

LEGAL OPINION

HUNGARY'S 2021 GAY "PROPAGANDA" LAW



INTRODUCTION

The present legal memo provides an overview of the possible legal arguments that could underpin a European Commission or Member State-led infringement procedure against Hungary for failure to comply with its obligations under EU law when enacting its anti-LGBTQI law, namely Act LXXIX.

The present document will specifically analyse the provisions of the Hungarian Law containing an education-related prohibition while leaving out the media-related provisions of the law that have recently formed the object of an infringement procedure launched by the Commission. This research aims to fill the gap by providing an in-depth analysis of the compatibility with EU law of the provisions of Act LXXIX concerning education and immediately actionable recommendations to prevent and challenge similar trends in the other Member States.

In particular, the memo seeks to establish Hungary's failure to comply with:

- **The EU internal market freedoms**, particularly freedom of movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital (Articles 45, 49, 56 and 63 of the Treaty on the Functioning of the EU or "TFEU").
- **Its fundamental rights obligations under the Charter of Fundamental Rights of the EU** ("the Charter"), particularly as regards (i) freedom of expression, to provide education and academic freedom, (ii) freedom of association, (iii) right to non-discrimination, work and education, and
- **EU anti-discrimination secondary law**, particularly the Employment and Gender Equality Directives.

To do so, the memo will:

- **Describe** the content of Act LXXIX and point to some case studies and practical examples of how legislation like the one enacted by the Hungarian government can negatively impact civic space (Section 1).
- **Establish** the Member States' obligations as concerns the internal market freedoms, the protection of fundamental rights and non-discrimination in employment (Section 2)
- **Ascertain** the specific violations of EU law by Act LXXIX (Section 3)

The memo will conclude that Hungary has failed to fulfil its obligations under EU law by:

1. **Establishing a discriminatory system** of registration and accreditation for private entities providing sex education courses that introduce unjustified restrictions to the internal market freedoms,
2. **Criminalising LGBTQI people's gender identity and sexual orientation**, particularly when working with minors.

Hence, the European Commission and the Member States should consider launching infringement actions against Hungary under Articles 258 and 259 TFEU.

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1. Analysis of the contents of the law

1. In recent years, Hungary has engaged in a race against fundamental rights and freedoms that has resulted in the adoption of restrictive laws targeting LGBTQI rights defenders and NGOs. One of the most prominent and worrying examples is [Act LXXIX of 2021](#), "*on stricter action against paedophile offenders and amendments to certain laws to protect children*".
2. According to the explanatory memorandum attached to Act LXXIX, the law "*seeks to contribute comprehensively to the protection of children in several areas*", particularly in the light of the increase in cases of child pornography, and stresses that the State must guarantee "*the preservation and protection of [the children's] inalienable [gender] identity aligning with their birth sex*".
3. Against this background, the bill lays down two sets of obligations concerning education and media content, respectively. First, it prohibits the provision of courses on sex education, biology, natural sciences or health that mention anything other than the traditional, heterosexual image of the family (hereafter referred to as "sex education courses"). Second, it provides that all media content, such as books and movies, which portrays '*non-traditional families*' or refers to '*non-traditional gender identities*' shall be immediately recognisable via a disclaimer or other similar message mentioning that they show a non-traditional (i.e., Christian, heterosexual) family image.
4. The law specifically provides for the following amendments regarding sex education courses:
 - First, the law establishes a prohibition to expose minors to any pornographic content and to any content that portrays other than the traditional image of family and sex, for instance, gender reassignment, non-heterosexual orientation, homo-parental family or single-parent family.
 - Second, the law introduces a system of registration and accreditation for NGOs that provide sex education courses to minors, thus hindering in practice the provision of comprehensive, science-based and inclusive courses, especially for LGBTQI-led organisations. Furthermore, the law clarifies that a Ministerial Decree should lay down the relevant criteria to be included in the register and granted accreditation. However, at the time of writing, the government has not adopted it yet.
 - Third, the law amends Act II of 2012 on Petty Offences and criminalises teachers and headteachers that allow the provisions to students of comprehensive, science-based, inclusive courses, especially by LGBTQI-led organisations.

