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## **The Enforcement of Non-Discrimination Law and Sexual Minorities' Rights in the EU: The Cases of Hungary and Poland<sup>1</sup>**

**Abstract:** The principle of equality and the prohibition of discrimination on grounds of sexual orientation are enshrined in the EU Treaties. A strong baseline is also laid down in secondary EU legislation. However, the impact of the respective provisions is constrained in two ways: by challenges to their enforcement and, regarding the secondary EU law, by limitations in their scope to employment.

This paper takes stock of the EU non-discrimination law with respect to sexual minorities' rights as well as the enforcement mechanisms applied by the EU to safeguard implementation in Member States. To contextualize the findings, we analyse the cases of Hungary and Poland where measures adopted by state and local authorities have led to decisive steps by the EU, including withholding financial transfers. The paper identifies systemic weaknesses in existing enforcement mechanisms and concludes by pointing to institutional reform which could address them.

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## Introduction

Under Art. 2 of the Treaty on European Union,<sup>2</sup> the respect of “human rights, including the rights of persons belonging to minorities,” constitutes one of the values on which the Union is said to be founded. The experience of the past indicates that ethnic and sexual minorities belong to one of the most vulnerable groups in the EU. However, while EU law prohibiting discrimination on grounds of ethnic origin is very broad in scope, EU legislation protecting sexual minorities is limited to employment. This incoherence cannot be attributed to diachronic development of anti-discrimination law in the EU, as the respective instruments establishing rules on ethnic and sexual minorities protection were adopted in the same year.

Against this backdrop, this paper seeks to take stock of the EU non-discrimination law with respect to sexual minorities’ rights as well as its enforcement mechanisms in the EU Member States. Sexual minority is an umbrella term referring to people whose sexual identity is denoted as lesbian, gay, bisexual, transgender, intersex or queer (LGBTIQ). Thus, it appears more appropriate to speak about multiple “sexual minorities.” To contextualize the findings, the argument turns to a case study on how such enforcement mechanisms were applied with respect to Hungary and Poland. The article places the deterioration of the situation of sexual minorities in these countries in a broader setting of the decline of democratic standards. While maintaining the rule of law in Central and Eastern Europe has attracted substantial scholarly attention, the interrelated issue of the respect of sexual minorities’ rights appears to be by and large under-explored.

The article proceeds as follows: First we briefly outline the state of the art of the EU non-discrimination legislation so as to identify regulatory gaps in the protection of the LGBTIQ people against any form of discrimination. Next we point to the role of the Court of Justice of the European Union<sup>3</sup> in enhancing sexual minorities’ protection in the face of regulatory lacuna. The follow-

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2 Hereinafter: TEU.

3 Hereinafter: CJEU.

ing sections look at the existing EU law enforcement mechanisms and how they have been applied to enforce EU non-discrimination rules in Hungary and Poland. The paper identifies systemic weaknesses in existing enforcement mechanisms and concludes by offering some reflection on institutional reform that could address them.

### **Non-Discrimination and Sexual Minority Rights Under EU Law**

The principle of equality and the prohibition of discrimination on grounds of sexual orientation are enshrined in the EU treaties. Article 2 TEU stipulates that “[t]he 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.” Combating social exclusion and discrimination as well as promoting social justice and the protection of equality between women and men count amongst the Union objectives (Art. 3(3) subpara 2 TEU). More concretely, under Art. 10 of the Treaty on the Functioning of the European Union,<sup>4</sup> when defining and implementing its policies and activities, the EU shall combat discrimination based on sex, racial or ethnic origin,<sup>5</sup> religion or belief, disability, age or sexual orientation.

Initially, anti-discrimination law in the European Community was limited to provisions prohibiting discrimination on grounds of sex in employment.<sup>6</sup> With the Treaty of Amsterdam, the Community (and subsequently the EU) received new competences to combat discrimination, which correspond

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4 Hereinafter: TFEU.

5 In addition, in the EU composed of 27 Member States and their citizens, the prohibition of discrimination on the basis of nationality is a fundamental principle laid down in Art. 18 TFEU.

6 Art. 119 EEC Treaty of 25 March 1957.

to the current wording of Art. 10 TFEU. In effect, in 2000 the body of EU anti-discrimination law was extended by two instruments. Strikingly, despite being adopted in the same year, the material scope of the said instruments differs substantially. The Employment Equality Directive (2000/78/EC)<sup>7</sup> prohibited discrimination on the basis of sexual orientation, religion or belief, age and disability in the area of employment. The Race Equality Directive (2000/43/EC)<sup>8</sup> prohibited discrimination on the basis of race or ethnicity in employment, education, access to the welfare system and social security as well as goods and services. Whereas the principle of non-discrimination on grounds of sex was subsequently extended to goods and services (Gender Goods and Services Directive (2004/113/EC))<sup>9</sup> and social security (Gender Equality Directive (2006/54/EC)),<sup>10</sup> no similar progress has been achieved in extending protection of sexual orientation, religious belief, disability and age beyond the context of employment. The proposed horizontal equal treatment Directive<sup>11</sup> put forth by the European Commission in 2008 would prohibit discrimination on the aforementioned grounds in the areas of social protection, including social security and healthcare, education and access to goods and services, including housing. Such a Directive could potentially close the gaps in EU law protection against discrimination, including that based on sexual orientation.<sup>12</sup> Its adoption requires unanimity in the Council and consent of

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7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, 16–22.

