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INSIGHT

THE *NH* CASE: ON THE "WINGS OF WORDS" IN EU ANTI-DISCRIMINATION LAW

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ABSTRACT: This *Insight* examines a judgment of the Grand Chamber of the Court of Justice in case C-507/17, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford* (23 April 2020). In its preliminary ruling, the Court deliberated on whether a statement made by a senior lawyer at an Italian law firm during a media interview, abstractly asserting that he would never hire a gay colleague, constituted direct discrimination in terms of EU law, even though no specific vacancy opening was advertised at the time of the interview. Furthermore, the Court considered whether a local LGBTI organization (an association of lawyers) had standing to bring a lawsuit for damages even though none of its affiliates were applying for a position at the law firm. The case fits the sequel – now forming a "Luxembourg trilogy" – of three judgments of the Court of Justice on similar matters of racist and homophobic speech akin to direct discrimination in the employment context, with judgments in C-54/07 *Feryn* (10 July 2008) and C-81/12 *Asociația ACCEPT* (25 April 2013) preceding the C-507/17 *NH* and answering most of NH's outstanding questions. It remains questionable, therefore, whether the preliminary ruling of the Court of Justice in the *NH* case was even necessary in terms of the *acte clair* doctrine or whether this 2020 judgment substantively clarified EU anti-discrimination law.

KEYWORDS: *Associazione Avvocatura per I Diritti LGBTI* – Framework Equality Directive (2000) – homophobic speech – freedom of expression – LGBTI rights – direct discrimination.

I. INTRODUCTION

> "Words! Mere words! How terrible they were! How clear, and vivid, and cruel! One could not escape from them. And yet what a subtle magic there was in them! They seemed to be able to give a plastic form to formless things, and to have a music of their own as sweet as that of viol or of lute. Mere words! Was there anything so real as words".[1]

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[1] O. WILDE, *The Picture of Dorian Gray*, Broadview Literary Texts, 2000 (first published in July 1890), p. 60.

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In the *NH* case (2020),[2] the CJEU (hereinafter, also "Court") was asked do deliberate on homophobic speech in the employment context. During an interview for a radio program, a senior lawyer at a law firm – anonymized in the legal proceedings as "NH" – stated that he would never hire a homosexual person to work at his firm nor wish to use the services of such persons. At the time of the interview, there were no job openings at NH's law firm. Nonetheless, the *Associazione Avvocatura per i diritti LGBTI – Rete Lenford* (further "the *Associazione*"), an association of lawyers, brought proceedings against NH – first, at a district court in Bergamo, asking to pay damages to the *Associazione* for non-material loss, that he be ordered to publish a section of the order in a national daily newspaper and to establish an action plan to eliminate discrimination at his law firm. The national court (*Corte suprema di cassazione*, where the case ended up during the national proceedings) asked the CJEU, in a preliminary ruling, to answer two questions in this regard, specifying the scope of the EU Framework Equality Directive 2000/78 (further "FED"). First, does the *Associazione* have standing to bring such a lawsuit for damages? Second, does NH's statement made during a radio program fall within the scope of the FED, even if that statement does not relate to any current or planned recruitment procedure?

The radio statement of the Italian lawyer in this case mimicked the rhetoric previously already classified by the CJEU as direct discrimination in the two preceding cases of *Feryn* (2008),[3] regarding a Belgian firm director who expressed unwillingness to hire Moroccan employees, and *Asociaţia ACCEPT* (2013),[4] where a Romanian patron of a football club asserted that he would never hire a gay player. In these earlier cases the Court had established direct discrimination under the EU Race Equality Directive 2000/43 (further "RED") and FED, and there appears to be little difference between the facts of these earlier judgments and the *NH* case. Hence, it remains to be seen whether the judgment was even necessary in light of the *acte clair* doctrine of the Court or whether this preliminary ruling, nonetheless, brings substantive clarifications to the previous case law, further fortifying the "wings of words"[5] within the CJEU's jurisprudence.

[2] Court of Justice, judgment of 23 April 2020, case C-507/17, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*.

[3] Court of Justice, judgment of 10 July 2008, case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*. For an overview of the case, see K. HENRARD, *The First Substantive ECJ Judgment on the Racial Equality Directive*, in *New York University Jean Monnet Working Paper Series*, 2009, p. 1 *et seq*.; K. RÜDIGER, *Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV [2008]*, in *Common Market Law Review*, 2010, p. 917 *et seq*.; U. BELAVUSAU, *Fighting Hate Speech through EU Law*, in *Amsterdam Law Forum*, 2012, p. 20 *et seq*.

[4] Court of Justice, judgment of 25 April 2013, case C-81/12, *Asociaţia Accept*. For a detailed analysis of the case and its wider implications for EU anti-discrimination law, see U. BELAVUSAU, *A Penalty Card for Homophobia from EU Anti-Discrimination Law*: *Asociaţia ACCEPT*, in *Columbia Journal of European Law*, 2015, p. 353 *et seq*.

[5] Alluding to the literary trope referred to by the AG in this case of *NH* (2020) and further explained below. See *infra* note 6.

This *Insight* will first summarise the Opinion of the AG and the Court's judgment in this case. It will then comment on the judgment, in two major sub-parts. The first sub-part will critically analyse the rationale for this judgment by the Grand Chamber bearing in mind the *acte clair* doctrine. The second sub-part will unpack eight aspects of the decision in *NH* that demonstrate both its innovative features and missed opportunities. The conclusions will deduce how the *NH* judgment accords with but also transcends the previous, similar CJEU cases, deliberating "on the wings of words" in EU anti-discrimination law.

II. *Words have Wings*: Opinion of AG Sharpston and the judgment of the Court

II.1. Opinion of the AG (31 October 2019)

> Έπεα πτερόεντα, words have wings. The meaning of that expression, the origins of which can be traced back to Homer is twofold: that words fly away, carried by the wind; 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".