INFOBOX:

ANTI-LGBTQI TRENDS IN HUNGARY:

Hungary's escalation against LGBTQI communities and NGOs started in [2012](#), with a proposed bill against any action that "propagate disorders of sexual behaviour – especially sexual relations between members of the same sex". While the bill never made it to the Parliament's agenda, in 2018, Orban's government issued a [decree \(No. 188/2018 \(X.12\)\)](#) banning master's and PhDs degree programs on Gender Studies.

Hostility towards the LGBTQI community intensified in [2020](#), with a bill identifying gender with the 'sex assigned at birth'. With the amendment of a few words, the legislation banned the legal recognition of transgender and intersex citizens.

Finally, [in June 2021, Act LXXIX](#) barred gender identity education in school and related content on the media. The bill's deceitful rhetoric and framing earned sufficient consensus in the Parliament, resulting in further [discrimination against the LGBTQI community and human rights organisations defending LGBTQI rights](#).

The law directly echoes Russia's 2013 "[gay propaganda](#)" law, similarly intended to promote conservatism and nationalism at the expense of LGBTQI rights. The two ban children's access to information on LGBTQI topics in analogous ways.

On 3 April 2022, coinciding with parliamentary elections, the Hungarian government held a [referendum on LGBTQI in education](#) to endorse the 2021 law. The referendum, composed of four misleading questions, has been declared invalid due to a lack of sufficient valid votes, which gave a slight relief to the LGBTQI community.

Even without the endorsement of the population, the 2021 law is already in force and is maintained as it was. According to the law, during registered sexual education lectures held by authorised organisations, minors learn that gender identity and sex at birth coincide. They do not learn about gender reassignment. They are not told that having feelings for another person is common, regardless of their sex. They will not see any of it on the TV or in any advertisement. In Hungary, Billy Eliot is rated PG18.

INFOBOX:

ANTI-LGBTQI TRENDS IN EUROPE

The Hungarian anti-LGBTQI legislation is an alarming example of community stigmatisation and legitimisation of hate culture. Unfortunately, it is not the only one. The anti-LGBTQI wave has, indeed, echoed different analogous laws in neighbouring countries.

In this sense, Poland is exemplary for its radical laws. After attempting to prevent LGBTQI people from teaching in [March 2017](#), pressure on the community escalated, combining [disinformation](#) with [hateful propaganda](#). In [2019](#), approximately 100 Polish municipalities declared themselves "LGBTQI-free". Abuse of power over the community has been often reported, especially in [2020](#), when the Parliament discussed a proposal criminalising sex education. Although the bill did not pass, Poland has openly expressed its intention to follow Hungary and its anti-LGBTQI law, particularly by [preventing voluntary sex education courses to take place](#) in schools upon parents' request.

Similarly, the Romanian Senate passed a law prohibiting the spread of the so-called gender theory in [June 2020](#). But while the Romanian Constitutional Court subsequently cancelled the provision, the same cannot be said for Latvia's Education Law in [2015](#). Although not explicitly addressing the LGBTQI community, the law binds minors' education to moralism and conservative values. Similar measures can also be found in Lithuania already in [2002 \(Law No. IX-1067\)](#) and [2009 \(Law No. XI-594\)](#). The Baltic country attempted – failing – to restrain LGBTQI civic space again in [2010, 2014, and 2015](#).

The common thread connecting all these laws is the concept of deterrent or chilling effect, with provisions that disincentivise, discourage, and intimidate certain behaviours and the LGBTQI community specifically. Furthermore, the fact that such a common thread can be traced demonstrates how easily countries influence one another. Consequently, a further spread of such trends across Europe is a substantial risk.

These laws set alarming precedents, paving the way for hate crime in Europe to become a reality. According to [ILGA-Europe's 2022 Annual Review](#), the anti-LGBTQI wave has crashed into all countries. Violence, discrimination, and hate speech have been reported everywhere, and the aforementioned examples are merely their extreme expression.

