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**Threats to Media Freedom and Journalist's Security as  
a Challenge to Implementation of Constitutional Principle of  
Freedom of Speech in the Council of Europe's Member States**

**Keywords:** free speech, media freedom, security of journalists, Council of Europe

**Słowa kluczowe:** swoboda informacji, wolność mediów, bezpieczeństwo dziennikarzy, Rada Europy

**Abstract**

Free speech and freedom of the media are essential to the functioning of democratic systems. However, recent decades have brought phenomena that pose a threat to media freedom. The author analyzed threats to media freedom and journalist's security regarding resolution 2317 (2020) of the Parliamentary Assembly of the Council of Europe. All Council of Europe Member States must effectively guarantee the safety of journalists, create an environment conducive to freedom of the media and prevent the misuse of laws or normative provisions that may affect this freedom, without which there is no democracy. The right of journalists to protect their sources must be guaranteed; police violence against journalists must be condemned, and sanctions against any infringement of the freedom of the media must be dissuasive. Although it is only "soft law", the PACE resolution may inspire the Member States to take more effective measures in this regard.

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**Streszczenie****Zagrożenia dla wolności mediów i bezpieczeństwa dziennikarzy  
jako wyzwanie dla realizacji konstytucyjnej zasady wolności  
słowa w państwach członkowskich Rady Europy**

Swoboda informacji i wolność mediów mają zasadnicze znaczenie dla funkcjonowania systemów demokratycznych. Jednak ostatnie dziesięciolecie przyniosły szereg zjawisk zagrażających wolności mediów. Autorka przeanalizowała zagrożenia dla wolności mediów i bezpieczeństwa dziennikarzy nawiązując do uchwały 2317 (2020 r.) Zgromadzenia Parlamentarnego Rady Europy. Ważne jest, aby wszystkie państwa członkowskie Rady Europy skutecznie gwarantowały dziennikarzom bezpieczeństwo, tworzyły środowisko sprzyjające wolności mediów i zapobiegały nadużywaniu praw lub przepisów normatywnych, które mogą mieć wpływ na tę wolność, bez której nie ma demokracji. Należy zagwarantować prawo dziennikarzy do ochrony swoich źródeł; należy potępić policyjną przemoc wobec dziennikarzy, a sankcje za wszelkie naruszenia wolności mediów muszą być odstrasżające. Uchwała ZPRE, choć ma tylko charakter „miękkiego prawa”, może inspirować państwa członkowskie do podjęcia bardziej skutecznych działań w tym zakresie.

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**I. Introduction**

Free speech is considered a fundamental condition for the functioning of democratic systems<sup>2</sup>. Some analytics suggests even an idea of a “free speech century”<sup>3</sup>. Media freedom is treated as a fundamental right<sup>4</sup>. The vision of free expression that characterized much of the twentieth century is inadequate to protect free expression today. The twentieth century featured a dyadic or

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<sup>2</sup> A. Tsesis, *Free speech constitutionalism*, “University of Illinois Law Review” 2015, No. 3, p. 1015; *Media policies revisited: the challenge for media freedom and independence*, ed. E. Psychogiopoulou, Basinstoke 2014.

<sup>3</sup> *The free speech century*, ed. L.C. Bollinger, New York 2019.

<sup>4</sup> J. Oster, *Media freedom as a fundamental right*, New York 2015, p. 42; J. Russel, *The problem of ‘free speech’ in the idea of freedom of speech*, “Murdoch University Electronic Journal of Law” 2008, No. 2, p. 168.

dualist model of speech regulation with two basic kinds of players: territorial governments on the one hand and speakers on the other. The twenty-first-century model is pluralist, with multiple players<sup>5</sup>.

In recent decades even in stable democracies, “free speech” is under attack<sup>6</sup>. It may seem strange when legal protections for free expression remain strong and overt government censorship minimal. Nevertheless, a range of political, economic, social, and technological developments have raised profound challenges for how we manage speech. New threats to political discourse arise – from the rise of authoritarian populism and national security secrecy to the decline of print journalism and public trust in experts to the fake news, trolling, and increasingly subtle modes of surveillance made possible by digital technologies<sup>7</sup>. The coronavirus pandemic has created other negative factors threatening the access to public information for journalists or more bureaucratic and economic obstacles for media existence<sup>8</sup>.

