the right to freedom of expression and the notion of hate speech. In this paper the right to freedom of expression can be interpreted as how it has been formulated in the Convention. The Convention reads that everyone is entitled to express themselves freely and that the right to freedom of expression includes “the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.” (1950, p. 6). Furthermore, the Convention reads that the right to freedom of expression “shall not prevent States from requiring the licensing of broadcasting, televisions or cinema enterprises.” (1950, p. 6). Hate speech in this paper can be interpreted as speech that has the intent to spread, incite or promote hatred, whether anonymously or non-anonymously, offline or online, spoken or written on the basis of race religion, gender, ethnicity, cultural background or sexual orientation. Moreover, in this paper hate speech, which also includes the sub-category online hate speech, can be interpreted not only simply as words but also as speech that actually incites hatred towards others. Oster (2015) explains that “‘hate speech’ is, in linguistic terms, a perlocutionary speech act, that is, an act

not aimed at reaching understanding, but a strategic action that follows another goal. Therefore, hate speech not merely incite action; hate speech *is* action. Hate speech is significant not because of what language *says*, but of what it *does*.” (p. 224). Tulkens (2015) adds that this approach towards hate speech is called speech act theory. According to this approach, certain outings do not just ‘sound’ in the semiotic space of oral expressions, images and lyrics and written acts but perform as acts, bringing clear consequences with legal implications (Tulkens, 2015).

Chapter 5 Liability and online hate speech

5.1 Introduction

Article 10 ECHR clarifies that everyone has the right to freedom of expression and that this right is subject to certain limitations, which has been discussed in section 3.2. Article 10 ECHR does not mention that the word *everyone* also includes, for example, online business. This leads to the question if online businesses have a right to freedom of expression. If online businesses do have this right, they need to take into account the duties and responsibilities of this right just like citizens have to. Given the fact that online businesses interact with their audience by publishing news articles or opinion pieces and vice versa by responding in comments. Two more questions can be raised based on this interaction: 1) who carries the responsibility for these comments, and 2) to what degree can the audience express their opinion without immediate monitoring? The ECtHR seems to answer these questions in the cases of *Delfi* and *MTE* and *Index*. The first question constitutes the aim of this chapter.

5.2 Delfi AS

Delfi AS is a public company and owns one of the biggest Internet news websites in Estonia, publishing up to 330 articles a day. In one of these articles, the readers were informed about a ferry company wanting to alter their route to reach certain islands faster. Shortly after this was announced, it was revealed that the newly chosen route would bring damage to the water and the ice caps and the actual decision was therefore postponed for a number of weeks. Though the website is hosted by Delfi, the readers were able to place comments and to access the comments placed by others under the article. The ferry company article received 185 comments, more than 20 of which contained severe threats aimed at the ferry owner and the operator. The comments were considered to be of a very rude nature (*Delfi AS v. Estonia* (application no. 64569/09), 2015). The ferry company's lawyers requested for Delfi to remove the comments, which they did in March 2006 (i.e. six weeks after the comments were published). Delfi was sued by the owner of the ferry company who successfully won his case. Delfi did not agree with the proceedings and appealed to the Court of Appeal. The Court of Appeal upheld the previous judgement rejecting Delfi's argument that they could not be held liable under the Information Society Service Act (i.e. Directive 2000/31/EC). Unsatisfied with the Court of Appeal's ruling Delfi appealed to the Estonian Supreme Court who also rejected Delfi's claim and confirmed the Court of Appeal's ruling (*Delfi AS v. Estonia* (application no. 64569/09), 2015). Since Delfi believed that they could not be held liable for the comments

posted by third parties on their website, it eventually appealed to the ECtHR. The ECtHR examined the case and held that there had been no violation of Article 10 ECHR.