8 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, 22–26.

9 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, 37–43.

10 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204, 26.7.2006, 23–36.

11 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

12 Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of

the European Parliament. To date, however, little progress has been achieved in the Council. The positions of delegations remain polarized. Some express general reservations to the proposal, notably the alleged violation of the subsidiarity principle, lack of an adequate legal basis to legislate and the burden that the proposed measures would impose on businesses, especially SMEs. Other delegations express concern that the text has already been watered down as a result of the introduced modifications. The latter are said to be weakening the protection it offered, and potentially opening the door for discrimination in areas such as marital and family law.<sup>13</sup> It is noteworthy that even in its original version, the horizontal draft Directive did not propose comparable protection to that afforded under the Race Equality Directive. While the ban on discrimination based on race or ethnical origin applies “to all persons [...] in relation to [...] access to and supply of goods and services which are available to the public, including housing” (Articles 3.1 and 3.1.h), in the horizontal draft Directive the prohibition covers individuals “only insofar as they are performing a professional or commercial activity” (Articles 3.1 and 3.1.d(2)). Thus, contrary to the solution adopted in the Race Equality Directive, making goods or services available to the public would not automatically be covered by the horizontal draft Directive.<sup>14</sup>

Regulatory gaps in the EU protection of sexual minorities also concern penal law. The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia<sup>15</sup>

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Equality: LGBTIQ 2020–2025 Strategy, COM(2020) 698 final, 8.

13 Cf. Progress Report of 23 November 2021, <[https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=&InterinstitutionalFiles=2008%2F0140%28CNS%29&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT\\_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=>](https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=&InterinstitutionalFiles=2008%2F0140%28CNS%29&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=>)>.

14 See the statement on the proposed directive by the European Commission on Sexual Orientation Law (ECSOL) <[https://www.sexualorientationlaw.eu/images/documents/080916\\_comments\\_horiz\\_directive-lo.pdf](https://www.sexualorientationlaw.eu/images/documents/080916_comments_horiz_directive-lo.pdf)>.

15 OJ L 328, 6.12.2008, 55.

neither explicitly covers anti-LGBTIQ hate crime and hate speech, nor does it include targeting sexual orientation or gender identity among the defining characteristics of hate crime and hate speech.

In the absence of dedicated protection in salient socio-economic areas, members of sexual minority groups benefit from the freedom of movement within the EU territory to safeguard the enjoyment of their rights. This resonates the general state of affairs of minority groups' protection in the EU. The protection in question is linked to the EU Internal Market principles (Art. 26(2) TFEU), notably the economic objectives of the integration process such as the realization of EU economic freedoms and fair competition. This market-driven approach to the minority protection, when coupled with the regulatory lacuna and ailing enforcement measures (see below) is unlikely to prove highly effective. For the above specified reasons, it is even described in legal scholarship as dysfunctional,<sup>16</sup> albeit the same legal scholarship rightly ascertains that the problem lies in the limitations of EU's competences in the protection of human rights in general,<sup>17</sup> which may be attributed to the Member States' unwillingness to yield their sovereign powers in that field. On a positive note, it is worth exploring the extent to which the enforcement of Internal Market rules may compensate for the lack of EU competences in minority rights' protection.

### **How are Regulatory Gaps Addressed at the EU Level?**

The CJEU's effective interpretation of existing non-discrimination rules has considerably contributed to the enhanced protection of sexual minorities, thus partly filling regulatory gaps in the EU law. In view of the existing substantive rules, the Court's jurisprudence is particularly rich in the area of employment. By way of example, in the case *P v. S and Cornwall County Council* the Court ruled that the principle of equal treatment for men and women laid down in the Gender

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16 Dimitry Kochenov, and Timofey Agarin, "Expecting Too Much: European Union's Minority Protection Hide-and-Seek", *Anti-Discrimination Law Review* 1. 2017.

17 Kochenov, and Agarin.

Equality Directive precludes dismissal for a reason related to gender reassignment.<sup>18</sup> More recently, CJEU jurisprudence extended protection against discrimination through a public statement by the employers and persons that could have an influence on the recruitment process. The first landmark judgment in *Feryn* concerned a public statement by an employer who excluded recruiting employees of certain ethnic or racial origin in view of his “customers’ requirements.”<sup>19</sup> The Court held that public statements may constitute direct discrimination in respect of recruitment even if there is no identifiable victim, as such statements are “likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.”<sup>20</sup>

In a subsequent judgment in *Accept*,<sup>21</sup> the CJEU further acknowledged that a person making discriminatory statements in public does not necessarily need to have the legal capacity to bind or represent the employer in recruitment matters. It suffices that such a person is perceived among the general public and the social group concerned as capable of exerting a decisive influence on that employer’s recruitment policy, which is likely to deter members of that group from applying for a post offered by that employer. In that case a shareholder of a Romanian football club publicly stated that the club would not employ a homosexual and the club in question has not distanced itself from that statement. The CJEU also held that for determining direct discrimination by the club it is irrelevant whether or not the recruitment process has actually been initiated.<sup>22</sup> This argument was

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18 *P v. S and Cornwall County Council*, case C-13/94, Judgement of 30 April 1996, ECLI:EU:C:1996:170.