In this eloquent way, referring to Homer,[6] (UK) AG Sharpston starts her Opinion in the *NH* case.[7] In her analysis, the AG reversed the order of questions suggested in the reference from the Italian court. It was thus first necessary to ascertain whether the situation at issue in the proceedings fell within the scope of FED, and then to examine whether the *Associazione* had standing to bring proceedings to enforce the provisions of that directive.[8]

Answering the second question, the AG established direct discrimination in terms of the FED, considering that a gay person seeking employment in NH's law firm would be treated less favourably – that is, would not be hired – on the grounds of his or her sexual

[6] The formula is used several times by Homer, both in the Iliad and the Odyssey (for example, Iliad, Book 15, 145 and 157). See P. Vivante, *On Homer's Winged Words*, in *The Classical Quarterly*, 1975, p. 1 *et seq*. On the analogues of "free speech" in Ancient Greek rhetoric – *παρρησία (parrhēsia)* and *ισηγορία (isēgoria)* – with contemporary constitutional debate on freedom of expression versus hate speech, see U. Belavusau, *Judicial Epistemology of Free Speech through the Lenses of Ancient Rhetoric*, in *International Journal for the Semiotics of Law*, 2010, p. 165 *et seq*. In its second sense, marked by Eleanore V.E. Sharpston, the formula corresponds to the first part of the well-known Latin expression *verba volant, scripta manent*, underlying the importance of written texts.

[7] Opinion of AG Sharpston delivered on 31 October 2019, case C-507/18, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*.

[8] *Ibid.*, para. 29.

orientation than another person in a comparable situation.[9] She further demonstrated that the facts of the case fell under the heading "employment and occupation" in terms of Art. 3, para. 1, let. a), FED, therefore coming within the material scope of EU anti-discrimination law.[10] This element is crucial considering that – unlike the RED – the FED relates only to the area of employment and occupation, with education and health provisions, for example, falling out of the scope of its application in EU law. Furthermore, the referring court expressed doubts as to whether there was a sufficient link between NH's statements during the radio interview and access to employment, since there had been, at the time those statements were made, no current recruitment procedure or vacancy notice at NH's law firm. Likewise, mere statements of opinion that do not present a minimum link with an employment procedure are technically protected by the freedom of expression. Art. 3, para. 1, let. a), FED 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". The AG maintained that when it comes to "access to employment", the term encompasses the conditions, criteria, means, and ways to get employed work. If an employer opts not to hire certain persons because of their (perceived) sexual orientation, (s)he establishes a (negative) discriminatory selection criterion for employment. Such a situation falls squarely within the scope of the FED.[11]

Unsurprisingly, the AG went to cite extensively findings of the Court in its previous two cases of a similar nature, that is *Feryn* and *Asociaţia Accept*,[12] from which she derived the following principles concerning the scope of "access to employment" in Art. 3, para. 1, let. a), FED: (i) that concept must be given an autonomous and uniform interpretation throughout the European Union (further 'EU'); (ii) that given the objective of the FED 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 depend-

[9] *Ibid.*, para. 33.
[10] *Ibid.*, paras 43-59.
[11] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 44.
[12] *Ibid.*, paras 47 and 48.

ent 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.[13]

The crucial deliberation of the AG in *NH* was how close the link with an actual recruitment procedure must be for discriminatory statements such as those in the proceedings to fall within the scope of the FED. The AG considered that a *purely hypothetical* link would not be enough and developed her considerations by offering contrasting the following counter-examples to the situation that unfolded in the *NH* case. 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 has no actual link to 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. Such examples, the AG stated, 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.[14] To distinguish the guiding principles on when discriminatory statements present a sufficient link with "access to employment" in accordance with the Court's case-law, the AG distilled a (non-exhaustive) list of criteria as follows:[15]

1) The *status and capacity of the person making the statements* must 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.

2) The *nature and content of the statements made* must be considered. 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.

3) 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)?

4) 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*. 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 demoralizing 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.

[13] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 50.
[14] *Ibid.*, paras 51 and 52.
[15] *Ibid.*, paras 52-57.

In light of these criteria and the information submitted to the Court, the AG concluded that NH's statements in the main proceedings are *capable* of falling within the scope of Art. 3, para. 1, let. a), FED.[16] The AG also reserved a part of her Opinion for considerations regarding a potential conflict in restricting homophobic speech with freedom of expression.[17] In AG Sharpston's view, by enacting the FED the EU legislature expressed a clear choice: statements that are discriminatory and that fall within the scope of the FED 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 defense. In making such a statement, an employer is not exercising a right to freedom of expression but rather is enunciating a discriminatory recruitment policy.[18]

Regarding the first question, posed by the Italian court, on whether the *Associazione* had standing to bring proceedings to enforce obligations under the FED in the absence of an identifiable victim, the AG too recalled the CJEU's judgments in *Feryn* and *Asociaţia Accept*, where the Court held that a non-governmental organization can bring such an action.[19] She then deliberated on the possible, specific criteria that an association has to fulfil in order to have such a standing, specifically concentrating on the principles of equivalence and effectiveness in EU law.[20] NH submitted that the *Associazione* could not be deemed to represent the interests of LGBTI persons and that it therefore did not have standing to act in the present case.