The growing phenomenon in recent decades is threats for media and the security of journalists, which are confirmed by reports of organizations monitoring media freedom all around the world<sup>9</sup>. Reporters without Borders (RSF) identified five areas of media freedom's crisis: (...) a geopolitical crisis (due to aggressiveness of authoritarian regimes); a technological crisis (due to a lack of democratic guarantees); a democratic crisis (due to polarization and repressive policies); a crisis of trust (due to suspicion and even hatred of the media); and an economic crisis (impoverishing quality journalism)<sup>10</sup>.

An occasion to discuss media freedom creates a resolution of the Parliamentary Assembly of the Council of Europe 2317 (2020), *The threats to me-*

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<sup>5</sup> J.M. Balkin, *Free speech is a triangle*, “Columbia Law Review” 2018, No. 7, p. 2011.

<sup>6</sup> Freedom and the Media 2019. *Media Freedom: A Downward Spiral*, Freedom House, <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral> (27.03.2021).

<sup>7</sup> *The Perilous Public Square: Structural Threats to Free Expression Today*, ed. D.E. Pozen, New York 2020.

<sup>8</sup> World Press Freedom Index 2020: “Entering a decisive decade for journalism, exacerbated by coronavirus”, Reporters without borders, <https://rsf.org/en/2020-world-press-freedom-index-entering-decisive-decade-journalism-exacerbated-coronavirus> (27.03.2021).

<sup>9</sup> A. Jaskiernia, *Monitoring wolności mediów w Europie*, Warsaw 2018, p. 371.

<sup>10</sup> World Press Freedom Index 2020: “Entering...”.

dia freedom and journalist's security<sup>11</sup>. In this document, PACE offered general characteristics of that problem and recommended the Member States to take proper actions. It is essential to see that PACE's effort as an element of the discussion on how to provide media freedom in the contemporary democratic systems.

This analysis aims to situate dangers to media freedom and journalist security in the broader context of determinants of implementation of the constitutional principle of free speech. I use the following methods of research: legal-dogmatic, legal-comparative, and systemic analysis.

I verify the following hypothesis: It is unacceptable that, in the Europe of human rights, dozens of journalists are physically attacked, arbitrarily imprisoned, and even murdered; those responsible for these crimes sometimes remain unpunished. Threats, harassment, legal and administrative restrictions, and undue political and economic pressure against journalists are commonplace<sup>12</sup>. All Council of Europe Member States must effectively guarantee the safety of journalists, create an environment conducive to freedom of the media and prevent the misuse of laws or normative provisions that may affect this freedom, without which there is no democracy. The right of journalists to protect their sources must be guaranteed; police violence against journalists must be condemned, and sanctions against any infringement of the freedom of the media must be dissuasive. The Council of Europe Platform to promote the protection of journalism and the safety of journalists is an essential tool for alert and collaboration that helps analyze the situation in the Member States and identify positive and negative trends. The Member States must respond quickly and effectively to alerts issued by the Platform and co-operate with the latter in good faith.

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<sup>11</sup> *Assembly debate* on January 28, 2020 (4<sup>th</sup> Sitting) (see Doc. 15021, report of the Committee on Culture, Science, Education and Media, rapporteur: Lord George Foulkes). *Text adopted by the Assembly* on January 28, 2020 (4<sup>th</sup> Sitting). See also Recommendation 2168 (2020).

<sup>12</sup> World Press Freedom Index 2020: *Europe's journalists face growing dangers*, <https://rsf.org/en/2020-rsf-index-europes-journalists-face-growing-dangers> (27.03.2021).

