

## Homophobic Statements and Hypothetical Discrimination: Expanding the Scope of Directive 2000/78/EC

ECJ 23 April 2020, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*

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### INTRODUCTION

‘Words can hurt’, said Advocate General Maduro in the opening of his Opinion in the case of *Feryn*.<sup>1</sup> Likewise, Advocate General Sharpston began her Opinion in *Associazione Avvocatura per i diritti LGBTI* by saying ‘Words have wings’.<sup>2</sup> The present case note starts by saying that words might act like boomerangs:<sup>3</sup> they can return to the individual who initially pronounced them in the form of a legal sanction. In the case of *Associazione Avvocatura per i diritti LGBTI*,<sup>4</sup> the mobilisation of the jurisprudential principles developed by the Court of Justice in *Feryn* and *Asociația Accept*

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<sup>1</sup>Opinion of AG Maduro 12 March 2008, Case C-54/07, *Feryn*, para. 1.

<sup>2</sup>Opinion of AG Sharpston 31 October 2019, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*, para. 1.

<sup>3</sup>The expression is borrowed from Keck and Sikkink, who used it to explain a different phenomenon, namely the functioning of transnational activist networks. See M.E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998) p. 13.

<sup>4</sup>ECJ 23 April 2020, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*.

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triggered a new preliminary reference and a boomerang effect against the person who pronounced discriminatory statements against homosexual people.

This is the third time that the Court of Justice has addressed the issue of discriminatory statements. Here, the Court declared that the prohibition of discrimination in employment and occupation, contained in Directive 2000/78/EC,<sup>5</sup> applies also to statements made in non-professional contexts and even where no recruitment procedure is in place. Yet, the discriminatory statements must be connected to the employer's recruitment policy in a non-hypothetical way. This case note focuses on the enforcement of EU equality law at the national level, arguing that the case epitomises three parallel processes: the institutionalisation, the proceduralisation, and the expansion of EU equality law.

This case note is structured as follows: it first summarises the Opinion of Advocate General Sharpston and the judgment of the Court; then it examines the mobilisation of Directive 2000/78/EC in the Italian context; finally, the case note focuses on the novelties contained in the judgment, submitting that it did not simply enforce the EU anti-discrimination regime but also gave the Court of Justice the opportunity to further expand the scope of application of Directive 2000/78/EC.

#### THE FACTS AND THE PRELIMINARY REFERENCE

In 2013, during a popular Italian radio programme, lawyer NH expressed the view that he would never hire a homosexual person to work in his law firm, nor would he wish to use the services of such persons. This statement triggered the reaction of Associazione Avvocatura per i diritti LGBTI – Rete Lenford (hereafter, Rete Lenford), an association of lawyers that was founded in 2007 with the specific aim to mobilise the judiciary for the recognition of same-sex marriage in Italy. Today, Rete Lenford pursues the broader aim of contributing to the respect of LGBTI people's rights by offering legal advice and by taking representative actions on their behalf before the judiciary. In the case at hand, Rete Lenford took legal action in its own name against NH, whose conduct it considered to constitute direct discrimination on the grounds of workers' sexual orientation.

The first instance court, the Tribunale di Bergamo (Tribunal of Bergamo), confirmed NH's conduct to be unlawful because it was directly discriminatory. It ordered NH to pay €10,000 to Rete Lenford in damages and to publish extracts from its judicial order in a national daily newspaper. NH appealed against the order, but his appeal was dismissed. He then filed a new appeal against that judgment before the Corte Suprema di Cassazione (Supreme Court of Cassation), which is the referring court in the case at hand. In the appeal, the lawyer challenged the legal standing

<sup>5</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

of Rete Lenford by alleging the misapplication of Article 5 of Italian Legislative Decree No. 216/2003, transposing Article 9 of Directive 2000/78/EC on associational standing in anti-discrimination proceedings. Furthermore, NH contested the alleged discriminatory nature of his statements on the grounds that he expressed an opinion in a situation where he was not presenting himself as an employer but as a private citizen, and that the statements at issue were not made in any concrete professional context.