Under Art. 9, para. 2, FED, 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. In the present case, the national legislation at issue provided for a procedural right (*locus standi*) in order to enforce substantive rights that derive from EU law (namely, protection from discrimination). This triggers the application of the principle of procedural autonomy together with its corollaries, the principles of equivalence and effectiveness.[21] The AG maintained 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; and (iii) therefore the principles of equivalence and effectiveness have to be respected. National courts are alone competent to assess those aspects.[22] In the opinion of the AG, 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

[16] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 59.
[17] *Ibid.*, paras 60-71.
[18] *Ibid.*, para. 62.
[19] *Ibid*., paras 82-84.
[20] *Ibid*, paras 85-95.
[21] *Ibid.,* para. 92.
[22] *Ibid.*, para. 98.

on the grounds of sexual orientation would naturally turn, should they decide to bring proceedings in a particular case.[23] It followed in the AG's Opinion that: (i) an association empowered by national law to bring proceedings in order to enforce rights and obligations under the FED may request for discriminatory conduct to be sanctioned; (ii) that applies whether or not there is an identifiable victim; (iii) the FED 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) these sanctions may take the form of an award of damages. The types of damages available will again be a matter of national law. The AG did not find a reason of principle why such damages could not comprise both material and non-material damages, including moral damages.[24] Therefore, the AG concluded that the FED permits national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations in the absence of an identifiable victim. 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.[25]

II.2. Judgment of the Grand Chamber of the CJEU (23 April 2020)

The conclusion of the CJEU on both questions posed by the Italian court aligns closely with the AG's Opinion. Like AG Sharpston, the Court too reversed the order of the questions, starting with the scope and nature of direct discrimination via a speech act, and followed by tackling *locus standi* for the *Associazione*. The Court reformulated the second question, observing that, in essence, the referring court was asking whether the concept of "conditions for access to employment" in Art. 3, para. 1, let. a), FED must be interpreted as covering statements made by a person during an audiovisual program according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned.[26] With regard to the fact that no negotiation with a view to recruitment was under way when the statements concerned were made, the Court held that this did not preclude the possibility of such statements falling within the material scope of the FED.[27] It is nevertheless necessary, in order for such statements to fall within the material scope of the FED, that they be capable of in fact being related to the recruitment policy of a given employer, meaning that the link between those statements and the conditions for access to employment

[23] *Ibid.*, para. 99.
[24] *Ibid*., para. 109.
[25] *Ibid.*, para. 112.
[26] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., para. 29.
[27] *Ibid.*, para. 42.

and occupation with that employer must not be hypothetical.[28] The Court further referred to the criteria developed by its AG[29] in this regard, including *i*) the status of the person making the statements being considered and the capacity in which he or she made them,[30] *ii*) the nature and content of the statements concerned,[31] and *iii*) the context in which the statements at issue were made.[32]

The Court observed that the limitations therein respect the essence of the freedom of expression, since they are only applied for the purpose of attaining the objectives of the FED, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. They are thus sufficiently justified by those objectives, according to the Court of Justice.[33] The expression of discriminatory opinions in matters of employment and occupation by an employer or a person perceived as being capable of exerting a decisive influence on a recruitment policy is likely to deter the individuals targeted from applying for a post.[34] The Court's answer to the second question is, therefore, that the concept of "conditions for access to employment [...] or to occupation" in Art. 3, para. 1, let. a), FED must be interpreted as covering such statements as those made by NH, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking was not hypothetical.[35]

Regarding the first question posed by the Italian court, on whether the *Associazione* should have a *locus standi*, the Court observed that Art. 8, para. 1, FED, read in light of recital 28 thereof, provides that 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 that directive.[36] Referring to its findings in *Asociația ACCEPT*,[37] the Court held that Art. 9, para. 2, FED 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.[38] When a Member State chooses that option, it is for that State

[28] *Ibid*., para. 44.

[29] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., paras 53 to 56.

[30] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., para. 44.

[31] *Ibid.*, para. 45.

[32] *Ibid.*, para. 46.

[33] *Ibid.*, para. 51.

[34] *Ibid.*, para. 55.

[35] *Ibid.*, para. 58.

[36] *Ibid*., para. 62.

[37] *Asociația Accept*, cit., para. 37.

[38] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., para. 63.

to decide under which conditions an association such as that at issue in the main proceedings may bring legal proceedings for a finding of discrimination prohibited by the FED and for a sanction to be imposed in respect of such discrimination.[39] The answer of the Court to the first question is, thus, almost identical to the one proposed by its AG.

III. Comment

III.1. Is *ACTE CLAIR* out of fashion in Luxembourg?

What clearly consolidates the CJEU's judgment in *NH* (2020) with *Feryn* (2008) and *Asociaţia ACCEPT* (2013)[40] – both extensively cited throughout the AG Opinion in *NH* – into a "Luxembourg trilogy", apart from an employer's statement in a media interview discouraging certain protected groups (ethnic or sexual minorities) from applying to certain positions – is the absence of a single plaintiff from the respective groups willing to file an individual complaint, demonstrating that (s)he was refused a position within this entity. Instead, all three cases were litigated by pro-equality organizations as collective plaintiffs representing an abstract individual who was discouraged from submitting a job application to the employer by such statements. The difference between the *Feryn* and *Asociaţia ACCEPT* cases was quite significant, considering that they dealt with genetically-related yet technically independent instruments of secondary EU law, namely the RED and FED, respectively.[41] Furthermore, in *Feryn* the complaint was brought by the Belgian Equality Body, established under EU law itself,[42] while in *Asociaţia ACCEPT*, a similar "equality body"[43] was permitted to act as a labour tribunal and nonetheless failed to establish an instance of direct discrimination in line with the FED.[44] Most importantly, while in the Belgian case it was crystal-clear that the interviewee, Mr. Feryn, director of

[39] *Ibid*., para. 64.

[40] For a scrutiny of both (in particular *Asociația Accept*) cases, see U. Belavusau, *A Penalty Card for Homophobia from EU Anti-Discrimination Law*, in *Columbia Journal of European Law*, 2015, p. 353 *et seq*.