Learn more:  RECLAIM's Policy brief: [Anti-LGBT policies in Europe: Trend and Solutions](#)

2. Analysis of the Member States' obligations under EU law

2.1. Member State's authorities must remove any barrier limiting the exercise of the internal market freedoms

5. Under EU law, Member States have a general obligation to remove any barrier limiting the exercise of the internal market fundamental freedoms, namely the free movement of goods, workers, services and capital. Moreover, Member States shall refrain from taking any measure that is liable to hamper or render less attractive the exercise of such fundamental freedoms.¹ Particularly important for the present legal memo are the free movement of workers,² the freedom of establishment,³ the freedom to provide services⁴ and the free movement of capital.⁵
6. Member States may justify restrictions to the internal market freedoms on the basis of Article 52 TFEU or, in the case of the free movement of capital, Article 65 TFEU. This includes grounds of public policy, public security, public health or justifications developed by the CJEU.⁶ However, the CJEU has clarified that all restrictions must be interpreted very strictly in order to ensure scrutiny by the Court and prevent Member States from unilaterally altering the justification's scope. Thus, Member States must put forward clear evidence to establish and justify a derogation.⁷ It follows that general assertions regarding an alleged justification are deemed insufficient.⁸
7. Additionally, all derogations must be read in line with general principles of law, fundamental rights and the principle of proportionality. Indeed, the Court has constantly held that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaties can be justified only when they fulfil four conditions:
 - a) they must be applied in a non-discriminatory manner;
 - b) they must be justified by overriding reasons based on the general interest;

¹ See, inter alia, CJEU, Judgment of 10 December 1991, Case C-19/91, *Kraus*, ECLI:EU:C:1991:471, para. 32.

² Art. 45 TFEU.

³ Arts. 49 and 52 TFEU.

⁴ Arts. 56 and 57 TFEU.

⁵ Arts. 63 and 65 TFEU.

⁶ CJEU, Judgment of 17 July 2008, Case C-500/06, *Corporacion dermoestética*, ECLI:EU:C:2008:421, para. 35.

⁷ CJEU, Judgment of 4 December 1974, Case 41/74, *Van Duyn*, ECLI:EU:C:1974:133, para 18. See also judgment of 19 January 1999, Case C-348/96, *Calfa*, ECLI:EU:C:1999:6, para. 23.

⁸ CJEU, Judgment of 22 December 2008, Case C-161/07, *Commission v. Austria*, ECLI:EU:C:2008:759.

- c) they must be suitable for securing the attainment of the objective which they pursue and
- d) they must not go beyond what is necessary to attain that objective.⁹

2.2. Member State's authorities must ensure compliance with the fundamental rights enshrined in the Charter when implementing EU law

- 8. Under Article 51, paragraph 1 of the Charter, Member States must respect the rights and freedoms contained therein "*only when they are implementing Union law*". In this respect, it shall be recalled that, in the case *Transparency of Associations*, the CJEU has clarified that the Charter is applicable in cases in which Member States invoke an overriding reason in the public interest recognised by EU law to restrict fundamental internal market freedoms.¹⁰
- 9. Member States may impose limitations to the exercise of the rights and freedoms recognised by the Charter under the conditions listed in Article 52, paragraph 1 of the Charter. In essence, such limitations are subject to the same conditions that apply to restrictions of the internal market freedoms previously highlighted.

INFOBOX:

In *Transparency of Associations*, the CJEU assessed the compatibility of Hungary's 2017 anti-NGO Transparency Law with EU law and, in particular, with the free movement of capital (Article 63 TFEU) and the rights enshrined in the Charter.

One of the contested issues was the applicability of the Charter, insofar as Hungary did not implement any EU measure via its law.

However, the State justified the restrictions posed by the Transparency Law by reference to an overriding reason in the public interest. According to the Court, this was sufficient to consider the law as implementing Union law within the meaning of Article 51(1) of the Charter.

Thus, the Court clarified that the Charter is applicable in cases in which Member States justify a national measure that restricts fundamental freedoms of the internal market by invoking EU law objectives (see para. 101 of the judgment).

⁹ CJEU, Judgment of 5 March 2002, Joined Cases C-519-524/99 and C-526-540/99, *Reisch*, ECLI:EU:C:2002:135.

