



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 31 October 2019¹

Case C-507/18

NH

v

Associazione Avvocatura per i diritti LGBTI — Rete Lenford

(Request for a preliminary ruling from the Corte suprema di cassazione (Italy))

(Directive 2000/78/EC — Equal treatment in employment and occupation — Discrimination based on sexual orientation — Article 3(1)(a) — Access to employment — Public statements excluding the recruitment of homosexuals — Article 8(1) — Article 9(2) — Enforcement and remedies — Standing of an association in the absence of an identifiable victim — Claims for damages)

1. *Ἐπεα πτερόεντα*, words have wings. The meaning of that expression, the origins of which can be traced back to Homer² is twofold: that words fly away, carried by the wind;³ but also that words travel fast and spread quickly. The present case, concerning statements made during a radio interview, comes closer to the second meaning. Today, words spoken on the radio or television or transmitted via social media are disseminated rapidly and have consequences. The oral statements at the origin of the main proceedings have travelled as far as Luxembourg and give this Court the opportunity to interpret the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.⁴ Does the scope of Article 3(1)(a) of the directive, which prohibits discrimination in access to employment, also cover a general statement made on the radio to the effect that the interviewee would not recruit homosexuals to his law firm? And is it possible, in the absence of an identifiable victim, for an association to seek to enforce of the prohibition of discrimination in employment and occupation, including through the award of damages?

¹ Original language: English.

² The formula is used several times by Homer, both in the *Iliad* and in the *Odyssey*. See, for example, *Iliad*, Book 15, 145 and 157.

³ In that sense, the formula corresponds to the first part of the well-known Latin expression *verba volant, scripta manent*, underlying the importance of written texts.

⁴ OJ 2000 L 303, p. 16.

Legal framework

The European Convention for the Protection of Human Rights and Fundamental Freedoms

2. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') provides that:

'(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.

(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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

3. Article 14 prohibits discrimination, stating that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

4. A right to employment is not, however, amongst the specific rights protected by the ECHR.

EU law

The Charter of Fundamental Rights of the European Union

5. Article 11(1) of the Charter of Fundamental Rights of the European Union ('the Charter')⁵ provides that '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.'

6. Article 15(1) states that 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.'

7. Article 21(1) prohibits 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.

8. Article 52(1) states that '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 [EU] or the need to protect the rights and freedoms of

⁵ OJ 2007 C 303, p. 1.

others.’ Article 52(3) provides that ‘in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent [EU] law providing more extensive protection.’

Directive 2000/78

9. The recitals of Directive 2000/78 state, in particular:

‘(1) ... the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights ...

...

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

...

(11) Discrimination based on ... sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

...

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.

...

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

...

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

...

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

...

(37) In accordance with the principle of subsidiarity ... the objective of this Directive, namely the creation within the [EU] of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States’

10. Article 1 provides that the purpose of the directive is ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’.

11. Article 2 (‘Concept of discrimination’) states:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

- (a) 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 any of the grounds referred to in Article 1;
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.’

12. According to Article 3 (‘Scope’):

‘1. Within the limits of the areas of competence conferred on the [EU], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; ...’

13. Article 8 provides that:

‘1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.’

14. Under Article 9 ('Defence of rights'):

'1. Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them ...

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

...'

15. Article 17 provides that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. ...'

Italian law

16. Decreto legislativo 9 luglio 2003, No 216 ('Legislative Decree n° 216/2003') implemented Directive 2000/78. Article 1 explains that the decree 'lays down the provisions relating to the implementation of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation, as regards employment and occupation, establishing the necessary measures to ensure that there is no discrimination on those grounds, taking account also of the different consequences that those forms of discrimination may have for women and men'.

17. Article 2 defines discrimination. Its first paragraph provides that 'the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds of religion, belief, disability, age or sexual orientation. This principle means that direct or indirect discrimination, as defined below, shall be prohibited:

- (a) 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 the grounds of religion, belief, disability, age or sexual orientation;
- (b) indirect discrimination [shall be taken to occur where] an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons having a particular religion or belief, disabled persons or persons of a certain age or sexual orientation at a particular disadvantage compared with other persons ...'.

18. Article 3(1) states that 'the principle of equal treatment without distinction on grounds of religion, belief, disability, age or sexual orientation shall apply to all persons as regards both the public and private sectors and shall be entitled to judicial protection, in accordance with the formal requirements laid down by Article 4, with specific reference to the following areas:

- (a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions ... '.

19. Article 5 concerns standing and provides that:

‘1. Trade unions, associations and organisations representing the rights or interests affected under a mandate given by a public or certified private instrument, failing which the mandate shall be void, shall have standing to bring proceedings under Article 4 in the name and on behalf of, or in support of, the person subject to the discrimination, against the natural or legal person responsible for the discriminatory behaviour or act.

2. The persons referred to in paragraph 1 shall also have standing in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination.’

Facts, procedure and the questions referred

20. NH is a senior lawyer. The material before the Court does not permit definitive conclusions to be drawn as to NH’s precise current status within the law firm with which he is associated. During an interview in a radio programme, NH stated that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons. At the time when he made those remarks, there was no current recruitment procedure open at NH’s law firm.

