



Tackling Hate Speech in EU Law: *Main Features and CJEU Jurisprudence*

A guest lecture at the Academy of European Law (ERA)
within a seminar for members of judiciary
"Applying EU-Anti-Discrimination Law",

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1

Today

1) Hate Speech *via-à-vis* Freedom of Expression

2) Relevant secondary EU law:
Twin Directives (2000) & Council Decision (2018)

3) Relevant CJEU case law on the grounds of:

- (a) Race & ethnicity;
- (b) Sexual orientation

4) Wider policy documents and online implications: limits,
failures, and prospects?



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Scope

Relevant secondary law

Relevant CJEU case law

Limits, failures, prospects

2

Hate Speech in the EU Legal Context

- **Definition:**
Hate speech in EU law may be apprehended as *public expressions that incite violence or hatred against individuals or groups based on protected characteristics* recognised in EU primary and secondary law.
- It is addressed through a mix of **criminal law** and **anti-discrimination (in substance, labour) law** instruments within the EU's multilevel legal order.



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Scope

Relevant secondary law

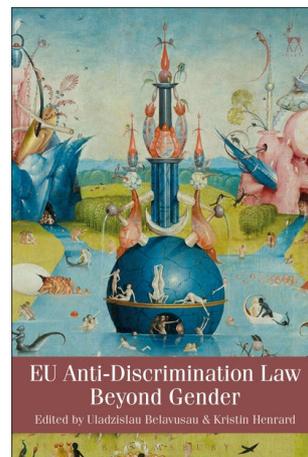
Relevant CJEU case law

Limits, failures, prospects

3

Protected discrimination grounds in EU Law

- Rome, 1957 – EEC Treaty: European integration was meant to serve exclusively a commercial purpose;
- The only exception is "sex equality" (Art. 119 EEC), which laid down an activist way for the CJEU to foster gender equality;
- While the Court has been episodically engaged into other grounds, shaping EU anti-discrimination law on the grounds of ethnicity, sexuality, disability, and age became possible only after the Treaty of Amsterdam (1997).



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4

Relevant secondary EU law: introducing the Twin Equality Directives

- *Sex*:
Directive 2006/54/EC (a.k.a. “Equal Treatment” or “Gender/Sex Equality” Directive);
 - *Racial and ethnic origin*:
Directive 2000/43/EC (a.k.a. “Race Equality Directive”, or RED)
 - *Religion, disability, age, and sexual orientation*:
Directive 2000/78/EC (a.k.a. “Framework Equality Directive”, or FED)
- + **Council Framework Decision 2008/913/JHA** on combating certain forms of racism and xenophobia by means of criminal law

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Scope	Relevant secondary law	Relevant CJEU case law	Limits, failures, prospects
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5

Unequal material scope of the Equality Directives (RED & FED)

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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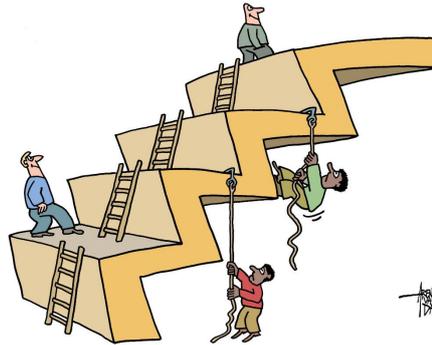
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6

Positioning Hate Speech within EU “Forms of Discrimination”

As of 2000 a new generation of Directives:

- ✓ Direct discrimination;
- ✓ Indirect discrimination;
- ✓ Harassment;
- ✓ Instruction to discriminate.



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7

The Luxemburg trilogy

Three judgments by the Court of Justice on similar matters of racist/ homophobic speech akin to direct discrimination in the employment context



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8

Late & modest opening of the CJEU's jurisprudence:
Case C-54/07 *Feryn* [2008]



- “Apart from these Moroccans, no one else has responded to our notice in two weeks ...but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes” (*De Standaard*)
- ‘Centrum voor gelijkheid van kansen’ – Arbeidsrechtbank – ECJ
- “By publically stating this intention[...] the employer is, in fact, excluding those persons from the application process and from his workflow. He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a ‘speech act’.”
- Opinion of AG Maduro
- Direct / indirect discrimination? = Art. 2 (2) RED (2000/43/EC ‘Race Equality Directive’)