¹⁰ CJEU, Judgment of 18 June 2020, Case C-78/18, *Transparency of Associations*, ECLI:EU:C:2020:476, para. 101.

2.3. Member States must ensure compliance with the provisions of EU secondary law concerning employment and gender equality

10. Member States have an obligation to ensure compliance with EU secondary legislation and, in particular, with EU anti-discrimination legislation. Particularly relevant for the present case are Directive 2000/78 and Directive 2006/54.
11. Directive 2000/78, or Employment Directive, lays down many obligations that employers, both in the private and in the public sector, need to meet to avoid discrimination towards employees. In particular, the Directive prohibits direct¹¹ or indirect discrimination¹² as regards employment on any of the grounds referred to in Article 1, including sexual orientation, and obliges the Member States to take the necessary measures to ensure that any provision resulting in any form of direct or indirect discrimination or unequal treatment is abolished and/or declared null and void and amended.¹³ Moreover, the Directive prohibits harassment, as a form of discrimination, when a behaviour "*takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment*".¹⁴
12. Directive 2006/54, or Gender Equality Directive, provides similar obligations. It applies, among other cases, to persons having undergone a gender reassignment procedure.¹⁵ In particular, the Directive provides that the Member States shall ensure that there is no direct and indirect discrimination or harassment based on gender in both public and private employment policies.¹⁶
13. It follows from the preceding that, to ensure compliance with the Employment Directive and with the Gender Equality Directive, Member States' authorities must:
- a) Adopt employment policies in the public sector that do not contain discriminatory clauses.
 - b) Declare null and void employment policies or clauses in both the public and private sectors, resulting in direct or indirect discrimination.
 - c) Cooperatively engage with civil society organisations to strengthen dialogue and prevent the establishment of a hostile environment that could result in harassment.

¹¹ Pursuant to Article 2(2)(a) of the Employment Directive, direct discrimination occurs where one person is treated less favourably than another person in a comparable situation.

¹² Pursuant to Article 2(2)(b) of the Employment Directive, indirect discrimination occurs where an apparently neutral provision, criterion, or practice would put persons having a particular sexual orientation at a distinct disadvantage compared with other persons.

¹³ See Article 16 of the Employment Directive.

¹⁴ See Article 2(3) of the Employment Directive.

¹⁵ See Recital no. 3 of the Gender Equality Directive.

¹⁶ See, in particular, Articles 1, 2, 3 and 14 of the Gender Equality Directive.

Conversely, they must not:

- a) Adopt employment policies in the public sector, resulting in direct or indirect discrimination.
- b) Fail to intervene or justify employment policies or clauses, neither in the public nor in the private sector, which might result in direct or indirect discrimination.
- c) Defame, insult, or incite hatred resulting in direct or indirect discrimination.
- d) Contribute, through their actions or omissions, to establishing a hostile environment that could result in harassment.

3. Analysis of Hungary's violations under EU law

14. The following section provides an in-depth analysis of the compliance of Act LXXIX with EU law, particularly with the internal market freedoms, the fundamental rights enshrined in the Charter and EU secondary law.

3.1. Applicability of EU law to the Hungarian Law

15. Under Article 6 TEU, Member States enjoy the widest discretion in setting schools' curricula.¹⁷ However, this does not exclude the applicability of EU law. Indeed, as the CJEU clarified in its landmark case *Viking Line*, “*even if, in the areas which fall outside the scope of the Union’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with [Union] law*”.¹⁸ In this respect, as pointed out above, it shall be recalled that national measures that are liable to make the exercise of EU fundamental freedoms guaranteed by the Treaties less attractive come within the scope of EU law and shall be compliant with it.¹⁹ Therefore, the mere existence of provisions liable to make the exercise of such freedoms less attractive shall be regarded as implementing EU law and thus falling within the scope of application of the Treaties.

¹⁷ See Article 6 TEU, which provides that the Union shall have the competence to carry out actions to support, coordinate or supplement the efforts of the Member States in, among others, the areas of education, vocational training and youth. See also Council of the European Union (2021), [Council Resolution on a strategic framework for European cooperation in education and training towards the European Education Area and beyond \(2021-2030\)](#).

