



IV.2

Uladzislau Belavusau, Florence/Berkeley*

Sex in the Union: EU Law, Taxation and the Adult Industry.

(Erotic Center BVBA v Belgische Staat, ECJ (Eighth Chamber), Judgment of 18 March 2010, C-3/09)

In March of 2010 the ECJ rendered what appeared to be a routine judgment in the realm of taxation. The objects of the levying were films, which are displayed in individual cubicles on a pay per minute basis. The Court excluded such display from the tax benefits enjoyed by other categories of cinema. However, this illusion of a «traditional» internal market dispute easily disappears if one «sexes up» the decision, in which judges were essentially confronted with a subtle legal concept of «cinema» and its controversial constituent, pornographic movies. In the best of Victorian traditions, the Court omits any reference to the very word «sex», which raises certain concerns about the adequacy of the rhetorical construction of this 21st century decision and its strikingly puritan judicial appraisal of sexuality.

(1) Facts

(a) Instruments

The Sixth Council Directive 77/388/EEC and its Annex (entitled «List of supplies of goods and services which may be subject to reduced rates of VAT»), as amended by Council Directive 2001/4/EC (from now on referred to as the «**Sixth Directive**»), harmonizes the application of VAT in the EU law as a percentage of the taxable amount for the supply of goods and services. It allows Member States to apply either one or two **reduced rates**. These rates should be fixed as a percentage of the taxable amount, which may not be less than 5% and should apply only to supplies within the specified categories of goods and services. The latter category includes «admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities».

The related legal instrument in Belgium, Royal Decree No 20 (1970), provides that VAT is levied at the reduced rate of 6% for certain goods and services, «granting the right of admission to establishments for culture, sports or entertainment, as well as granting the right to make use thereof, with the exception of: (1) granting the right to make use of automated recreation devices; and (2) providing movable goods».

(b) Procedural history

In 2004, local authorities imposed a fine on Erotic Center BVBA in the Flemish city of Bruges for the allegedly incorrect application of the reduced rate of VAT (i.e., 6% instead of the standard 21%). The centre is a commercial establishment, where clients choose to watch what is often labeled as «adult», or «**X-rated**» **films on a pay per minute basis**. The viewing facilities are **private cubicles for single clients**. The difference in application of VAT arose due to the legislators' unclear specifications. **Erotic Center** considered its services to fall within the **category of «culture, sport and entertainment»** and regarded its display of films as «**cinema**» (i.e., enjoying the reduced tax). However, the **tax authorities** insisted that these services fall within the use of **automated recreation devices and movies**. The latter lack what is traditionally considered a «cultural value», and therefore should be covered by the standard tax rate.

Erotic Center first unsuccessfully lodged its application against tax authorities before *Rechtbank van eerste aanleg te Brugge* (the Court of First Instance in Bruges) and then in an appeal before *Hof van Beroep te Gent* (the Court of Appeal in Ghent). The latter stopped the proceedings and referred to the ECJ for a preliminary ruling.

(c) Dispute

Contrary to the estimation of the applicants, the Belgian government decided that cubicles could not be classified as a «cinema» for three reasons: they are not conceived for a group of people to watch the same film together, the films do not begin playing without intervention from the audience, and the customers do not pay for admission in advance. At this «tax point», the dispute touches upon a broader EU legal issue regarding **what constitutes both «cinema» and «cultural facilities»** within the Sixth Directive. The court of appeal in Ghent formulated its **question to the ECJ** as follows: «Should a cubicle consisting of a lockable space where there is room for only one person and where this person can watch films on a television screen for payment, where this person personally starts the film projection by





inserting a coin and has a choice of different films, and during the time paid for can continually modify his choice of projected films, be regarded as a «cinema» as referred to in the Sixth Council Directive?»

