Preliminary remarks

Terms of reference

On 19 August 1999, the Council of Europe formally commissioned the Lausanne-based Swiss Institute of Comparative Law to produce a report on legal measures, in particular criminal law measures, intended to combat racism on the Internet. The study was to be based on the situation in a dozen member countries of the Council of Europe: Germany, Austria, Belgium, Estonia, France, Italy, Norway, Poland, the Czech Republic, the Russian Federation, Sweden and Switzerland.

The terms of reference were defined at a meeting between the deputy director of the institute and the European Commission against Racism and Intolerance (ECRI), held in Strasbourg on 15 June 1999. A member of the institute who attended a meeting of the ECRI's Internet Sub-Committee in Paris on 5 November presented a progress report and the object of the research was further refined.

On 31 March 2000, within the agreed deadline, the institute submitted the present report to the ECRI in a bilingual version, partly in French and partly in English.

In 2006, the Swiss Institute of Comparative Law was asked to update the report.

Scope of the study

The first thing to note here is the fact that the terms of reference are confined to criminal law: the limitation is justified by the fact that this branch of the law is best suited to combating hate speech. That said, we consider it appropriate to refer occasionally to civil and administrative law, which sometimes offer effective means, particularly in terms of speed, of ensuring that access to racist sites is blocked, or indeed that the sites are simply closed down.

It should also be noted that the study concentrates on legal measures to combat racism on the Internet. The word "legal" must be understood in a

broad sense, however, and is not restricted solely to positive law, consisting of legal rules and judicial decisions. Given the evolving and unstable nature of Internet law (see cautionary note below), the majority of countries covered by the study have combined a traditional legislative approach with measures deriving from soft law. The institute considered, despite the absence of any express provision in its terms of reference, that it could not disregard these more flexible instruments, consisting of codes of conduct, ethical requirements, recommendations or hotlines, if not because of their effectiveness, at least because of their strategic importance.

As regards the traditional legislative approach, it should be emphasised at the outset that rules specifically aimed at racism – or even more generally at abuse of freedom of expression – on the Internet are virtually non-existent. Admittedly, there is no shortage of proposals, whether from legal commentators or from the authorities but, in order to avoid over-diversification and confusion (owing to the frequently divergent and contradictory nature of these proposals), we have made a point of dealing only with proposals which are in the process of being adopted; in other words, those already the subject of parliamentary debate.

It should further be noted that judicial decisions on the matter are also still rare; and they do not constitute a body of settled case law, since with few exceptions the only judgments delivered thus far have been those of lower courts. In order to compensate for this lacuna, the study takes into account judicial decisions delivered in other cases involving unlawful expression on the Internet, in particular pornography and infringement of copyright. The strong similarity of the relevant issues, beginning with the delicate question of the "subsidiary" liability of technical operators (access providers and hosts), justifies and indeed dictates this broadening of the investigation's scope.

Does this extension of the material scope of the study make up for the reduction of its geographical scope? The reader will note that the report says virtually nothing about the situation in the four central and eastern European countries referred to in the terms of reference (Estonia, Poland, the Czech Republic and the Russian Federation).[163] This relative silence is

163. There are currently no specific laws on the Russian statute book concerning dissemination of racist or xenophobic utterances via the Internet. This does not mean, however, that such material can be disseminated with impunity. Prosecutions can be taken on the basis of ordinary law, namely Article 282 of the Russian Criminal Code (dealing with incitement to hatred and violation of human dignity). It outlaws the dissemination, publicly or via the mass media, of ideas that are racist or xenophobic, that incite hatred or that degrade the dignity of an individual or group of individuals on the basis of gender, race, nationality, language, origin, attitude to religion, or membership of a particular social group. The public nature of the utterance is thus a key criterion for objective definition of the offence. This implies dissemination of ideas inciting racial, national or religious hatred among an unlimited number of persons. The Internet has all the necessary characteristics for

not due to forgetfulness on our part or to an absence of racist messages on the networks of the countries in question; in fact, we redoubled our efforts to contact the bodies concerned with racism on the Internet in these countries (prosecution authorities, access providers and human rights organisations) – to no avail. No specific provisions of relevance were reported, whether of a traditional legislative or regulatory nature or in the realm of soft law;[164] and relevant case law was apparently non-existent.

The last point to note is that the study includes the situation at European Union level. Not that the EU is in the process of mounting a direct attack on the problem of racism on the Internet, for that is by no means the case. Nonetheless, Directive 2000/31/EC[165] of 8 June 2000 on electronic commerce establishes certain standards concerning the liability of technical intermediaries: these standards are binding on member states and contribute to some extent to combating the distribution of illegal – including racist – content.