¹⁸ CJEU, Judgment of 11 December 2007, Case C-438/05, *International Transport Workers’ Union Federation et al. v Viking Line ABP*, ECLI:EU:C:2007:772, para. 40.

¹⁹ See AG Sharpston Opinion in Case C-34/09, [Ruiz Zambrano v Office national de l’emploi \(ONEM\)](#), ECLI:EU:C:2010:560, para. 71, referring to CJEU, Judgment of 31 March 1993, Case C-19/92, *Dieter Kraus v Land Baden-Württemberg*, para. 32.

16. In the present case, the Hungarian law is liable to impact the mere recipients of sex education courses, such as minors in schools. Indeed, the law is susceptible to heavily impact external providers of sex education courses, typically non-governmental organisations relying heavily on public and private funding to conduct their activities and private schools that provide extra-curricular courses.²⁰ The Hungarian law expressly acknowledges this when it provides that *"only a person or organisation registered by the body designated by law shall be allowed to hold [...] a session on sexual culture, sexual life, sexual orientation, sexual development, the harmful effects of drug use, the dangers of the Internet, and other issues related to physical and mental health development"*. Moreover, the explanatory memorandum of the law refers to organisations providing sex education courses to positively influence the sexual development of children through anti-discrimination and sensitising programmes as having *"questionable professional credibility"*.
17. Through these legal provisions, the law is liable to discourage natural and legal persons providing sex education-related courses established in a Member State other than Hungary from exercising such activity in Hungary. Accordingly, it follows from the foregoing that EU law applies to the present case.

3.2. Hungary violated its obligations under EU law as regards the internal market freedoms

18. Act LXXIX poses unjustified restrictions to the exercise of the internal market freedoms, particularly on the freedom to provide services²¹ and the freedom of establishment,²² the free movement of workers²³ and free movement of capital.²⁴
19. First, the prohibition against providing courses mentioning other than the traditional heterosexual family, along with the system of accreditation and registration established by the law, are liable to have a detrimental effect on non-Hungarian NGOs and other private providers working on inclusion and non-discrimination, particularly when LGBTQI-led. Indeed, said measures can make it less attractive for such actors to provide sex education courses, thus constituting a restriction to the freedom to provide services. Likewise, the law restricts the right to freedom of establishment, insofar as it is likely to discourage private entities legally established in an EU Member State other than Hungary from exercising their economic activity there. In addition, as already mentioned, the Ministerial Decree detailing the relevant criteria

²⁰ World Health Organisation & Bundeszentrale für gesundheitliche Aufklärung (2006). [*Youth Sex Education in a Multicultural Europe*](#).

²¹ Arts. 56 and 57 TFEU.

²² Arts. 49 and 52 TFEU.

²³ Arts. 45 TFEU.

²⁴ Arts. 63 and 65 TFEU.

for the registration and accreditation has not been adopted yet.²⁵ Therefore, currently, no civil society organisations may hold sex education courses. It follows that the law presently creates a blanket exclusion of civil society organisations from the possibility of holding sex education courses.

20. Second, the law prevents the free movement of workers, particularly sex educators, from providing comprehensive, inclusive, and science-based courses, as the law expressly bans the latter. For the same reason, employees of LGBTQI-led organisations will also be discouraged from working in Hungary.
21. Third, Act LXXIX is likely to endanger both the freedom to provide funds and access to funds, which shall be intended as forms of expression of the freedom of movement of capital.²⁶ Indeed, the registration and accreditation system is likely to make it less attractive for foreign donors to provide funds to Hungarian entities delivering sex education courses. In turn, this will negatively impact Hungarian NGOs and LGBTQI-led organisations. They will have reduced access to private funding, which is of fundamental importance to their work given the Hungarian government's strong political influence in allocating public funds.²⁷
22. Hungary cannot justify such far-reaching restrictions to the internal market freedoms merely by reference to the protection of children. Indeed, although the protection of children may fall under the ambit of the public interest, public policy or public safety justification, the latter remain subject to the principle of proportionality, which the contested law fails to respect. Indeed, the introduction of a total ban against comprehensive and inclusive sex education courses does not appear to be a suitable measure to increase the protection of children's mental and physical health. In this respect, there is a total absence of reliable scientific studies that conclude that being exposed to non-heterosexual content or receiving limited sex education courses is detrimental to the children's mental and physical health. On the contrary, such measure is likely to damage the children's sexual development by depriving them of a truly comprehensive and science-based understanding of sexuality which is, according to numerous international studies, a positive and fundamental factor for the proper sexual development of children.²⁸