In its preliminary reference to the Court of Justice, the Supreme Court of Cassation submitted two questions: first, it asked whether an association like Rete Lenford, which aims to promote respect for LGBTI people's rights but is not (exclusively) composed of LGBTI people and does not have a clear non-profit character, qualifies as a body representing collective interests for the purposes of Article 9(2) of Directive 2000/78/EC and thus automatically has standing to bring proceedings and claims for damages.<sup>6</sup> Second, it sought clarification as to whether a statement broadcast on a radio programme falls within the material scope of Directive 2000/78/EC, even if it does not relate to any current or planned recruitment procedure by the law firm and it was pronounced as a manifestation of a personal opinion, as such protected by freedom of expression.<sup>7</sup>

#### SUMMARY OF THE OPINION OF THE ADVOCATE GENERAL

Advocate General Eleanor Sharpston began her Opinion by addressing the second question posed by the referring judge: do the facts at issue fall within the scope of Directive 2000/78/EC? NH contended that the Directive was not applicable to his case, as when he expressed his views on LGBTI people there was no recruitment procedure in place at his law firm, nor a vacancy to be filled. In fact, Directive 2000/78/EC applies only to discrimination in relation to conditions for access to employment, working conditions and membership of workers' organisations (Article 3 of the Directive). According to NH, the anti-discrimination provisions, if applied extensively to situations unrelated to employment, would lead to an excessive compression of the freedom of expression.

The Advocate General first noted that an autonomous interpretation must be given to 'conditions for access to employment' (Article 3(a)) and that, considering the Directive's objectives and the nature of the right at stake, such interpretation cannot be restrictive. Indeed, the Directive gives expression to a general principle of EU law, stated in the Charter, in several international instruments and in member states' common traditions.<sup>8</sup>

<sup>6</sup>Corte Suprema di Cassazione 30 May 2018, Case 19443/18, Ordinanza Interlocutoria. *See also Associazione Avvocatura per i diritti LGBTI, supra* n. 4, paras. 22–27.

<sup>7</sup>*Associazione Avvocatura per i diritti LGBTI, supra* n. 4, para. 27.

<sup>8</sup>Recital 1 of Directive 2000/78/EC.

The Advocate General referred to the Court's case law for further guidance as to the scope of the concept of 'access to employment'. Drawing from the cases of *Feryn* and *Asociația Accept*, she proposed a (non-exhaustive) list of criteria to assess whether discriminatory statements present a sufficient link with access to employment to fall within the scope of Directive 2000/78/EC.<sup>9</sup> These criteria are: the status and capacity of the person making the statements; the nature and content of the statements; the context in which the statements were made; and the extent to which those statements may discourage persons belonging to the protected group from applying for employment with that employer. On the basis of the available information, Advocate General Sharpston considered that NH's statements were 'capable of falling within the scope' of the Directive, leaving the referring court to examine the relevant facts in greater detail.<sup>10</sup> Furthermore, vis-à-vis NH's claim that his statements would amount to merely hypothetical discrimination, she recalled former Advocate General Maduro's Opinion in *Feryn*:

a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. [...] such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue.<sup>11</sup>

As to interference with the right to freedom of expression, Advocate General Sharpston clarified that this right, along with the right to work and not to be discriminated against, are fundamental rights recognised by the Charter.<sup>12</sup> Although freedom of expression performs an essential role in a democratic society, it is subject to limitations, which should be established by law, should not compromise the essence of the right and should aim at realising an objective of general interest in a proportionate manner.<sup>13</sup> According to the Advocate General, these conditions were all fulfilled in the case at hand.

Advocate General Sharpston then examined the second question of the referring judge, concerning Rete Lenford's legal standing. Under Italian law, trade unions, organisations and associations can bring anti-discrimination actions on their own behalf 'in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination'.<sup>14</sup> The Advocate General stated that this is not contrary to EU law because, although

<sup>9</sup>ECJ 10 July 2008, Case C-54/07, *Feryn*; ECJ 25 April 2013, Case C-81/12, *Asociația Accept*.