19 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, case C-54/07 ECLI:EU:C:2008:397.

20 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, paras 23–25, 28. At first the President of the Brussels Labour Court dismissed the claim by the Belgian equal treatment authority, stating that there was neither proof nor a presumption that somebody had applied for a job and had not been employed as a result of his/her ethnic origin. On the claimant’s appeal, the Brussels Labour Court stayed the proceedings and referred the issue to the CJEU for a preliminary ruling.

21 *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, case C-81/12 ECLI:EU:C:2013:275.

22 *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, para 52–53.

further developed by the Court in case *NH* concerning a statement made by an Italian lawyer in an interview during a radio programme that he would neither recruit homosexual persons to his law firm nor use their services in his firm.<sup>23</sup> On the one hand the CJEU confirmed that the non-existence of an ongoing or planned recruitment procedure is not decisive to determine whether public statements relate to a given employer's recruitment policy. However, the Court specified that such statements must *de facto* be capable of being related to the recruitment policy of that employer, which means that the *link* between those statements and the conditions for access to employment with that employer must not be hypothetical.<sup>24</sup> This criterion is essential for determining the employer's intention to discriminate on the basis of one of the criteria laid down by the Employment Equality Directive,<sup>25</sup> otherwise their homophobic statement could potentially enjoy protection under freedom of expression as private opinion.<sup>26</sup> This embedded division between the private and the public further constrains the impact of anti-discrimination provisions and poses challenges in their application. This effect is mitigated, but not resolved, through the litigation model of *actio popularis* under EU law established by the CJEU in *Feryn*, which enables national anti-discrimination bodies and NGOs to launch proceedings in the absence of plaintiffs. "In the case of homophobic expressions, the common dearth of individual plaintiffs should be foremost explained by the nature

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23 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, case C-507/18, Judgment of 23 April 2020, ECLI:EU:C:2020:289. Italy is among the few EU states without a specific legislation to protect individuals from homophobic discrimination. On 27 October 2021 a centre-right majority in the Italian Senate blocked the *Disegno di Legge* (DdL) Zan, i.e. a bill that would expand anti-discrimination laws to protect women, disabled people and members of the LGBTQI community. Viola Stefanello, *Italian Senate torpedoes anti-discrimination bill*, EURACTIVE.it, 28.10.2021; <[https://www.euractiv.com/section/politics/short\\_news/italian-senate-torpedoes-anti-discrimination-bill/?utm\\_source=piano&utm\\_medium=email&utm\\_campaign=15143&pnespid=7b1iGn5fOKQLxajc.SqqHY3RvRa1DoQuMPfjw\\_JqvB9mDyhQkcgfnyN7MpQAau3ChZyAzoM3Gg](https://www.euractiv.com/section/politics/short_news/italian-senate-torpedoes-anti-discrimination-bill/?utm_source=piano&utm_medium=email&utm_campaign=15143&pnespid=7b1iGn5fOKQLxajc.SqqHY3RvRa1DoQuMPfjw_JqvB9mDyhQkcgfnyN7MpQAau3ChZyAzoM3Gg)>.

24 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, para 43.

25 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, para 45.

26 Maciej Kułak, "Does the *Feryn-Accept-NH* Doctrine enhance a Common Level of Protection against Discrimination in the EU? A Reflection on the Procedural Aspects of the CJEU's Concept of Discriminatory Speech", *European Law Review*, no. 4. 2021: 554.

of their often-silenced identity. That silence is trapped within heteronormative chains in labor.”<sup>27</sup>

The absence of protection of sexual minorities in salient socio-economic areas is also partly compensated by the safeguards provided under the freedom of movement within the EU territory. By way of example, although the EU does not have competences in the area of family law, its Internal Market rules have far-reaching effect on the *de facto* recognition of same-sex unions and families around the Union.<sup>28</sup> A strong baseline is established by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.<sup>29</sup> Accordingly, in the *Coman* case the CJEU determined that “the term ‘spouse’ within the meaning of Directive 2004/38/EC is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.”<sup>30</sup> Moreover, the Court held that “a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.”<sup>31</sup>

### **Implementing Sexual Minorities' Rights in EU Member States: Key Questions**

While *de jure* Member States have to implement the EU non-discrimination law, the *de facto* compliance of national authorities with their obligations in that re-

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27 Uladzislau Belavusau, “A Penalty Card for Homophobia from EU Non-Discrimination Law”, *Columbia Journal of European Law* 21, no. 2. 2015: 381.

28 Kochenov, and Agarin, 12. Enhanced protection of cross-border rainbow families and the availability of legal gender recognition are spelled out as the main objectives of the EU LGBTIQ Equality Strategy 2020–2025, *supra* n. 8.

29 OJ L 158, 30.4.2004, 77–123.

30 *Coman*, case C- 673/16, Judgement of 5 June 2018, ECLI:EU:C:2018:385, at 35.