---

producing this effect of general dissemination. Therefore, as the law makes no distinction with regard to the means by which offending content is disseminated or relayed, the act of dissemination is punishable where the substance of the offence (namely publication) is present, whether the material is published on the Internet or elsewhere. Possible penalties for dissemination of racist ideas via the Internet are a fine equivalent to the amount of the convicted person's wage or salary for a period of one to two years; a ban on the convicted person occupying certain types of post or doing certain types of work for a maximum of three years; forced labour for a period of 180 hours; public service for one year; or a custodial sentence of up to two years.

According to information supplied by non-governmental human rights associations, few prosecutions for incitement to racial hatred on the Internet are taken under Article 282. Members of the judiciary point out that there is a problem in determining the author of most publications that incite national, ethnic or racial hatred. Since January 2005, however, a substantial number of cases have been pending in regional courts, in which the accused are activists attached to radical parties that disseminated xenophobic information on the Internet.

See, for further information, the report of the Moscow Human Rights Bureau entitled *Racism, xenophobia, anti-Semitism and ethnic discrimination in the Russian Federation in 2005*, Academia, 2006. The text can be accessed at: http://antirasizm.ru/publ_060.doc, or via the *Contre la haine sur internet* portal of the SOVA Centre for Information and Analysis at http://xeno.sova-center.ru/13B565E/70783E1.

164. However, the principal access providers, which are subsidiaries of foreign companies such as IBM, AT&T in Croatia or FREEnet in Russia, refer to the codes of conduct of their (mainly American) parent companies.

165. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce).
See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML.

Our approach

We decided not to present a compilation of reports on a country-by-country basis, since the reader would eventually have been lost in a jungle of national specificities, mainly of an institutional and procedural nature. We opted instead for a horizontal approach, which provides a better means of comparing problems and attempted solutions.

We therefore begin by setting out the various technical and legal difficulties associated with seeking the persons committing offences involving racist expression. We then examine the possibilities of imposing liability on parties other than the person who actually committed the offence, first by means of traditional legal measures and then by soft-law measures. After briefly considering those provisions of international law that may be relevant, the study ends by summarising the problem and briefly lists the instruments which we consider appropriate or inappropriate. In all cases our general considerations are illustrated by examples of significant developments in one or other of the countries studied.

Before we get to the core of the subject, however, we feel we need to cover certain technical matters: in particular, it is important to define the role played by the different parties involved in the process of disseminating communications on the Internet; similarly, it is worth mentioning the various services offered by the Internet. The differences between them give rise to nuances and distinctions in the legal regime applicable.

Finally, we must point out that the present study does not review the various criminal provisions of the countries concerned aimed at combating racism in general. That information is available in an earlier report by the institution, also commissioned by the Council of Europe, entitled *Legal measures to combat racism and intolerance in the member states of the Council of Europe*, which was published by the ECRI in 1998 and is also available on the Internet.[166]

Cautionary note

The myth of the Internet as a lawless, godless zone should be dismissed at the outset. This myth of a legal vacuum – which is encouraged by certain alarmist politicians, amplified by the press and exacerbated by ill-considered declarations of independence by "surfers" eager for absolute freedom – does not stand up to scrutiny. Like any other means of communication, the Internet has to function within the law. As a general rule, laws governing the right of communication are drafted in a technically neutral manner,

166. See: www.coe.int/t/f/droits_de_l'homme/ecri/1-ecri/3-thèmes_généraux/3-mesures_juridiques_nationales/.

taking into account any dissemination of information irrespective of the medium; consequently, they are fully applicable to messages distributed on the Internet. As we shall see, the problem thus lies not so much in the absence of adequate substantive rules as in obstacles to their application, namely the characteristics peculiar to the network of networks – its polycentric structure, its ubiquity and the cover of anonymity.

In fact, to return to the specific matter of racist content, our previous report showed that all European countries have at their disposal a more or less effective legislative arsenal for penalising hate speech. That minimum standard is, moreover, imposed by the United Nations Convention on the Elimination of All Forms of Racial Hatred, Article 4 of which requires the adoption, *inter alia*, of a provision penalising the propagation of racial hatred outside a strictly private circle. Application of these criminal law provisions, which are drafted in general terms, extends to hate speech disseminated via the Internet.

There is, however, an exception to the common standard and it concerns negationism, which means calling into question the existence of genocide. Apart from France, where it is against the law to "dispute crimes against humanity",[167] only Switzerland, Germany, Belgium and Austria punish this offence; and in the latter three countries the offence is limited to the denial of genocide committed by the Nazis. This difference in approach is worth mentioning since revisionist sites are flourishing on the Internet.

The reader's attention should be drawn to one further important point: the changing, or rather ephemeral, nature of the present study. Technology develops very rapidly – who, at the beginning of the 1990s, could have predicted the lightning development of the Internet? – and the law on communications, while not quite managing to keep pace, is also developing very quickly. The problems described here may no longer be problems in a few years or even a few months time, and the solutions recommended are equally volatile. With that in mind, it should finally be noted that the various links to websites included in the footnotes were up to date on 6 August 2008.

167. Article 24 of the Act of 29 July 1881, as amended by the Act of 13 July 1990.