In *Delfi*, the ECtHR thus stated that Delfi could and should be held accountable for the comments posted on their website by others and that this did not breach their right to impart information. The ECtHR's judgement in *Delfi* is interesting because it is the first case in which the ECtHR had to analyse whether an Internet news portal could be held liable for comments posted by third parties (European Court of Human Rights, 2015). The fact that the ECtHR held Delfi liable for the user-generated comments on their website caused a stir in the 'world of Internet portals'. Susi (2014) highlights that many international financial portals strongly opposed the ECtHR's decision on the grounds that it departs from the conventional approach to liability for anonymous comments. Susi (2014) also highlights that the ruling could have far-reaching consequences for the freedom of anonymity and Internet liability. The ECtHR's judgement in *Delfi* also stood out internationally, because Estonia is globally known to have a good reputation for its press and Internet freedoms (Susi, 2014).

Regardless of the fact that Delfi indeed has enjoyed press and internet freedoms, in *Delfi* the ECtHR reasons that holding Delfi liable was a proportionate restriction of the Internet news portal's freedom of expression. The ECtHR stresses that while Delfi may have freedom of expression, it also has duties and responsibilities that it has to take into account. With this line of thought, the ECtHR not only upholds its own reasoning when it comes to the significance of duties and responsibilities of the right to freedom of expression but also expands this significance from the offline world to the online world. To explain, Delfi might be situated in Estonia, that is to say in a physical building, it, however, operates as an Internet news portal that publishes their articles online and that can be accessed anywhere in the world. The ECtHR found that Delfi had not sufficiently taken their duties and responsibilities of their right to freedom of expression into account, because the comments were extreme in nature and only removed six weeks after they were published. Susi (2014) highlights that the ECtHR's reasoning resonates with the Estonian Appeal and Supreme Court. In the domestic proceedings, both Courts had decided that Delfi's right to freedom of expression did not cover rude and denigrating comments on their websites, which went beyond acceptable criticism and resulted in direct insults (Susi, 2014). Following the domestic Courts reasoning, the ECtHR upholds its own reasoning that "concrete expression constituting hate speech, [...], are not protected by Article 10 of the Convention." (Gündüz, v. Turkey, (application no. 35071/97), 2003, para. 41).

5.3 *Delfi*: the marketplace of ideas

The fact that *Delfi* is held liable for comments placed by third parties that are extreme in nature, go beyond acceptable criticism, and result into direct insults, goes against the principles of the marketplace of ideas. The marketplace of ideas holds that good and bad ideas should compete with one another in order for the correct idea or the truth to come forward. To hold someone accountable for the truth, which in this case are the comments with an extreme nature, implicates a restriction of the right to free speech, which is uncommon within this theory. In the marketplace of ideas it is agreed upon that it should be possible to utter words, regardless of their content. This standpoint is confirmed in the case of *Cox v. State of Louisiana* (397 U.S. 536 1965), in which, the U.S. Supreme Court clarified that the “function of free speech [...] is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea. That is why freedom of speech is protected against censorship or punishment. There is no room [...] for a more restrictive view. For the alternative would lead to standardisation of ideas either by legislatures, courts or dominant political or community groups.” (*Cox v. State of Louisiana* (379 U.S. 636 1965), 1965, para. 551-52).

The fact that most European countries have enacted legislation to restrict hate speech and therewith regulate freedom of expression demonstrates that the standardisation of ideas by legislatures is accepted. In addition, the fact that the ECtHR consistently declares cases inadmissible that constitute clear racial, ethnic or religious speech or Holocaust denial demonstrates that the standardisation of ideas is accepted by courts as well. These reasons, and the adaptation of several protocols and recommendations on combatting (online) hate speech by the Council of Europe, who also created the European Commission against Racism and Intolerance (ECRI), prove that for Europe the marketplace of ideas has a negative rather than a positive effect on the regulation and protection of freedom of expression in Europe (Bleich, 2014; Alkiviadou, 2018; Council of Europe, 2016).

