



## PRESS RELEASE No 64/25

Luxembourg, 5 June 2025

Advocate General's Opinion in Case C-769/22 | Commission v Hungary ('Values of the European Union')

### EU values: Advocate General Ćapeta considers that, by prohibiting or restricting access to LGBTI content, Hungary infringed EU law

*She suggests that the Court should also find a self-standing infringement of Article 2 TEU, which sets out the European Union's fundamental values*

By Law LXXIX of 2021 adopting stricter measures against persons convicted of paedophilia and amending certain laws for the protection of children, Hungary introduced several amendments to different domestic legislative acts (the amendments). Several of those amendments, which were adopted, according to Hungary, with the aim of protecting minors, actually prohibit or restrict access to content that portrays or promotes 'gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality' ('LGBTI content'). The Commission brought an infringement action before the Court of Justice against Hungary for those amendments. It asks the Court to find that Hungary infringed EU law on three different levels: primary and secondary law relating to the internal market in services, <sup>1</sup> as well as the General Data Protection Regulation ('GDPR'); <sup>2</sup> several rights of the EU Charter of Fundamental Rights ('the Charter'); and Article 2 TEU. <sup>3</sup>

**Advocate General Tamara Ćapeta proposes that the Court rule that the action is well founded in relation to all grounds.**

First, **those amendments** infringe **the freedom to provide and receive services** as enshrined in primary EU law and in one or several provisions **of the Directive on electronic commerce, the Services Directive, the Audiovisual Media Services Directive, as well as the GDPR.**

Second, **said amendments also interfere with a number of fundamental rights protected by the Charter, namely the prohibition of discrimination on grounds of sex and sexual orientation, <sup>4</sup> the respect for private and family life, <sup>5</sup> the freedom of expression and information, <sup>6</sup> as well as the right to human dignity. <sup>7</sup>**

According to the Advocate General, these interferences cannot be justified by the reasons put forward by Hungary, namely the protection of the healthy development of minors and the right of parents to raise their children according to their personal convictions. <sup>8</sup> In that respect, Advocate General explains that, in the name of the protection of minors, the Hungarian legislation at issue prohibits portrayal of ordinary lives of LGBTI people, and is not limited to shielding minors from pornographic content, which was prohibited by the law in Hungary already prior to the amendments.

Hungary has not offered any proof of the potential risk of harm of the content, which portrays ordinary lives of LGBTI people to the healthy development of minors. Consequently, **those amendments are based on a value judgment that homosexual and non-cisgender life is not of equal value or status as heterosexual and cisgender life.**

Third, the Advocate General is of the opinion that the Court should establish, as asked by the Commission, a self-standing infringement by a Member State **of Article 2 TEU**, which sets out the fundamental values on which the

European Union is founded.

AG Ćapeta points out that the EU legal order is developed through dialogue. This means that there might be different visions about how common values should be 'concretised'. Disagreements about the content of fundamental rights or divergences in balancing two or more fundamental rights should not result in the finding of an infringement of Article 2 TEU. They are part of the constitutional dialogue in the EU legal system, which allows for differing 'concretisations' of rights. Such disagreements do not, however, negate the values themselves.

**A finding of an infringement of Article 2 TEU should be made only if the Court concludes that a Member State has breached a Charter right because it has negated the value which that right concretises.**

**In the present case, the Advocate General is of the view that LGBTI persons deserving equal respect in Member States is not open to contestation through dialogue. Disrespect and marginalisation of a group in a society are the 'red lines' imposed by the values of equality, human dignity and respect for human rights.**

Therefore, she considers that, **by calling into question the equality of LGBTI persons, Hungary is not demonstrating a disagreement or a divergence about the content of the values of the European Union. Instead, that Member State has negated several of those fundamental values and, thus, has significantly deviated from the model of a constitutional democracy, reflected in Article 2 TEU.**

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355.

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<sup>1</sup> Namely [Article 56](#) TFEU and the following instruments of secondary EU law: [Directive 2000/31/EC](#) on electronic commerce, [Directive 2006/123/EC](#) on services in the internal market, [Directive 2010/13/EU](#) on the provision of audiovisual media services.

<sup>2</sup> [Regulation \(EU\) 2016/679](#) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

<sup>3</sup> [Article 2](#) of the Treaty on the European Union states: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

<sup>4</sup> [Article 21](#) of the Charter.

<sup>5</sup> [Article 7](#) of the Charter.

<sup>6</sup> [Article 11](#) of the Charter.

<sup>7</sup> [Article 1](#) of the Charter.

<sup>8</sup> [Article 14\(3\)](#) of the Charter.