



TACKLING HATE SPEECH IN EU LAW

Dr. Sara Benedi Lahuerta
University College Dublin,
Sutherland School of Law
(sara.benedilahuerta@ucd.ie)

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OVERVIEW

1. **Freedom of expression** v hate speech
2. **EU Primary Law**
3. **EU Secondary Law**
(equality directives, internal market, criminal law)
4. **Soft-law and legislation**
pending adoption
5. **EU definition** of hate speech
(?)



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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)

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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."

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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

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EU LAW OVERVIEW

Non-exhaustive list

PRIMARY LAW

- Art. 2 TEU – values
- Enforcement through Art. 7 TEU
- Art. 10 TFEU – mainstreaming of non-discrimination
- Art. 19 TFEU – legal base
- Arts. 67(3), 83(1) TFEU – criminal law
- Art. 6(3) TEU – Relevance of ECHR
- Charter of Fundamental Rights

SOFT-LAW

- EU Code of Conduct on countering illegal hate speech online (2016)
- Communication on tackling illegal content online, presenting guidelines and principles for online platforms, COM/2018/236 final

SPECIFIC SECONDARY LAW

- Anti-discrimination Directives**, mainly: Directives 2000/43/EC, 2000/78/EC, 2006/54/EC and 2010/41/EU
- Framework Decision 2008/913/** on combating certain forms and expressions of racism and xenophobia by means of criminal law

OTHER RELEVANT SECONDARY LAW

- Directive 2018/1808/EU (Audio-visual Media Services Directive)
- Directive 2000/31/EC (E-commerce Directive)
- Directive 2019/790/EU (Copyright Directive)
- Directive 2012/29/EU (Victims' Directive) ...

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EU PRIMARY LAW

Art. 2 TEU – Union values

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Enforcement through:

→ **Art. 7 TEU** → procedure to 'sanction' Member States where 'clear risk of serious breach' of Art. 2 TEU values (e.g. suspending voting rights at the Council):

✓ [European Parliament Resolution on the use of Art. 7 TEU against Poland and Hungary](#) (among others, due to the creation of [LGBT-free zones](#) and anti-LGBT law)

→ **Art. 258 TFEU (infringement procedure)** → [EU Commission action against Poland and Hungary for violation of LGBT+ rights](#)

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EU SECONDARY LAW – EQUALITY DIRECTIVES

Direct Discrimination

Definition – Art. 2(2)(a) RED

'direct discrimination shall be taken to occur where one person is treated *less favourably* than another *is, has been or would be treated* in a comparable situation on grounds of racial or ethnic origin'

✓ Case 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"

✓ Case C-507/18, *Rete Lenford* → Lawyer states in radio interview that he would not wish to recruit homosexual persons to his law firm

→ **Can they be considered to be hateful speech?**

→ **Do these expressions amount to direct discrimination?**

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OPINION OF AG POIARES MADURO IN *FIRMA FERYN*

“16. Yet, in cases such as these it may be very difficult to identify individual victims, since the persons affected may not even apply for a position with that employer in the first place. [...] By publicly stating his intention not to hire persons of a certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his workforce. **He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a ‘speech act’.** (14) The announcement that persons of a certain racial or ethnic origin are unwelcome as applicants for a job is thus itself a form of discrimination.

17. It would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive [...] it would defeat the very purpose of the Directive if public statements made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin would be turned down, were held to fall outside the concept of direct discrimination.”

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EU SECONDARY LAW – EQUALITY DIRECTIVES

Harassment

Definition – Art. 2(3) RED

‘Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an *unwanted conduct* related to racial or ethnic origin takes place with the *purpose or effect of violating the dignity* of a person *and* of creating an intimidating, hostile, degrading, humiliating or offensive *environment*. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.’

→Difference with direct discrimination?

- Comparison not required
- Pre-employment: direct discrimination
- During employment: harassment

*Increasingly used in some jurisdictions:

Italy - *Tribunale di Milano*,
Sezione lavoro, ordinanza 22
March 2012

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EU SECONDARY LAW – EQUALITY DIRECTIVES

Instructions to discriminate

Definition – Art. 2(4) RED

'An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.'

→ **Can instructions overlap with or be similar to incitement?**

- Grey areas/overlaps
 - ✓ E.g. incitement strongly encouraging actions against certain groups
- According to some, Art. 4 of ICERD confirms close relationship between 'orders' and 'incitement':
 - ✓ Choudhury
 - ✓ Fundamental Rights Agency of the EU (FRA)

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EU SECONDARY LAW – INTERNAL MARKET

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**

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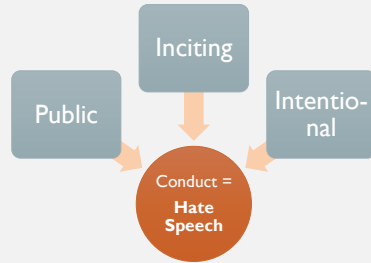
EU SECONDARY LAW – CRIMINAL LAW

- Key instrument:
Framework Decision 2008/913/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**”
- **BUT important derogations**, e.g. Art. 1(2) and (3)

Key aspects of the conduct:



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SOFT-LAW & LEGISLATION PENDING ADOPTION (I)