31 *Coman*, at 36.

spect unveils a more complex picture. The implementation of the EU equality directives into the national legal order (typically through adopting national legislation, regulations and administrative provisions) is only the first step. Member States may enjoy a certain margin of manoeuvre regarding such implementation as long as the objectives of the specific directive are met. Nevertheless, implementation in the sense of the realisation of sexual minorities' rights by Member States requires the commitment of public authorities at state and local government levels. The recent experience of declining rule of law standards in Central and Eastern Europe has shown that the Union is to a large extent powerless in the face of a defiant Member State refusing to take the values of Article 2 TEU seriously.<sup>32</sup> Although discussing this issue is beyond the scope of this paper, it raises two questions which are pertinent for the development of the argument. The first is of a general nature and asks: What instruments (if any) does the EU have at its disposal to intervene in cases involving infringements of minority rights by a Member State public authority action or inaction? Are these instruments adequate in terms of the type and depth of intervention? The second relates to the unavoidable interaction between national and EU judiciaries when EU minority rights are at stake in cases pending before national courts. There the major concern is: Does the EU judicial mechanism of minority protection still function when a national jurisdiction is affected by court capture? We will attempt to address both questions, albeit with varying degrees of success.

### **Infringements of Sexual Minority Rights in Hungary and Poland**

In July 2021 the European Commission<sup>33</sup> initiated treaty infringement procedures (Art. 258 TFEU) against Hungary and Poland in connection with measures adopted in both countries which target the equality principle and funda-

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32 Jan-Werner Müller, "Should the European Union Protect Democracy and the Rule of Law in Its Member States", *European Law Journal* 21, iss. 2. 2015: 141.

33 Hereinafter: EC.

mental rights of LGBTIQ people. The EC emphasized that equality and the respect for dignity and human rights constitute core values of the EU enshrined in Art. 2 TEU and that it “will use all the instruments at its disposal to defend these values.”<sup>34</sup> In relation to Hungary the procedure concerns two presumed instances of infringement. The first concerns a law published in June 2021 which, under the pretext of protecting minors, prohibits or limits access to content that depicts or promotes the so-called “divergence from self-identity corresponding to sex at birth, sex change or homosexuality” for individuals under 18. The second instance relates to a disclaimer imposed by the Hungarian Consumer Protection Authority on a children’s book with LGBTIQ content that the book depicts forms of “behaviour deviating from traditional gender roles.” Regarding Poland, the infringement procedure is linked to the infamous local government resolutions on “LGBT-ideology free zones” and the failure by Polish authorities to respond to the EC’s concerns regarding the nature and impact of such resolutions.<sup>35</sup>

In recent years in both countries concerted repressive policy measures have detrimentally affected the rights of the LGBTIQ community. In Hungary these included eliminating the Hungarian Equal Treatment Authority (the most successful body addressing LGBTIQ discrimination claims),<sup>36</sup> a ban on legal gender recognition (the amended act on registry procedures provides for the inalterability of the ‘sex at birth’), and restrictions on becoming an adoptive parent as a single person, in particular for those living with their same-sex partner.<sup>37</sup>

34 Press Release, 15 July 2021, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3668](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668)>.

35 Press Release, 15 July 2021.

36 The competences of the Authority have been allocated to the Hungarian Commissioner for Fundamental Rights. The shift of competences to the Commissioner was officially justified with the need to provide a more efficient institutional structure to create a procedure that could address discrimination claims in a more comprehensive manner. While this move would not be controversial as such in a well-functioning democracy, in Hungary the Ombudsman is no longer considered as an independent actor, see Eszter Polgári, and Tamás Dombos, *A New Chapter in the Hungarian Government’s Crusade Against LGBTIQI People*. Verfassungsblog, 18.11.2020. <<https://verfassungsblog.de/a-new-chapter-in-the-hungarian-governments-crusade-against-lgbtqi-people/>>.

37 Refusing the authorization of adoption for single individuals solely on grounds of their sexual orientation is a violation of Article 14 in conjunction with Article 8 of the European Conven-

Moreover, the ruling party bans the access of LGBTIQ sensitising programs from schools, thereby entrenching an educational embargo on sexual and gender minorities in the Fundamental Law of Hungary. Under its Ninth Amendment, “Hungary protects children’s right to their identity in line with their birth sex, and their right to education according to our country’s constitutional identity and system of values based on Christian culture.” As rightly argued by Polgári and Dombos (2020), a proclamation by the public authority of its preference as to the content of school instruction is at odds with the states’ duty of neutrality with regard to religious and philosophical convictions.<sup>38</sup> Most recently, the Hungarian parliament has passed the aforementioned legislation that bans images or content depicting or ‘promoting’ homosexuality or trans-identity from the public space. Legal scholarship rightly describes the objective of such measures as clearly discriminating against and stigmatising the LGBTIQ population.<sup>39</sup>

Regarding the developments in Poland, by the end of 2019, more than 80 local governments in Poland had passed resolutions declaring themselves “LGBT-free zones” or “Free from LGBT-ideology.” In 2020, this number increased to 94, which amounted to one third of the territory of the Republic of Poland.<sup>40</sup> This development was linked to verbal oppression that LGBT persons had been subjected to in public debate,<sup>41</sup> as well as civil and penal lawsuits<sup>42</sup>

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tion on Human Rights (ECHR). See e.g. Grand Chamber of the ECtHR in *E.B. v. France*.