5.4 *Delfi*: the four criteria

The emphasis of the ECtHR on the nature of the comments and on the duties and responsibilities of *Delfi*, can be explained by the notion that in *Delfi* the ECtHR formulated four criteria with which it determines whether or not an Internet news portal can be held accountable for the comments posted by others and therewith breaches their freedom of expression

(European Court of Human Rights Research Division, 2015). The Research Division of the European Court of Human Rights (2015) explains that the ECtHR took certain things into account when formulating these criteria. These were the nature of the comments, where the comments were placed, the owner of the news portal and if there was an economic gain. Furthermore, the ECtHR took into account if the measures taken by the applicant company to delete the harmful comments as soon as possible after the publication were sufficient. The ECtHR also took into account the sanction enforced on the application company (European Court of Human Rights Research Division, 2015). Sidlauskiene and Jurkevicius (2017) argue that these criteria are not new but are based on the criteria that the ECtHR set out in the cases of *Axel Springer AG v. Germany* (application no. 39954/08) and *Von Hannover v. Germany* (application no. 60641/08) (No. 2) on the assessment of media liability for press releases. Furthermore, Sidlauskiene and Jurkevicius (2017) highlight that the criteria used in *Delfi* were also applied in *MTE* and *Index*. In this case the ECtHR added two criteria, which include the behaviour of the injured party and the consequences of the comments for the injured party (Sidlauskiene & Jurkevicius, 2017).

5.5 MTE and Index

MTE and Index are two companies situated in Hungary. MTE is the self-regulatory body of the Internet content providers in Hungary and Index owns one of the largest Hungarian Internet news portals (Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (application no. 22947/13), 2016). Users were able to comment on items on both portals knowing that they were responsible for the comments they posted. MTE published an item on its website regarding the ill-practises of two real-estate websites. Index republished the item and received comments that were of a rude and despicable nature. The company behind the real estate website brought a civil action against MTE and Index and as a response both companies removed the comments of their news portals (Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (application no. 22947/13), 2016). MTE and Index made counterclaims but these were rejected by the Hungarian Supreme Court. MTE and Index believed that their right to freedom of expression was violated and they appealed to the ECtHR. In this case, the ECtHR concluded that MTE and Index' right to freedom of expression had been violated.

In *MTE* and *Index*, the Court thus ruled that the Hungarian entities could not be held liable for the comments posted by others on their website. The ECtHR's ruling in *MTE* and *Index* is interesting not only because it is the second case in which it had to analyse if an Internet

news portal could be held liable for comments posted by third parties but also because the ECtHR came to a different conclusion than in *Delfi*. Sidlauskienė and Jurkevicius (2017) stress that the ECtHR's case law on liability for Internet news portals asks for a thorough examination. The ECtHR used the same criteria in *MTE* and *Index* as in *Delfi* but came to a different judgement. Sidlauskienė and Jurkevicius (2017) question whether the criteria should be formulated as universal criteria or should be seen as relative and therefore applied ad hoc in each case. As seen in the present case, the ECtHR might decide to use the second option, which is strengthened by the ECtHR's preference for an autonomous conception of certain notions.

5.6 The differences between *MTE* and *Index* and *Delfi*

Based on *Delfi*, it can be said that Internet news portals have freedom of expression and have duties and responsibilities that they should be aware of. The duties and responsibilities of Internet news portals extend to third-party contents and therefore differ from the duties and responsibilities of traditional media (*Delfi AS v. Estonia* (application no. 64569/09), 2015). In addition, Internet news portals can be held liable for third-party comments if the Internet news portal provides, for economic purposes, a platform to leave comments and if the comments are clearly unlawful expressions, resulting into hate speech and incitement to violence (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), 2016). *MTE* and *Index* also provide a platform for their users where they could comment on items but as pointed out by the ECtHR the situation in *MTE* and *Index* is different than in *Delfi*. The comments posted in the case of *MTE* and *Index*, although very rude and offensive, did not qualify as clearly unlawful speech that could result into hate speech whereas the comments posted on *Delfi*'s item did.