(2) Judgment

The considerations of the ECJ are unusually brief, consisting of only 7 paragraphs. The Court begins with the general observation that the application of the **reduced rates of VAT** in EU law is an option allowed to Member States as an **exception** to the principle that the standard rate applies. The reduced rates may apply only to supplies of the specified goods and services. The «exceptional» provisions must be **interpreted strictly**, i.e., within the **«usual meaning of words»**. Therefore, a valid semantic interpretation of the concept of «admissions to a cinema» includes **only movies available to the public upon prior payment of an admission fee**. This fee gives all those who pay it the right to collectively enjoy the cultural and entertainment services characteristic of those events and facilities. It cannot apply to customers who pay to watch one or more films individually or include films displayed in private cubicles.

(3) Comment

(a) Legacy of judicial sexophobia

For someone who follows the internal market developments in Luxembourg, it is hard to blame the ECJ for producing an «unexpected» decision this time. To the contrary, as it will be demonstrated further, it was unlikely that the Court would have disregarded the financial implications and blurred the **distinctions between** what the European public has traditionally labeled «**art**» and its almost antagonistic counterpart of «**pornography**». However, what is striking about this judgment is the rhetorical construction of a decision about sexually implicit services **without a single reference to the very word «sex»**. Without seeing the adjective «erotic» in the denomination of the applicant, a random reader might be left with the impression that the Court was confronted with some «innocent» type of personalized movie house, where once upon a time (let us say) a distinguished law professor might have entered to watch a film by Pier Paolo Pasolini, Woody Allen or Emir Kusturica. He waits for his wife, who has been shopping for a while, unsure when she will accomplish her consumerist mission. It does not make sense for him to sit in a noisy cinema. On the contrary, he prefers the cozy private space of a cubicle where he is free to entertain him-

self while regulating the time he wants to spend there and alternating between types of film content. In the middle of «Decameron», he apparently feels tired and switches to «American Beauty». Then, his wife calls, he easily stops the movie and leaves the room. Finally, the satisfied couple happily drives home with a few new shopping bags.

However the object of display is somewhat less «comfortable material»: **pornographic movies** on the premises of a sex shop. The conflict is essentially about what qualifies as «culture», **artistic expression**, and ultimately entertainment, which in Europe (with its long traditions of cultural ministries and **government-sponsored art**) has enjoyed a particularly privileged status.¹ The underlying rationale is the necessity of state support to maintain and encourage the biggest cultural industry of **film production in the Union**.² Thus, the EU provisions on VAT explicitly permit Member States the option of a reduced tax. But in the 21st century, from where do we derive this karmic knowledge of what constitutes art, and why is pornography excluded from that category? How could one be sure that pornographic movies lack any artistic value without entering into the **slippery slope of «tax censorship»**?

The **judicial legacy of anti-erotic censorship in Europe** is a genetic offspring of the infusion of the Judeo-Christian ethics into legal reasoning. The perception of **eroticism during Antiquity** was essentially different from our contemporary genophobic traces of shame. Since then, and throughout European history, the aesthetic legitimacy of explicit sexual representation has altered the normative legal frameworks several times. For example, the forced exclusion of the erotic narratives and visual representations is pertinent to the **Middle Ages**. The medieval church was certainly a patron of art but was its greatest censor at the same time. Thus, early Christians were greatly influenced by the literal interpretation of the **Second Commandment** (similar to the conservative Judaic perception) and therefore abhorred graven images.³ Christian art did not even depict the miracles of Jesus until around the 3rd century, and visualizations of the body were strictly censored. Certain liberalization arrived with the Councils in Milan (367) and Ephesus (431), which permitted paintings inside the temple. The eroticized depictions remained a subject of a strict taboo, although present in popular culture. In a broad sense, human visualization was at the centre of an ardent debate. The most unfortunate moment in this period of European history





was perhaps the «*iconoclasm*» movement both in the Byzantine era (when in the 8th century Leo III provoked the destruction of images of Jesus and severe persecution of people who resisted the elimination) and during the Western Roman Empire (when at the end of 15th century, the *fight against nudity in art* reached its peak with the *auto-da-fé* in Florence and a «great fire» arranged by enthusiastic followers of Girolamo Savonarola).⁴