<sup>10</sup>Opinion of AG Sharpston, *supra* n. 2, paras. 53-57.

<sup>11</sup>Opinion of AG Sharpston, *supra* n. 2, para. 47.

<sup>12</sup>See Arts. 11(1), 15(1) and 21(1) of the European Charter of Fundamental Rights.

<sup>13</sup>Opinion of AG Sharpston, *supra* n. 2, paras. 66-69.

<sup>14</sup>Art. 5 Legislative Decree 216/2003.

Article 9 of Directive 2000/78/EC grants legal standing only to associations that act 'either on behalf or in support of a complainant', Article 8 leaves to member states the possibility to grant higher protection than the one provided by EU law.

For what concerns specific criteria that associations need to fulfil, the Advocate General observed that the Directive requires only that associations have a legitimate interest in ensuring that the provisions of the Directive are complied with, leaving to national law the further definition of criteria, subject to the principles of national procedural autonomy, equivalent and effective protection.<sup>15</sup> Although national courts alone are competent to assess the compliance of national law with those principles, the Advocate General dismissed as irrelevant NH's argument about the fact that not all Rete Lenford's members are LGBTI persons: 'One does not require, of a public interest association dedicated to protecting wild birds and their habitats, that all its members should have wings, beaks and feathers'.<sup>16</sup> Instead, the Advocate General highlighted the valuable role of such associations in ensuring adequate judicial protection and the *effet utile* of the Directive.

Prompted by the defendant, who raised some doubts regarding the non-profit making character of Rete Lenford, the referring court asked whether an association with legitimate interest has also to be non-profit making, as required by Commission Recommendation 2013/396/EU.<sup>17</sup> The Advocate General replied in the negative, noting that the Recommendation is not applicable to the situation at hand as it refers to cases where the national government designates an association to bring actions, which is not the case with Rete Lenford.

This brings us to the final point addressed by the Advocate General, on whether an association that brings action in the absence of an identifiable victim may ask for an award of damages. Advocate General Sharpston recalled Article 17 of the Directive, which requires member states to provide for effective, proportionate and dissuasive sanctions. As the Court stated in *Feryn*, such sanctions shall apply regardless of whether there is an identifiable victim, and in that case the sanction may 'take the form of the award of damages to the body bringing the proceedings'.<sup>18</sup> On that basis, the Advocate General concluded that an association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned by an award of damages.

<sup>15</sup>Opinion of AG Sharpston, *supra* n. 2, paras. 92-95.

<sup>16</sup>Opinion of AG Sharpston, *supra* n. 2, para. 99.

<sup>17</sup>Art. 4(a) of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201.

<sup>18</sup>Opinion of AG Sharpston, *supra* n. 2, para. 108.

## SUMMARY OF THE COURT'S JUDGMENT

In its ruling, the Court largely followed the Advocate General's Opinion. Like the Advocate General, the Court of Justice started by addressing the question of the material scope of the Directive first, ruling that the concept of 'conditions for access to employment or occupation' (Article 3(a)) should be given an autonomous and uniform meaning throughout the EU. Moreover, in light of the fundamental values that the Directive safeguards, the concept should not be interpreted restrictively. As stated in *Asociația Accept*, the discriminatory act may consist in discriminatory statements pronounced by a person who is not the employer and might not have the capacity to define the recruitment policy. Nevertheless, such statements need to be 'related to the recruitment policy of a given employer, which means that the link between those statements and the conditions for access to employment and to occupation with that employer must not be hypothetical'.<sup>19</sup>

In this respect, the Court put forward three guiding criteria that national courts should take into consideration when establishing whether discriminatory statements fall within the scope of application of the Directive: (i) the status of the person making the statements: he/she should be the employer, a person exercising considerable influence over recruitment policies, or a person who 'may be perceived by the public or the social groups concerned as being capable of exerting such influence'; (ii) the content of the statements: they must express the intention to discriminate; (iii) the context: whether the statements had a public character or were broadcast.<sup>20</sup>