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9

C-81/12 Asociația ACCEPT v. CNCD (2013):
Parties

The Accuser



- an LGBT rights organization
- Major lobbyist for de-criminalization of homosexuality in Romania
- Organizer of LGBT events (GayFest)

The Accused



- A populist politician, G. Beccali
- “Patron” of the *Steaua* Football club
- Involved in shady land-transactions, but also an MP

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-------	------------------------	------------------------	-----------------------------

10

C-81/12 Asociația ACCEPT v. CNCD (2013):
Events of the case

March 2010



=> Harassment; Written Warning



=> Direct Discrimination

- ACCEPT: Becali, 'de jure' decision maker
- Steaua: Becali, no employer involvement

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Relevant secondary law

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11

C-81/12 Asociația ACCEPT v. CNCD (2013):
Events of the case

February 2010

*"Not even if I had to close Steaua down could I accept a homosexual on the team. Maybe he's not a homosexual. But what if he is? There's no room for gays in my family, and [FC Steaua] is my family. (...) **This isn't discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.** Even if God told me in a dream that it was 100 percent certain that the player wasn't homosexual I still wouldn't take him. Too much has been written in the papers about him being a homosexual. (...) He could be the biggest troublemaker, the biggest drinker. . . but if he's a homosexual I don't want to know about him."*

The player in question was **not** hired by the club

For a detailed analysis of this case, see U. Belavusau, [A Penalty Card for Homophobia from EU Non-Discrimination Law](#), *Columbia Journal of European Law*, 21, 2, 2015.

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Scope

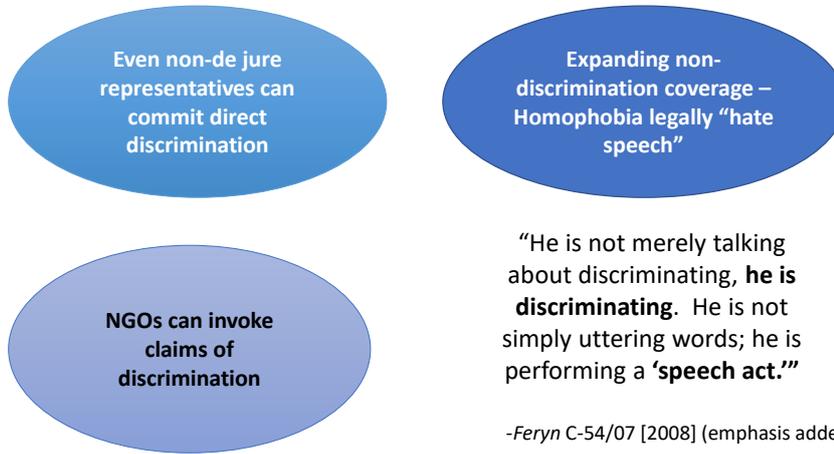
Relevant secondary law

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12

C-81/12 Asociația ACCEPT v. CNCD (2013):
Implications



-Feryn C-54/07 [2008] (emphasis added)

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The Luxemburg trilogy

1	2	3	
<p>C-54/07 <i>Feryn</i> (2008)</p> <ul style="list-style-type: none"> • No plaintiff involved • Belgian seller/installer of doors publicly stated that he wouldn't employ persons of Moroccan origin • Court found that this 'speech act' is likely to dissuade certain candidates from submitting their candidature and accordingly hinders their access to the labour market direct discrimination in respect of recruitment • Direct discrimination found in the absence of a concerned complainant from the affected minority 	<p>C-81/12 <i>Asociația ACCEPT v. CNCD</i> (2013)</p> <ul style="list-style-type: none"> • "Patron" of the Steaua Football club said he would never accept a homosexual player • Court declared that an entity may be liable for its <u>non-de jure representative</u> committing direct discrimination • Established that NGOs can invoke discrimination claims 	<p>C507/17, <i>NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford</i> (2020)</p> <ul style="list-style-type: none"> • Senior lawyer at an Italian firm stated that he would not hire/work with a homosexual colleague (<u>no vacancies</u> at the time) • Question of whether a local LGBTI organization (an association of lawyers) had standing to bring a lawsuit for damages → Court concluded that this was allowed under the FED • Building on <i>Feryn</i> and <i>Asociația ACCEPT</i>, the Court finds direct discrimination → such discriminatory statements influenced applications and access to the job market 	
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Guiding principles: when do discriminatory statements present a sufficient link with “access to employment” in accordance with the Court’s case-law?