21. The Associazione Avvocatura per i diritti LGBTI — Rete Lenford (‘the Associazione’)⁶ is an association of lawyers which, according to its statutes, aims ‘to contribute to the development and dissemination of the culture and respect for the rights of [LGBTI] persons’ and to create a network of lawyers to offer judicial protection to LGBTI persons and to take representative action on their behalf before national and international jurisdictions. The Associazione brought proceedings against NH, asking that he be ordered to publish a section of the order in a national daily newspaper, to establish an action plan to eliminate discrimination and to pay damages to the Associazione for non-material loss.

22. By order of 6 August 2014 the Tribunale di Bergamo (District Court, Bergamo, Italy), acting as an employment tribunal, found that NH had acted illegally. It held that his behaviour was unlawful because of its discriminatory nature, made the publication order requested and ordered him to pay EUR 10 000 to the Associazione in damages.

23. NH’s appeal against that order was dismissed by the Corte d’appello di Brescia (Court of Appeal, Brescia, Italy) by judgment of 23 January 2015.

24. NH appealed in cassation against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy (‘the referring court’)).

25. The referring court expresses doubts as to whether the Associazione is a body representing collective interests for the purposes of Article 9(2) of Directive 2000/78 and thus has standing to bring proceedings against NH. It also expresses doubts as to whether NH’s statements fall within the scope of Directive 2000/78 on the basis that they concern ‘employment’, or whether they should be regarded as mere expressions of opinion, unrelated to any discriminatory recruitment procedure.

⁶ ‘LGBTI’ is an acronym commonly used for lesbian, gay, bisexual, transgender and intersex persons. See, inter alia, Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, Luxembourg, 24 June 2013. Those guidelines provide, in point 13, a working definition of the term, indicating that it is not, however, binding and that it has not formally been adopted by an intergovernmental body.

26. Against that background, the referring court asks the Court the following questions:

‘(1) Must Article 9 of Directive 2000/78 be interpreted as meaning that an association composed of lawyers specialised in the judicial protection of LGBTI persons, the statutes of which state that its objective is to promote LGBTI culture and respect for the rights of LGBTI persons, automatically, as a legal person having a collective interest and as a non-profit association, has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons?’

(2) On a proper construction of Articles 2 and 3 of Directive 2000/78, does a statement expressing a negative opinion with regard to homosexuals, whereby, in an interview given during a radio entertainment programme, the interviewee stated that he would never appoint an LGBTI person to his law firm, nor wish to use the services of such persons, fall within the scope of the anti-discrimination rules laid down in that directive, even if that statement does not relate to any current or planned recruitment procedure by the interviewee?’

27. Written observations were submitted by NH, the Associazione, the Greek and Italian Governments and the European Commission. At the hearing on 15 July 2019, NH, the Associazione, the Italian Government and the European Commission made oral submissions.

Assessment

Preliminary observations

28. The facts at the origin of the present case are not in contention. NH did say, on a radio interview, that he would not hire a homosexual person to work in his law firm and would not wish to use the services of such persons. The case turns on the legal qualification of those facts. Do they constitute discrimination in relation to employment within the meaning of Directive 2000/78? And if they do, is the Associazione allowed to bring proceedings against NH, in the absence of an identifiable victim?

29. It is thus first necessary to ascertain whether the situation at issue in the main proceedings falls within the scope of Directive 2000/78, and then to examine whether the Associazione has standing to bring proceedings to enforce the provisions of that directive. That is the order in which I shall deal with the preliminary questions (thus reversing the order in which they appear in the order for reference).

30. According to the Court’s settled case-law, it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that it is intended to establish a *general framework* for ensuring that everyone benefits from equal treatment ‘in matters of employment and occupation’ by providing effective protection against discrimination based on any of the grounds listed in Article 1 thereof, which include sexual orientation.⁷

⁷ Judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 40 and the case-law cited.

31. The directive also aims to create a level playing field within the European Union as regards equality in employment and occupation.⁸ However, the protection offered by the directive is to be considered as a minimum — thus, Member States are free to introduce or to maintain more favourable provisions.⁹ Directive 2000/78 offers protection at two different levels: the substantive level, by prohibiting direct and indirect discrimination on the grounds of, *inter alia*, sexual orientation; and the level of enforcement, by providing a minimum standard for remedies that Member States must ensure are available in cases of discrimination.

Question 2

32. Question 2 addresses the scope of Directive 2000/78. Does a statement made during a radio programme in which the interviewee said plainly and unequivocally that he would never hire a homosexual person to work in his law firm, nor wish to use the services of such persons, fall within the scope of that directive, even if that statement does not relate to any current or planned recruitment procedure?

33. The assessment of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.¹⁰ That said, it seems to me that *if* Directive 2000/78 applies, the facts of this case as presented to the Court are such as to amount to direct discrimination. It is evident that a homosexual person seeking employment in NH's law firm would be treated less favourably — that is, would not be hired — on the ground of his sexual orientation than another person in a comparable situation.¹¹

34. Do the facts described by the referring court fall within the material scope of Directive 2000/78? Are they covered by the rubric of 'employment and occupation', and more particularly by 'conditions for access to employment', as specified by Article 3(1)(a) of the directive?

The scope of Article 3(1)(a) of Directive 2000/78

35. The referring court expresses doubts as to whether there is a sufficient link between NH's statements during the radio interview and access to employment, since there was, at the time those statements were made, no current recruitment procedure or at least a vacancy notice at NH's law firm. It also observes that mere statements of opinion that do not present a minimum link with an employment procedure are protected by the freedom of expression.

