**Response to call for submissions by the UN Special Rapporteur on the Protection of the Right to Freedom of Opinion and Expression**

ADF International is an alliance-building legal organisation that advocates for the right of people to freely live out their faith, with a particular focus on freedom of thought, conscience and religion. One of ADF International’s main concerns relating to freedom of opinion and expression in the area of telecommunications and the internet access sector is the marginalisation of these freedoms through the utilisation of so-called “hate speech” laws.

The concept of “hate speech” is something which has no real certainty, as it has not been defined by any binding international forum or tribunal. The International Covenant on Civil and Political Rights (ICCPR) states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”[[1]](#footnote-1) This provision has been used as a basis upon which attempts have been made to enact increasingly expansive “hate speech” laws on the grounds that so-called “hateful words” can incite violence and should be banned. No conclusive evidence, however, has shown that such laws actually help in reducing or eliminating violence, and the more obvious effect of them is that they cause citizens to have difficulty ascertaining whether or not they are acting within legal bounds, given the heavily subjective and varying nature of such laws across jurisdictions. The European Court of Human Rights has admitted that there is no universally accepted definition of the expression “hate speech,” and therefore international bodies are allowed to create their own definitions.[[2]](#footnote-2)

One salient example of this is the 31 May 2016 presentation by the European Commission and the IT companies Facebook, Twitter, YouTube and Microsoft of a joint “Code of Conduct on Countering Illegal Hate Speech Online” (Code of Conduct), which includes a series of commitments to combatting the spread of illegal online “hate speech” in Europe. Given its breadth and the commitments it advances, the Code of Conduct is likely to have a significant impact on free speech in the digital arena by way of delegating the role of “free speech regulator” to companies and private sector actors. The European Union’s Framework Decision on racism and xenophobia defines “hate speech” as “public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin.”[[3]](#footnote-3) The Code of Conduct goes even further than this definition, as is seen in Commissioner Věra Jourová’s mention of sexual orientation, gender identity, and disability also being possible grounds of protection, depending on the State in question.[[4]](#footnote-4)

Not only is this Code unclear in terms of definition, it is also unclear concerning who has the final authority to make determinations with regard to what amounts to “hate speech,” as it does not specify whether the legitimate assessors are the users reporting alleged violations themselves, employees of tech companies tasked with responding to violation reports, civil society as a whole, or domestic judicial authorities. An earlier Council of Europe factsheet concluded as well that a supposedly hateful element may be able to be “traced” by considering alleged intentions or links. This would include being “concealed in statements which at first glance may seem to be rational or normal” rather than manifesting itself through the expression of hatred or emotions.[[5]](#footnote-5)

It may end up being the case, therefore, that online “hate speech” may ultimately be judged as anything which is deemed offensive or disturbing by a certain demographic as opposed to being determined by a clear and predictable application of the “reasonable person” test. This approach would have the potential to shrink the limits of free speech and have a chilling effect on public speech in general, given that citizens would likely avoid engaging in “sensitive” or possibly “offensive” topics online for fear of having their comments deemed to be “hate speech.” This is itself a form of censorship, as individuals need to be able to freely express their thoughts, ideas, and personal convictions without risk of sanction. Without such freedom, debates over differences of opinion and unpopular views will be stifled and a climate of suspicion and mistrust will arise. The Secretary-General of the Council of Europe has stated concern over some States’ vague definitions of hate speech, and has stated that “decisions are often delegated to authorities who are given a wide margin for interpreting content, potentially to the detriment of freedom of expression.”[[6]](#footnote-6)

Commissioner Jourová stated that this Code of Conduct was the result of the High-Level European Commission Colloquium in 2015, during which participants “stressed the need for clearer procedures to prosecute and take down hate speech on the internet.”[[7]](#footnote-7) This statement, however, seems to blur the line, however, between prosecution and mere removal of content, with no mention of any court or impartial arbiter being involved in determined which online speech should be considered “hate speech” or in considering appeals of unwarranted restrictions on free speech. The Code also requires IT companies to proceed once they receive a “valid removal notification,” upon receipt of which they are required “to review such requests against their rules and community guidelines and *where necessary* national laws,” which indicates that a “valid removal notification” does not even necessarily require speech to be illegal under national law.[[8]](#footnote-8) Under European and international human rights law, any limitation on freedoms enjoyed by citizens must be “prescribed by law,” rather than by self-proclaimed “voluntary instruments” like this Code of Conduct. It also provides no adequate remedies when free speech is unjustifiably restricted, a failure which has been specifically addressed in 2012 by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

Any restriction (on freedom of expression) imposed must be applied by a body that is independent of political, commercial or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the right of access to an independent court or tribunal. Indeed, the risks that legal provisions prohibiting hate speech may be interpreted loosely and applied selectively by authorities underline the importance of having unambiguous language and of devising effective safeguards against abuses of the law.[[9]](#footnote-9)

This Code of Conduct is therefore just one example of the undemocratic and ultimately unaccountable measures taken by national and supranational organisations that is likely to have significant detrimental impact on the free speech of citizens. By blurring the lines between voluntary arrangements and legal safeguards, and failing to clarify what constitutes illegal content, the Code of Conduct is likely to become a censorship tool without any impartial oversight.

The United Nations Human Rights Council, in Resolution 32/13 on the promotion, protection and enjoyment of human rights on the Internet, resolved that “the exercise of human rights, in particular the right to freedom of expression, on the Internet is an issue of increased interest and importance, as the rapid pace of technological development enables individuals all over the world to use new information and communications technology.”[[10]](#footnote-10) The importance of “building confidence and trust in the Internet, not least with regard to the freedom of expression, privacy and other human rights” was recognised, and the importance of privacy online for the realisation of the right to freedom of expression and the right to hold opinions without interference was recognised, as well as an affirmation that all of the same rights that people have offline must also be protected online.[[11]](#footnote-11)

The Special Rapporteur and the Human Rights Council (as well as all of its other relevant mechanisms and procedures) must advocate for the protection of these rights on the Internet, especially the right to freedom of speech and expression. The EU Code of Conduct, therefore, as well as all other measures of a similar nature, must be examined in light of this and given due attention by Special Rapporteur.

1. ICCPR, Article 20(2). [↑](#footnote-ref-1)
2. Council of Europe Factsheet, “Hate Speech.” [↑](#footnote-ref-2)
3. Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [↑](#footnote-ref-3)
4. Code of Conduct – Illegal online hate speech, “EC – Code of Conduct Q&As.” [↑](#footnote-ref-4)
5. Council of Europe Factsheet, “Hate Speech” (2008), 2. [↑](#footnote-ref-5)
6. “Secretary General Concerned about Internet Censorship – Newsroom,” <http://bit.ly/24iqmLQ>, accessed 19 October 2016. [↑](#footnote-ref-6)
7. “European Commission - Press Release - Speech by Commissioner Věra Jourová at the Launch of the EU High Level Group on Combating Racism, Xenophobia and Other Forms of Intolerance,” <http://europa.eu/rapid/press-release_SPEECH-16-2197_en.htm>, accessed 19 October 2016. [↑](#footnote-ref-7)
8. Code of Conduct on Countering Illegal Hate Speech Online, 2. [↑](#footnote-ref-8)
9. Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression, A/67/357, paragraph 42 (7 September 2012). [↑](#footnote-ref-9)
10. A/HRC/RES/32/13, PP 7. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)