[41] For a detailed study regarding the role of these twin equality directives – both adopted in 2000 – in shaping EU anti-discrimination law, see U. Belavusau, K. Henrard, *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart, 2018.

[42] *Centrum voor gelijkheid van kansen en voor racismebestrijding* (CGKR, in Dutch), or *Centre pour l'égalité des chances et la lutte contre le racisme* (CECLR, in French), starting from 2013 known as UNIA (*Interfederaal Gelijkekansencentrum*). See also, Ordonnance portant sur l'approbation de l'Accord de coopération du 12 juin 2013, entre l'Autorité fédérale, les Régions et les Communautés visant à créer un Centre interfédéral pour l'égalité des chances et la lutte contre le racisme et les discriminations sous la forme d'une institution commune, au sens de l'article 92bis de la loi spéciale de réformes institutionnelles du 8 août 1980 (1) – 3 April 2014.

[43] *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination] ("CNCD"). About the genesis and divergent functions of equality bodies in EU anti-discrimination law, see B. De Witte, *New Institutions for Promoting Equality in Europe: Legal Transfer, Bricolage and European Governance, in American Journal of Comparative Law*, 2012, p. 49 *et seq*.

[44] U. Belavusau, *A Penalty Card for Homophobia*, cit., p. 368.

the firm, was the ultimate decision-maker with regard to contractual offers in his enterprise, in the Romanian case, a homophobic statement albeit in the employment context was made by Mr. Becali, only a patron of a club potentially hiring a gay football player. Hence, in *Asociaţia ACCEPT*, the Court had to establish a plausible link between Mr. Becali and the football club at stake, ultimately deciding that the actual management of the club had failed to distance itself from the homophobic statements of its patron, thereby disapproving their unwillingness to hire a gay player.[45]

Since the CJEU has already delivered two substantially similar cases prior to its 2020 decision in *NH*, it remains to be seen whether its judgment in *NH*, even more so the judgement decided by the Grand Chamber,[46] was even necessary in light of the *acte clair* doctrine in EU law.[47] Furthermore, the *NH* case – in both its fact and the decision of the Court – is considerably closer to its sibling-predecessors (*Feryn* and *ACCEPT*) in Luxembourg compared to the proximity of *Feryn* and *Asociaţia ACCEPT* between themselves. The inconsistent application of the *acte clair* at the CJEU is not surprising,[48] and lead to the often-quoted statement by the (Swedish) AG Wahl that the chances that all courts will have no doubt on a given interpretation in light of EU law would seem to be "just as likely as encountering a unicorn."[49] Yet the "unicorn" nature of the *NH* case is somewhat obvious: there is little chance that a national court could have deprived the *Associazione* in the Italian case of legal standing in light of the clear *locus standi* granted by the CJEU

[45] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., paras 58 and 59.

[46] The Court establishes its Rules of Procedure, which require the approval of the Council, acting by a qualified majority. The Court may sit as a full Court with 27 judges, in a Grand Chamber of 15 judges or in chambers of three or five judges. The Grand Chamber (consisting of all 15 judges including the President and Vice-President of the Court) is supposed to gather in particularily complex or important cases. It is questionable that the routine case of *NH* with similar facts to *Feryn* and *Asociaţia ACCEPT* merits a Grand Chamber hearing.

[47] The *acte clair* doctrine, first articulated in *Cilfit* stems from Art. 267 TFEU. In accordance with this doctrine, a national court against whose judgment there is no higher appeal *must* refer a question to the CJEU when a question on the interpretation of EU law arises, unless the answer is "so obvious as to leave no scope for any reasonable doubt". In practice, the rule leaves courts of last instance with significant discretion since whether something is beyond reasonable doubt is principally for the national court to decide. See T. TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure,* in *Common Market Law Review*, 2013, p. 9 *et seq*.

[48] In this regard, see H. RASMUSSEN, *The European Court's Acte Clair Strategy in C.I.L.F.I.T. (Or: Acte Clair, of Course! But What does it Mean?)*, in *European Law Review*, 1984, p. 242 *et seq*.; N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the* Acte Clair *Doctrine*, in *Yearbook of European Law*, 2011, p. 180 *et seq*.; A. LIMANTE, *Recent Developments in the* Acte Clair *Case Law of the EU Court of Justice: Towards a More Flexible Approach*, in *Journal of Common Market Studies*, 2016, p. 1384 *et seq*.

[49] Opinion of AG Wahl delivered on 13 May 2015, joined cases C-72/14 and C-197/14, *X and van Dijk*. In view of AG Wahl, if a national court is sufficiently certain of its own interpretation of a matter in EU law, it ought to be legally entitled to resolve it without the involvement of the CJEU. Should that interpretation be incorrect, the Commission can always initiate an infringement procedure or the affected individual could hold a Member State liable in damages for breaches of EU law caused by highest courts.

to the Romanian *Asociația* [ACCEPT] seven years ago. There is equally *little* to *no* doubt that a national court should have considered a media statement by somebody with a decision-making – not hypothetical, as the Court put it – power in employment, discouraging a protected minority from applying to a position, as a matter of direct discrimination, should that – albeit potentially recruiting – entity fail to further alienate itself sufficiently from or disprove of the statement. Furthermore, the Opinion of AG Sharpston, truly elegant as it is, does not cite any academic literature covering the span of 12 years since the *Feryn* case, demonstrating a deaf ear to the doctrine of EU law.[50] It is particularly emblematic in this regard that the predecessor of the *NH* case on homophobic speech as a matter of direct discrimination in employment, the *Asociaţia ACCEPT* case, did not include any opinion of the AG. As for the Court, back in 2013, it appeared sufficiently clear as to how to decide the case in light of *Feryn* (2008), the latter being accompanied by the sophisticated Opinion of AG Maduro.[51] This commentary will therefore examine whether this judgment, nonetheless, brings substantive clarifications to the previous case-law, fortifying the "wings of words", to cite AG Sharpston, in the Court's jurisprudence further.

