


Tackling hate speech in EU law


Dr. Sara Benedi Lahuerta

- University College Dublin,
- Sutherland School of Law
- (sara.benedilahuerta@ucd.ie)

Applying EU Anti-discrimination Law
Online Seminar

ERA (Trier) – 6-7 September 2021






Funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission

1

OVERVIEW

1. **Freedom of expression** v hate speech
2. **EU Criminal law** framework
3. **EU Discrimination law** framework
4. **Online** hate speech: current & prospective measures
5. **EU definition** of hate speech (!)



2

FREEDOM OF EXPRESSION V HATE SPEECH (I)

Freedom of expression:

- International law, e.g. **International Covenant on Civil and Political Rights (1966), Art. 19**
- **ECHR, Art. 10(1)**: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”
- **European Charter of Fundamental Rights (ECFR), Art. 11(1)**: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”
 - ✓ In line with the ECHR and ECtHR case law: **ECFR, Art. 52(3)** → at least same “meaning and scope” as the rights of the ECHR
 - ✓ **Case C-547/14, Philip Morris Ltd, British American Tobacco Ltd**: “same meaning and scope as the freedom guaranteed by the Convention” (para 47)

3

FREEDOM OF EXPRESSION V HATE SPEECH (II)

Freedom of expression can be protected even it is offensive:

- E.g. ECtHR *Handyside v the UK (1976)*:

“[freedom of expression] is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. **Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”**” (para 49)

BUT it can be limited in certain situations:

- ECHR, Art. 10(2): “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
- ECHR, Art. 17 (“abuse of rights”): “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”
- ECFR, Art. 52(1): “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

4

FREEDOM OF EXPRESSION V HATE SPEECH (III)

Indeed, the **ECtHR** recognised in *Erbakan v Turkey (2006)* that...

"[T]olerance and respect for the equal dignity of all human beings constitute foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance..., provided that any .. 'restrictions'... imposed are proportionate to the legitimate aim pursued."

At ECtHR level:

- **'Hate speech'** often referred to as "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)", *Guñduz v Turkey (2003)* para. 40; *Erbakan v Turkey (2006)*, para. 56.
- **BUT** case-by-case approach

Soft-law definitions → Council of Europe (CoE), European Commission Against Racism and Intolerance (ECRI)

- **CoE:** Committee of Ministers Recommendation No. R(97)20 on "Hate Speech"
- **ECRI:** General Policy Recommendation No 15 on "hate speech", CRI(2016)15

→ **Common features:**

- 'all forms of expression' that...
- spread (or 'advocate'), incite, promote or justify certain negative ideas / feelings / stereotypes / offences

5

EU CRIMINAL LAW FRAMEWORK

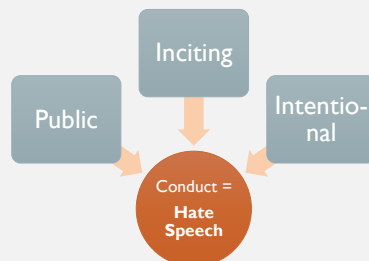
- Key instrument:
Framework Decision 2008/91/JHA
- Replaces the Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia
- Definition of **hate speech** → Art. 1 (1)(a-b):

- "intentional conducts [...] publicly inciting to violence or hatred against a group of persons or a member of such group defined by reference to race, colour, religion, descent or national or ethnic origin" **OR**

- "publicly disseminat[ing] or distribut[ing] tracts, pictures or other material" that intentionally incites to violence or hatred against those persons or groups

- See also: Art. 1 (1)(c-d) → negationism
- Art. 2(2): "Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting"
- Further derogations, e.g. Art. 1(3)

Key aspects of the conduct:



6

EU DISCRIMINATION LAW FRAMEWORK

Potential relevance of EU anti-discrimination directives?

(43/2000/EC, 78/2000/EC, 54/2006/EC, 41/2010/EU)

- **Direct Discrimination** → “Speech Acts’ Theory”
 - ✓ C-54/07, *Firma Feryn* → Firm director said:
“We aren’t looking for Moroccans. Our customers [...] don’t want them coming into their homes.”
 - ✓ Case C-81/12, *Asociația Accept* → Football club shareholder said:
“Not even if I had to close [the Club] down would I accept a homosexual on the team [...]”
- **Harassment** → What matters is the **effect** of the conduct
 - ✓ Increasingly used in some jurisdictions
 - ✓ Italy - *Tribunale di Milano, Sezione lavoro, ordinanza 22 March 2012, Register No 16945/2011*
- **Orders to discriminate** → **Order ≠ Incitement**
 - ✓ But grey areas/overlaps → e.g. incitement strongly encouraging actions against certain groups
 - ✓ Art. 4 of ICERD confirms close relationship between ‘orders’ and ‘incitement’ (see Choudhury; FRA)