According to the remedy of more speech, the offensive comments on *MTE* and *Index*' website could be countered with more speech. The risk of having more speech is that this particular speech can actually amount to hate speech and therefore adds fuel to the fire instead of extinguishing it. In order to prevent a larger fire, the ECtHR prefers to restrict speech if it has the tendency to amount to hate speech and incitement to violence and prohibits speech that results into clear hate speech. These restrictions create a situation in which the remedy of more speech is considered to have a negative effect rather than a positive one on the regulation and protection of freedom of expression in Europe. Furthermore, *MTE* and *Index* do not have a history of publishing degrading comments whereas *Delfi*'s history of publishing extremely offensive and rude comments is notorious (*Delfi AS v. Estonia* (application no. 64569/09), 2015). Additionally, the ECtHR points out that even though, *Index* is the owner of the largest

Internet news portal in Hungary and therefore, like Delfi, has an economic interest, MTE does not have this interest because it is the self-regulatory body of Hungarian Internet content providers. In this capacity MTE does not strive for economic gain. For these reasons, MTE and Index could not be held liable for user-generated comments by third parties. This could potentially have led to a violation of MTE and Index' right to freedom of expression, which the ECtHR found in something else.

After examining if the interference with the scope of freedom of expression was justified, the ECtHR ruled that this was not the case. The ECtHR based its ruling on the fact that the domestic courts had not carried out a proper balancing exercise between the real estate website's right to respect its commercial reputation and MTE and Index's right to freedom of expression when deciding if MTE and Index could be held liable for user-generated comments of third parties (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), 2016). Furthermore, the ECtHR held that there had been a violation of the entities' freedom of expression because the notice-and-take-down-system of both news portals function as an appropriate tool in the majority of the cases for balancing the interests and rights of all those concerned. Therefore, the ECtHR finds that this system is able to provide adequate protection for the reputation of the real estate websites (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), 2016).

5.7 Conclusion

The aim of this chapter was to analyse to what extent the ECtHR treats online hate speech as being protected by freedom of expression. Based on the ECtHR's reasoning in *Delfi*, it can be concluded that the Court treats online hate speech as being protected by freedom of expression when Internet news portals can be held liable for user-generated comments of third parties and that this does not breach the Internet news portal's freedom to impart information. However, as the ECtHR clarifies in *MTE* and *Index*, an Internet news portal can only be held liable if it is influential and provides, for economic benefits, its users with a platform where they can leave comments; and if these comments constitute speech that is clearly unlawful. If an Internet news portal does not meet these criteria, it cannot be held accountable for the comments posted on their news portals by third parties and therefore, its right under Article 10 ECHR can be breached. As seen in *MTE* and *Index*, the violation of the Internet news portal's right can also be found in a different aspect of the case such as an improper balancing exercise of two equal rights. Therefore, it can be concluded that the ECtHR *does not* treat online hate

speech as being protected by freedom of expression when the balancing exercise of two equal rights have not been sufficiently executed.

Chapter 6 Internet media and online hate speech

6.1 Introduction

The possibilities that individuals had to exercise their rights to freedom of expression and information in the 20th century were limited to printed press, whereas the possibilities for individuals to exercise these rights in the 21st century are numerous due to the digitalisation of today's society (Rorive, 2009). Rorive (2009) adds that individuals connected to digital networks can reach a large audience globally and can access huge amounts of information within seconds. While there is a beauty in gaining easy access to information and entertaining an audience worldwide, there is also an ugliness to it. Rorive (2009) argues that new technologies such as websites and social media have a significant impact on the spread of online hate speech as the Internet offers a global platform to authors of xenophobic and racist propaganda and those spreading messages with the intent of causing sincere harm to others. For example, the Council of Europe found 4,000 websites spreading xenophobic messages in 2002 as compared to 160 in 1995 (Rorive, 2009). This example demonstrates that there is a rise in websites that publish information that might contain speech that is considered to be clearly unlawful and which might amount to hate speech and incitement to violence. Nevertheless, the Research Division of the European Court of Human Rights (2015) points out that internet publications fall within the scope of Article 10 ECHR. The difficulty of internet publications is the medium on which it is published. The Research Division of the European Court of Human Rights (2015) stresses that the particular form of the medium in question puts the ECtHR in a position where it has to decide on certain limitations that might be enforced on freedom of expression on the Internet. Because of the significance of Internet media in cases that involve freedom of expression and online hate speech, the aim of this chapter is to examine the role of Internet fora to the extent that the ECtHR treats online hate speech as being protected by freedom of expression.