## II. Freedom of the Media as an Important Element of the Democratic Constitutional Systems in the Council of Europe's Member States

In free speech theory, 'speech' has to be defined as a special term of art. Free speech discourse comes with a tacit commitment to a 'Subtractive Approach' to defining speech. As an initial default, all communicative acts are assumed to qualify as a speech before exceptions are made to 'subtract' those acts that do not warrant the special legal protections owed to 'speech'<sup>13</sup>.

The debate over the foundations and boundaries of freedom of speech, once a matter of balancing the individual rights of unpopular speakers against broader social interests, took on a new shape in the 1980s when feminists began to advocate restrictions on pornography and critical race theorists to advocate the restriction of certain kinds of hate speech. These challenges to traditional liberalism brought into sharp focus the issues of why we value free speech and how much weight it should be given against competing values. Difficult as it is to resolve these issues domestically, we now face new challenges arising from the increasingly rapid dissemination of information across international borders in an atmosphere of considerable political tension. The riots in response to the publication of Danish cartoons ridiculing Mohammed and the death threats against Salman Rushdie indicate how dramatically the stakes have been raised. At the same time, there is increased concern over the discriminatory treatment of sexual minorities, Muslims, and immigrants<sup>14</sup>.

The principles of freedom of expression have been developed over centuries. The questions have been raised: How are they reserved and passed on? How can large Internet gatekeepers be required to respect freedom of expression and to contribute actively to a diverse and plural marketplace of ideas? These are key issues for media regulation and will remain so for the foreseeable decades<sup>15</sup>.

Without the right to freedom of expression and free, independent, and pluralistic media, there is no true democracy. The Council of Europe and its Par-

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<sup>13</sup> R.M. Simpson, *Defining 'Speech': Subtraction, Addition, and Division*, "The Canadian Journal of Law and Jurisprudence" 2016, No. 2, p. 457.

<sup>14</sup> *Freedom of Expression in a Diverse World*, ed. D. Golash, Dordrecht 2010.

<sup>15</sup> A. Koltay, *New media and freedom of expression: rethinking the constitutional foundations of the public sphere*, Oxford 2019, p. 42.

liamentary Assembly are firmly committed to strengthening media freedom in all its aspects, including the right of access to information, the protection of sources, the protection against searches of professional workplaces and private domiciles and the seizure of materials, the safeguard of editorial independence and of the ability to investigate, criticize and contribute to public debate without fear of pressure or interference. The safety of journalists and other media actors is a fundamental component of this freedom.

The researcher has raised the question of how a democracy can devolve into a post-factual state. The media is being flooded by populist narratives, fake news, conspiracy theories, and make-believe. Misinformation is turning into a challenge for all of us, whether politicians, journalists, or citizens. Attention is a prime asset in the age of information and may be converted into money, power, and influence – sometimes at the cost of facts. The point is to obtain exposure on the air and print media and generate traffic on social media platforms. With the information in abundance and attention scarce, the competition is ever fiercer, with truth all too often becoming the first victim<sup>16</sup>.

The studies held explores the relationship between the safety of journalists and self-censorship practices around the world. They provide new and updated insights into self-censorship and free speech patterns, focusing on a variety of factors that affect these issues, including surveillance, legislation, threats, violent conflict, gender-related stereotypes, digitization, and social media<sup>17</sup>.

Newspaper reporting has long shaped how we see the world, played key roles in exposing scandals, and has even been alleged to influence international policy. The past several years have seen the newspaper industry in a state of crisis, with Twitter and Facebook ushering in the rise of citizen journalism and a de-professionalization of the industry, plummeting readership and revenue, and municipal and regional papers shuttering or being absorbed into corporate behemoths<sup>18</sup>.

The greatest impact on smartphone news as a dominant technological artifact is to shift it away from an authoritative, fixed ‘first draft of history’ to be-

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<sup>16</sup> V.F. Hedrix, *Reality Lost Markets of Attention, Misinformation and Manipulation*, Cham 2019, p. 41.

<sup>17</sup> *Journalist safety and self-censorship*, eds. A.L. Larsen, I. Fadnes, L. Krøvel, London 2020.