Then, the Court addressed the possible conflict between freedom of expression and the application of the Directive to discriminatory statements. The Court recognised the importance of freedom of expression as a fundamental right protected under the EU Charter, but it also acknowledged that, as with any other right, it is not absolute and is subject to limitations established by law and proportional to the attainment of a legitimate aim, as in the case at hand. Indeed, not all statements are prohibited – only those which are discriminatory and which are made in the context of employment and occupation.<sup>21</sup> If an employer, or a person capable of influencing recruitment policies, were free to express his/her discriminatory opinions in matters of employment, prospective applicants belonging to a protected group would be likely to be deterred from applying for the post. Like the Advocate General, the Court also quoted former Advocate General Maduro Opinion in *Feryn*: 'in any recruitment process, the principal selection takes place between those who apply, and those who do not'.<sup>22</sup>

<sup>19</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, para. 43.

<sup>20</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, paras. 44–46.

<sup>21</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, paras. 49–53.

<sup>22</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, para. 55.

The Court then addressed the procedural questions raised by the referring court, and in particular the legal standing of associations such as Rete Lenford. The Court held that Directive 2000/78/EC does not preclude Italian legislation from automatically granting legal standing to an association of lawyers on account of its aim, which, according to its statutes, is the judicial protection of LGBTI persons and the promotion of the culture and respect for the rights of LGBTI persons. Although Article 9(2) of Directive 2000/78/EC does not require member states to grant associations standing to bring judicial proceedings where no victim can be identified, member states are free to introduce or maintain more favourable provisions, since the Directive imposes only minimum requirements.<sup>23</sup>

The Court concluded by saying that it was, therefore, for member states to decide on the conditions under which an association may bring legal proceedings when acting in the absence of an identifiable victim, and this also applied to its for-profit or non-profit character. Member states were also free to decide which sanctions may be imposed, provided that these, in line with Article 17 of the Directive, are 'effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party'.<sup>24</sup>

#### COMMENT: INSTITUTIONALISATION, PROCEDURALISATION AND EXPANSION OF EU EQUALITY LAW

This comment aims to assess *Associazione Avvocatura per i diritti LGBTI*'s significance by taking into account the context where the mobilisation of EU anti-discrimination provisions took place. Following the trajectory of the preliminary reference proceedings, this comment's first section will trace the local conditions that brought the case before the Italian judiciary and subsequently the Court of Justice; the second section will then assess the extent to which the judgment contributes to the development of the EU's anti-discrimination regime.

The harder you throw a boomerang, the harder it will come back to you. The defendant in the trial, NH, is a very well-known Italian lawyer, who has built his career by defending accused persons in high-profile criminal cases. His notoriety is not only due to his appearances in court, but also to his work as an Italian MP from 2001 to 2006 and to his service as a legal expert for the Italian government in 2001.<sup>25</sup> As a result, NH is often invited as a guest on TV and radio talk-shows and, thanks to his bold opinions, he often makes the front page of Italian newspapers. Indeed, the homophobic statements under dispute in the Court of Justice case were anything but exceptional: he had made similar comments about LGBTI

<sup>23</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, para. 62.

<sup>24</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 4, para. 64.

<sup>25</sup>See ([www.senato.it/leg/14/BGT/Schede/Attsen/00017792.htm](http://www.senato.it/leg/14/BGT/Schede/Attsen/00017792.htm)), visited 20 October 2020.

people before, and has continued to make them even since the first instance tribunal condemnation.<sup>26</sup> Given this, why did NH's homophobic statements boomerang on him this time, and led him to court?

The case shows three parallel processes in place. First, what academics defined as the institutionalisation of EU governance, and specifically of the Court of Justice's equality jurisprudence: 'the process by which these rules and procedures become increasingly formalised and are supported by actors and organisations with increasing competence to change these rules'.<sup>27</sup> The second, parallel, process is the proceduralisation of EU equality law and its 'over-implementation' by some member states, which equipped public interest organisations with legal tools which they use to invoke EU equality law in court with the aim of triggering a transformation at the domestic level.<sup>28</sup> Third, the Court-made expansion of the material scope of the Equality Directives. I shall describe these three processes more in detail in this section.