²⁵ See also European Commission for Democracy through Law (Venice Commission) (2021). *Hungary – Opinion on the compatibility with international human rights standards of Act LXXIX amending certain acts for the protection of children*, p. 19.

²⁶ CJEU, Judgment of 18 June 2020, Case C-78/18, *Transparency of association*, cit., paras. 45-51.

²⁷ As pointed out by several CSOs, access to public funding is increasingly being granted to government-aligned NGOs alone (also referred to as GONGOs – Government-organized non-governmental organisation). It follows that private entities providing comprehensive and non-discriminatory sex education courses are likely to resort to private funds. See on this point Sárosi, P. (2021). *Outsourcing Autocracy: The Rise of the Hungarian Deep State in Autocracy Analyst. Reporting on the rise of authoritarian Rule in Hungary*.

²⁸ See, among others, UNFPA (2020). *International Technical and Programmatic Guidance on Out-of-School Comprehensive Sexuality Education (CSE)*; UNESCO (2018). *International technical guidance on sexuality education*, pp. 28-31; UNESCO (2019). *Global Education Monitoring Report Team, Facing the facts: the case for comprehensive sexuality education*; Haberland, N. and Rogow, D. *Sexuality Education: Emerging Trends in Evidence and Practice in Journal of Adolescent Health*, Vol. 56, 2015, pp. 15-21.

23. Moreover, Hungary could have introduced less restrictive measures. Indeed, the introduction of a system of accreditation and registration for providers of sex education courses can, in principle, be suitable to achieve the goal of protecting children's rights. However, the same aim could have been achieved, for instance, by introducing a verification system denying accreditation to individuals and entities displaying age-inappropriate content to minors participating in sex education courses.

3.3. Hungary violated the fundamental rights and freedoms under the Charter

24. The explanatory memorandum attached to Act LXXIX justifies the adoption of the law based on the need to protect children against criminal conduct and, more specifically, against paedophilic acts. As previously noted, in principle, the protection of children's mental and physical safety can fall under the ambit of the public interest, public policy or public safety justification, which Hungary may therefore put forward in the event of an infringement procedure launched against it.

25. In compliance with the CJEU's consistent case-law, particularly with the case *Transparency of Associations* mentioned above, when Member States rely on EU law-related reasons to justify a national law, the provisions of that law must comply with the Charter. Such requirement entails that those provisions do not impose any limitations on the rights and freedoms laid down by the Charter or, if they do, that those limitations are justified in the light of the requirements set out in Article 52(1) of the Charter.

26. The provisions of Act LXXIX impose unjustified limitations to

- a) the freedom of expression,²⁹ to provide education³⁰ and academic freedom;³¹
- b) the freedom of association;³²
- c) the right to non-discrimination,³³ to work³⁴ and to education.³⁵

27. First, the prohibition against mentioning nothing but heterosexuality and the 'traditional' image of the family introduced by the Hungarian law represents a restraint to freedom of expression and education. It also hinders academic freedom, which shall be understood as freedom to disseminate information and distribute knowledge and truth without restriction. Indeed, the law represents an attempt to pursue an aim

²⁹ Art. 11 of the Charter.

³⁰ Art. 14 of the Charter.

³¹ Art. 13 of the Charter.

³² Art. 12 of the Charter.

³³ Art. 21 of the Charter.

³⁴ Art. 15 of the Charter.