38 Polgári, and Dombos, 32. On the State’s duty to remain neutral and impartial, see e.g. ECtHR, case *Barankevich v. Russia*, par. 30.

39 Sébastien Van Drooghenbroeck, Cecilia Rizcallah, Emmanuelle Bribosia, Olivier de Schutter, Isabelle Rorive, Jogchum Vrieling, Stéphanie Wattier, et al., *Attack on the Rights of LGBTQIA+ People in Hungary: Not Just Words, but Deeds as Well?: An Open Letter*. Verfassungsblog, 25.06.2021. <<https://verfassungsblog.de/attack-on-the-rights-of-lgbtqia-people-in-hungary-not-just-words-but-deeds-as-well/>>.

40 ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*. Brussels, 2021.

41 The Commissioner for Human Rights, *The legal situation of non-heterosexual and transgender persons in Poland. International standards for the protection of LGBT persons’ human rights and compliance therewith from the perspective of the Commissioner for Human Rights. Report Synthesis*. Warsaw, 2019, 5.

42 According to Art. 196 of the Polish penal code, offending the religious feelings of others is a crime and carries a maximum prison sentence of two years. Maintaining Art. 196 (commonly known as the “blasphemy law”) in the Polish penal code remains prob-

whereby the situation of sexual minorities in Poland radically deteriorated.<sup>43</sup> Gender and LGBTIQ movements were described by the highest state officials and the Catholic Church representatives as ideologies comparable to communism and National Socialism which threaten national traditions, the majority religion, and the traditional family model.<sup>44</sup> The hate speech directed at the LGBTIQ community was eagerly disseminated by the public media subordinated to political power and radical organizations whose statutory goal was to counteract abortion. This narrative contributed to the radicalization of views within the society. It also gave a sense of the state apparatus consenting to aggressive actions against non-heterosexual people. This was reflected, amongst other things, by the increasingly aggressive activity of nationalist circles, including physical attacks by nationalists on participants of the Białystok equality parade in July 2019 (where, with the passivity of the police, over a dozen people were severely beaten)<sup>45</sup> and in Łódź in June 2021. The aggressive narrative was subsequently transposed to the local government level where the resolutions on 'LGBTIQ ideology-free zones' were drivers of hostile attitudes towards LGBTIQ people in many local communities.

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lematic in the light of international and European human rights law, notably the freedom of expression. One of the recent cases concerns penal proceedings against an activist who placed posters and badges in the streets of Płock bearing the image of the Virgin Mary with her halo painted in the colours of the rainbow flag. For discussion, see Dominika Bychawska-Siniarska, *Offence Intended – Virgin Mary With a Rainbow Halo as Freedom of Expression*. Verfassungsblog, 14.05.2019. <<https://verfassungsblog.de/offence-intended-virgin-mary-with-a-rainbow-halo-as-freedom-of-expression/>>.

43 The Commissioner for Human Rights, 5, refers to a survey conducted by the Public Opinion Research Center (CBOS) in 2019, according to which public acceptance of non-heteronormative persons decreased compared to 2017, although previously it had been growing for a number of years.

44 Cf. Anna Śledzińska-Simon, "Populists, gender, and national identity", *International Journal of Constitutional Law* 18, iss. 2. 2020: 449.

45 Jan Skórzyński, *Atak na Marsz Równości w Białymstoku. Kronika Skórzyńskiego (20–26 lipca 2019)*. OKO.press, 27.07.2019. <<https://oko.press/atak-na-marsz-rownosci-w-bialymstoku-kronika-skorzynskiego-20-26-lipca-2019/>>.

### **Ideological Discourse on Gender and LGBTIQ: A Socio-Political Perspective**

The labelling of LGBTIQ as an *ideology* had an inflammatory effect and has been spreading in online and offline communication, the same phenomenon being observable for the ongoing campaign against the so-called “gender *ideology*.”<sup>46</sup> The reference to “LGBTIQ *ideology*” by representatives of state and local government authorities was arguably a targeted tactic to discredit and stigmatise members of the LGBTIQ community. In political discourse the notion of ideology is mostly used with negative connotations that are particularly strong in societies which were tormented by totalitarian regimes. In countries of the post-communist bloc, the very reference to *ideology* in political and public discourse awakens distrust, while describing something as *ideology* or *ideological* typically stigmatizes.

Ideology is, however, a highly flexible conceptual tool encompassing attributes which tend to be contradictory. The social sciences, for instance, operate with value-free definitions of the notion of ideology. A definitional analysis of the concept reveals that the *coherence* (or *consistency*) of views on political or other matters is semantically most prevalent and thus also a core attribute of *ideology*.<sup>47</sup> Therefore, to say that ideological pluralism is the distinct characteristic of open-minded, liberal societies should raise no controversies. Surprisingly, though, while the need for ideological pluralism seems undisputed

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46 COM(2020) 698 final, 13.