The *Renaissance* reintroduced Ancient types of eroticized nude depictions both in artistic practices and literary narratives and provoked a heated debate about medieval law's normative stand regarding sexuality. This revitalization of the «erotic» in the pre-nation period produced another phenomenon, in which a sex-centered tradition was immediately imagined, both by authors and audiences, to be *European rather than narrowly national*. This phenomenon paved the way for an intellectualized legacy of eroticism during the *Enlightenment*.⁵ But preceding the latter, the *Reformation* and protestant dogmatics had contributed to the formation of «*obscenity*» as a *Western legal concept*, whereas the 17th century philosophical shift towards an empirical, subject-based epistemology fostered the value of personal sensation and facilitated the emancipation of the sexual self as well as the liberation of the *pornographic genre* in the middle of the 18th century. Meanwhile, the very *legal category of pornography* was shaped quite late, in the cradle of the 19th-century Victorian censorship.⁶ In this respect, one can recall Michel Foucault's position that sex was not only a matter of sensation and pleasure, of law and taboo but also of truth and falsehood.⁷ Therefore, pornography should be understood as the product of new forms of legal regulation and new desires for knowledge. Hence, both as literary and visual practice, pornography is linked to modernity in its wider historical sense, whereas its counterpart in legally structured censorship can be traced to Victorian reactionism and conservative dogmatism of the late 19th through the early 20th centuries. The latter epoch is a somewhat forgotten period of European legal history, one full of desperate attempts to single out pornography as a genre and to prosecute the ever-growing pornographic industry.⁸

As some historians of art maintain, «the acceptance of sensation under the rubric of the aesthetic opened the way for a positive revision of the place of a number of mass-cultural practices in high art, most notably the pornographic».⁹ Already, *modernist art* is full of publically irritat-

ing («*épatant les bourgeois*»), uncomfortable and ultimately disputable visualizations in terms of legal nomenclature. The contemporary epoch of *post-modernism* (with its dominant mainstreaming of form over content, consumerism over high art, scandal over traditional aesthetics etc.) has made a legal *distinction between art and pornography practically impossible* to draw.¹⁰

Therefore, the question about Erotic Center and «movie fun in cubicles» goes far beyond a standard issue of taxation. The underlining dilemma is whether the contemporary «*bonnes mœurs*» of EU citizens are ready to accept pornography as a part of artistic expression. The transformation of law throughout modernity and the introduction of the category of the obscene have empowered judges to distinguish pornography from art. However, sexual emancipation makes it more and more difficult for them to continue performing that assessment. Meanwhile, the *mainstreaming of culture*, and cinema in particular, is one of the goals of the Union.¹¹ Taxation is, thus, an important mechanism for that noble perspective. However, can we really distinguish the genre of pornography from «cinema» without entering into a slippery slope of censorship? Do we keep on thinking about nudity as a set of «dirty images»? The response of the Court is comfortable content-neutral silence rather than clear feedback.¹² It says nothing about the correlation of the tax to the films' *content*. Instead, the decision on the non-applicability of the «beneficial» tax is linked to the *method of demonstration*. As it will be suggested further, this is a very dubious approach that explains little.

(b) Sex in the Union

Having suggested that this ECJ judgment reminds one of the 19th-century silencing and its regime of sexual repression,¹³ one should pay some tribute to Luxembourg and offer the disclaimer that the Court has played a fairly progressive role in the construction of «Euro-sex». That is, it has legally contributed to several of the most important controversies around issues of gender and sexuality.