III.2. Clarifying achievements and missed opportunities of the *NH* case

There are, at least, eight – albeit minor – aspects in which the *NH* judgement, read in conjunction with the Opinion of the AG to which the Court agreed wholeheartedly, differs or *could have been* progressively more different from the *Feryn* and *Asociaţia ACCEPT* cases.

[50] Needless to say, there is nothing in the rules of the Court that would oblige AGs to cite academic literature, nor does this paper advocate that it should be absolutely necessary on all occasions to adopt something reminiscent of German *herrschende Lehre*, especially for case law that is sufficiently clear. Yet it is striking that apart from Homer's *Iliad*, the AG opted to cite only one – albeit excellent – academic article, and even that from the current President of the Court of Justice: K. Lenaerts, *Exploring the limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2012, p. 375 *et seq*. Likewise, the Court does not cite any literature on this occasion restricting its analysis exclusively to previous case law, two-thirds of which, unsurprisingly, is about discussing *Feryn* and *Asociaţia ACCEPT*. This leads to the question of whether it was accidental or just illustrative of a poor engagement of the Courts' *référendaire(s)* on this occasion. In this regard, see a brilliant reflection about the various streams of fragmentation in the doctrine of EU law, in particular, emerging in the Luxembourg Court, in B. De Witte, *A European Union Law: A Unified Academic Discipline?*, in A. Vauchez, B. De Witte (Eds), *Lawyering Europe: European Law as a Transnational Social Field*, Oxford: Hart, 2013, p. 101 *et seq*.

[51] See Opinion of AG Maduro delivered on 12 March 2008, case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn*. In building his advice to the Court, AG Maduro, in particular, cites *speech act theory*, denoting the *performative* potential of speech in the context of employment market, relying on the work of J. Searle, *Speech Acts*, Cambridge: Cambridge University Press, 1969; and J.L. Austin, *How to Do Things With Words*, Cambridge (Mass.), 1962: "By publicly stating his intention not to hire persons of a certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his workfloor. He is not merely talking about discriminating, he *is* discriminating. He is not simply uttering words, he is performing a 'speech act'" (see the Opinion of AG Maduro, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn,* cit.).

First, the Court considered the *hypothetical* decision-making status of the senior lawyer in the *NH* case, as it was unclear from the proceedings whether Mr. NH could indeed execute a decision-making function within his law firm. It was obvious from *Feryn* that a head of an entity who discourages a certain group (Moroccans in that case) from applying to an open vacancy at that entity clearly falls under the scope of direct discrimination in terms of the EU twin equality directives, the RED and FED. In *Asociaţia ACCEPT*, the Court confirmed that this rule also covers people with a decision-making power or influence on the recruiting entity, even whenever technically such people may not be the direct employer, like Mr. Becali who was only a patron of a football club. The football club, according to the Court, had a specific obligation to alienate itself from the discriminatory statements of its patron. However, in both *Feryn* and *Asociaţia ACCEPT* there were open vacancies at the time that the impugned statements were made, respectively, for a technician at the Feryn's firm and of a football player at the *Steaua* club. In *NH*, therefore, the Court made a tiny step forward in finding direct discrimination also in discouragement to recruit an abstract gay individual at a law firm in the absence of any vacancy opened or even envisaged at the time of the interview, as this "does not preclude [this] possibility" in the future.[52]

Second, the fact that the litigating organization at stake, the *Associazione*, consists of lawyers and trainee lawyers who are themselves not necessarily LGBTI persons is completely irrelevant. In words of the Court's AG, seemingly fascinated with the *wings*-analogy throughout her Opinion:

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]

Third, the fact that the speaker of the purportedly discriminatory statement is not necessarily capable of directly influencing employment policies is not *per se* "a bar to such statements falling within that employer's conditions for access to employment or to occupation".[54] The explicit norm that emerges from the Court's decision is that the nexus between the discriminatory statement and the conditions for access to employ-

[52] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., para. 42.
[53] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 54.
[54] *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford*, cit., para. 41.

ment "must not be hypothetical".[55] Again in the eloquent words of AG Sharpston, discriminatory statements about LGBTI gardeners, made by a person who has no garden, fall outside of the FED's scope.[56]

The fourth aspect is rather a missed opportunity for the Court, which has for a long time been encouraged by academic literature to clarify its position regarding burden of proof, in particular, after the *Feryn-Asociaţia ACCEPT* sequel.[57] Apart from extreme examples, the burden falls on judges in Member States to determine if the nexus is sufficiently strong to constitute a violation of EU law. While the Court itself avoided mentioning burden of proof in the *NH* judgement, its AG inserted a brief clarifying note in this regard. In the view of the AG, there should be a *rebuttable presumption* that, sooner or later, the potential employer will wish to recruit and that, when it does so, it will apply the discriminatory criterion that it previously announced publicly forms part of its recruitment policy. The burden of rebutting that presumption in any particular case of recruitment would then fall on the potential employer.[58] That approach to the burden of proof is, according to the AG, consistent with Art. 10 FED, which provides:

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.[59]

Similarly, the fifth aspect relates to a missed opportunity, or rather unwillingness, of the Court to finally specify the difference between direct discrimination and harassment, considering that both the RED and FED *de jure* enlist four forms of discrimination in EU equality law: *direct* and *indirect* discrimination, *harassment* and *instruction to discriminate*. Art. 2, para. 3, RED and Art. 2, para. 3, FED stipulate a similar definition that "[h]arrassment shall be deemed to be discrimination [...], when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".[60] Clearly transplanted from the US Title VII of the Civil Rights Act

[55] *Ibid.*, para. 43.

[56] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 52.