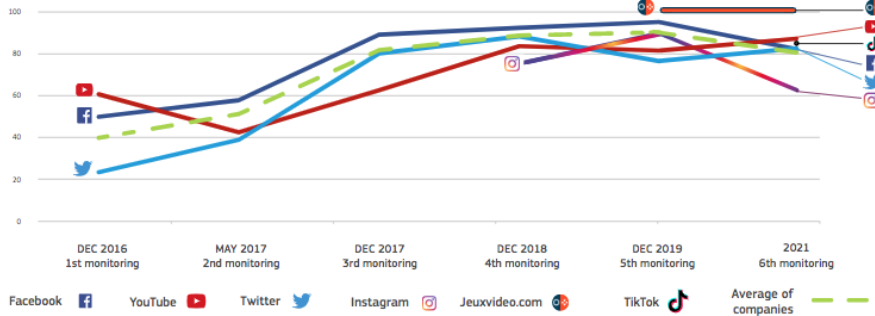
- [EU Code of Conduct on countering illegal online hate speech](#) (2016)
- ✓ **Signatories:** European Commission + Facebook, Google, Twitter, Microsoft + Instagram, Google+, Snapchat, Dailymotion, Jeuxvideo.com, TikTok, LinkedIn
- ✓ **Key principles:**
 - Clear procedures for notifications
 - Checking notifications in 24h
 - Removing or disabling content
 - Collaborating with States and other companies
- [Recommendation 2018/334 on measures to effectively tackle illegal content online](#)



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THE CODE OF CONDUCT IN PRACTICE

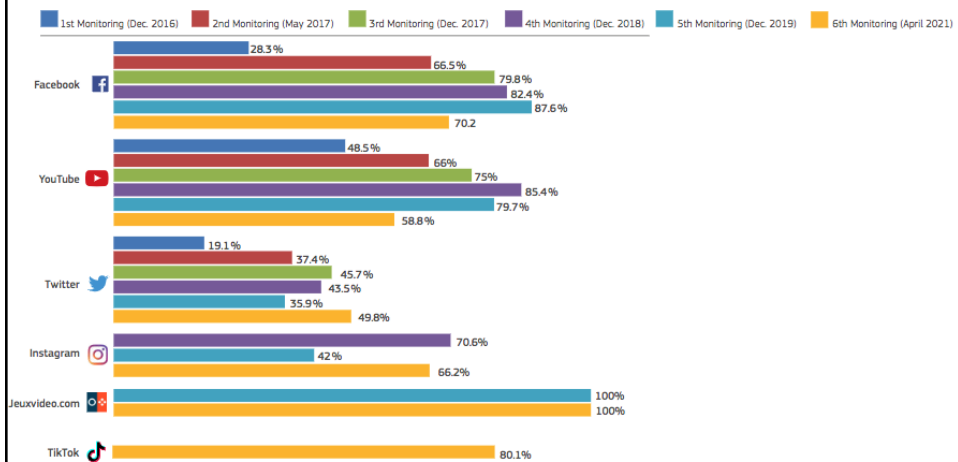
Percentage of notifications assessed within 24 hours - Trend over time



Source: [European Commission, 6th Monitoring Round \(2021\)](#)

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Removals per IT Company



Source: [European Commission, 6th Monitoring Round \(2021\)](#)

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SOFT-LAW & LEGISLATION PENDING ADOPTION (II)

- **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"



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SOFT-LAW & LEGISLATION PENDING ADOPTION (III)

[EU Directive Proposal on combating violence against women and domestic violence COM\(2022\) 105 final](#)

Article 10: 'Member States shall ensure that the intentional conduct of inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex or gender, by disseminating to the public material containing such incitement by means of information and communication technologies punishable as a criminal offence.'

[EU Communication: 'A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime' COM\(2021\) 777 final](#)

1st step: The Council unanimously adopts a decision identifying hate speech and hate crime as falling within Art. 83(1) TFEU

2nd step: The Commission may propose directives on minimum rules → definitions and sanctions of hate speech and hate crime



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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* → **Intention required**
 - Directive 2000/31/EC (e-Commerce), Art. 3(4)(a)
 - ✓ **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 (?); Directive Proposal on combating violence against women and domestic violence

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FURTHER READING

- **On the approach of the ECtHR:**
 - HOWARD, E., *Freedom of expression and religious hate speech in Europe* (Routledge 2017)
- **On Direct Discrimination and the “Speech Acts’ Theory”:**
 - SEARLE, J., *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969)
 - MATSUDA, M. J., LAWRENCE, C. R., DELGADO, R., & CRENSHAW, K. W., *Words that wound. Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder 1993)
 - BELAVUSAU U., ‘Fighting Hate Speech through EU Law’ (2012) 4 *Amsterdam Law Forum* 20
- **On the use of harassment to litigate in cases of hate speech:**
 - MÖSCHEL, M., ‘Italy’s (Surprising) Use of Racial Harassment Provisions as a Means of Fighting Discrimination. In Anti-Discrimination Law in Civil Law Jurisdictions’, in Havelková, B., & Möschel, M. (eds.), *Anti-Discrimination Law in Civil Law Jurisdictions* (OUP 2019) pp. 279-308.
- **On the overlap between orders to discriminate and incitement to hatred:**
 - CHOUDHURY, T., ‘Chapter Five. Instructions to Discriminate and Victimization’, in D. SCHIEK, L. WADDINGTON AND M. BELL (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007)
 - FRA, ECtHR and Council of Europe, *Handbook on European non-discrimination law*, (POEU 2011) p. 33

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