The *implicit* legal problematization of sex became possible due to the corpus of anti-discrimination development in the Union. Following the timid steps of the ever-growing harmonization in the respective field (and very often preceding it), the ECJ had to address several important issues of both direct and indirect *discrimination on the grounds of sex*. Sex-equality between men and





women was part of the European project from the beginning. Thus, a clause on equal pay was written into the Treaty of Rome in 1957. However, the initial rationale of the legislators was purely commercial: they aimed to safeguard the consistency of the internal market.¹⁴ Over the last three decades, the EU has passed nine directives on gender equality that closely reflect the ECJ's own judgments on the topic.¹⁵ Most recently the Court had to confront the issues of **discrimination on the grounds of sexuality**. The respective clause in the Treaty of Amsterdam¹⁶ fostered an essential relief for the construction of gay rights in Luxembourg and made gender identity and sexual orientation a serious focus in European anti-discrimination law.¹⁷ The progressive stance of the ECJ on gender equality and LGBT rights seemed to follow a respective liberalization occurring before the European Court of Human Rights and within national constitutional traditions.¹⁸

The *explicit* involvement of the Court into «Euro-sex» began even earlier due to the inevitable clash of certain moralistic ideas with the rationales of the common market. The first line of these decisions addresses controversies around **prostitution**.¹⁹ The ECJ brings prostitution into the domain of labor and confirms that Member States should adopt a consistent attitude towards both citizens and migrants. Therefore, the refusal to permit French prostitutes to remain in Belgium constituted an arbitrary discrimination.²⁰

The second line (within which the case of the Belgian company Erotic Center partially fits) addresses the **trade in sexual objects and services**. Among the grounds (exceptions for international market), which shall not preclude prohibitions or restrictions on imports, exports or goods in transit (such as public policy, public security, protection of health, animals or plants, national treasures, industrial and commercial property), Article 30 EC locates «public morality» on the first position. Thus, theoretically the ECJ could have used that provision for a conservative shift in jurisprudence. However, the Court took a somewhat more pragmatic position. In the case *Hann and Darby* [1979],²¹ the appellants were convicted in a British court of a variety of offences connected with the trade in pornographic materials. In that instance, the Court held that Article 30 EC means that a Member State may, in principle, lawfully impose prohibitions on the importation of articles that are of an indecent or obscene character as understood by its domestic law. The Court left **Member States** with the **discretion to determine obscenity** in accordance with their own value

scale. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not prevent that state from applying a unitary concept with regard to prohibitions on imports imposed (on grounds of public morality) on trade with other Member States.²² In a subsequent case (7 years later), *Conegate Ltd* [1986],²³ which again came up as a preliminary ruling from the UK, the Court essentially clarified its position. A number of life-size blow-up dolls and vacuum flasks were seized and confiscated upon being imported into the UK from Germany. The British authorities brought up the example of *Hann and Darby* and argued that this restriction on the free movement of goods fell within the scope of the «public morality» clause in Article 30 EC, and, therefore, Article 28 EC did not apply. Nevertheless, the ECJ held that as a limitation on a vital principle of EC law, Article 30 EC had to be interpreted restrictively. Thus, a Member State would have to prove that the national measure is aimed exclusively at the protection of public morality and, therefore, that it applies equally to national producers and service-providers. However, similar products were already lawfully sold in the UK. Consequently, the restriction on importation could not be justified under Article 30 EC.

Both explicit and implicit case lines have illuminated sex and sexuality as an important subject of legal discussion in the EU.

(c) Towards a porno-tax?

Therefore, despite the progressive and fairly liberal developments of the Court, where prudish legacy seem to play very little role, the recent «Belgian case» reveals the ECJ's evident **reluctance to engage with content-based discussion**. One can imagine two extreme explanations for the judges' stance.

On the one hand, the Court may have been **too «lazy»** to develop a substantial and thoroughly constructed position with which to address the matter. Ultimately, three facts support this claim: (1) the judgment is not even accompanied by an **Opinion of the Advocate General**, (2) the Belgian court itself formulates its question to Luxembourg in **sex-neutral language**,²⁴ and (3) on its surface, the issue of pornography seems to be of so little (if not of somewhat hilarious) importance in the realm of the ECJ judgments. The Court definitely has to address many serious issues under the pressure of a great (pan-European) responsibility within a short timeframe. Nonetheless, this «giggling attitude» towards pornography is quite unfortunate because currently the





industry consists of *a billion business* producers and service-providers who do take the issue seriously.