[57] See K. HENRARD, *The Effective Protection against Discrimination and the Burden of Proof: Evaluating the CJEU's Guidance Through the Lens of Race*, in U. BELAVUSAU, K. HENRARD (Eds), *EU Anti-Discrimination Law Beyond Gender*, cit., p. 95 *et seq*.

[58] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 55.

[59] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., footnote 25.

[60] The EU Equal Treatment Directive 2006/54 gives an almost identical definition of harassment with regard to gender, but also adds one more form of discrimination, "sexual harassment", consisting of "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the pur-

1964 into EU equality law, harassment still remains a subsidiary form of discrimination with unclear borders regarding direct and indirect discrimination.[61] The CJEU had an opportunity to define harassment twice, but in both cases limited its wording to fairly general phrasing that does not shed much light on the distinguishing elements of harassment in EU anti-discrimination law. In the case of *Coleman* (2008), the CJEU held that the prohibition of harassment is not limited to the harassment of people who are themselves disabled.[62] In *Asociaţia ACCEPT*, the Court requalified harassment as (erroneously) established by the national court as direct discrimination.[63] In the trilogy on the "winds of words" at the CJEU (*Feryn*, *ACCEPT* and *NH*), the utterances of the speaker (director, patron, and lawyer, respectively) are essentially offensive claims that could have been easily (mis-)interpreted under the clauses of harassment in the twin directives of RED and FED. Perhaps the only distinctive element that separates this trilogy from incidents of harassment is that, in all three cases, individuals did not experience that type of racist and homophobic bullying during employment, but were discouraged from employment by virtue of a statement made by a person connected to the entity concerned. In the *NH* case, which is already not particularly revolutionary on novel facts to be afforded a hearing at the Grand Chamber, the Court again missed the opportunity to distinguish harassment from direct and indirect discrimination.

In contrast with the fourth and fifth aspects, the sixth aspect should be applauded as an achievement of the Court, or rather of its AG, in deriving several guiding principles concerning the scope of "access to employment" in Art. 3, para. 1, let. a), FED as based on, in particular: *1*) the status and capacity of the speaker; *2*) the nature and content of the statements made; *3*) the context in which the statements were made ; and *4*) 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.[64] What appears less convincing, however, in the Opinion of the AG (as the Court seems to ignore this consideration further in its judgment) is her view on humour in the context of homophobic speech: "That said, I reject emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful

pose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment": Art. 2, para. 1, let. d), Equal Treatment Directive.

[61] See U. Belavusau, K. Henrard, *A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives*, in *German Law Journal*, 2019, p. 630-632.

[62] Court of Justice, judgment of 17 July 2008, case C-303/06 *Coleman v. Attridge Law and Steve Law*. The plaintiff was the primary caretaker of a disabled child. She was harassed and discriminated on the grounds of her child's disability. The Court established direct discrimination in that case (similar to the *Feryn-ACCEPT-NH* trilogy), despite the fact that it was not the plaintiff herself who was disabled.

[63] Regarding the uneasy distinction between harassment and direct discrimination in *Asociaţia ACCEPT*, see U. Belavusau, *A Penalty Card for Homophobia*, cit., p. 363-367.

[64] See para. 46 in the Judgment, reflecting the Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., paras 52-57.

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".[65]

It is hard to agree with this statement for two reasons, although one should not be otherwise too pedantic about this element of the AG's Opinion, which by no means is central to the rest of the opinion and constitutes rather her intellectual observation *en passant* here. First, as explained earlier, following the debate on (in-)direct discrimination and harassment as distinct forms of discrimination in the current set-up of EU equality law, it would been a perfect occasion for the AG to consider the distinction between direct discrimination – central to the findings in *NH* – and harassment. Homophobic jokes referred to by the AG with a chilling effect should constitute an instance of harassment rather than discrimination. The AG Opinion, therefore, only perpetrates further the confusion between discrimination and harassment from previous case law and literature, by placing her observation about homophobic humour in the discussion about the case which both her and the Court interpret under a heading of direct discrimination, even though "access to employment" is a matter that should be relevant for both harassment and direct discrimination in the context of the FED's application. Second, employment as any other area of human life, despite its higher conventions regarding professional ethics and neutrality, cannot, of course, sterile to humour. One can imagine dozens of situations where humour is a natural ally in releasing a stressful situation or building up a team spirit in a working community. Furthermore, homophobia, as much as racism, sexism, ageism and other aspects of identity-based distinctions is often a matter of inconsistent perception, depending on personal – rather than group – sensitivities, context, intensity, vulgarism and frequency. An isolated joke referring to sexuality in some occasional contexts, including by a potential employer, is not necessarily a manifestation of direct discrimination and an "unbearable" offence for the applicant to continue the recruiting process. To have a chilling effect, referred to by the AG, such homophobic jokes should amount to harassment in terms of the FED, the latter being assessed in terms of their frequency. To constitute harassment, a homophobic joke – a heading that is difficult to squeeze under legal categories in labour law – cannot be isolated and should be of a systemic and particularly offensive character.

The seventh aspect deals with the comparative exercise of the CJEU, as its AG referred to the jurisprudence of the European Court of Human Rights regarding homophobic hate speech, in particular, the case of *Vejdeland* (2012).[66] In that case, a group of right-wing activists were convicted for distributing leaflets expressing contempt for gay people in a Swedish school. The Strasbourg Court found that the interference with the freedom of expression guaranteed by Art. 10, para. 1, European Convention on Human

[65] Opinion of AG Sharpston, *NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford,* cit., para. 56.

[66] European Court of Human Rights, judgment of 9 February 2012, application no. 1813/07, *Vejdeland and Others v. Sweden*, paras 47 to 60.