7

ONLINE HATE SPEECH EU APPROACH

Soft-law and legislation pending adoption:

- [EU Code of Conduct on countering illegal online hate speech \(2016\)](#)
- ✓ **Singatories:** European Commission + Facebook, Google, Twitter, Microsoft + Instagram, Google+, Snapchat, Dailymotion, Jeuxvideo.com, TikTok, LinkedIn
- ✓ **Key principles:**
 - Clear procedures for notifications
 - Checking notifications in 24h
 - Removing or disabling content
 - Collaborating with States and other companies
- [Recommendation 2018/334 on measures to effectively tackle illegal content online](#)
- **Proposal: Digital Services Act**
 - **Aim:** creating a ‘horizontal regulatory framework for information society services on their obligations to address illegal content on their services’
 - Regulation would apply where other EU Acts (e.g. Directive 2010/13/EC “AVSMD” - *lex specialis*) don’t apply
 - Recital 12: “illegal content” includes “illegal hate speech or terrorist content and unlawful discriminatory content”

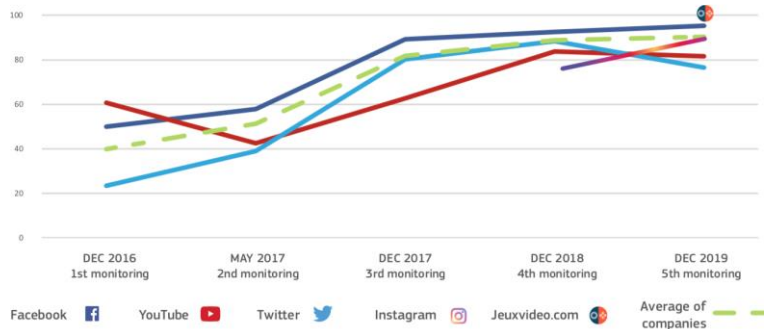


8

THE CODE OF CONDUCT IN PRACTICE

Removals per IT Company

Percentage of notifications assessed within 24 hours - Trend over time



Source: [European Commission \(2020\)](#)

9

CASE LAW (I)

Key case: Case C-244/10, Mesopotamia Broadcast

- **Former Directive 89/552/EEC** → Directive 2010/13/EU (Audiovisual Media Services Directive, AVMSD – codified/consolidated in 2018: last version available [here](#))
- CJEU:
 - ✓ No definition of ‘incitement to hatred’ (Directive 89/552/EEC, Art. 22a) (para 38)
 - ✓ Scope must be determined by reference to ‘**everyday language**’ of the terms used’ and ‘taking into account the **context** in which they occur and the **purposes of the rules** which they are part’ (para 40)
 - ✓ “‘**incitation**’ and “**hatred**” [...] refer, first, to an **action intended** to direct specific behaviour and, second, a **feeling of animosity or rejection** with regard to a group of persons’ (para 41)
 - ✓ ‘by using the concept “incitement to hatred”, [the Directive] is designed to forestall any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons’ (para 42)

→ **Related case: Case C-622/17, Baltic Media Alliance**

10

CASE LAW (II)

Internal market case law: Criteria for pondering freedom of expression v other interests

- **Case C-71/02 Karner v Troostwijk**
 - Any limitation of freedom of expression must be provided by law, should protect a legitimate aim and be necessary in a democratic society
 - Reluctant to restrict freedom of expression where it plays a role in public interest discussions or when freedom of expression is unlikely to cause 'serious harm to the Communities' interests'
 - **Case C- 340/00 Commission v Michael Cwik**
 - 'the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'
- A conflict between freedom of expression and a fundamental freedom (i.e. free movement of goods) is likely to have different implications than a conflict between freedom of expression and another human right, as the freedom of religion, the right not to be discriminated against
- **ECtHR:** 'a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion', **Handyside v the United Kingdom (1976)**

11

EU DEFINITION OF HATE SPEECH (?)

- **Fragmented legal framework**
- **Criminal law** definition → intention required
- **BUT: outside criminal law?**
 - ✓ **Anti-discrimination law** → intention not required
 - ✓ **Internal market legislation:**
 - ✓ **Harmonization**, e.g.:
 - Directive 2010/13/EU (AVMSD) → Case C-244/10, *Mesopotamia Broadcast*
 - ✓ **No harmonization:** TFEU internal market derogations could apply (TFEU free movement provision & derogations)
- **+Online hate speech:**
 - ✓ Code of Conduct (2016), Recommendation 2018/334
 - ✓ Digital Services Act (?)

12