

Tackling hate speech in EU law

Margarita S. Ilieva
Independent expert



1

Concept of hate speech: EU Law

- No comprehensive legal definition
 - [2008 Framework Decision](#): only most severe, criminal, *intentional* speech on racial/ religious grounds:
 - public incitement to violence or hatred directed against (a member of) a group
 - [EU Code of Conduct on countering illegal hate speech online](#): same definition
 - [Non-discrimination directives](#): harassment (incl. *unintentional*)
 - unwanted conduct on protected grounds, purpose or effect violating person's dignity & creating intimidating, hostile, degrading, humiliating or offensive environment
 - Illustrative [national case law](#) (civil/ administrative law)

2

Concept of hate speech: EU Law

- EC Initiative 2021: [Hate speech & hate crime – inclusion on list of EU crimes](#)
 - Extend the list of crimes under Art. 83.1 TFEU to include *all forms* of hate crime and hate speech
 - A future basis for a comprehensive definition

3

Concept of hate speech: CoE Law

- Comprehensive definition
 - [2022 Recommendation on combatting hate speech](#)
 - all types* of expression inciting, promoting, spreading or justifying violence, hatred *or discrimination* against a person *or group*, or denigrating them, by reason of real *or attributed* characteristics or status such as “race”, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, SOGI
 - ECtHR case law concept
 - Evolving case by case, context-based

4

Recent ECtHR Precedence

- Hate speech victims
 - [Behar and Gutman v. Bulgaria, Budinova and Chaprazov v. Bulgaria](#) (2021)
 - [Oganezova v. Armenia](#) (2022)
 - [Nepomnyashchiy and Others v. Russia](#) (2023)

5

Recent ECtHR Precedence

- Hate speech authors/ enablers
 - [Lenis v. Greece](#) (2023)
 - [Sanchez v. France](#) (2023)
 - [CNews c. France](#) (2023)

6

Behar & Budinova

- Court's [key cases](#) 2021
- 1st violations re impersonal hate speech: Art. 14 + 8
 - Domestic courts' failure to protect
- Non-targeted community members = victims
- Community sense of identity > members' self-worth ([Aksu v. Turkey](#))
- 'Severity' threshold for Art. 8/ 14 applicability

7

Behar & Budinova

- Criteria for general hate speech
 - **target** community (size, homogeneity, vulnerability)
 - **content** (*potential to affect* core group identity/ dignity - stereotyping specifics)
 - **form** and immediate **context**
 - **reach**
 - **author** status
 - **overall** socio-political **context**

Non-exhaustive. Interplay; none take precedence.

8

Oganezova

'Aggressive homophobic campaign':

- Continuum of on- and offline, private and official hate speech, harassment, vandalism, arson
- Multiple actors, loosely coordinated
- Retaliation aim (victimisation)

9

Nepomnyashchiy

- 2nd violation re general hate speech: Art. 14 + 8
- 1st violation re homophobic speech
- Community members' victimhood acknowledged
- *Behar* and *Budinova* criteria, severity threshold
 - 'Openly' homophobic, v. 'aggressive' statements by public officials published in well-read papers, wide reach
- Public officials may not publicly promote intolerance
- Gender/ sexual minorities require special protection from hate speech, esp. in a homophobic society

10

Nepomnyashchiy

- **Gravest** hate speech promoting/ justifying violence/ intolerance is excluded entirely from Art. 10 protection (under **Art. 17**)
- Less grave hate speech does not fall entirely outside Art. 10, but may be restricted
 - Criminal sanctions may be justified
 - Not all hate speech against vulnerable groups must attract criminal sanctions
- Art. 8 and 10 must be **balanced** – no hierarchy

11

Nepomnyashchiy

- Domestic courts' failed response
 - No examination in light of Art. 8 + 10 ECtHR case law
 - No balancing Art. 8/ 10 rights
 - Focus on freedom of expression, 'personal opinion'
 - No recognition victims' Art. 8 rights
 - No *Behar/ Budinova* analysis of vulnerability and impact
 - No persuasive reasons

12

Lenis

- Explicit findings of ‘gravest’ ‘hate speech’ and ‘incitement to violence’ against a group
- 1st time Art. 17 applied to homophobic speech > inadmissible hate speaker’s application
- [*Vallianatos and Others v. Greece*](#) implementation > victimization by senior Church official
 - Context and author position – important factors
- Online blog, republished by media, wide dissemination