<sup>18</sup> C.W. Anderson, *The news media: what everyone needs to know*, New York 2020, p. 32.

come a fluid, flexible stream of information from which each constructs its own meaning. The news has taken on a new life, fragmented by five billion smartphones, disrupting an industry and the consequence of the news in societies worldwide<sup>19</sup>.

Laura Schneider developed the Media Freedom Analyzer, a new way to objectively, unbiased, and transparently measure global media freedom. Grounded in the opinions of around 1000 experts from 126 countries, the index is the first empirically validated tool to assess free and independent media across the world. The existing press freedom rankings are frequently criticized for being arbitrary and having a Western bias<sup>20</sup>.

### **III. Threats to Media Freedom and Journalist's Security in the Council of Europe Member States**

Under the European Convention on Human Rights – in particular, but not only its Art. 10 – Member States of the Council of Europe have a positive obligation to establish a sound legal framework for journalists and other media actors to work safely. However, threats, harassment, legal and administrative restrictions, and undue political and economic pressure are widespread. Worse still, in some countries, journalists who investigate affairs involving corruption or abuse of power or who merely voice criticism of political leaders and governments in power are physically attacked, arbitrarily imprisoned, tortured, or even murdered.

The analysis taken by European Audiovisual Observatory offered a structured insight into the European Court of Human Rights' case-law on freedom of expression and media, and journalistic freedoms have been widely appreciated. It is presented as a *vade mecum* on Art. 10 of the European Convention on Human Rights<sup>21</sup>.

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<sup>19</sup> A. Duff, *Smartphones and the news*, Abington–New York 2021, p. 29.

<sup>20</sup> L. Schneider, *Measuring Global Media Freedom. The Media Freedom Analyzer as a New Assessment Tool*, Wiesbaden 2020, p. 34.

<sup>21</sup> D. Voorhoof, *Freedom of expression, the media and journalists: case-law of the European Court of Human Rights: A publication of the European Audiovisual Observatory*, 5<sup>th</sup> ed., Strasbourg 2020, p. 23.

According to the information published by the Council of Europe Platform to promote the protection of journalism and safety of journalists, from 2015 to November 25, 2019, 26 journalists have been killed, including 22 cases where there has been impunity, and 109 journalists are currently in detention; 638 serious press freedom violations have been perpetrated in 39 countries. Threats on media freedom and the safety of journalists have become so numerous, repeated, and serious that they are jeopardizing not only citizens' right to be properly informed but also the stability and smooth functioning of our democratic societies<sup>22</sup>.

As rapporteur of the Parliamentary Assembly of the Council of Europe has noted, severe cases occurred in the Council of Europe Member States<sup>23</sup>. On August 10, 2017, Kim Wall, a freelance journalist, went missing after a trip to a submarine to interview its inventor Peter Langkjær Madsen. On August 23, 2017, the Danish police identified a headless torso as Kim Wall's. Peter Madsen was arrested, and in September 2018, he was sentenced to life imprisonment for the murder of the journalist. Daphne Caruana Galizia, an investigative journalist and blogger from Malta, was killed when her car exploded following death threats she had received some weeks before. In December 2017, three persons accused of making the bomb were charged and placed in detention; in July 2019, they were formally charged with the killing<sup>24</sup>. The same case happened to the investigative journalist from Slovakia in 2018. Ján Kuciak and his partner Martina Kusnirova were killed in their home, causing outrage among the political class and society. He investigated the alleged links between certain Slovakian politicians and the Italian mafia and fraud involving European farm subsidies. The Slovakian billionaire and businessman Marian Kocner, whose name featured in Mr. Kuciak's investigations, was charged with ordering the murder.

A particularly oppressive situation, with draconian law and a "stifling atmosphere for independent journalists" is observed in the Russian Federa-

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<sup>22</sup> *Hands off press freedom: attacks on media in Europe must not become a new normal. Annual reports by partner organizations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists*, Strasbourg 2020, p. 5.

<sup>23</sup> PACE, Report, *Threats to media freedom and journalist's security*, rapporteur: Lord George Foulkes, January 3, 2020, Doc. 'S021.

