

LGBTI+ Rights in EU Law after Commission v Hungary (*Union Values* case)

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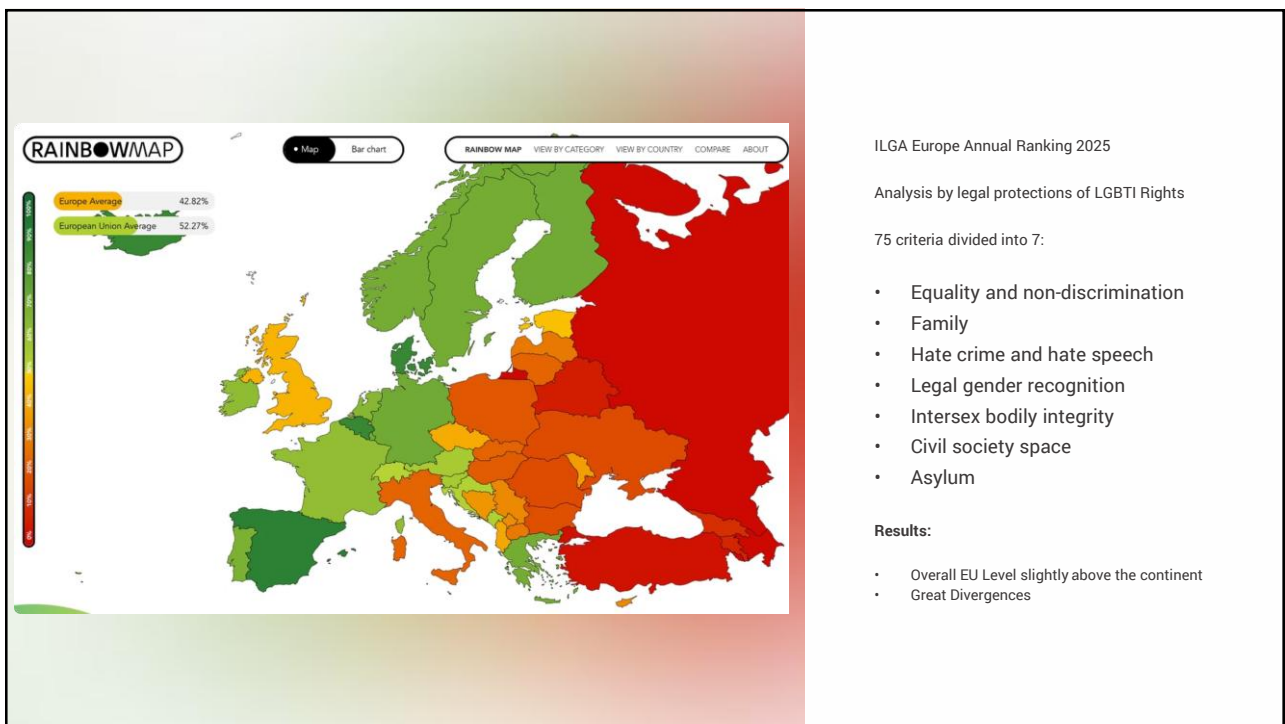


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2. LGBTI+ Rights and Recurring EU Law Asymmetries

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Art. 2 TEU: 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.

Art. 10 TEU In defining and implementing its policies and activities, **the Union shall aim to combat discrimination based on sex... or sexual orientation**

Art. 20 CFR Everyone is equal before the law

Art. 21(1) CFR Prohibition of discrimination on grounds including sexual orientation

General Principles of EU Law

- Art. 6(3) TEU
- CJEC, Asociația Accept, C-81/12 (para. 55)

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BUT Recurring Mismatch

Obligations and objectives

1. The division of competences and the scope of EU Law
2. The will to and the exercise of competences
3. When EU law exists
 - a. Interpretation by authorities and especially the CJEU
 - b. The implementation and effectivity of EU law

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2.1. Existence of EU Competences and Scope of EU law

Two linked and mutually reinforcing limits:

- General principle of conferral
- Translation in the limited scope of the Charter of Fundamental Rights of the EU (art. 51(1) Charter)

Important scopes of rights of LGBTI community -> Member States:

- Family laws and status: recognition of same-sex relationship
- Civil status: recognition of gender identity
- General criminal law: protection against hate crimes

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Tools of advancement in that line: anchoring mechanisms

Anchoring Mechanisms

1. Citizenship / movement cases
2. Secondary legislation
Directive on Asylum (X, Y Z, A, B and C) · Blood Directive and blood donation (Léger)
3. GDPR — special case
Mousse & Deldits: only partially anchoring mechanism; self-standing rights applied to LGBTI issues

Limits of Such Construction

- Citizenship/Movement cases:
 - movement remains a condition of applicability, even though no longer only protects movement related rights (Cupriak-Trojan; Shipova)
 - produces discrimination between mobile and non-mobile citizens, and between EU and non-EU citizens
- Object of the instruments: can Mousse really provide for same-sex marriage, as its lawyers claim?