47 John Gerring, “Ideology: A definitional Analysis”, *Political Research Quarterly* 50, no. 4. 1997: 960, 984. The definitions of ideology referred to by the author as most influential are that of Martin Seliger, *Ideology and Politics*. London, 1976: George Allen and Unwin, at 11: “Sets of ideas by which men posit, explain and justify ends and means of organized social action, and specifically political action, irrespective of whether such action aims to preserve, amend, uproot or rebuild a given social order;” and of Malcolm Hamilton, “The Elements of the Concept of Ideology”, *Political Studies* 35, 1987: 39: “A system of collectively held normative and reputedly factual ideas and beliefs and attitudes advocating a particular pattern of social relationships and arrangements, and/or aimed at justifying a particular pattern of conduct, which its proponents seek to promote, realize, pursue or maintain.”

in the context of transnational and global legal orders,<sup>48</sup> the rationale for its existence in the state context is by and large underestimated. Part of the problem is the enduring dogma of the homogeneity of the *demos*. It does not mean that a minimum convergence of legal culture is not requisite for a well-functioning constitutional order.<sup>49</sup> Still, claims that self-affirm as the only valid interpretation of constitutional tradition and values, without connecting to the pluralism of society, are ideological in the negative sense and therefore damaging to inclusive democratic discourse and culture.<sup>50</sup> The latter imply a society embracing a plurality of world views and not infrequently competing conceptions of what may constitute the *common good*. From this perspective, neither the wording of a constitution nor its interpretation should serve only the interests of the dominant group within its constituent society.<sup>51</sup> On the contrary, a constitution must contain mechanisms to effectively safeguard the interests of minorities and vulnerable or marginalised groups. As aptly put by Max Steinbeis, “Majoritising minorities is not authoritarian, it’s the opposite: It is a service to the diversity of opinion, a basic condition for the political spectrum from left to right to fan out in all its pluralistic beauty.”<sup>52</sup>

Not surprisingly, the dismantling of ideological pluralism constitutes one of the manifestations of a broader tendency of democratic backsliding.<sup>53</sup> It pairs with a growing gap between the constitutional text and constitutional reality, notably in terms of rule of law and protection of minority rights.<sup>54</sup> The observ-

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48 Michel Rosenfeld, “Rethinking constitutional ordering in an era of legal and ideological pluralism”, *International Journal of Constitutional Law* 6, no. 3–4. 2008.

49 Cf. Rosenfeld, 453.

50 Arguably, such ideological manipulation is a deeply rooted syndrome of the statist context. Neil Walker, “The Idea of Constitutional Pluralism”, *The Modern Law Review* 65, no. 3. 2002.

51 Walker.

52 Maximilian Steinbeis, *Majority*. Verfassungsblog, 19.11.2021. <<https://verfassungsblog.de/majority/>>.

53 Cf. in that sense e.g. Śledzińska-Simon, 40, 448; Ben Stanley, “The thin ideology of populism”, *Journal of Political Ideologies* 13, iss. 1. 2008: 95–110.

54 For a methodological approach to analyse such a divergence, see Stefan Voigt, “Mind the gap: Analyzing the divergence between constitutional text and constitutional reality”, *International Journal of Constitutional Law* 19, iss. 5. 2021: 2.

able deterioration of sexual minority protection in some Central and Eastern European states should be placed in exactly this setting. Gender and LGBTIQ not only stand in contradiction to the traditionally conditioned roles for men and women in society, but also uphold inherently non-conforming attitudes which are both inconvenient and unwelcome in the political and societal architecture authoritatively acclaimed and propagated by populist right-wing governments.

### **The Enforcement of Non-Discrimination Law by the EU**

Since possible infringements of EU law by Member States' action or inaction may not be excluded, the central question is how the Union can enforce the respect of its principles and rules. The EU disposes of various instruments which may be applied according to the type of infringement, its scale and gravity. These include soft measures such as political dialogue and (peer) pressure, conditionality mechanisms linked to the suspension of funding, regular judicial mechanisms within the preliminary ruling procedure and, *ultima ratio*, the treaty infringement procedure under Art. 258 TFEU. Consequently, the EU has no competence to directly intervene in cases of violations of human rights by Member States as long as these do not infringe on concrete EU provisions e.g. protecting sexual minorities' rights.

This becomes apparent in the light of the legal grounds specified by the Commission regarding the on-going infringement procedure against Hungary. The EC considered that the aforementioned law banning access to LGBTIQ content by children violates the EU rules on, inter alia, i) the Audiovisual Media Services Directive<sup>55</sup> with respect to standards for audio-visual content and the free provision of cross-border audiovisual media services; and ii) the Direc-

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<sup>55</sup> 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. OJ L 95, 15.4.2010, 1–24.

tive on electronic commerce<sup>56</sup> by restricting cross-border information society services. Thus, the EC deems Hungary to have infringed Treaty principles of the free movement of services (Art. 56 TFEU) and the free movement of goods (Art. 34 TFEU) by prohibiting the provision of goods or services displaying content showing different sexual orientations to minors. Since the Hungarian authorities have failed to explain in what way the exposure of children to such content could be detrimental to their well-being, the EC considers that the restrictions introduced by the law are unjustified, disproportionate and discriminatory. The same conclusions have been reached regarding the disclaimer on children books with LGBTIQ content. Particularly noteworthy is the statement in the press release of 15 July 2021, which clearly spells out the limits to the EU action due to the restricted field of application of the EU Charter of Fundamental Rights and the EU's deficient competences in the area of human rights, namely:

“the Commission believes that in these fields falling into the area of application of EU law, the Hungarian provisions also violate human dignity, freedom of expression and information, the right to respect of private life as well as the right to non-discrimination as enshrined respectively in Articles 1, 7, 11 and 21 of the EU Charter of Fundamental Rights. Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU.”<sup>57</sup>

Against this backdrop, the question arises of whether the instruments the Union has at its disposal to enforce the respect of its principles and rules are

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56 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. OJ L 178, 17.7.2000, 1–16.