A central condition for the institutionalisation of EU equality law, and of the Court of Justice's equality jurisprudence, is the mobilisation of EU legal knowledge. Indeed, if relevant actors (non-governmental organisations, associations, victims of discrimination) are not aware of the potential of EU anti-discrimination law, they will never mobilise it in court. This is true also for the *Associazione Avvocatura per i diritti LGBTI* case: the first step in the litigation strategy was made by a labour lawyer, a member of Rete Lenford, who, having listened to the NH's homophobic declarations on the radio, linked this episode with the cases of *Feryn* and *Asociația Accept*, and with the prohibition of discrimination in the employment field. He convinced the members of Rete Lenford that this time, instead of just filing a complaint to the Italian Bar Association, they should bring the case to court as the NH's statements were not just homophobic, they expressly referred to his law firm's recruitment policy and thus called into question discrimination in the employment domain.<sup>29</sup> This intuition was determinant for the mobilisation of Directive 2000/78/EC before Italian courts.

The critical importance of EU legal knowledge is further demonstrated by the fact that Rete Lenford could rely on few financial resources (most of the legal work was provided pro bono) but on important intellectual ones. Indeed,

<sup>26</sup>S. Rame, 'Carlo Taormina alla Zanzara: "Riconosco un frocio dai movimenti, come i delinquenti"' *ilGiornale.it* (23 July 2015) ([www.ilgiornale.it/news/politica/carlo-taormina-zanzara-riconosco-frocio-dai-movimenti-i-deli-1154738.html](http://www.ilgiornale.it/news/politica/carlo-taormina-zanzara-riconosco-frocio-dai-movimenti-i-deli-1154738.html)), visited 20 October 2020.

<sup>27</sup>R.A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007) p. 2.

<sup>28</sup>E. Muir, 'Procedural Rules in the Service of the "Transformative Function" of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along', 8 *Review of European Administrative Law* (2015) p. 153; E. Muir et al., 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum', *EUI Working Paper 2017/17*.

<sup>29</sup>Conversation with Lawyer F.R., member of Rete Lenford, on 9 June 2020.

Rete Lenford created a working group and invited one of the best-known Italian anti-discrimination lawyers, Alberto Guariso, to participate; this lawyer has extensive experience in litigating anti-discrimination cases before national and EU courts, contributing to the shaping and the advancement of equality law in Italy.<sup>30</sup> This confirms once more that the new opportunities offered by EU law and the Court of Justice case law can be relied upon only by national actors that possess the necessary resources and 'know how'.<sup>31</sup>

Regarding the second process, the proceduralisation, Rete Lenford could bring an antidiscrimination action thanks to the procedural novelties introduced by the Equality Directives and their 'over-implementation' by Italy. The proceduralisation resulted from a specific choice of the EU law-maker that decided to secure the effective implementation of the Equality Directives by requiring member states to create equality bodies and to grant collective actors legal standing when acting in the name of or on behalf of victims of discrimination.<sup>32</sup> In addition, Italy, prompted by a Commission's infringement procedure, is one of the member states that 'over-implemented'<sup>33</sup> the Equality Directives by providing that qualified associations can challenge in court a discriminatory act on their own behalf in cases of collective discrimination, i.e. when a victim is not immediately and directly identifiable.<sup>34</sup>

<sup>30</sup>Guariso was the lawyer in the cases of *Abercrombie*, C-143/16 and *Martinez Silva*, C-449/16. See V. Passalacqua, 'Advancing Equality Law in Italy: Between Unsystematic Implementation and Decentralized Enforcement', 17 *EUI Working Papers LAW* 75 (2017).