On the other hand, the Court may have been *too «smart»* to engage itself in an unpopular discussion on the *content restrictions*, a traditional controversy in the realm of free speech debate. Moreover, the ECJ is still primarily a «commercial court». In order to establish a link with a fundamental rights' type of reasoning, the Court lacks both a sufficient counterpart before the ECtHR in Strasbourg and a constitutional unanimity in national legislations. Although all EU member states have decriminalized pornography either *de jure* or *de facto*, there is *no such thing as a European concept of porno-tax*.

However, most likely the Court's decision is an outcome of both motivations («lazy» and «smart»), though one can speculate on the proportions of both. The Court's easy track brings *more questions than it answers*. The content-neutral 7-paragraph decision appears «smart» until one reverses the situation and suggests that the same pornographic movies could have been displayed on the premises of an erotic movie theatre, where a group of spectators could buy tickets in advance to watch a single movie without changing the content. Following the ruling of the court, the Directive does not cover a payment made by a customer to individually watch one or more films, or excerpts from films, in private cubicles. In other words, the fact whether a customer is going to watch «Titanic» by James Cameron or «Deep throat» by Gerard Damiano is irrelevant: that is if a porno movie is demonstrated to 5 clients in a cinema, it falls under a category of the preferential VAT. Thus, using *method-restriction* to avoid the content-discussion essentially loses any sense.

If, when framing the decision as a method-restriction, the Court still meant to single out the pornographic genre from the category of «cinema», then the goal of such exclusion for tax law remains unclear. If the Court had a puritan project in mind, directed toward the discouragement of the «dirty business», the raised VAT will primarily affect those consumers whose *demand* economists call «inelastic». For example, in cases of tobacco dependence a raise in VAT (and consequently, in price) does not essentially change the customers' behaviour. Therefore, the only plausible explanation is that the Court favored the *safeguarding of revenue for Member States* and recognized that this segment of the film industry does

not require a state support, an acute need in the case of «high art» cinema. The reverse decision would have also raised questions about the *taxation model in France* and similar attempts to reform tax in other Member States.²⁵ This formulation (based on the *necessity to support the high-art film industry*) would have clearly excluded pornographic movies from the beneficial («affirmative») tax while at the same time would have avoided a moralistic discussion.

Finally, the *textological strategy* of the Court, which involves linking its interpretation once again (as it has done traditionally in its tax decisions) to the «*usual meaning of words*», is rather dubious. In this respect, the Court neglects the *intentionalist methodology* of legal interpretation, which is actually capable of providing a stronger support for the ECJ's reasoning. It is highly unlikely that the EU Council meant to mainstream the pornographic industry when it drew a list of exceptions to VAT. Additionally, «*verba artis ex arte*»: that is terms of art should be explained in relation to their usage in the art to which they belong. In the analogous «tax» case of *Commission v. Germany* [2003],²⁶ the Court held that by applying the reduced rate of a value-added tax to services provided directly to the public by soloists, but applying the standard tax rate to the services of soloists working for an organizer, a Member State fails to fulfill its obligations under the Sixth Directive. Therefore, the situation is somewhat of a paradox. On the one hand, the ECJ held that the *method of music performance* (whether individually or on the premises of an organizer) is *irrelevant* but the method of film demonstration (in a private cubicle or in a cinema) is apparently of high importance. In both cases the ECJ appeals to the «usual meaning of words».

The *content-neutral decisions* (a favorite offspring of the jurisprudence of the US Supreme Court on freedom of speech²⁷) are definitely attractive. On the surface, they permit wolves, goats and cabbages to coexist peacefully. However, do they ultimately cross the river in the same Euroboat?