2.2. Exercise (or Not) of existing EU competences: the limited scope of EU anti-discrimination

Art. 19(1) TFEU *The Council, acting unanimously... may take appropriate action to combat discrimination based on... sex... and sexual orientation.*

- Sexual Orientation

 - Directive 2000/78/EC (Employment Equality)
 - Covers: direct, indirect, association, harassment
 - Private and public employers
 - ⚠ Limited to employment & vocational training only
- Gender Identity

 - Not expressly included in any instrument
 - 'Sex' includes " since CJEC, P v S (1996)
 - Gender Equality Directive
 - Gender Self-Employment Directive
 - Gender Goods and Services Directive

⚠ Lack of Political Will in the Council

- Equal Treatment Directive (horizontal): Commission proposal blocked in the Council since 2008 — unanimity required
- Citizens' Initiative on conversion therapies ban:
 - rejected by Commission on 13 May 2026 — both underlying vehicles (Equal Treatment Directive; listing of EU crimes) require Council unanimity and face foreseeable failure



Currently:

- Only 8 EU Member States prohibit conversion therapies
- Some EU member States do not have anti-discrimination legislation beyond employment

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2.3. i) Interpretation by the CJEU

1) Scope of EU protections

- Protected grounds: CJEC, P v S (1996) C-13/94 : sex also includes gender reassignment, but not sexual orientation
- Material scope: CJEU, *Associazione Avvocatura per i diritti LGBTI*, C-507/18 (para 38): a lawyer's public refusal to hire LGB individuals — even outside any recruitment process — qualifies as 'conditions for access to employment' under Art. 3(1)(a) Dir. 2000/78 because it is a "specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter

2) Articulation with competing rights

- CJEU, *Associazione Avvocatura per i diritti LGBTI*, C-507/18: freedom of expression of employers v LGBTI individuals

3) Articulation of competences

- Comp. *Maruko v Parris*

4) Reproduce or Deconstruct Prejudices

- CJEU, *Deldits*: recognition of lived gender identity but can be made conditional upon presentation of "reasonable evidence"

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2.3. ii) Implementation by MS

Blatant disregard by MS:

- *Coman* and Romania: right of residence of third country same-sex spouse
- and despite a failed referendum against the decision;
- pending ECtHR case.

Wrong implementation and the limits of EU Law

- CJEU, 2025, *Makeleio and Zoulga* (C-555/23)
- Homophobic statements made in audiovisual content broadcast online
- Directive imposes on Member States an obligation to prevent and sanction content contrary to "human dignity"
- Transposition of the directive excludes broadcast content
- CJEU held:
 - National law cannot exclude online content
 - But the principle of legality of penalties → the scope of a criminal offence cannot be extended on the basis of the directive

3. The Changes Brought (or not) by the *Union Values* case

Hungary breached:

Internal Market

Primary and Secondary Rules on the provision of services

Charter Rights

Art. 21 (ND) · Art. 7 (family) · Art. 11 (expression) · Art. 1 (dignity)

EU Values

Equality · Dignity · Protection of human rights (Art. 2 TEU)

2021 "Child Protection Law"

- Ban on 'portrayal' and 'promotion' to minors of homosexuality, gender reassignment and deviation from sex assigned at birth
- Scope: media, advertising, public education, childcare
- Premise: LGBTI content is harmful to children's development



Political Instrumentalisation

- Part of Hungary's democratic backsliding (NGOs, universities, judicial independence)
- Nationalist narratives deployed to weaken rule of law
- **Triggers delegitimisation of supranational institutions acting as checks and balances** (Malagodi & Stradella)

3.1 Anchoring Mechanism: A Catch-All Market?

Outside the Employment Equality Directive – Commission chose the internal market as legal basis

Extensive Reading of Market Provisions by the Court

1. Hypothetical language

"It cannot be excluded" (paras. 270, 336) · "is likely" (para. 271) · "may be fulfilled" (paras. 225, 266, 380)

2. Broad 'economic activity'

Mere possibility of remunerated services sometimes suffices – even where public operators are involved (paras. 270, 296, 339)

3. 'Market access' approach

Any measure rendering freedoms 'less attractive' = restriction – Dirs. 2000/31 & 2006/123 + Art. 56 TFEU – even where connection to cross-border activity is tenuous (paras. 281, 351, 370)

4. Public education – change of perspective

Normally excluded under the Humbel doctrine; Court focused instead on potential external providers in public schools to bring the matter within EU law (para. 394)

3.2. The Centrality of the Charter

1) Breach of Internal Market Rules

Art. 21 informs almost all market violations (paras. 129–163, 195–197, 306–310, 412–415)

One formal exception: Art. 9(1)(c) and (g) of Directive 2010/13

Material convergence: requires Member States to ensure advertising does not prejudice human dignity or promote discrimination based on, inter alia, sexual orientation

Well-established role as a tool where:

- Discrimination occurs on the protected grounds of Art. 21 but falls outside the material scope of anti-discrimination secondary legislation
- The Charter applies where Member States intend to derogate from EU law

2) Self-Standing Violations of the Charter — Identical in Substance to the Market Violations

Art. 21
Non-discrimination

Art. 7
Private & family life

Art. 11
Freedom of expression

Art. 1
Human dignity

Rather recent practice:

- First finding of self-standing Charter breach: NGO Transparency Law case and C-66/18 (Central European University case)
- Material overlap: findings all refer back to the findings under Art. 21 / market provisions

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3.3. The Construction of a Principled Rejection of LGBTI Bans

Manifestation of a Principled Rejection — Breach of the 'Essence' of Art. 21 CFR

- Differential treatment reveals a 'preference' (para. 136) that undermines the 'essence' of the right (para. 141) → cannot be justified under any circumstances (para. 142)
- Art. 52 CFR: no possibility of justification for such differentiation

Convergence and Strengthening of ECtHR's *Bayev* · and *Macaté*?