Rights (ECHR) was justified under Art. 10, para. 2, thereof. Thus, the European Court of Human Rights, endorsed the conclusion of the Supreme Court of Sweden, which acknowledged that "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". Perhaps the CJEU should have followed the example of the AG in fostering a comparative aspect in its jurisprudence and giving a bow of respect to the Strasbourg Court, considering that the EU is technically bound by the ECHR (in accordance with Art. 6 TEU).

Interestingly, two recent decisions of the Strasbourg Court considered homophobic speech. *Beizaras & Levickas* (2020)[67] concerned the refusal to investigate and prosecute authors of serious homophobic threats on Facebook. The second European Court of Human Rights case was decided, somewhat ironically, only two weeks after the *NH* judgment in Luxembourg: the case of *Lilliendahl* (2020)[68] which clearly indicated that anti-gay hate speech is not protected by Art. 10 ECHR. A more extensive reference of the CJEU to the case law of the Strasbourg Court (apart from obviously then pending *Lilliendahl* case) on homophobic hate speech would have fortified a more convincing treatment of freedom of expression by the Luxembourg Court, especially since NH, the lawyer in the Italian case in Luxembourg, clearly avoided referencing himself as employer in the context of his interview to a local radio, instead preferring to address himself as "person".

The final, eighth aspect of the judgment deals with the terminology of gay activism. In practically all of its previous case law, including *Asociaţia ACCEPT* and perhaps the most highlighted – in literature and the media – case of *Coman*,[69] the Court of Justice and its AGs used either a generic form of homosexual and "same-sex" (with regard to partnerships and marriages), or sometimes acronymical "*g*ay, *l*esbian, *b*isexual and *t*ransgender (or *t*ranssexual)" (that would form "LGBT"). *NH* appears to be the first CJEU case where both the AG and the Court consistently use the acronym of "LGBTI", imply-

[67] European Court of Human Rights, judgement of 14 January 2020, application no. 41288/15, *Beizaras & Levickas v. Lithuania*. For a comment, see I. MILKAITE, *A Picture of a Same-Sex Kiss on Facebook Wreaks Havoc: Beizaras and Levickas v. Lithuania*, in *Strasbourg Observers*, 2020, strasbourgobservers.com.

[68] European Court of Human Rights, judgment of 12 May 2020, application no. 29297/18, *Lilliendahl v. Iceland*.

[69] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman*. For an extensive annotation regarding accomplishments of this case, see D. KOCHENOV, U. BELAVUSAU, *Same-Sex Spouses: More Free Movement, but What about Marriage? Coman*, in *Common Market Law Review*, 2020, p. 227 *et seq*. For a more critical analysis of this judgment, unpacking its problematic and unresolved aspects, see D. KOCHENOV, U. BELAVUSAU, *After the Celebration: Marriage Equality in EU Law Post-*Coman *in Eight Questions and Some Further Thoughts*, in *Maastricht Journal of European and Comparative Law*, 2020 (forthcoming).

ing a separate category of "intersex" persons.[70] It obviously remains to be seen whether this wording is *ad hoc*, considering that even in its most recent case with regard to sexual identity, *MB*,[71] the Court used only "transgender" or neutral generic formulations like "change of gender" and "gender / sex reassignment". Should the Court's choice of wording, however, be accidental, suiting the specific judgment in *NH*, it is easy to explain this single choice by looking to two specific facts of the case. First, the plaintiff at stake, the *Associazione* (*Associazione Avvocatura per i diritti LGBTI — Rete Lenford*), included the LGBTI acronym in its full title. Second, the AG and Court may have been influenced by the recent soft institutional documents in the EU bureaucracy.[72] It remains questionable, however, whether this terminological shift is necessarily a huge achievement for the Court, as this acronym has continuously mushroomed in the recent literature and jargon of gay activists, from LGBTI to LGBTQ (whereas *Q* is implying "queer" identity), LGBTIQ, LGBTQI+ and even LGBTQIAP (adding *A* for "asexual" and *P* for "pansexual" to the "already-easy to grasp" jargon of queer activists).[73] Furthermore, in strictly legal terms, trans-/intersexuality has been considered by the CJEU to be a matter of sex discrimination. It respectively falls into the scope of the EU Equal Treatment Directive

[70] *Coman*, cit., para. 16: "[i]t is apparent from the file submitted to the Court that NH is a lawyer and that the *Associazione* is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons (LGBTI) in court proceedings". The Court (as much as its AG) further consistently uses the LGBTI acronym throughout this judgment.

[71] Court of Justice, judgment of 26 June 2018, case C-451/16, *M.B. v. Secretary of State for Work and Pensions*.

[72] In particular, AG cites the Council of the EU, *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 (see footnote 6 in the AG Opinion). See also M. Van Den Brink, P. Dunne, *Trans and Intersex Equality Rights in Europe – A Comparative Analysis, Report of the European Network of Legal Experts in Gender Equality and Non-Discrimination*, 2018, ec.europa.eu. This report adopts the definition of intersex individuals (set out by the Commissioner for Human Rights of the Council of Europe in his 2015 report, 'Human rights and intersex people') as people who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure. In contrast, the term "trans" in this Report includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. 'Trans' is an umbrella term that includes, but is not limited to, men and women with trans pasts and people who identify as transsexual, trans, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, non-binary, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through presentation (e.g. self-referring language, clothing, etc.) or body modifications, including (but not necessitating) the undergoing of multiple surgical procedures.

[73] See T.Y. Coyt, *Real Talk About LGBTQIAP: Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, and Pansexual*, Joe Barry Carroll Publishing, 2019; Nederlandse Omroep Stichting (NOS), *LGBT kennen we nu wel, maar wat is LGBTQIAP?*, 11 October 2016, available at: nos.nl.

