

Hate speech, freedom of expression and non-discrimination

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Definition of hate speech: EU Law

- No comprehensive legal definition
 - [2008 Framework Decision](#) limited to 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](#): above definition
 - [Non-discrimination directives](#): harassment (incl. unintentional)
 - unwanted conduct on protected grounds with purpose or effect violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment
 - Illustrative [national case law](#) (civil/ administrative law)

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Definition 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

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Definition of hate speech: CoE Law

- Comprehensive definition
 - [2022 Recommendation on combatting hate speech](#)
 - all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as “race”, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation
 - ECtHR case law concept
 - Evolving case by case, context-based

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Recent ECtHR Precedence

- Hate speech victims
 - [*Behar and Gutman v. Bulgaria*](#), [*Budinova and Chaprazov v. Bulgaria*](#) (2021)
 - [*Nepomnyashchiy and Others v. Russia*](#) (2023)
- Hate speech authors/ enablers
 - [*Lenis v. Greece*](#) (2023)
 - [*Sanchez v. France*](#) (2023)

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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

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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.

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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.”

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Thank you for your attention.

Let's discuss.

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