6.2 Internet media

One of the first cases that deals with online hate speech and the rights to freedom of expression and information that the ECtHR had to issue a judgement on is *Delfi*. *Delfi* turned out to be a seminal case because for the first time the ECtHR holds that an Internet news portal is liable for the user generated comments of third parties (*Delfi AS v. Estonia* (application no. 64569/09), 2015). That *Delfi* (the Internet news portal) is liable does not violate its freedom to

impart information because according to the ECtHR, Delfi had not sufficiently taken the duties and responsibilities of its right to freedom of expression into account (*Delfi AS v. Estonia* (application no. 64569/09), 2015). Furthermore, Delfi met the criteria for determining whether or not an Internet news portal is accountable for the comments posted by others has not breached the portal's right to freedom of expression (European Court of Human Rights, 2015).

What has not been given attention by the literature on *Delfi* and other Internet cases of the ECtHR, but is worth analysing, is that the decision reached in *Delfi* cannot be extended to other Internet media. In *Delfi*, the ECtHR states that this case does not concern other Internet media such as a bulletin forum or a social media platform where third parties can post comments or engage in online discussions (*Delfi AS v. Estonia* (application no. 64569/09), 2015). With regards to social media platforms, the ECtHR makes explicitly clear that its decision in *Delfi* does not concern social platforms where the platform provider does not provide any content and where the provider may be a private person running the website or blog as a hobby (*Delfi AS v. Estonia* (application no. 64569/09), 2015). The ECtHR's choice to limit its decision in *Delfi* only to Internet news portals is quite telling given the great range of variety of Internet media, the growing presence of social media in everyday life and the increase of hate propaganda on the Internet (Breckheimer, 2002). Despite differences in the final judgement, the ECtHR seems to uphold its statement in the case of *MTE* and *Index* as MTE is a self-regulatory body of Internet content providers and Index is an Internet news portal (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), 2016). The case of *Buda v. Poland* (application no. 38940/13) (*Buda*) might challenge the ECtHR's statement in *Delfi* and in particular the ECtHR's statement on social media platforms. The *Buda* case concerns a private person (Buda) who conveyed his private opinion on an online discussion forum and who was insulted and threatened by others for expressing his opinion (*Buda v. Poland* (application no. 38940/13), 2015). A social media Internet portal provided the online discussion forum. Buda argues that his right to freedom of expression was violated as he was not safeguarded from threats and insults uttered by third parties on the online discussion forum while expressing his opinion as a private person. The domestic courts ruled that individuals who are active on the Internet can be considered public persons and are thus not entitled to protection. The domestic courts reasoned that because Buda is active on social media, he can be considered a public person and therefore does not deserve protection (*Buda v. Poland* (application no. 38940/13), 2015). Buda appealed to the ECtHR because he did not agree with the reasoning of the domestic court. Even though Buda holds that his right to freedom of expression is violated, the ECtHR will examine if the social media Internet portal violated

Buda's right to respect for private and family life (i.e. Article 8 ECHR) (*Buda v. Poland* (application no. 38940/13), 2015). Despite the fact that the case of *Buda* is still pending, the ECtHR's reasoning and final judgement will provide for a very interesting insight in the role of social media Internet portals with regards to the right to respect for private and family life and the right to freedom of expression. Additionally, the final outcome in the *Buda* case will also determine if the ECtHR will uphold its statement made in the *Delfi* case or if it will diverge from its statement. The latter should not come as a surprise given the ECtHR's preference for autonomous conception of certain notions and its preference for the case-by-case approach so that it is not constrained by its own reasoning or case law definitions.