- 1) The status and capacity of the person making the statements must be examined.
- 2) The nature and content of the statements made must be considered.
- 3) The context in which the statements were made is also relevant.
- 4) Last, it is important to consider the extent to which the nature, content and context of the statements made may discourage persons belonging to the protected group from applying for employment with that employer.

Further reading: Ulad Belavusau, [On the Wings of Words in EU Anti-Discrimination Law](#), *European Papers*, 5(2), 2020. 1001-1020.



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Limits, failures, prospects

15

Limits, Failures and Prospects of 2000 EU Equality Directives (RED & FED)

- **Race**
 - Poor number of cases at the CJEU based on RED;
 - Confusion of discrimination based on “nationality” and “race / ethnic origin” in the jurisprudence of the CJEU;
 - Often intersectional status of race discrimination that is difficult to catch within strict reading of RED;
 - Insignificant number and subordinate societal status of active plaintiffs coming from disadvantaged ethnic groups;
 - Unequal status and activeness of Equality Bodies (under RED) in Member States;
 - Issues affecting the burden of proof, indirect discrimination & access to remedies
- **Sexual Orientation**
 - Limited material scope of FED;
 - Resistance of Member States to implement FED and Citizenship Directives adequately;
 - Concealment of sexuality by plaintiffs in Member States with predominant homophobia, evidenced in both a pressing social embarrassment for individuals and groups advancing sexual emancipation, and a climate of physical and verbal violence.
 - Unequal status and activities of Equality Bodies (under RED) in Member States.
 - Issues affecting the burden of proof, indirect discrimination & access to remedies

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16

Mapping Hate Speech Counter-Acting Aspects in EU Law

Analytical lens	Comparative Constitutional Law perspective	EU legal framework & instruments	Illustrative focus / examples
Anti-discrimination and labour-law dimension	Hate speech often manifests in employment or service provision; equality and dignity are protected through civil and labour law.	Equality Directives: <ul style="list-style-type: none"> • 2000/43/EC (Racial Equality) • 2000/78/EC (Employment Equality) • 2006/54/EC (Gender Equality) 	Focus on direct discrimination / harassment that create a hostile environment as discrimination
Criminal law dimension	Criminalisation is justified to protect human dignity and public order against incitement to hatred and violence.	Council Framework Decision 2008/913/JHA on combating certain forms of racism and xenophobia by means of criminal law.	Obligates Member States to criminalise public incitement to hatred based on race, colour, religion, descent or national/ethnic origin – including <i>Holocaust denialism</i> and <i>trivialisation of genocide</i> .
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17

Mapping Hate Speech Counter-Acting Aspects in EU Law

Analytical lens	Comparative Constitutional Law perspective	EU legal framework & instruments	Illustrative focus / examples
Online hate speech regulation	The digital sphere amplifies harmful expression; regulation balances freedom of speech with online safety and platform accountability.	Digital Services Act (Regulation 2022/2065) and Code of Conduct on Countering Illegal Hate Speech Online (2016, revised 2022) .	Requires platforms to promptly remove hate content and cooperate with national authorities and NGOs in monitoring antisemitic, homophobic, or racist content.
Integrative EU approach	EU law merges criminal, digital, and equality-law tools to promote accountability and inclusion.	Article 83 TFEU proposal (2021–2025): adding hate speech and hate crime to the list of EU-level offences; EU Strategy on combating antisemitism and fostering Jewish life (2021–2030) ; LGBTIQ Equality Strategy (2020–2025) .	Ongoing harmonisation efforts include criminalising homophobic and antisemitic hate speech across Member States and promoting protection of Jewish life through education, monitoring, and enforcement mechanisms.
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18

Danke für Ihre Aufmerksamkeit!



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For further references, see:

Ulad Belavusau & Kristin Henrard (eds.),
[*EU Anti-Discrimination Law Beyond Gender*](#), Hart
(Oxford, 2018) →

Ulad Belavusau, [*On the Wings of Words in EU
Anti-Discrimination Law*](#), *European Papers*, 5(2),
2020. 1001-1020.