36. NH submits that there was no current or planned recruitment procedure. There was thus no professional context. He was expressing his personal opinion as a simple citizen.

37. At the hearing, the Italian Government emphasised that the context in which the statements were made should be considered. The link with access to employment might differ, depending on whether the statements were made during a serious broadcast with the participation of employers and news journalists or during an irony-filled programme of political satire.

⁸ See recital 37 of Directive 2000/78 and judgment of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415, paragraph 47.

⁹ Recital 28.

¹⁰ See recital 15 and judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 42.

¹¹ See, by analogy, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 25. Since it is unclear from the remarks reported what NH's attitude would have been towards hiring a person who was bisexual, transsexual or intersex, 'another person' should here be taken as meaning 'a person whose apparent sexual orientation was heterosexual'. Whether a person's sexual orientation can be discerned from their appearance and whether questions asked during an interview would (or could, or should) elicit material from which that orientation can be deduced are issues that do not form part of this case and I shall not address them further.

38. Is it possible to consider that statements such as those at the origin of the main proceedings, when no current recruitment procedure was open, fall within the scope of ‘access to employment’ under Article 3(1)(a) of Directive 2000/78?

39. That provision states that discrimination must be avoided in respect of ‘selection criteria’, ‘recruitment conditions’ and ‘promotion’. It does not, however, define what is meant by ‘access to employment’.

40. It follows from the need for EU law to be applied uniformly and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.¹²

41. Directive 2000/78 is a specific expression, in the areas that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter.¹³ The directive does not itself create the principle of equal treatment in employment and occupation. The source of the principle prohibiting those forms of discrimination is found, as is clear from recitals 3 and 4 in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.¹⁴ The aim of the directive is to put into effect in the Member States the principle of equal treatment by laying down a general framework for combating discrimination in employment and occupation with a view to guaranteeing equal opportunities for all to contribute to the full participation of citizens in economic, cultural and social life and to realising their potential.¹⁵

42. Given the objective of Directive 2000/78 and the nature of the rights it seeks to safeguard, its scope cannot be defined restrictively.¹⁶ That conclusion also applies to the terms of the directive that define its substantive scope, such as employment, access, vocational guidance and training, working conditions, social protection and advantages. Equality of treatment in respect of access to employed or self-employed activities involves the elimination of *any discrimination* arising from *any provision which prevents access* of individuals to all forms of employment and occupation.¹⁷ Employment and occupation are key elements in guaranteeing equal opportunities for all.¹⁸

43. The term ‘access’ is defined as the ‘means or opportunity to approach or enter a place’.¹⁹ When it comes to ‘access to employment’ the term encompasses the conditions, criteria, means, way to get employed work. If an employer chooses not to hire certain persons because of their (perceived) sexual orientation, he establishes a (negative) discriminatory selection criterion for employment. Such a situation falls squarely within the scope of Directive 2000/78.

¹² See, inter alia, judgment of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 40 and the case-law cited.

¹³ See judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47.

¹⁴ Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 74.

¹⁵ Recital 9 and Article 1 of Directive 2000/78.

¹⁶ See, by analogy, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 42 and the case-law cited. That judgment concerned Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22). The scope of Directive 2000/43 is different from that of Directive 2000/78, since the former concerns discrimination in a wide range of areas, as defined in its Article 3(1)(a) to (h), whereas the latter only covers discrimination relating to occupation and employment, as defined in its Article 3(1) (a) to (d). That said, the Court has already referred to its case-law under Directive 2000/43 to draw useful inspiration for interpreting Directive 2000/78: see, for example, the judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275.

¹⁷ See the explanation of Article 3 defining the scope of the directive in the Explanatory Memorandum to the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation, OJ 2000 C 177 E, p. 42 (‘the Explanatory Memorandum to the Proposal for a Directive’), emphasis added.

¹⁸ Recital 9.

¹⁹ That definition of ‘access’ is to be found in the *Oxford English Dictionary*. The *Collins English Dictionary* offers ‘the act of approaching or entering’, ‘the condition of allowing entry’, ‘the right or privilege to approach, reach, enter, or make use of something’ and ‘the way or means of approach or entry’.

44. Access to employment and professional development are, as my colleague Advocate General Poiares Maduro put it, ‘of fundamental significance for every individual, not merely as a means of earning one’s living but also as an important way of self-fulfilment and realisation of one’s potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person’s ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life’.²⁰

45. Although it does not directly address the issue at stake here, the Court’s case-law already offers some guidance as to what ‘access to employment’ means.