<sup>24</sup> BBC News, *Daphne Caruana Galizia murder: Suspect pleads guilty*, February 23, 2021, <https://www.bbc.com/news/world-europe-56172454> (27.03.2021).



tion, where murders and physical attacks against journalists continue to go unpunished<sup>25</sup>. Several cases, only from 2017, confirmed these opinions: Nikolai Andrushchenko, a journalist and co-founder of the newspaper “Novy Petersburg”, was attacked and beaten in Moscow and died after two weeks in hospital; Maksim Borodin, an investigative journalist in Yekaterinburg for the independent news website Novy Den, died after falling from the balcony of his fifth-floor apartment three days earlier; an investigative journalist Dmitry Popkov was shot in his garden in the city of Minusinsk, near Krasnodar<sup>26</sup>. Perilous state for journalists became Turkey under the presidency of Recep Erdogan. The Parliamentary Assembly of the Council of Europe has noted the death of Saeed Karimian, founder of the Persian language television channel GEM TV, who was shot in Istanbul. Turkey has become a notorious predator of media freedom and journalists, ranked 154<sup>th</sup> out of 180 countries in RSF's 2020 World Press Freedom Index<sup>27</sup> – at the same time as being a candidate state of the EU<sup>28</sup>.

Even though the context of each of these murders is specific, it can nonetheless be seen that some were thoroughly investigated and solved, while for others, the action taken was limited: there was no official response by the authorities to the alerts and no tangible consequences for those who carried out or ordered the murders. This silence casts doubt on the authorities' willingness and the police's commitment to solving these cases with due diligence.

#### **IV. Recommendation of the Parliamentary Assembly of the Council of Europe**

In the resolution 2317 (2020), PACE has stated that the Council of Europe bodies, including the Parliamentary Assembly, must not only contin-

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<sup>25</sup> Reporters without Borders, *Stifling atmosphere for independent journalists*, <https://rsf.org/en/russia> (27.03.2021).

<sup>26</sup> Comp. D. Skillen, *Freedom of speech in Russia: politics and media from Gorbachev to Putin*, London 2017, p. 128.

<sup>27</sup> Reporters without Borders, *Turkey – press freedom in figures*, <https://rsf.org/en/news/turkey-press-freedom-figures> (27.03.2021).

<sup>28</sup> N. Martin, *The Securitisation of News in Turkey Journalists as Terrorists?*, Cham 2020, p. 47.

ue to advocate the development in all European countries and beyond of a safe environment for journalists and other media actors but also make use of all their leverage to prompt the Member States to remedy quickly and effectively any threats to media freedom, urging and supporting necessary reforms<sup>29</sup>.

Therefore, the Assembly has called on the Member States to protect journalists and media freedom more effectively. In this connection, they must: a) fully implement Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors; b) carry out effective, independent and prompt investigations into any crimes against journalists, such as murders, attacks or ill-treatment, and bring to justice authors, instigators, perpetrators and accomplices who are responsible under the law, ensuring that there is no impunity for attacks against journalists; c) set up national mechanisms consistent with the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity, ensuring that such mechanisms are designed and implemented under strong political and operational leadership, with proper inter-agency co-ordination and in genuine partnership with civil society, notably journalists' associations and trade unions, and media freedom watchdog organizations; d) fight online harassment of journalists, particularly female journalists and journalists belonging to minorities, and enhance the protection of investigative journalists and whistle-blowers; e) support the establishment of early-warning and rapid-response mechanisms, such as hotlines or emergency contact points, to ensure that journalists have immediate access to protection whenever they are threatened; f) pay particular attention to the rising number of attacks on journalists and media outlets from groups of extremists and criminal organizations, and take appropriate preventive measures when journalists' lives and safety are exposed to real and immediate risks; g) enhance the co-operation and exchange of information, expertise and best practices with other states whenever crimes against journalists involve cross-border or online dimensions; h) back up laws protecting journalists with effective law-enforcement apparatus and redress mechanisms for victims and their fam-

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<sup>29</sup> PACE Res. 2317, § 4.

ilies; i) avoid arrest and extradition of journalists in exile to their countries of origin where they risk punishment and persecution<sup>30</sup>.