57 Press Release, 15 July 2021, *supra* n. 36. On the EU's approach to minority protection resulting from Member States' reluctance to confer explicit competences to the EU in that area, see e.g. Bruno de Witte, “The Constitutional Resources for an EU Minority Protection Policy” in: *Minority Protection and the Enlarged European Union*, ed. Gabriel N. Toggenburg. Budapest, 2004, 123.

adequate in terms of type and depth of intervention. In simplified terms, the adequacy of enforcement instruments may be assessed on the basis of whether or not they bring about the desired effects.

In that regard, even the ultimate instrument of the Treaty infringement procedure in its initial phase has the form of a dialogue between a potentially defector state and the EC. It begins with a letter of formal notice from the Commission specifying the grounds for the presumption of the alleged infringement. Depending on the Member State's response (observations), the EC may submit a reasoned opinion on the matter. Should the State concerned fail to comply within that opinion, the EC may refer the matter to the CJEU (Art. 258 TFEU).

On 15 July 2022, the Commission decided to bring the case of the Hungarian law before the CJEU. The EC considers that Hungary has not provided a sufficient response to its concerns "in terms of equality and the protection of fundamental rights,"<sup>58</sup> a reasoned opinion to that effect having been delivered to Hungary in December 2021.

The enforcement of EU non-discrimination rules with regard to Poland has not reached this stage yet. This is due to a different form of infringement of EU rules (local government resolutions) and thus also the possibility to apply other available instruments to induce corrective measures on the part of national authorities. On 27 May 2020 the Commission addressed a letter to five local government authorities which represent the regions of Lublin, Łódź, Małopolskie, the Podkarpackie and Świętokrzyskie and were among the Polish local communities declared as "zones free from LGBT ideology." The EC called on the local authorities to ensure compliance with EU law and to ensure non-discriminatory access to activities financed by cohesion policy (all five regions had run programs supported by the EU's Structural and Investment Funds). It also demanded clarification on the matter and information as to measures to be un-

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<sup>58</sup> Agence Europe, Bulletin of 16 July 2022.

dertaken to promote equality and non-discrimination.<sup>59</sup> Since political pressure turned out to be insufficient, the EU suspended financial transfers to the local governments which adopted the infamous resolutions. The financial sanction proved to be effective and some local governments have already repealed the resolutions in question. It is noteworthy that the EC had no other option than taking action with regard to discriminatory local governments' resolutions. Otherwise, the EU cohesion policy and the financial benefits linked to it could have been abused by Polish local authorities to enhance discriminatory policies, thus creating a precedent of the Commission itself being inadvertently in breach of EU law, be it through its action (providing financing to potentially unlawful activity) or inaction (by turning a blind eye to breaches of EU law by local authorities).

Enforcement through the EU judicial mechanism unveils a yet more complex picture. Minority protection within that mechanism rests on the interaction between a national court and the CJEU, including the national court's power (or, as the case may be, obligation) to activate the CJEU in the preliminary ruling procedure.<sup>60</sup> The question arises as to whether such a judicial mechanism still functions when a national jurisdiction is affected by court capture, as it "calls into question the decision-making ability, the neutrality, and the legitimacy of courts."<sup>61</sup> The case of Polish local governments' resolutions is only a single instance for such a "functionality test" and thus provides only limited insight. Nonetheless, the fact that judicial procedures targeting the said resolution have been launched and their relative success allows for some op-

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59 Agence Europe, Bulletin of 5 June 2020. It should be noted that under the EU equality directives an instruction to discriminate against persons on the grounds covered by those directives is deemed to be discrimination within the meaning of those directives (see e.g. Art. 2 para 4 of the Employment Equality Directive (2000/78/EC)).

60 Under Art. 267 TFEU, the national court may refer the matter to the CJEU if it deems the interpretation of EU law is necessary for it to pronounce judgment in a case pending before it. However, when the case is pending before a national court against whose decision there is no remedy under national law (last instance decision), that court is obliged to bring the matter before the CJEU.

61 Jonas Anderson, "Court Capture", *Boston College Law Review* 59, iss. 5. 2018, 1593.

timism. Nine anti-LGBT resolutions have been challenged by the Ombudsman before Polish administrative courts. Some courts initially questioned their own jurisdiction over the matter, claiming that resolutions of this kind are not enactments of local law. Such decisions were quashed by the Polish Supreme Administrative Court (NSA) which returned these claims for re-consideration to the respective lower administrative courts, thus confirming that all the resolutions of the local government authority must be subject to judicial review.