²⁵ Ph.D. candidate at the European University Institute (Florence, Italy), currently a visiting scholar at the University of California at Berkeley (Berkeley, USA), LL.M. from the Collège d'Europe (Bruges, Belgium).

²⁷ For the differences in appraisal of a state's role in support of culture in the USA and Europe, see *Demarsin/Schrage/Tilleman/Verbeke* (eds.), *Art and Law* (2008). Governmental support for the arts in Europe is based on the as-





sumption of a national cultural heritage. Europe has a long tradition of the authorities meddling with the arts, whether it is the Venetian Doges, the Pope, the aristocracy or the Bourbon kings. Meanwhile, the protestant ethos in the US was initially quite skeptical, if not outright hostile, to the idea of the state support for art. Indeed, art in the US has traditionally been supported more by private philanthropy than governmental subsidies.

² By virtue of Article 151 (4) EC, cultural mainstreaming is one of the goals of the Union. See *Psychogiopoulou*, The Integration of Cultural Considerations in EU Law and Politics (2008). Nonetheless, the author considers that the ECJ seems to be more comfortable with relying on principles such as «free movement» and «equal treatment» and, therefore, avoids making reference to cultural issues (p. 150). In the field of taxation, cultural mainstreaming efforts are seen as «sometimes deliberate but incomplete and at other times rather incidental» (p. 178).

³ «To make no images of anything in heaven or on earth, or in the water under the earth, and not to worship idols».

⁴ *Carmilly-Weinberg*, Fear of Art. Censorship and Freedom of Expression (1986), pp. 10-17; *Aldeeb Abu-Sahlieh*, L'art figuratif en droits juif, chrétien et musulman, in: Centre du droit de l'art (ed.), Liberté de l'art et indépendance de l'artiste. Kunstfreiheit und Unabhängigkeit der Kunst-Schaffenden (2004), pp. 113-151.

⁵ *Hunt*, The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800 (1993), p. 364.

⁶ *Marcus*, The Other Victorians (1964); *Hunter/Saunders/Williamson* (eds.), On Pornography: Literature, Sexuality, and Obscenity Law (1993); *Hunt*, *supra* 5. Amongst other, *Lynn Hunt* notes that «although desire, sensuality, eroticism and even the explicit depiction of sexual organs can be found in many, if not all, times and places, pornography as a legal artistic category seems to be an especially Western idea with a specific chronology and geography. As a term in modern sense, pornography came into widespread use only in the nineteenth century. For some commentators, consequently, the late eighteenth and early nineteenth centuries were critical in the development of a modern notion of pornography. But the main lines of the modern pornographic tradition and its censorship can be traced back to sixteenth-century Italy and seventeenth- and eighteenth-century France and England (albeit with important antecedent in ancient Greece and Rome)» (p. 356).

⁷ *Foucault*, Histoire de la sexualité: La volonté de savoir (1976).

⁸ Since it is beyond the scope of this article to analyze the history of the *fin-de-siècle* censorship, I will recall just a few legal initiatives in order to illustrate the roots of contemporary sexophobia in courts. The epoch is characterized by the birth of several legal fictions such as Anglo-Saxon «obscurity» or French «l'homme moyen sensuel» and «outrage aux bonnes mœurs»: an imagined public sensitivity towards the pornographic genre (measured by a vague «average-person» standard). Thus, obscene expression receives its legal manifestation as an exception to freedom of speech, under public policy derogations. In 1857, the English Parliament passed its first legislation on obscenity, which was regarded as the best way to restrict the circulation of French erotic etchings, books and postcards. A first restriction on the law of freedom of the press in France (promulgated just a year before) became an offense of «outrage aux bonnes mœurs» (1882), a notion which migrated afterwards into criminal legislation or doctrine in most European countries. The law was meant to limit the proliferation of pornographic literature reported by the police and it is still a part of the *Code pénal* (Articles 283-290).