³⁵ Art. 14 of the Charter.

of indoctrination while at the same time preventing teachers from providing an objective, critical and pluralistic education on sexual life. This is contrary to Articles 11, 13 and 14 of the Charter, which read in light of the corresponding provisions of the ECHR, impose upon the Member States the obligation to ensure that information included in sex education curriculum is objective and provided in a critical and pluralistic manner.³⁶

28. Second, the obligation of registration and accreditation provided in the law constitutes a restriction to the freedom of association under Article 12 of the Charter. Indeed, such obligation limits the possibility of associations providing comprehensive and science-based sex education courses, particularly LGBTQI-led organisations, to collect funds. Moreover, the lack of implementing decree can induce a chilling effect on foreign donors supporting LGBTQI-led organisations, which may feel discouraged from providing financial support to such organisations.

CASE STUDY

A group of civil activists in Hungary wants to form an organisation, and it is looking for ways to fund its future activities. Its projects will consist of inclusive and affirmative sex education, particularly attentive to promoting European values like human dignity, freedom, and equality. This makes it especially appealing to foreign European donors.

According to Act LXXIX, the CSO is obliged to officially register and get accredited before being legally recognised and operating. Although the law foresees it, no official set of criteria for such accreditation has been stated by Ministerial Decree. Furthermore, the law prohibits minors' exposure to any form deviating from the 'traditional family' image.

The progressive nature of the CSO makes it unlikely to manage to be registered and receive the accreditation, hence nullifying the potential donations.

Therefore, Act LXXIX makes it difficult for CSO's to operate, as they cannot be registered and, consequently, cannot demand financial support. This infringes their rights to raise funds and their fundamental right to freedom of association as enshrined in the CFR. In addition, it represents an unjustified and discriminatory limitation to freedom of movement of capital, thus violating non-Hungarian donors' right to make use of their resources freely.

³⁶ See CJEU, Judgment of 6 October 2020, Case C-66/18, *European Commission v Hungary*, ECLI:EU:C:2020:792, para. 225. See also ECtHR, Judgment of 27 May 2014, *Mustafa Erdoğan and Others v. Turkey*, CE:ECHR:2014:0527JUD000034604, para. 40 and judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, CE:ECHR:1976:1207JUD000509571.

29. Third, the system of accreditation established by the law is not compliant with the principle of non-discrimination, the right to work and the right to education protected under Articles 21, 14 and 15 of the Charter. Indeed, the law is likely to discourage LGBTQI workers from manifesting their sexual orientation or reassigned gender insofar as they may feel threatened by the possibility of undergoing disciplinary and criminal proceedings for having exposed minors to non-heterosexual content. Likewise, the law will presumably discourage public and private schools and accredited private providers of sex education courses from employing LGBTQI people. In turn, this negatively impacts the children's access to comprehensive, inclusive, and science-based information, thus undermining the fundamental right to education.

CASE STUDY

A teacher has undergone a gender reassignment procedure and is now considering applying for a permanent position in a public school in Hungary to provide biology and health-related courses.

However, due to Act LXXIX, he is likely to feel discouraged from submitting his candidature.

Indeed, Act LXXIX prohibits the exposure of minors to any content that portrays other than the traditional image of family and sex and introduces criminal charges in case of breaches. Hence, a teacher having undergone gender reassignment will feel discouraged to manifest his/her/their sexual orientation or reassigned gender for fear of losing his/her/their job or incurring criminal liability. It is also likely that, because of the stigmatising nature of the law, the teacher will face harassment in the workplace, a circumstance which is expressly prohibited by EU anti-discrimination law.

30. Finally, Act LXXIX does not meet any of the requirements listed in Article 52, paragraph 1 of the Charter to justify fundamental right' restrictions. Indeed, Act LXXIX lacks sufficient clarity and precision. It also fails to meet the requirements of proportionality and necessity, as it has been analysed in-depth in the previous section concerning the internal market freedoms.

3.4. Hungary violated its obligations under EU law as concerns non-discrimination in the field of employment

31. Although Act LXXIX does not directly concern employment policies, whether in the public or the private sector, both the Employment Directive and the Gender Equality Directive are applicable. Indeed, as the CJEU clarified in its case law, statements or acts adopted by State officials capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer may fall within the material scope of EU anti-discrimination employment legislation.³⁷ That is even more true when it's not just mere released statements but actual legislative measures like the Hungarian law.