46. In sex discrimination cases the Court has given a wide meaning to ‘access to employment’. Thus, it has stated that ‘not only the conditions obtaining before an employment relationship comes into being ... are involved in the concept of access to employment’ but also factors which influence a person’s decision as to whether or not to accept a job offer.²¹

47. In *Feryn*, a case concerning the interpretation of Directive 2000/43, the company’s director made public statements that his undertaking was looking to recruit door fitters, but that it could not employ ‘immigrants’ because its customers were reluctant to give them access to their private residences to carry out the work. The Court held that ‘statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy’. The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment, which is not dependant on identifying a specific complainant claiming to have been the victim.²²

48. Closer to the present situation is *Asociația Accept*, which — as here — concerned the interpretation of Directive 2000/78. In that case, an important shareholder in FC Steaua who had acted as the club’s ‘banker’ stated, during an interview to the mass media concerning the potential transfer of professional footballer X, that he would not accept a homosexual in the team. The football club had not started any negotiations with a view to recruiting player X, who was presented as homosexual. However, the football club did not recruit that player, presumably because of his sexual orientation.²³

49. The Court held that it might be presumed from facts such as those of the main proceedings that there has been discrimination within the meaning of Directive 2000/78. It was irrelevant that ‘the system of recruitment of professional footballers is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of players having regard to their interest for the employer’. Moreover, ‘a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from

²⁰ Opinion in *Coleman*, C-303/06, EU:C:2008:61, point 11.

²¹ See, to that effect, judgment of 13 July 1995, *Meyers*, C-116/94, EU:C:1995:247, paragraph 22. See also Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford University Press, 2012, p. 287.

²² Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 15, 16, 25 and 31.

²³ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 24, 25 and 52. The fact that the football club had not started any negotiations with a view to recruiting player X appears indirectly from paragraph 52 of the judgment.

a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters'. The fact that such an employer 'might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts'. The perception of the protected groups concerned may also be relevant for the overall assessment of the statements at issue. Further, the fact that a professional football club might not have started any negotiations with a view to recruiting a player presented as being homosexual 'does not preclude the possibility of establishing facts from which it may be inferred that that club has been guilty of discrimination'.²⁴

50. I therefore derive the following principles concerning the scope of 'access to employment' in Article 3(1)(a) of Directive 2000/78: (i) that concept must be given an autonomous and uniform interpretation throughout the European Union; (ii) given the objective of Directive 2000/78 and the nature of the rights it seeks to safeguard, the scope of that concept cannot be defined restrictively; (iii) public declarations that persons belonging to a protected group will not be recruited are clearly likely to dissuade certain candidates from submitting their candidature and to hinder their access to the labour market; (iv) the specific method of recruitment is irrelevant (whether or not there has been a call for applications, a selection procedure etc.); (v) provided that the person making the discriminatory statements regarding the selection criteria may reasonably be regarded as having an influence on the potential employer, it is likewise irrelevant that that person is not legally capable of binding the actual employer in recruitment matters; (vi) the fact that the employer may not have started any negotiations with a view to recruiting a person presented as being a member of a protected group does not preclude the possibility of establishing discrimination; and (vii) a finding of discrimination is not dependent on identifying a complainant. Other relevant factors that may be considered are whether the actual employer clearly distanced itself from the statements and the perception of the protected groups concerned.

51. Against that background, how close does the link with an actual recruitment procedure have to be for discriminatory statements such as those in the main proceedings to fall within the scope of Directive 2000/78?

52. It seems to me that a purely hypothetical link is not enough. Thus, for example, suppose a person were to proclaim, 'If I were a lawyer, I would never hire an LGBTI person for my law firm'. If the person making the statement is an architect rather than a lawyer and does not work in a law firm in any capacity, the statement, regrettable as it might be, has no actual link with access to employment. The same would follow if someone who has no garden and no prospect of acquiring one stated that he would never employ an LGBTI gardener. The examples may be multiplied. Depending on how they are constructed, the link between the discriminatory statement and potential access to employment will be closer or more remote.

53. However, the principles that I have distilled from the Court's case-law make it possible to derive a (non-exhaustive) list of criteria to establish when discriminatory statements present a sufficient link with access to employment to fall within the scope of Directive 2000/78.

54. Thus, the *status and capacity of the person making the statements* have to be examined. That person has to be either an actual potential employer or someone who, *de jure* or *de facto*, is able to exert a significant influence on the potential employer's recruitment policy or, at least, can reasonably be perceived as being able to exert such influence, even though he cannot legally bind the employer in recruitment matters.

²⁴ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 45 and 49 to 52. I note that the Court decided to dispense with an Advocate General's Opinion when dealing with that case.

55. The *nature and content of the statements made* must also be taken into account. They must concern employment within the area of activity of the potential employer or the person making them — an area, therefore, in which that person is likely to recruit. Such statements must establish the employer's intention to discriminate against members of the protected group. They must also be of such a nature as to dissuade persons belonging to the protected group from applying if and when a vacancy with that potential employer becomes available. In that connection, it seems to me that there should be a *rebuttable presumption* that, sooner or later, the potential employer will wish to recruit and that, when he does so, he will apply the discriminatory criterion that he has announced publicly forms part of his recruitment policy. The burden of rebutting that presumption in any particular case of recruitment would then fall on the potential employer.²⁵

56. The *context in which the statements were made* is also relevant. Were they private remarks (uttered, for example, over dinner with the speaker's partner), or statements made in public (or, even worse, live on air and then reproduced via social media)? That said, I reject emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful instrument and can all too easily be abused. One can easily imagine the chilling effect of homophobic 'jokes' made by a potential employer in the presence of LGBTI applicants.