2006/54/EC and of Art. 157 TFEU (as a ground in primary EU law, on which this 2006-Directive – covering gender equality – is adopted), while sexual orientation has been a matter of 2000-FED with its separate ground in Art. 19 TFEU.[74] Another question emerges, however, in the context of homophobic speech in employment. Suppose the *NH* case was not about "homosexuals" but rather about an employer that expressed a similar view that (s)he would never recruit a person who does not behave or look up to his / her biologically-born sex (implying anything from cross-dressing to gender-reassignment, and people who simply cannot be classified according to the medical norms of female and male bodies), within her/his law firm. Should the matter then fall under the heading of "transphobia" or "intersexophobia"? In practice, it is not yet entirely clear how cultivating the expansion of this acronym within judicial narratives may lead to concrete emancipation of the respective individuals.

IV. Summary: Paroles, paroles, paroles

From the facts of the proceedings before the Court,[75] it remains unclear whether Mr. NH was involved in higher management of the legal firm or whether he was just a senior lawyer. Central to this case, however, is not his seniority or his actual capacity to recruit, but NH's interview at a radio station. During this interview a journalist asked him a couple of questions, from which it became clear that if hypothetically NH was to recruit a colleague for his law firm, he would never choose a gay individual due to NH's ethical convictions. Unlike in the earlier *Feryn* and *Asociația ACCEPT* cases, there was no vacancy open or supposedly even planned to be open at the time of NH's radio-interview. Nonetheless, a local *Associazione* of LGBT[I] lawyers litigated a case against NH in the national courts (first at a district court in Bergamo and then at the Supreme Court of Cassation, the referring court), claiming the non-material loss (a fine of EUR 10,000) to be paid on the basis of direct discrimination to this organization. As outlined above, the national court asked the CJEU for a preliminary ruling, to clarify two questions. First, whether the statement by NH fell within the scope of direct discrimination under the FED in EU anti-discrimination law, considering that there was no position open at the moment of the

[74] For the earlier CJEU's cases on trans people, see Court of Justice: judgment of 30 April 1996, case C-13/94, *P. v. S. & Cornwall Country Council*; judgment of 7 January 2004, case C-117/01, *K.B. v. National Health Service Pension Agency*; judgment of 27 April 2006, case C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*. In this regard, it is only correct to separate LGB and T, in the analysis of cases with regard to FED, for example: see 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, K. Henrard (Eds), *EU Anti-Discrimination Law Beyond Gender*, cit., p. 229 *et seq*.

[75] The title of the Section recalls "*Parole parole*" (words words) in the original Italian version is a duet song composed by Gianni Ferrio, Leo Chiosso and Giancarlo Del Re. In the 1970s, the French version of the song has become a world-famous hit by a "gay icon", an Italian singer Dalida who performed it together with a French actor Alain Delon.

interview at the law firm of NH. Second, whether the LGBTI organization could have a standing to represent a victim of direct discrimination, considering that no members of the *Associazione* had been personally impacted by the NH's comments. As it is clear from the summary of the decision in this *Insight*, both the Court and its AG gave positive answers to both questions.

Bearing in mind the *acte clair* doctrine, it remains highly questionable, however, whether this case at the CJEU – furthermore, at its Grand Chamber – was even necessary. The referring Italian court (*Corte suprema di cassazione*) had all the factual and legal guidance provided by the two previous, similar cases at the CJEU (*Feryn* and *Asociaţia ACCEPT*) to decide on this matter of EU law. It remains doubtful whether the AG and the Court have delivered necessarily a particularly innovative – although, unquestionably, a very elegant (especially in the AG's Opinion) – reasoning or have provided clarifications (e.g., by engaging with arguments from academic literature on EU anti-discrimination law) that would have been otherwise not achievable to deduce by the national court, based purely on existing EU primary, secondary and case law. The judgment and the AG's Opinion have nonetheless provided some helpful guidelines for national courts, in particular, by recognizing that a general discouragement statement in media to recruit an abstract gay individual at a law firm in the absence of any vacancy opened or even envisaged at the time of the interview constitutes direct discrimination in terms of EU equality law. The fact that the litigating organization, the *Associazione*, consists of lawyers and trainee lawyers who are themselves not necessarily LGBTI persons – the acronym that the Court used for the first time in its jurisprudence (implying also "intersexuality") – is completely irrelevant. Likewise, the fact that the speaker is not necessarily capable of directly influencing employment policies is not *per se* "a bar to such statements". The explicit norm that emerges from the Court's decision is that the nexus between the discriminatory statement and the conditions for access to employment "must not be hypothetical". Furthermore, the Court has derived four guiding principles concerning the scope of "access to employment" in Art. 3, para. 1, let. a), FED. This is crucially important, since the FED – covering sexual orientation, age, religion and disability – spreads exclusively to employment and occupation areas, unlike its twin sibling the RED – on race and ethnicity, and covering areas beyond the employment.[76] The Court, however, was, again regrettably not willing to clarify such confusing aspects of EU anti-

[76] About the wider role of the FED in protecting LGB individuals via EU law, see A. TRYFONIDOU, *The Impact of the Framework Equality Directive*, cit. To grasp the importance of falling into the apparently very narrow scope of the FED – employment and occupation – see analysis of the *Léger* case in U. BELAVUSAU, *Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship*, in *European Journal of Risk Regulation*, 2016, p. 801 *et seq*. In that case, dealing with a blood donation by gay and bisexual men, the Court did not even consider the FED, since the matter fell outside the area of employment.

discrimination law with regard to discriminatory speech, as burden of proof and the place of harassment *vis-à-vis* (in-)direct discrimination.

The *NH* case is the third in a trilogy of cases in EU anti-discrimination law, all concerned essentially with speech acts of discriminatory nature preceding the employment, proving indeed that *επεα πτερόεντα*, words have wings.