



## **Hate Speech: Tackling Hate Speech in EU Law**

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Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

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## **Hate Speech: Tackling Hate Speech in EU Law**

- Definition?
- EU Anti-Discrimination Framework
- Criminal Law Framework
- Online Hate Speech - Digital Services Act

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## Hate Speech – Definition?

No universal definition of hate speech  
Issues/Problems?

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### **Definition – European Union Agency for Fundamental Rights**

The incitement and encouragement of hate, **discrimination** or hostility against a person, which are motivated by prejudices against said person because of a certain characteristic.

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### Academic Definition (Example)

Greenawalt: Expressions that reflect stereotypes about race, ethnic groups, religion and gender and can dangerously promote prejudices and feelings of inferiority

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### EU Equality Directives

[Directive 2000/43/EC](#) against discrimination on grounds of race and ethnic origin

[Directive 2000/78/EC](#) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.

[Directive Proposal \(COM\(2008\)462\)](#) against discrimination based on age, disability, sexual orientation and religion or belief **beyond the workplace.**

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## EU Equality Directives

**Variation of protection** – race/religion on the one hand and other characteristics e.g. sexual orientation on the other.

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## EU Equality Directive (Employment)

In EU law, the Framework Equality Directive contains four grounds of prohibited conduct, namely *direct discrimination*, *indirect discrimination*, *harassment* and *instruction to discriminate*.

As to the substance of the term harassment, the general definition provided in the Directive appears fairly clear.

However, looking at the case law of the Court of Justice of the European Union (CJEU), the difference between direct discrimination and harassment remains a perplex issue.

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### **Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn**

Involved a Belgian firm director who stated that he was unwilling to hire Moroccan employees.

First case on the Race Equality Directive (about targeting a particular racial or ethnic origin)

The CJEU established that a public statement by an employer not to hire a person because of that person's attribution to the protected minority constitutes direct discrimination under EU anti-discrimination law.

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### **Asociația Accept v Consiliul Național pentru Combaterea Discriminării**

This judgment concerned a homophobic incident in a Romanian football club, lays the foundation for a new cluster in EU anti-discrimination law.

In February 2010, a patron of the Romanian football club Steaua București SA ("Steaua"), Mr. Becali, stated, amongst other things, that "not even if I had to close [FC Steaua] down could I accept a homosexual on the team" and that "even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker . . .but if he's a homosexual I don't want to know about him."

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**Case C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării**

The *Ferlyn* approach was continued in *ACCEPT*, which concerned the characteristic of sexual orientation.

With *ACCEPT*, the Court made an important statement acknowledging that certain homophobic utterances in the employment context amount to direct discrimination.

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**NH v. Associazione Avvocatura per I Diritti LGBTI**

During an interview on a radio programme, a senior lawyer at a law firm stated that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons.

However, there was no recruitment procedure open at NH's law firm at the time when he made those remarks.

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### NH v. Associazione Avvocatura per I Diritti LGBTI

The Court held that:

‘conditions for access to employment ... or to occupation’ in Article 3(1)(a) of the Framework Equality Directive must be interpreted as covering such statements as those made by NH, *even though no recruitment procedure had been opened*, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.

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### NH v. Associazione Avvocatura per I Diritti LGBTI

In the Advocate’s General opinion:

There was a discussion on the relationship between non-discrimination law and freedom of expression.

In her opinion, by enacting the Framework Equality Directive, the EU legislature has expressed a clear choice.

Statements that are discriminatory and that fall within the scope of Directive 2000/78 may not be exonerated by invoking freedom of expression.

Thus, an *employer* cannot declare that he would not hire LGBTI persons, or disabled persons, or Christians, or Muslims, or Jew, and then invoke freedom of expression as a defence. In making such a statement, he/she is not exercising his/her right to freedom of expression. He/she is enunciating a discriminatory recruitment policy.

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## Framework Decision on Racism and Xenophobia

### *Article 1*

#### **Offences concerning racism and xenophobia**

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) Publicly inciting to **violence** or **hatred** directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

2. For the purpose of paragraph 1, 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**.



## Framework Decision on Racism and Xenophobia

**Thresholds** – compare with Article 20(2) of the International Covenant on Civil and Political Rights.

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**Protected characteristics** – e.g. LGBTQI community?

In 2013, the European Parliament recommended that the Decision should include grounds of sexual orientation and gender identity.



### Online Hate Speech - Digital Services Act

- In February 2020, the Commission proposed the **Digital Services Act** (DSA) to create a harmonized response to issues such as the removal of illegal online content, which includes “hate speech...and unlawful discriminatory content.”
- The DSA provides for measures such as the creation of points of contact for all internet intermediaries, the submission of annual reports, internal audits and the imposition of **penalties** in the event of non-conformity.

### Online Hate Speech - Digital Services Act

- Conditional liability rather than general monitoring obligation
- It applies to providers of intermediary services, and in particular intermediary services consisting of services known as ‘mere conduit’, ‘caching’ and ‘hosting’ services,
- Platforms/very large platforms – migration of content?
- “Illegal content”/ “without undue delay”/fines
- Digital Services Coordinator in each member state to monitor implementation (Hungary 2021 ‘gay propaganda’ law?)



### Way forward?

- Inequality *vis-à-vis* protected characteristics
- Hate speech in EU Law – Discrimination framework & Criminal Law Framework
- Differences between the two?
- DSA
- Impact of each on freedom of expression and non-discrimination?

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### Useful Resources on Hate Speech developed by Justitia

ECHR database on hate speech: <https://futurefreespeech.com/hate-speech-case-database/>

UN database on hate speech: <https://futurefreespeech.com/un-hate-speech-case-database/>

Global handbook on hate speech laws: <https://futurefreespeech.com/global-handbook-on-hate-speech-laws/>

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# Questions