57. Last, it is important to consider the extent to which the nature, content and context of the statements made *may discourage persons belonging to the protected group from applying* for employment with that employer. As Advocate General Póiares Maduro cogently explained in *Feryn*, 'in any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired. Therefore, 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. To ignore that as an act of discrimination would be to ignore the social reality that 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'.²⁶

58. The information presented to the Court indicates that NH is a senior lawyer and that the statements he made referred to his own law firm. He clearly formulated a (negative) recruitment criterion that would discriminate against homosexual potential applicants. His statements were made publicly on the radio. They have been widely diffused — indeed, the Italian Government stated at the hearing that they may readily be found on the Internet. The statements were likely to deter homosexual potential applicants from seeking employment as lawyers or support staff with that law firm.

59. I conclude that statements such as those made in the main proceedings are *capable* of falling within the scope of Article 3(1)(a) of Directive 2000/78. It is for the referring court to establish and assess the relevant facts in greater detail as necessary to arrive at a concluded view.²⁷

²⁵ That approach to the burden of proof is in my view consistent with Article 10 of Directive 2000/78, which provides that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

²⁶ Opinion of Advocate General Póiares Maduro, C-54/07, EU:C:2008:155, point 15.

²⁷ See point 33 above. Since the reference comes from a national supreme court in a cassation procedure, it may be necessary for the case to be remitted back to the first instance court to make further findings of fact.

The interference with freedom of expression

60. The referring court wonders whether NH's statements could be protected by freedom of expression, whilst stating that legislation against discrimination in employment and occupation cannot be considered as interfering with that freedom.

61. Freedom of expression, the right to work and the principle of non-discrimination are all fundamental rights recognised by the Charter (in Articles 11(1), 15(1) and 21(1) respectively). Freedom of expression constitutes one of the essential foundations of a democratic society. As a principle, it applies 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.²⁸ Freedom of expression is, however, subject to limitations.²⁹

62. In my view, by enacting Directive 2000/78 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 Jews, and then invoke freedom of expression as a defence. In making such a statement, he is not exercising his right to freedom of expression. He is enunciating a discriminatory recruitment policy.

63. Was the EU legislature's choice a permissible choice?

64. Article 52(1) of the Charter permits limitations on the exercise of the rights and freedoms laid down therein, on condition that any such limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.³⁰

65. Those conditions are met here.

66. First, the limitation to the freedom of expression is provided by law, namely by Directive 2000/78.

67. Second, as the Greek Government submitted in its written observations, the limitations to the freedom of expression deriving from Directive 2000/78 can be justified by reference to the objectives of the directive, namely equal treatment in employment and occupation and the attainment of a high level of employment and social protection; and the limitations are necessary to attain those objectives. Equal treatment in employment and occupation, which is an expression of the fundamental right to be protected against discrimination, is an objective of general interest recognised by the European Union.

68. Third, although the attainment of the objectives of the directive may interfere with freedom of expression, the interference is not such as to affect adversely the essence of that right. Directive 2000/78 only precludes the expression of discriminatory opinions in a limited context, namely that of employment and occupation.

²⁸ Judgment of 6 March 2001, *Connolly v Commission*, C-274/99 P, EU:C:2001:127, paragraph 39.

²⁹ See the wording of Article 10 ECHR; see also judgment of 6 March 2001, *Connolly v Commission*, C-274/99 P, EU:C:2001:127, paragraph 40.

³⁰ See, inter alia, judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 38. The wording of Article 52(1) is largely inspired by previous case-law of the Court (see, inter alia, judgment of 13 April 2000, *Karlsson and Others*, C-292/97, EU:C:2000:202, paragraph 45) which, in turn, draws on the case-law of the European Court of Human Rights ('the Strasbourg court'). See Lenaerts, K., 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 2012, 8(3), 375-403.

69. Fourth, the principle of proportionality is respected. The scope of Directive 2000/78 is defined by Articles 1 (which lists the grounds of discrimination that are prohibited) and 3 (which defines the directive's personal and material scope). The only statements that are prohibited are those that constitute discrimination *in employment and occupation*. That interference with freedom of expression does not go beyond what is necessary and appropriate to attain the directive's objectives.³¹

70. That interpretation is in line with the case-law of the Strasbourg court.³² Since the exercise of freedom of expression 'carries with it duties and responsibilities', Article 10(2) of the ECHR authorises interferences 'for the protection of the reputation or rights of others' as long as they are 'prescribed by law' and are 'necessary in a democratic society'. In *Vejdeland and Others v. Sweden*, a group of persons were convicted for distributing leaflets in a school expressing contempt for homosexuals. The Strasbourg court found that the interference with the freedom of expression guaranteed by Article 10(1) of the ECHR was justified under Article 10(2) thereof. The Strasbourg court stressed there that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. It endorsed the conclusion of the Supreme Court of Sweden, which acknowledged 'the applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights [and] found that the statements in the leaflets had been unnecessarily offensive'.³³

71. I therefore consider that the prohibition, under Directive 2000/78, of statements which amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.

The possibility of derogating from Directive 2000/78

72. I have indicated that in my view the statements made by NH in the radio programme amount to direct discrimination on grounds of sexual orientation.³⁴ As such, they are statements of a kind that is prohibited under Article 2(1)(a) of Directive 2000/78. The only derogations possible in the case of direct discrimination are occupational requirements (Article 4), justifications of differences of treatment on grounds of age (Article 6), positive action (Article 7) and measures necessary for, *inter alia*, the protection of the rights and freedoms of others (Article 2(5)).

73. None of the parties has submitted that the derogations contained in Articles 4, 6 or 7 could be applicable and they seem to me plainly to be irrelevant. Since Article 2(5) was discussed at the hearing, I shall examine it briefly.