6.3 Speech and Internet media

At the core of the analysis of the role of Internet media to the extent that the ECtHR treats online hate speech as being protected by freedom of expression is speech itself. Kiska (2012) points out that where it used to be certain that speech that amounts to hate speech and incitement to violence falls outside the scope of freedom of expression and therefore cannot justify an interference with the scope of freedom of expression, is not certain anymore. This is underlined by the ECtHR's rulings in the cases of *Delfi* and *MTE and Index*. In the first case, the ECtHR holds that there had been no violation of *Delfi*'s freedom of expression for holding it liable for user generated comments even though, these comments amount to hate speech and incitement to violence. In the second case, the ECtHR holds that there had been a violation of *MTE and Index*'s right to freedom of expression while the comments posted by third parties do not amount to hate speech and incitement to violence.

Based on the judgements of these cases, it can be argued that it is difficult to determine for Internet media when the information published or the comments posted is speech that is allowed or prohibited under Article 10 ECHR. Susi (2014) stresses that this is amplified by the ECtHR omitting in the *Delfi* case how Internet media can guarantee the protection of third parties. It is important for Internet media to know when speech is and is not considered lawful speech because in this manner they can protect their audience and themselves from engaging in speech that amounts to hate speech and incitement to violence. Even though the ECtHR considers the Internet to be a different information and communication tool than the printed media, it can be argued that Internet media *is* media and therefore has the duty to communicate information and ideas that matter to the public (*Editorial Board of Pravoye Delo and Shetkel v. Ukraine* (application no. 33014/04), 2011; *Observer and Guardian v. the United Kingdom* (application no. 13585/88), 1991). It can be argued that this duty makes it even more important

for Internet media to have clarity on when speech does or not enjoy protection under Article 10 ECHR because they want to be portrayed by their audience as a medium that informs its audience on matters of public interest and not as a medium that is used as a mean to incite hatred and violence. Breckheimer (2002) underlines the latter by stating that hate groups portray the Internet as unprecedented means of communication to spread messages that incite violence and hatred and as unprecedented means of recruiting like-minded people. In other words, hate groups view the Internet and its media as a means to an end of which the end is to incite hatred and violence instead of as a platform that informs its audience on matters of public interest.

6.4 The marketplace of ideas and the remedy of more speech

Internet media can be seen as a marketplace of ideas where good and bad ideas are expressed and compete for the truth. People will refute good and bad ideas if they believe that these ideas do not constitute the truth or people will add more ideas in order to find the truth. The marketplace of ideas theory and the remedy of more speech are excellent theories to apply to the role of Internet media in cases that deal with freedom of expression and online hate speech because, as argued by Breckheimer (2002), the Internet Age has ignited a situation where the Internet has rendered national boundaries and guarantees unclear. In other words, it is very hard for the governments to interfere and regulate speech online. Nevertheless, it can be argued that both theories are a negative model for free speech in Europe. This argument is based on the fact that in Europe freedom of expression is regulated and is subject to limitations. Kucs (2014) argues that even though the ECtHR has granted national authorities a margin of appreciation when it comes to the regulation of freedom of expression, the ECtHR has the final say in the regulation of freedom of expression.

6.5 Conclusion

The aim of this chapter was to analyse the role of Internet media to the extent that the ECtHR treats online hate speech as being protected by freedom of expression. In this moment in time it is difficult to precisely determine what the role of Internet media is in this regard because the case law on this subject is limited. The *Buda* case assumes to be a welcome addition to the ECtHR's case law on cases that deal with freedom of expression and online hate speech but this can only be verified once the ECtHR has issued its judgement. Difficult about the role of Internet media as well is that it is hard for Internet fora to live up to the image of being a respected information and communication tool when it does not know when speech is or is not

protected by Article 10 ECHR and how it can shield itself and its audience for engaging in speech that amounts to hate speech and incitement to violence.

Chapter 7 Conclusion

As stated in chapter 1, the research question of this research is the following: “To what extent does the European Court of Human Rights treat online hate speech as being protected by freedom of expression?” Before the research question can be answered, this chapter will look at how the ECtHR interprets the notion of freedom of expression and which approach the ECtHR applies when it examines cases that deal with the incitement of hatred and freedom of expression. In addition, this chapter will look at the role of liability and Internet media to the extent that the ECtHR treats online hate speech as being protected by freedom of expression.