The criminal construction enables a judge to appreciate what constitutes public sensibilities. However, the paradox is that before a judge intervenes, the situation requires the involvement of a policeman, leaving enormous discretionary powers to law enforcement. Since the radical emancipation of morality after World War II, law enforcement seems to

have less and less interest in such interventions, and in most parts of the Western world, pornography has become a flourishing industry. The international problematization of pornography stops after 1947. Nowadays the entire discussion on porn within international law is akin to the problem of child pornography. However, the initial idea that a judge is supposed to measure public sensitivity remains vital. The «sex-free» rhetorical construction of this recent decision in the ECJ is illustrative of the ways in which a European judge escapes the controversies of sexuality.

⁹ *Pease*, Modernism, Mass Culture, and the Aesthetics of Obscenity (2000), p. 167.

¹⁰ *Adler*, Post-Modern Art and the Death of Obscenity Law, 99/6 Yale Law Journal [1990] 1359-1378.

¹¹ See *Herold*, European Film Policies in EU and International Law; Culture and Trade – Marriage or Misalliance? (2010); *Schaefer/Kreile/Gerlach*, Nationale Filmförderung: Einfluss und Grenzen des europäischen Rechts, 3 Zeitschrift für Urheber- und Medienrecht [2002] 182-194.

¹² On the ability of rhetorical «silence in law» to produce legal effects see *Constable*, Just Silence: The Limits and Possibilities of Modern Law (2005).

¹³ In this sense, one can recall what *Foucault* labeled as the «speaker's benefit»: «[...] if sex is repressed, that is condemned to prohibition, non-existence, and silence, then the mere fact that one is speaking about it has the appearance of a deliberate transgression. A person who holds forth in such language places himself to a certain extent outside the reach of power; he upsets established law; he somehow anticipates the coming freedom. This explains the solemnity with which one speaks of sex nowadays. [...] What sustains our eagerness to speak of sex in terms of repression is doubtless this opportunity to speak out against the powers that be; to utter truths and promise bliss; to link together enlightenment, liberation, and manifold pleasures; to pronounce a discourse that combines the fervor of knowledge, the determination to change the laws, and the longing for the garden of earthy delights» (*Rabinow* (ed.), The Foucault Reader (1984), 295-296.)

¹⁴ See *Rankin* (ed.), Gender Politics in the Expanding European Union. Mobilization, Inclusion, Exclusion (2008); *Schiek*, Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multi-Dimensional Conception of Equality Law, 12 Maastricht Journal of European and Comparative Law [2005] 427-466; and *Belavusau*, From L. tzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy, 2 European Law Reporter [2010] 45-49.

¹⁵ Among others see Directive 75/117/EEC on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45; Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1997] OJ L 6; Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services, [2004] OJ L 373/37, etc.

¹⁶ Article 13, introduced in the Amsterdam Treaty (entered into force in 1999) specifically empowers the Union to take action by combating discrimination based on sex, racial or ethnic origin, religion or belief, disabilities, age or sexual orientation.

¹⁷ *Beger*, Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potence of Rights Politics at the European Court of Justice, 9/2 Social and Legal Studies [2000] 249-270; *Kochenov*, On Option of Citizens and Moral Choices of States: Gays and European Federalism, 33 Fordham International Law Journal [2009] 156-205; and *Bell*, Sur l'égalité d'accès aux avantages liés au travail pour les couples du même sexe: réflexions concernant l'affaire Maruko, 8 Revue du droit européen relatif à la non-discrimination [2009] 11-21.

¹⁸ *Besson*, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, 8/4 Human Rights Law Review [2008] 647-682; *Martin*, Strasbourg, Luxembourg et la di-





scrimination: influences croisées ou jurisprudences sous influence? 69 *Revue Trimestrielle des Droits de l'Homme* [2007] 132-4.

¹⁹ Interestingly enough, the first usage of the word «pornography» is attributed to the book *«Le Pornographe»* by a French novelist Nicolas-Edme Rétif (1769), in which he actually refers to *prostitution* rather than «pornography» in contemporary understanding. A Greek word πόρνη (*pornē*) means prostitute (the latter derived from Latin).