74. The Court has held that 'in adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of Directive 2000/78, the principles established by the directive do not apply to

³¹ See by analogy, for an analysis of those factors, judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 34 et seq.

³² Article 52(3) of the Charter provides that in so far as the rights it protects correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by that convention. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the Strasbourg court and by this Court. See the Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17.

³³ ECtHR, 9 February 2012, *Vejdeland and Others v. Sweden*, CE:ECHR:2012:0209JUD000181307, § 47 to 60.

³⁴ See point 33 above.

measures incorporating differences in treatment on one of the grounds referred to in Article 1 of the directive, on condition, however, that those measures are ‘necessary’ for the attainment of the abovementioned objectives’.³⁵ As an exception to the principle of the prohibition of discrimination, Article 2(5) must be interpreted strictly.³⁶

75. In my view, the Article 2(5) derogation cannot apply here. First, no relevant national legislation has been identified that would give effect to that derogation. Second, even if (*quod non*) such legislation existed, I cannot see how permitting discriminatory statements which impede access to employment could conceivably be construed as being ‘necessary’ for ‘the protection of individual rights and freedoms *which are necessary for the functioning of a democratic society*’.³⁷

76. It follows that none of the possible derogations from the prohibition of direct discrimination provided by Directive 2000/78 are applicable here.

77. In the light of all the foregoing, I conclude that remarks made by an interviewee during a radio programme stating that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons are capable of falling within the scope of Directive 2000/78, as being likely to hinder access to employment. When those statements are not made in the context of a current recruitment procedure, it is for the national court to assess whether the link with access to employment is not hypothetical, in the light of the status and capacity of the person who made the statements, the nature, content and context of the statements, as well as in the extent to which such statements may discourage persons belonging to the protected group from applying for employment with that employer. The prohibition, under Article 2 and 3 of Directive 2000/78, of statements that amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.

Question 1

78. The Associazione, it will be recalled, is an association of lawyers which according to its statutes aims ‘to contribute to the development and dissemination of the culture and respect for the rights of [LGBTI] persons’ and to create a network of lawyers to offer judicial protection to LGBTI persons and to take representative action on their behalf before national and international jurisdictions. By its first question, the referring court seeks to ascertain whether, under Article 9(2) of Directive 2000/78, such an association has automatic standing to bring proceedings, including claims for damages, in circumstances of alleged discrimination on grounds of sexual orientation.

79. That question raises three issues. First, does an association have standing to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim? Second, are there specific criteria that an association has to fulfil in order to have standing and, if so, what are those criteria? Third, does the possibility for an association to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim also include bringing claims for damages?

³⁵ Judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 55.

³⁶ Judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraphs 54 and 55.

³⁷ See, by analogy, my Opinion in *Bouagnaoui and ADDH*, C-188/15, EU:C:2016:553, points 104 and 105 (emphasis added).

Does an association have standing to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim?

80. Article 9 of Directive 2000/78 reaffirms the fundamental right to an effective remedy and provides that Member States must ensure that all persons who consider themselves wronged by discrimination are able to assert their rights.³⁸ That provision introduces the right to enforce rights under the directive not only for all persons who consider themselves wronged, but also, in accordance with Article 9(2), for associations with a legitimate interest which may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure.

81. That wording does not however mean that associations are necessarily precluded from acting in the absence of an identifiable complainant. It would be difficult to achieve the directive's objective of fostering conditions for the full participation of citizens in economic, cultural and social life if Directive 2000/78 only bit where an unsuccessful candidate for a post, considering himself to be the victim of (here) direct discrimination, brought legal proceedings against the employer.³⁹

82. Article 8(1) of Directive 2000/78 on 'minimum requirements' introduces a 'non-regression' provision in respect of Member States which have or wish to adopt legislation providing for a higher level of protection than that guaranteed by the directive.⁴⁰ It provides that the implementation of the directive may under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the areas covered by the directive.⁴¹

83. The Court has already read Article 8(1) in conjunction with Article 9(2) in order to conclude that Directive 2000/78 in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant.⁴² Thus, in *Asociația Accept* the Court held that a non-governmental organisation, whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, can bring an action seeking, inter alia, the imposition of a fine on a football club and one of its shareholders on the grounds that a professional footballer was not hired because he was presumed to be homosexual.

84. That approach is in line with a general trend in the Court's case-law. Indeed, the same solution was adopted in *Feryn*. There, a Belgian body designated, pursuant to Article 13 of Directive 2000/43, to promote equal treatment, applied to the Belgian labour courts for a finding that Feryn applied a discriminatory recruitment policy. The Court found, based first, on the fact that the existence of direct discrimination is not dependent on the identification of a complainant who claims to have been the victim and, second, on the fact that Directive 2000/43 contains a 'minimum requirements' provision (similar to Article 8(1) of Directive 2000/78), that that directive in no way precludes Member States from recognising the right for associations with legitimate interest to ensure compliance with the directive and bring proceedings without acting in the name of a specific complainant or in the absence of an identifiable victim.⁴³

38 Judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 61.

39 See recital 9 of Directive 2000/78 and, by analogy, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 24.

40 See recital 28 of the directive and the Explanatory Memorandum to the Proposal for a Directive.

41 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 43.