<sup>31</sup>T.A. Börzel, 'Participation Through Law Enforcement. The Case of the European Union', 39 *Comparative Political Studies* (2006) p. 128; M. Dawson et al., 'A Tool-Box for Legal and Political Mobilisation in European Equality Law', in D. Anagnostou, *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing 2014).

<sup>32</sup>Art. 9(2) of Directive 2000/78/EC and Art. 7(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

<sup>33</sup>L. Farkas, 'NGO and Equality Body Enforcement of EU Anti-Discrimination Law: Bulgarian Roma and the Electricity Sector', 17 *EUI Working Papers LAW* (2017) p. 35 at p. 36; I. Chopin and C. Germaine, *A Comparative Analysis of Non-Discrimination Law in Europe 2017: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey Compared* (Publications Office of the European Union 2017) p. 87–96 ([op.europa.eu/en/publication-detail/-/publication/36c9bb78-db01-11e7-a506-01aa75ed71a1](http://op.europa.eu/en/publication-detail/-/publication/36c9bb78-db01-11e7-a506-01aa75ed71a1)), visited 20 October 2020.

<sup>34</sup>Italy designed this collective discrimination model drawing from its tradition of trade union litigation: the 1970 Worker Statute gave trade unions legal standing in determined circumstances regardless of workers' mandate. M. Barbera and A. Guariso, 'Italy', in M. Mercat-Bruns et al. (eds), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* (Springer International Publishing 2018) ch. 13. The collective discrimination provisions are: Art. 5(2) Legislative Decree 216/2003 transposing the Framework Directive; Arts. 37 and 55 of the Legislative Decree 198/2006 on equality between men and women; Art. 4(3) of Law 67/2006 on disability rights.

This provision precisely aims at closing the accountability gap that would arise in cases such as *Associazione Avvocatura per i diritti LGBTI*, where it is almost impossible to have an individual complainant: beyond the usual reticence that LGBTI individuals have in bringing legal action, as this would compromise their privacy or force them to come-out,<sup>35</sup> in this case they would not even apply for a job in NH's law firm as they would know that they would never be selected. Indeed, it is not a coincidence that the other two cases against discriminatory statements (*Feryn* and *Asociația Accept*) were also brought to court by organisations which were granted legal standing thanks to national procedures that 'over-implemented' the Equality Directives.

Contrary to what one might expect, Rete Lenford's litigation strategy did not contemplate reaching the Court of Justice; instead, the preliminary ruling was proposed by NH's defence.<sup>36</sup> Rete Lenford had already obtained a clear victory both before the first and the second-instance courts, but NH managed to instil some doubts in the Italian Supreme Court regarding the scope of application of EU anti-discrimination law. This brings us to the third process in place: the expansion of the material scope of the Equality Directives.

The preliminary reference gave the Court of Justice the opportunity to further refine its previous case law. Its landmark judgments of *Feryn* and *Asociația Accept* had made a crucial contribution in defining who can bring an anti-discrimination claim to court and when:

- (i) they expanded the Equality Directives' personal scope: there can be discrimination even in the absence of an identifiable complainant;<sup>37</sup>
- (ii) they expanded the Equality Directives' material scope: the discriminatory statements do not have to be made by the employer directly or by the person responsible for recruitment matters;<sup>38</sup>
- (iii) they expanded the associational standing: the Equality Directives set minimum standards for organisations' legal standing but member states are free to introduce more favourable standing rules.<sup>39</sup>

As we have seen, the case of *Associazione Avvocatura per i diritti LGBTI* emerged thanks to the legal opportunities opened by the two previous landmark rulings. However, the ruling in the case of *Asociația Accept* had left some unanswered

<sup>35</sup>A. Tryfonidou, 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law', in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing 2019) p. 239; U. Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on *Asociația Accept* (C-81/12)', 21 *Columbia Journal of European Law* (2015) p. 369.

<sup>36</sup>Conversation with Lawyer F.R., member of Rete Lenford, on 9 June 2020.

<sup>37</sup>*Feryn*, *supra* n. 9, para. 23; *Asociația Accept*, *supra* n. 9, para. 36.