²⁰ ECJ [1982] ECR-1665 *Rezguia Adoui v. Belgian State and City of Liège*; *Dominique Cornuaille v. Belgian State*.

²¹ ECJ [1979] ECR 3795 *Regina v. Maurice Donal Henn and John Frederick Ernest Darby*.

²² See *Weiler*, *Europornography*. First Reference of the House of Lords to the European Court of Justice, 44/1 *Modern Law Review* [1981] 91-96.

²³ ECJ [1986] ECR 1007 *Conegate Ltd. v. HM Customs & Excise*.

²⁴ The court in Ghent worded its question in a completely content-neutral manner. To appreciate this puritan «neutrality», one may recall a judgment by the EFTA Court about a Swedish-Norwegian dispute on pornographic broadcasting, during which one of the questions was referred as follows: «In the event that Article 22, first sentence of Council Directive 89/552/EEC establishes a common standard for the European Economic Area: is the Swedish norm which accepts scenes shot in close-ups with masturbation, licking and sucking of sexual organs, intercourse, dwelling on ejaculation in the mouths of women and group sex an expression of the common norm in Article 22 which is to apply for the European Economic Area?» (EFTA Court, [1998] EFTA Ct. Rep., 68 *TV 1000 Sverige AB v. The Norwegian Government represented by the Royal Ministry of Cultural Affairs*)

²⁵ France (the pioneer of VAT) was the first to impose an extra tax on pornographic materials (primarily videos and DVDs). Porno film producers and distributors pay a 33% special «porno-tax» on top of France's standard corporate tax of 33%. In 1976, the respective clauses were introduced into *Code général des impôts (Chapitre III – Section VI)*. A possible increase in this tax is the subject of constant political debate. Italy seems to have followed the French example. The

project of a porno-tax was first introduced by a MP from *Forza Italia*, Vittorio Falsitta in 2002 and since then has been a point of constant speculation by conservative forces. Most recently, Silvio Berlusconi signed the Decree on pornographic materials with new fiscal rules (*Decreto del Presidente del Consiglio dei Ministri 13 marzo 2009 «Definizione di materiale pornografico e di trasmissioni volte a sollecitare la credulità popolare, nonché relative disposizioni di carattere fiscale»*). A peculiar fact about that decree is that it conjoins two types of materials within its legal nomenclature: pornography (*materiale pornografico*) and broadcastings which influences popular beliefs (*di trasmissioni volte a sollecitare la credulità popolare*), such as those by fortunetellers, healers and mediums, magicians and astrologists. A popular Italian daily, *Corriere della Sera*, describes a history of this «fiscal plan» aimed to introduce a 25% «porno-tax»: *Cavalli*, *Libri*, *cinema*, *TV: torna la porno-tax*, *Corriere della Sera* [2008]. The Belgian case before the ECJ deals with an application of a standard VAT tax. Therefore, if decided otherwise, it would have called into question the legitimacy of the French and Italian «porno-taxes» in relation to the concept of cinema in EU law.

²⁶ ECJ [2001] ECR I-445 *Commission v. Germany*.

²⁷ One of the most striking differences in the methodological appraisal of free speech between the European Court of Human Rights and the US Supreme Court is an attribution of a higher protection in the latter to the restrictions, which pass the test of the so-called «content (or viewpoint) neutrality», i.e. regulations of speech regardless of its subject matter and content. In other words, any law that regulates content must satisfy a strict scrutiny that requires a narrow tailoring to meet a compelling governmental interest. For instance, the mainstreaming of the content-neutrality explains the radical difference in the judicial appraisal of hate speech in the USA and Europe. See *Belavusau*, *Judicial Epistemology of Free Speech Through Ancient Lenses*, 23/2 *International Journal for the Semiotics of Law* [2010]; and *Chemerinsky*, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 *Southern California Law Review* [2000] 49-64.