42 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 24, 30, 36 and 37.

43 Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 15 to 17 and 25 to 28.

85. It follows from Articles 9(2) and 8(1) of Directive 2000/78, as interpreted by the Court's case-law, that Member States are not precluded from granting additional possibilities for legal enforcement. It seems to me – but that is a matter solely for the national court to assess – that this is what Article 5(2) of Legislative Decree No 216/2003 does when it expressly recognises 'standing in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination' for the associations it defines in its first paragraph.

Are there specific criteria that an association has to fulfil in order to have standing and, if so, what are those criteria?

86. The order for reference explains that standing for associations in discrimination cases falling within the scope of Directive 2000/78 is governed in Italy by Article 5(1) of Legislative Decree No 216/2003, which affords standing to 'trade unions, associations and organisations representing the rights or interests affected'. The referring court explains that the national legislator has not established any additional criteria in that respect, contrary to the position for associations active in other areas. Thus, the legitimate interest of the association to act must be verified on a case by case basis.

87. NH submits that the Associazione cannot be deemed to represent the interests of LGBTI persons and that it therefore does not have standing to act in the present case. The Associazione is a grouping of around 100 lawyers who are not themselves LGBTI persons. Its aim is to promote the rights and culture of LGBTI persons and to ensure their legal representation. The non-profit character of that association is not certain.

88. Under Article 9(2) of Directive 2000/78, the only requirement for an association to have standing is that it should have a legitimate interest in ensuring that the provisions of the directive are complied with.

89. In *Asociația Accept*, the Court examined Article 9(2) of Directive 2000/78 in the light of Article 8(1) thereof and concluded that that provision 'in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant'.⁴⁴ That dictum also marks the dividing line between the *locus standi* recognised to associations for the enforcement of obligations under the directive and an *actio popularis*.

90. The directive expressly cross-refers here to national law. Thus, where there is no complainant or identifiable victim, the standing of associations to act is *not* governed by EU law.⁴⁵ However, the substantive rights and obligations that they will be seeking to enforce do indeed derive from Directive 2000/78.

91. In that respect, the present case is different from *Julián Hernández and Others*.⁴⁶ The Court was there considering Article 11(1) of Directive 2008/94,⁴⁷ which states that that directive 'shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'. The Court held that that provision does not grant the Member States an option of legislating by virtue of EU law, but merely recognises the power which the Member States enjoy under national law to provide for such more favourable provisions *outside*

⁴⁴ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 37.

⁴⁵ Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 24, but concerning the particular issue of time limits under Article 9(3) of Directive 2000/78.

⁴⁶ Judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055.

⁴⁷ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

the framework of the regime established by that directive.⁴⁸ Thus, a provision of national law which merely granted employees more favourable protection resulting from the exercise of the exclusive competence of the Member States (as confirmed by Article 11(1) of Directive 2008/94), could not be regarded as coming within the scope of that directive.⁴⁹

92. By contrast, in the present case the national legislation at issue provides for a procedural right (*locus standi*) in order to enforce substantive rights that derive from EU law (protection from discrimination). That constellation triggers application of the principle of procedural autonomy together with its corollaries, the principles of equivalence and of effectiveness.

93. In accordance with settled case-law, in the absence of EU rules it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness).⁵⁰

94. The *principle of equivalence* requires that the national rule in question must be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar. In order to establish whether the principle of equivalence has been complied with here, it will be for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of employment law, to consider both the purpose and the essential characteristics of allegedly similar domestic actions.⁵¹

95. As regards the *principle of effectiveness*, the Court has held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.⁵²

96. It follows from all the above that: (i) the definition of associations with a legitimate interest is a question for national law; (ii) those associations enforce rights and obligations deriving from EU law; (iii) therefore the principles of equivalence and effectiveness have to be respected. National courts are alone competent to assess those aspects.

97. In order to conduct its assessment, the referring court asks for guidance as to whether the aims of the Associazione (as recalled at point 78 above) correspond to those of an association having a legitimate interest to enforce the rights and obligations deriving from Directive 2000/78.

⁴⁸ At paragraphs 44 and 45 of the judgment.

⁴⁹ The purpose of the national legislation at issue in that case was *not* to recognise an employee's claim against his employer resulting from his employment relationship (to which Directive 2008/94 is capable of applying by virtue of Article 1(1) thereof), but to recognise *a right of a separate nature*, namely, the right of the employer to request from the Spanish State compensation for the loss suffered as a result of 'irregularities' in the administration of justice: see paragraph 39 of the judgment.

⁵⁰ Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 25.

⁵¹ Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraphs 26 and 28.

⁵² Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35.

98. Subject to verification of the facts by the referring court in the light of the applicable national legislation, it seems to me that an association with such objectives is precisely the kind of association that will have a legitimate interest in bringing proceedings in such circumstances. It is also the kind of association to which a victim of discrimination on the grounds of sexual orientation would naturally turn, should they decide to bring proceedings in a particular case.