The Ombudsman challenged the local government resolutions on grounds such as the following:

- violation of the principle of legality (Art. 7 of the Constitution of the Republic of Poland<sup>62</sup>);
- violation of Art. 32 para 1&2 ConRP by discriminating on grounds of sexual orientation and sexual identity through the exclusion of LGBT people from the community of their respective municipalities;
- violation of Art. 31 para 3 ConRP by limiting constitutional freedoms, whereas such limitation may be imposed only by statute;
- violation of the provisions of the ConRP and ECHR by infringing on the human dignity of LGBT people, their right to private life according to their sexual orientation and identity and free expression of such features;
- unlawful restriction of parents' rights to educate their children in accordance with their own convictions (Art. 48 ConRP) through interference in the activities of educational institutions and imposing values representing only one worldview;
- violation of EU law with respect to the freedom of movement within the territory of Member States (discouraging aspect of the resolutions), the right to private and family life, freedom of expression, and the prohibition on discriminating on the basis of sexual orientation.<sup>63</sup>

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<sup>62</sup> Hereinafter: ConRP.

<sup>63</sup> See e.g. Complaint of the Commissioner for Human Rights against Resolution No. VII.67.2019 of the Tarnów Powiat Council of 30 April 2019 concerning the adoption of the Resolution on stopping the “LGBT” ideology by the local government community,

All the seized administrative courts have declared the discriminatory resolutions invalid. The argument that the resolutions in question would not infringe on individual rights as they refer to LGBT *ideology*, not people, was rejected. The courts held that, by adopting the resolutions in question, local authorities acted without a legal basis and exceeded their competence by establishing rules on i) defining the school curricula and ii) who can enter schools within their territory (notably by banning psychological support for LGBT pupils/students, banning educational and sensitizing programs conducted by NGOs, providing instructions to exclude non-heteronormative teachers from employment). Moreover, the courts held that the resolutions discriminated against individuals whose sexual orientation was other than heteronormative and excluded them from the community of their respective municipalities. The courts also ruled that, in breach of Art. 47 ConRP and Art. 8 of the ECHR, the challenged resolutions constitute an unauthorized interference with the freedoms and rights of non-heteronormative persons by violating their dignity and the right to personal and family life in accordance with their sexual orientation and identity.<sup>64</sup> A noteworthy stance was also expressed by the administrative court in Warsaw regarding minorities. The court recollected that each minority requires special care on the part of public authorities. In the opinion of the Court, the position of minorities in a given community and the attitude of public authorities to them is “a measure of the maturity” of that community,<sup>65</sup>

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XI.505.1.2020.MA; Complaint of the Commissioner for Human Rights against Resolution No. X/40/2019 of the Ryki Poviát Council of 30 April 2019, XI.505.2.2020.MA.

<sup>64</sup> See i.a. Judgement of WSA in Kielce, II SA/Ke 382/20; Judgement of WSA in Kraków, III SA/Kr 975/21; Judgement of WSA in Warsaw, VIII SA/Wa 42/20. The courts agreed with the argumentation presented by the Ombudsman that, in accordance with the established case law of the ECtHR, sexual orientation, sexual life and gender identity are essential elements of private life. In some cases, the ECtHR found a violation of the rights of an individual even if a concrete law was not applied to him or her. Unlawful interference in private life by such law was established based on the effect of fear and anxiety it had induced in the applicant (e.g. case *Dudgeon v. United Kingdom*), which made it impossible for him or her to live freely in accordance with his or her identity. See Complaint of the Commissioner for Human Rights against Resolution No. VII.67.2019 of the Tarnów Poviát Council para 59.

<sup>65</sup> Judgement of WSA in Warsaw, VIII SA/Wa 42/20.

be it as a democracy<sup>66</sup> or a community embodying the idea of humanism, for which aspect the court preferred to leave an understatement.

None of the administrative courts resorted to the preliminary ruling procedure. The courts considered that the CJEU's answer is not indispensable for deciding these cases given the multiple legal grounds under national law to declare the resolutions invalid. While in general the administrative courts rose to the challenge of protecting sexual minorities, the decisions in question are not yet final since the captured public prosecutors' offices have appealed at the court of higher instance.

It is likely that the issue of discriminatory local governments' resolutions will eventually be resolved in the course of the national judicial procedures. The Commission could then discontinue the aforementioned treaty infringement procedure against Poland. However, the existing concerns would not be completely eliminated, given that some local governments have adopted so-called *Charters of family rights*, which in essence are anti-LGBT resolutions, albeit under the veil of protecting the constitutionally entrenched traditional family model.<sup>67</sup>

The question of a possible court capture in a Member State and its detrimental effects on the EU judicial mechanisms, including in cases of minority protection, remains unresolved. For the mechanism to function properly, it must be based on the sincere cooperation of national courts and the CJEU, requiring respect for the principle of primacy of application of EU law and of the obligation of courts of last instance to refer unsettled matters of interpretation

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66 For the concept of ECHR rights as counter-majoritarian rights, see ECtHR, case *Barankevich v. Russia*, par. 30: "Referring to the hallmarks of a "democratic society," the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 90, 17 February 2004). (...) What is at stake here is the preservation of pluralism and the proper functioning of democracy, and the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."

67 See e.g. <[http://powiatdebicki.esesja.pl/zalaczniki/58704/xi1012019\\_548147.pdf](http://powiatdebicki.esesja.pl/zalaczniki/58704/xi1012019_548147.pdf)>.

of EU law to the CJEU under the preliminary ruling procedure. This can hardly be expected where individual judges are harassed and suspended for applying EU law or asking preliminary questions to the CJEU.<sup>68</sup> