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Judgment of the Court in Case C-769/22 | Commission v Hungary (Values of the European Union)

Values of the European Union: by adopting a law which stigmatises and marginalises LGBTI+ persons, Hungary has acted in breach of EU law

The Court finds, in particular, for the first time in an action brought against a Member State, an infringement of Article 2 TEU, which lists the values on which the European Union is founded

By 'Law No LXXIX of 2021 laying down stricter measures in respect of persons convicted of paedophilia and amending certain laws adopted in the interests of the protection of children', Hungary has amended various national legislative acts with a view to protecting children. In essence, those amendments prohibit or restrict access to content, including in the audiovisual or advertising sectors, which portrays or promotes deviation from the self-identity corresponding to the sex assigned at birth, gender reassignment, or homosexuality. Following an action for failure to fulfil obligations brought by the European Commission in that regard, the Court of Justice finds that Hungary has acted in breach of EU law on a number of separate levels: the primary and secondary law relating to services in the internal market, the Charter of Fundamental Rights of the European Union, Article 2 TEU and the General Data Protection Regulation (GDPR).

Hungary, by 'Law No LXXIX of 2021 laying down stricter measures in respect of persons convicted of paedophilia and amending certain laws adopted in the interests of the protection of children' ('the amending law'), has made various amendments to its national law. Although those amendments are, according to that Member State, intended to protect minors, several of them have the effect, in essence, of prohibiting or restricting access to content having as a defining element the portrayal or promotion of deviation from the self-identity corresponding to the sex assigned at birth, of gender reassignment, or of homosexuality.

The European Commission has brought an action for failure to fulfil obligations before the Court of Justice against Hungary concerning the adoption of the amending law. It claims that the Court should find that Hungary has acted in breach of the primary and secondary law of the European Union relating to services in the internal market,¹ several rights guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter'), Article 2 TEU,² and, lastly, the General Data Protection Regulation (GDPR).³

The Court, sitting as the Full Court, finds that the action is well founded as regards all the pleas in law relied on.

First, **those amendments are in breach of the freedom to provide and receive services**, which is enshrined in the primary law of the European Union as well as in various provisions of the e-Commerce Directive, the Services Directive and the Audiovisual Media Services Directive. The Court begins by noting that the amendments limit the possibility for media service providers or other providers to develop and disseminate content having, essentially, as a defining element the portrayal or promotion of deviation from the self-identity corresponding to the sex assigned at birth, of gender reassignment, or of homosexuality. Those amendments thus entail **restrictions on that freedom**. Next, the Court confirms that it is possible, under EU law, for such restrictions to be justified by the promotion of the best interests of the child or by the need to safeguard the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, both of which are guaranteed by the Charter.⁴ The Court emphasises, in particular, the **margin of assessment which the Member States have, in the absence of harmonising rules at EU level, when defining the content, including audiovisual content, which is likely to impair the physical, mental or moral development of minors**.

Nevertheless, the Court finds that that margin of assessment must be exercised in line with the Charter, in particular in line with **the prohibition on discrimination based on sex or sexual orientation** guaranteed by Article 21(1) thereof. The Court finds that that is not the situation in the present case. Indeed, the aspects of the amending law which are based on

the criterion of the portrayal or promotion of deviation from the self-identity corresponding to the sex assigned at birth, of gender reassignment, or of homosexuality are based on the premiss that any portrayal or promotion of that kind, whatever its specific content, is such as to be detrimental to the best interests of the child. **Such an approach reveals a preference for certain identities and sexual orientations to the detriment of others, which are stigmatised as a result, which is incompatible with the requirements flowing, in a society in which pluralism prevails, from the prohibition on discrimination based on sex or sexual orientation.** In view of such a failure to respect the essence of that prohibition, the restrictions at issue do not appear to be justified under any circumstances by, inter alia, the objective of promoting the best interests of the child. The Court specifies that minors may be adequately protected against programmes which are not age-appropriate without there being direct discrimination in that regard based on sex and sexual orientation such as that resulting from the amendments at issue.

Second, **those amendments constitute a particularly serious interference with several fundamental rights protected by the Charter, namely the prohibition on discrimination based on sex or sexual orientation, respect for private and family life,⁵ and the freedom of expression and information.⁶**

In particular, **the Hungarian legislation at issue stigmatises and marginalises non-cisgender persons** – including transgender persons – or non-heterosexual persons as being detrimental to the physical, mental and moral development of minors solely on the basis of their gender identity or sexual orientation. The title of the amending law **associates those persons with persons convicted of paedophilia**; an association which is such as to increase the stigmatisation of the former and to encourage hateful conduct towards them.

In those circumstances, the interferences at issue undermine the essence of the fundamental rights referred to above and cannot therefore be justified by the objectives relied on by Hungary, namely the promotion of the best interests of the child or the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.

The Court also finds that, in the present case, Hungary has acted in breach of **the right to human dignity.⁷** This results from the fact that the aspects of the amending law contested by the Commission **treat a group of persons** forming an integral part of a society in which pluralism prevails **as a threat to society** meriting special legal treatment, solely on the basis of their gender identity or sexual orientation. The offensive and stigmatising nature of the amending law results in such persons' social 'invisibility' being established, maintained, or reinforced, which violates their dignity.

Third, **the Court finds**, for the first time, **a separate infringement of Article 2 TEU, which lists the values on which the Union is founded and which are common to all the Member States. The aspects of the amending law targeting content which portrays or promotes deviation from the self-identity corresponding to the sex assigned at birth, gender reassignment, or homosexuality** constitute a coordinated series of discriminatory measures which **are in breach, in a way that is both manifest and particularly serious**, of the rights of non-cisgender persons – including transgender persons – or non-heterosexual persons, as well as the values of respect for human dignity, equality and respect for human rights, including the rights of persons belonging to minorities.

Consequently, **that law is contrary to the very identity of the Union as a common legal order in a society in which pluralism prevails.** Hungary cannot validly rely on its national identity as justification for adopting a law which is in breach of the values referred to above.

Fourth, the Court finds that **the Hungarian legislation at issue is in breach of the GDPR, as well as the right to the protection of data guaranteed by the Charter**, inasmuch as it has amended the Law on the Criminal Records System in order to widen access to information registered in the criminal records system concerning persons who have committed offences abusing the sexual freedom or sexual morality of children. Although such access may be lawful in certain circumstances, the Court finds, in essence, that the Hungarian legislation does not provide a sufficiently precise definition either of the persons authorised to access criminal records data or of the substantive conditions for access necessary to offer appropriate safeguards for the rights and freedoms of the persons whose data are concerned.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under EU 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.

Unofficial document for media use, not binding on the Court of Justice.

The [full text and, as the case may be, the abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ Namely Article 56 TFEU, as well as the following instruments of EU secondary law: [Directive 2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [Directive 2006/123/EC](#) of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [Directive 2010/13/EU](#) of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

² Article 2 TEU provides: '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.'

³ [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁴ See Article 24(2) of the Charter and Article 14(3) of the Charter, respectively.

⁵ Article 7 of the Charter.

⁶ Article 11 of the Charter.

⁷ Article 1 of the Charter.