99. In that respect, NH's arguments concerning the number of members of the Associazione, the fact that they are lawyers and trainee lawyers and the fact that they are not themselves LGBTI persons are completely irrelevant. 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. There are many excellent advocates within the LGBTI community, who can and do speak eloquently in defence of LGBTI rights. That does not mean that others who are not part of that community – including lawyers and trainee lawyers motivated simply by altruism and a sense of justice – cannot join such an association and participate in its work without putting at risk its standing to bring actions. Accepting NH's arguments would undermine a valuable aid to ensuring adequate judicial protection and would jeopardise the *effet utile* of the directive.⁵³

100. The referring court also asks whether an association with legitimate interest has to be non-profit making, in particular in the light of 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.⁵⁴

101. According to the Court's settled case-law, even if recommendations are not intended to produce binding effects, national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions.⁵⁵

102. However, the requirement mentioned in point 4(a) of the recommendation that an association be of a non-profit-making character in order to bring representative actions applies where Member States *designate* representative entities to bring actions. The referring court states that that is not the case in Italy, where the legislator has not designated any such associations to enforce the rights deriving from Directive 2000/78.

103. In its written observations, the Greek Government draws attention to the (possible) risk that a *profit-making* association might abuse the right to bring proceedings in order to enhance its profits, arguing that that would jeopardise the attainment of the objectives of the directive. The most obvious response is that, given the uncertainty inherent in litigation (and perhaps particularly in litigation involving discrimination claims), a trigger-happy approach to launching actions would itself be a risky strategy for a commercially minded association to adopt. Beyond that, it is for the national court to verify *if necessary* that the Associazione is complying with its stated objectives to protect the interests of the persons in question and with its statutes as regards its status.⁵⁶

104. I conclude that it is for national law to define the criteria that must be satisfied in order for an association to have a legitimate interest to bring actions to enforce the rights and obligations stemming from Directive 2000/78, subject to the principles of equivalence and effectiveness.

⁵³ The extensive case-law of this Court on *locus standi* for non-governmental associations in environmental actions (and the specific provisions of the Aarhus Convention granting such organisations standing), provide a useful parallel in this regard. See, *inter alia*, judgments of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 34 et seq. and of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631.

⁵⁴ OJ 2013 L 201, p. 60.

⁵⁵ Judgment of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraph 41.

⁵⁶ There is no material before the Court as to how the Associazione is funded or as to the amount(s) (if any) that it has obtained for itself (as distinct from the amount(s) obtained on behalf of LGBTI clients for whom it was acting) as a result of successful actions.

Does the possibility for associations to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim also include bringing claims for damages?

105. Article 17 of Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions for breaches of national provisions adopted pursuant to that directive. It specifies that those sanctions must be effective, proportionate and dissuasive and that they may comprise the payment of compensation to the victim.

106. Article 17 thus requires Member States to ensure that their national legal systems contain the necessary legal tools to achieve the aim of that directive, so that judicial protection of the rights granted thereunder will be real and effective. It does not, however, prescribe a specific sanction, leaving Member States free to choose between the different solutions suitable for achieving its objective, subject to the principles of equivalence and effectiveness (see points 89 to 93 above).

107. The Court has explained that ‘the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must ... be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim’.⁵⁷ They must ‘in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and effective legal protection of the rights deriving from it ... The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect ... while respecting the general principle of proportionality’.⁵⁸ In any event, ‘a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78’.⁵⁹

108. The Court’s ruling in *Feryn*, made in the context of Directive 2000/43, provides guidance which is equally pertinent and appropriate in the context of Directive 2000/78: ‘... where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which Article 15 of Directive 2000/43 requires to be laid down in national law must also be effective, proportionate and dissuasive. If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings’.⁶⁰

109. It follows that: (i) an association empowered by national law to bring proceedings in order to enforce rights and obligations under Directive 2000/78 may ask for discriminatory conduct to be sanctioned; (ii) that applies whether or not there is an identifiable victim; (iii) Directive 2000/78 does not prescribe specific sanctions but leaves the matter to national law; (iv) the sanctions available under national law must be effective, proportionate and dissuasive; and (v) they may take the form of an award of damages. The types of damages available will again be a matter of national law. I see no reason of principle why such damages could not comprise both material and non-material damages, including moral damages.

110. I therefore conclude that Articles 8(1) and 9(2) of Directive 2000/78 permit national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations under Directive 2000/78/EC in the absence of an identifiable victim. It is for national law to lay down the criteria to determine whether an association has such a legitimate interest, subject to

⁵⁷ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 62. See also, in respect of the parallel provision in Article 15 of Directive 2000/43, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 40.

⁵⁸ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 63 and the case-law cited.

⁵⁹ Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 64.

⁶⁰ Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 38 and 39.

the principles of equivalence and effectiveness. An association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner, including by an award of damages, under the conditions laid down by national law.

Conclusion

111. I therefore propose that the Court should reply to the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

- Remarks made by an interviewee during a radio programme stating that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons are capable of falling within the scope of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as being likely to hinder access to employment.
- When those statements are not made in the context of a current recruitment procedure, it is for the national court to assess whether the link with access to employment is not hypothetical, in the light of the status and capacity of the person who made the statements, the nature, content and context of the statements, as well as the extent to which such statements might discourage persons belonging to the protected group from applying for employment with that employer.
- The prohibition, under Article 2 and 3 of Directive 2000/78, of statements that amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.
- Articles 8(1) and 9(2) of Directive 2000/78 permit national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations under Directive 2000/78 in the absence of an identifiable victim. It is for national law to lay down the criteria to determine whether an association has such a legitimate interest, subject to the principles of equivalence and effectiveness.
- An association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner, including by an award of damages, under the conditions laid down by national law.