<sup>38</sup>*Asociația Accept*, *supra* n. 9, para. 49.

<sup>39</sup>*Feryn*, *supra* n. 9, para. 27; *Asociația Accept*, *supra* n. 9, para. 37.

questions regarding the material scope of Directive 2000/78/EC, which the Court was asked to address. In particular, since the Directive applies only to the employment and occupation sphere (Article 3), it remained unclear whether it could be invoked against statements that have little or no connection with concrete recruitment procedures. This question assumes a great relevance in the case of discriminatory statements, because the definition of the Directive's scope of application influences the limit that can be imposed on individuals' freedom of expression: since discriminatory statements on the grounds of sexual orientation are not prohibited under EU (and Italian) law as such, an individual is free to express her/his views on LGBTI people as long as these do not affect the spheres of employment and occupation.

To solve the conflict between two opposing principles – i.e. the need to protect LGBTI people from discrimination and the respect of freedom of expression – the Court found a fair compromise: it stated that not all statements fall within the scope of application of the Directive; only those that are linked, in a non-hypothetical way, to the recruitment policy of the employer at issue. To guide national courts when making this evaluation, the Court outlined three criteria that they should consider: the status of the person making the statements; their discriminatory content; and the public or private context where the statements were pronounced. Interestingly, the three criteria can all be reconducted to one *fil rouge* in the Court's case law: the vulnerable groups' experience of discriminatory statements. In a way, the Court is inviting the national judge to take the perspective of the potential victim of discrimination, as only this can tell us whether a statement will have a dissuasive effect on their decision to apply for a job.

## CONCLUSION

Similar to the case of *Asociația Accept* in the Romanian context,<sup>40</sup> the case of *Associazione Avvocatura per i diritti LGBTI* is particularly significant in the Italian context where homophobic remarks are often tolerated but seldomly litigated in court, even in the employment field.<sup>41</sup> Although the Italian government tried to diminish the gravity of NH's homophobic declarations by saying that they were made during a satiric program,<sup>42</sup> this view was strongly rejected by the Advocate General ('[o]ne can easily imagine the chilling effect of homophobic "jokes" made by a potential employer in the presence of LGBTI applicants')<sup>43</sup> and

<sup>40</sup>Belavusau (2015), *supra* n. 35, p. 371.

<sup>41</sup>See a collection of Italian anti-discrimination cases: A. Guariso (ed.), *Senza Distinzioni. Quattro Anni Di Contrasto Alle Discriminazioni Istituzionali Nel Nord Italia* (Associazione Avvocati per Niente ONLUS 2012).

<sup>42</sup>Opinion of AG Sharpston, *supra* n. 2, para. 37.

<sup>43</sup>Opinion of AG Sharpston, *supra* n. 2, para. 56.

by the Court of Justice, which conversely considered the public character of the statements as an aggravating circumstance because of its dissuasive effect on LGBTI potential applicants.

This case note has argued that the case of *Associazione Avvocatura per i diritti LGBTI* exemplifies three parallel processes that are affecting and transforming EU equality law: its institutionalisation, proceduralisation, and expansion. An Italian LGBTI association, relying on the help of experts in EU anti-discrimination law and on the procedures introduced to grant associational standing, was able to mobilise Directive 2000/78/EC and to push for its expansive interpretation. As Directive 2000/78/EC was not conceived to fight homophobia in general, the Court did not go as far as to forbid discrimination beyond the employment sphere, but it required the existence of a non-hypothetical link between the statements and the recruitment policy of a given employer. Yet, the interpretation provided in the judgment appreciably expands the scope of application of Directive 2000/78/EC, that now can be relied upon by individual complainants and organisations to sanction discriminatory statements even if they are made in non-professional contexts and are not directly linked to a concrete recruitment procedure. For these reasons, *Associazione Avvocatura per i diritti LGBTI* can be ascribed, together with *Feryn* and *Associatia Accept*, to the line of cases that strengthens the enforcement of anti-discrimination law and paves the way for fulfilling its transformative potential.