Chapter two reviewed how the ECtHR interprets the notion of freedom of expression. Based on this chapter, one can conclude that the ECtHR interprets this notion as constituting one of the essential foundations of a democratic society. Furthermore, the ECtHR interprets this notion as being applicable to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that shock, disturb or offend the State or any other sector of the population. One can conclude as well that the ECtHR does not interpret this notion as an absolute right because the right to freedom of expression is subject to certain limitations.

Chapter three described the ECtHR’s approach in dealing with cases that involve hate speech and freedom of expression. Based on this chapter, one can conclude that the ECtHR uses a case-by-case approach when it is presented with a case that deals with hate speech and freedom of expression. Besides the preference for this approach, the ECtHR also favours the meaning of an autonomous conception of certain notions. Furthermore, one can conclude that if the ECtHR deals with a case that involves Holocaust denial or outright xenophobic or racist speech it will be dealt with under Article 17 ECHR. If the ECtHR deals with a case of which it is not certain if the speech in question is hate speech, it is dealt with under Article 10 ECHR. Concerning the latter, one can conclude too that the ECtHR’s interpretation whether or not the speech in question justifies an interference with the scope of freedom of expression is unclear.

The aim of chapter five was to analyse who is responsible for the user-generated comments posted by third parties. Based on the analysis of chapter five, one can conclude that Internet news portals have duties and responsibilities that they need to take into account when exercising their right to freedom of expression. Additionally, one can conclude that if an Internet news portal is large and provides, for economic benefits, a platform for its users where they, anonymously or identified, can comment on published items and if these comments amount to hate speech and incitement to violence, the Internet news portal in question can be

held liable for user-generated comments. This does not impart the Internet news portal's freedom to impart information because the Internet news portal's duties and responsibilities are extended to the behaviour of its audience. One can conclude as well that if an Internet news portal does not meet these criteria, it cannot be held accountable for the user-generated comments of third parties. Therefore, one can conclude that if an Internet news portal is held liable for user-generated comments of third parties and this does not violate the news portal's right to freedom of expression, the ECtHR treats online hate speech as being protected by freedom of expression.

The aim of chapter six was to analyse the role of Internet media to the extent that the ECtHR treats online hate speech as being protected by freedom of expression. Based on the analysis of chapter six, one can conclude that in this moment in time it is unclear what the precise role of Internet media is to the extent that the ECtHR treats online hate speech as being protected by freedom of expression because the ECtHR's case law on this topic is limited. Moreover, one can conclude that the ECtHR's inconsistent interpretation of when speech is and is not protected under Article 10 ECHR poses a challenge for publishing certain articles and makes it difficult for Internet media to adequately protect themselves and their audience from engaging in speech that amounts to hate speech and incitement to violence.

Now that it is analysed how the ECtHR interprets the notion of freedom of expression, which approach the ECtHR applies when it analyses cases that deal with the incitement of hatred and freedom of expression and what the role of liability and Internet media is to the extent that the ECtHR treats online hate speech as being protected by freedom of expression, the research question of this research can be answered. Based on the examination of the previous paragraphs, it can be concluded that the ECtHR treats online hate speech as being protected by freedom of expression to the extent that the Internet news portal in question can be held liable for user-generated comments without this violating the news portal's right to freedom of expression. The hypothesis of this research is accepted based on the fact that the ECtHR issued two different judgements in comparable cases.

This research has pointed out that the case law on cases that concern online hate speech and freedom of expression is thin. Therefore, further research on this topic, especially with the *Buda* case still pending, is recommended. Further research on the difference between traditional and new media and which standards apply is also recommended. The last recommendation of this research is to conduct research on Holocaust denial online. It is very interesting to know if the ECtHR would render such cases inadmissible or would subject them under the scrutiny of Article 10 ECHR.

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