32. Indeed, in the case at hand, Act LXXIX, read in light of its explanatory memorandum, is likely to establish a system of discrimination in the access to employment in the education sector against LGBTQI individuals, thus leading to the applicability of both directives. In particular, as noted in the previous sections, the law is likely to discourage both LGBTQI workers from manifesting their sexual orientation, reassigned gender or applying for jobs, and public and private schools from employing LGBTQI people for fear of undergoing disciplinary and criminal proceedings for having exposed minors to non-heterosexual "content".

33. It follows from the preceding that Act LXXIX is in breach of the Employment and Gender Equality Directives.

CASE STUDY

A Hungarian headmaster is going through job applications for a new post as a sex educator.

Under the Employment and Gender Equality Directives, Hungary must refrain from adopting national legislation entailing any form of direct/indirect discrimination or harassment. It is also obliged to prevent any form of discrimination in the public and private sectors.

However, by adopting Act LXXIX, and particularly by introducing the criminalisation of providers of comprehensive and science-based sex education along with the prohibition to display any kind of non-heterosexual content to minors, Hungary failed to do so.

Indeed, the State introduced provisions that increase the headmaster's risk to commit a petty offence for hiring LGBTQI people.

It follows that, because of Act LXXIX, the headmaster will likely discard applications submitted by a person having undergone gender reassignment and, more generally, applications submitted by LGBTQI persons.

³⁷ CJEU, Judgment of the Court of 25 April 2013, Case C-81/12, *Asociația Accept*, ECLI:EU:C:2013:275, paras. 47 to 51 and CJEU, Judgment of the Court of 17 April 2007, Case C-470/03, *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, ECLI:EU:C:2007:213, paras 56-58 and 66.

4. Conclusions

34. In light of the above, it is possible to conclude that, by adopting Act LXXIX, Hungary has failed to fulfil its obligations under EU law.

35. In particular, by adopting an Act that prevents external providers of class courses from mentioning other than the heterosexual and 'traditional' image of the family and which establishes a biased and unfair system of registration and accreditation for entities willing to provide such courses, Hungary has failed to:

- a) **Comply with its obligations under EU law as regards the internal market freedoms, insofar** as it posed unjustified restrictions to the exercise of the freedom to provide services³⁸ and the freedom of establishment,³⁹ the free movement of workers⁴⁰ and free movement of capital;⁴¹
- b) **Fulfil its obligation to ensure full respect of EU fundamental rights, as enshrined in the Charter, when implementing EU law**, particularly the freedom of expression,⁴² to provide education⁴³ and academic freedom,⁴⁴ the freedom of association,⁴⁵ the right to non-discrimination,⁴⁶ to work⁴⁷ and to education;⁴⁸
- c) **Correctly implement the Employment and Gender Equality Directives**, thus violating its **obligations** under EU law as concerns **non-discrimination in the field of employment**.

36. In the light of the above, the Commission should consider launching infringement proceedings against Hungary for failure to comply with EU law as far as the provisions of Act LXXIX on education are concerned.⁴⁹ It should also consider suspending EU funds towards Hungary under the cohesion fund, particularly the ESF+ for training and education materials projects, based on the lack of respect for the enabling conditions laid down in Annex III and IV of [Regulation \(EU\) 2021/1060](#).

³⁸ Arts. 56 and 57 TFEU.

³⁹ Arts. 49 and 52 TFEU.

⁴⁰ Art. 45 TFEU.

⁴¹ Arts. 63 and 65 TFEU.

⁴² Art. 11 of the Charter.

⁴³ Art. 14 of the Charter.

⁴⁴ Art. 13 of the Charter.

⁴⁵ Art. 12 of the Charter.

⁴⁶ Art. 21 of the Charter.

⁴⁷ Art. 15 of the Charter.

⁴⁸ Art. 14 of the Charter.

⁴⁹ As previously noted, certain provisions of Act LXXIX already form the object of an infringement procedure **launched** by the Commission against Hungary. However, such procedure only concerns the provisions of the law relating to media content, thus leaving out the provisions concerning sex education courses.

37. Additionally, Member States should consider supporting a Commission-led action or directly file a complaint against Hungary for failure to comply with EU law under Article 259 TFEU.

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