- No legitimate aim justifying interference (Bayev, para. 83; Macaté, para. 21)
- Bans rest on a 'preference' — LGBTI content normative but does not harm third parties; does not breach the best interests of the child; no breach of parents' rights to raise children according to their convictions
- Added value of CJEU: explicit discrimination finding because of the discriminatory content — *Macaté* found only expression breach, no ND clarification (see dissenting opinion)

Divergence with SCOTUS (Mahmoud v Taylor, 2025)

- Majority: books 'unmistakably normative' — presenting same-sex marriage 'as a cause for celebration' — constitutes a 'burden' on religious free exercise → strict scrutiny → opt-out right
- Dissent (Sotomayor J.): mere 'exposure' to ideas with which some parents disagree
- Necessity of combating LGBTI discrimination invoked by no one: majority, dissenters, nor defendant School Board

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3.4. The Doubts Around the Judicial Enforcement of Article 2 TEU

Breach of values of equality, dignity and protection of human rights – all corresponding to Charter rights, notably Arts. 1 and 21

Constitutive elements of the Art. 2 TEU breach mirror the Charter findings:

Assumption that LGBTI content is detrimental to minors – already underpinning the Art. 21 CFR violation (para. 535)

Stigmatisation and marginalisation of LGBTI individuals – already establishing violations of Arts. 7 and 1 CFR (para. 555)

Legislation contributes to social 'invisibility' of LGBTI persons – already central to the dignity analysis (para. 555)

3.4. The Doubts Around the Judicial Enforcement of Article 2 TEU

 **Question 1: Can EU values be enforced beyond the scope of the *acquis* as constrained by the principle of conferral?**

AG Capeta — 'self-standing' and 'autonomous' (para. 32)

- Art. 2 TEU invoked within scope of EU law but independently of specific secondary provisions
- Autonomous: capable of application beyond that scope entirely

Court of Justice — declines that terminology

- Not every breach of EU law = breach of Art. 2 TEU (para. 547)
- Charter violations are an 'indication' of such a breach (para. 548)
- Parra 550: "an interpretation of that article going beyond what is reflected in paragraph 547 of the present judgment would be liable to deprive the limits imposed on the scope of other provisions of EU law, and, in particular, the provisions of the Charter, which, pursuant to Article 51(1)"

Question 2: Is this the end of uncertainty regarding the articulation between EU Values and National Identities?

- CoJ: Art. 4(2) TEU 'only protects a view of national identity consistent with the values enshrined in Art. 2 TEU' (para. 562)
- Recurring Member State argument in movement cases (Coman, Pancharevo, Cupriak-Trojan) — already subject to fundamental rights review in those cases
- In rule-of-law cases: values form part of the Union's own identity; 'result to be achieved' cannot vary between Member States (Hungary v Parliament and Council, paras. 232–233)
- Sustainable? No distinction between types of identity claim; no proportionality analysis applied

 Question 3: What is the Added Value of a Judicial Finding of Breach of Art. 2 TEU?

- Higher financial sanctions under Art. 260 TFEU?
- Not yet clear even for the first self-standing Art. 1 CFR breaches — very recent, no case law on consequences
- Potential spillover onto political procedures (Art. 7 TEU)?
- Potential spillover onto other judicial procedures?

4. Concluding Thoughts

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What the judgment settles

- Principled rejection of LGBTI stigmatisation — not merely a technical market finding
- Multi-layered condemnation: internal market law + Charter rights + Art. 2 TEU
- Judicial enforcement of Union values now established
- Added value over Charter violations alone remains to be clarified

What the judgment opens up: the 'preference' logic

- Same-sex marriage: if differential treatment = prohibited preference, is the absence of recognition not equally a product of such preference?
- ECtHR bridge — *Fedotova v Russia*: no legitimate justification for complete invisibility → the gap between 'no obligation to recognise' and 'no permissible refusal to recognise' may be narrower than it appears
- Gender identity: if preference-based legislation cannot be justified, what follows for Member States refusing or restricting legal gender recognition?

What the judgment does not settle

- Division of competences formally untouched — every finding anchored in existing EU law
- Effectivity of Art. 2 TEU enforcement still open: sanctions, political spillover, judicial consequences
- The deeper question: should the EU claim competence over marriage and gender recognition that Member States regard as part of their constitutional identity? Normative perspective and legitimacy