The Assembly has also called on the Member States to create an enabling and favorable media environment and review to this end their legislation. They should prevent misuses of different laws or provisions that may impact media freedom – such as defamation, anti-terrorism, national security, public order, hate speech, blasphemy, or memory laws – which are too often applied to intimidate and silence journalists. In this connection, they must, in particular: a) propose no criminal sanctions for media offences – especially prison sentences, the closure of media outlets or blocking of websites and social media platforms – except in cases where other fundamental rights have been seriously impaired, for instance in the case of hate speech or incitement to violence or terrorism; and ensure that these sanctions are not applied in a discriminatory or arbitrary way against journalists; b) recognize, and ensure respect of, the right of journalists to protect their sources, and develop an appropriate normative, judicial and institutional framework to protect whistle-blowers and whistle-blowing facilitators, in line with Assembly Resolution 2300 (2019) on improving the protection of whistle-blowers all over Europe; and, in this respect, consider that the detention and criminal prosecution of Mr Julian Assange set a dangerous precedent for journalists, and join the recommendation of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment who declared, on 1 November 2019, that Mr Assange's extradition to the United States must be barred and that he must be promptly released; c) facilitate journalists' work in specific difficult contexts, such as in conflict zones or in public rallies; d) firmly condemn police violence against journalists and establish deterrent sanctions in this respect; e) develop specific training programmes for law-enforcement bodies and officials who are responsible for fulfilling state obligations concerning the protection of journalists; f) avoid any misuse of administrative measures, such as registration or accreditation, and of tax schemes to harass journalists or apply pressure on them; g) develop constructive, non-discriminatory mechanisms of dialogue with media and journalists' standing or *ad hoc* committees, bring-

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<sup>30</sup> Ibidem, § 5.

ing together politicians, judges, public prosecutors, police officers, journalists and editors, to discuss problems concerning journalists' security, and look for solutions in a collaborative framework, also paying specific attention to the need to ensure effective protection for investigative journalists, as well as to the higher vulnerability of women journalists and the particular vulnerability of freelance journalists<sup>31</sup>.

PACE formulated general recommendations and exposed specific expectations for the Member States where threats to media and journalist's security have occurred to take proper legal and political actions<sup>32</sup>. PACE's recommendations should be treated not only within the framework of legal obligations but also *know-how*. Individual states should know, upon international experiences, how they may protect free media and acts against the threats against them. Effective use of CoE's monitoring procedures might be of crucial importance in fulfilling the constitutional principle of free speech in the systemic practice of the Member States.

## V. Final Comment

The Parliamentary Assembly of the Council of Europe's analysis has once again realized the scale of threats to media freedom in the Member States. Although these countries treat freedom of speech as the "cornerstone" of their democratic constitutional systems, practical implementation faces serious difficulties. Cases of murder and persecution of journalists pose a severe threat to implementing the constitutional principle of freedom of speech, protected by international standards and valid axiology in the western model of deliberative and monitory democracy<sup>33</sup>.

Although the PACE resolutions are not legally binding in the system of international public law and belong to the so-called "soft law", it plays an important role in promoting standards and good practices for the media policies of the Member States. PACE is defined as the "conscience of Europe", and its resolutions and recommendations cause a significant resonance in Euro-

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<sup>31</sup> Ibidem, § 6.

<sup>32</sup> Ibidem, § 9.

<sup>33</sup> J. Keane, *The Life and Death of Democracy*, New York–London 2009, pp. 738–740.

pean public opinion. Despite the crisis of democracy and increasing authoritarian tendencies, the protection of freedom of expression remains high on the agenda of European organizations and the media in Europe. The Council of Europe's voice still needs to be heard. Therefore, regardless of the legal nature of "soft law" documents, they play the role of a democratic guide paving the way for the practices of the Member States.

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