13

Lenis

- Extreme, explicit slur, denial of LGBTI humanity
- Direct calls for violence
 - Against politicians and community
- Criminal conviction for incitement to violence, five months suspended prison term
- GR courts’ reasoning validated by ECtHR
 - ‘Careful assessment’ of the evidence
 - ‘Acceptable assessment of the facts’
 - Analysis in line with Art. 10, balancing exercise

14

Lenis

- Reasons to justify the interference 'relevant and sufficient'
- GR courts' approach
 - Article read as a whole and in context
 - Target group and aim clear from content – intention to dehumanise LGBTI people and incite hatred against
 - Incitement v. politicians targeted LGBTI, directly linked to homophobic intention
 - Words liable to cause hostility, potentially lead to violence; threatening and liable to cause LGBTI community to fear

15

Lenis

- Office – v. important factor, influential author
- ECtHR Art. 17 criteria – extreme, exceptional cases, gravest hate speech
 - Speech incompatible with ECHR values
 - Directed against ECHR values
 - Author intent to destroy ECHR rights
 - In(direct) calls for hatred/ violence
 - Internet dissemination > impact
 - V. speedy & wide reach
 - Permanence

16

Lenis

- National context of homophobia – int'l reports
- Homophobia as serious as racism
- Homophobic expression not necessarily outside Art. 10
- Dehumanisation of LGBTI + calls for violence (multiple, literal) > Art. 17
 - 'Immediately clear' sought to abuse Art. 10 for ends 'clearly contrary' to ECHR values
 - Complaint inadmissible

17

Sanchez

- Elected official convicted for incitement for not moderating Islamophobic posts on own electoral Facebook - precedent
- Authors also convicted
 - Posts clearly targeting Muslims, likely to arouse strong hostility
- Tense local context, elections
- Grand Chamber validation for FR courts' assessment
 - S. chose to enable public posts > duty to moderate

18

Sanchez

- Grand Chamber
 - Sanction proportionate
 - ECtHR previously held Internet portals may be liable for failing to promptly remove clearly unlawful user speech without being alerted
 - Removal duty extended to applicant. NB
 - Posts genuinely amounted to hate speech
 - Clearly incited to hatred/ violence, clearly unlawful
 - Tense election context, exacerbating impact

19

Sanchez

- Posts targeting political opponent
- Internet dissemination > higher risks
- Unlimited reach
- Applicant - experienced politician and digital strategist
- Allowed public access, knowing risks
- Comments to moderate only 15
- Could receive 1-year prison term and EUR 45 000 fine, under law. Instead, just EUR 3 000
- No other consequence, political career unaffected

20

Sanchez

- Account holder duty: identify clearly unlawful comments ASAP (24 hrs) and delete them without notification by injured party
- Duty to remove *entirety* of hateful comments forming “*a coherent whole*”, an “ongoing dialogue”, and not just isolated comments
 - undeleted comments echoed, “contributed to and thus pursued the same discourse” as deleted one

21

Sanchez

- Politicians have duties when using social media for political purposes, enabling public user posts
 - Influential
 - Resources to manage platforms
 - Account holders – no right to impunity
 - Even a prison sentence for political hate speech may be proportionate

22

Sanchez NB

- Incitement to hatred (= hate speech) does not require calls for specific violent acts/ offences
 - insulting communities, inciting to discrimination, suffices
- Hate speech *not always 'openly presented as such'*
 - various forms, *not only patently aggressive and wilfully discriminatory insults*
 - also *implicit ones, expressed guardedly* or hypothetically
 - equally as hateful

23

Sanchez NB

- > Hate speech need not be explicit and overtly intentional
- > No intent required for condoning
- Art. 17 liberal standard:
 - “[R]emarks *capable of* arousing a feeling of rejection and hostility towards a community fall outside the protection [of] Article 10.”

24

CNews c. France

- TV broadcaster's A10 application manifestly ill-founded (unanimously)
- Formal warning by broadcasting authority
- Journalist's comments inciting Islamophobia, legitimising violence
- Interference proportionate

25

Thank you for your attention.

Let's discuss.

margarita.ilieva@gmail.com

26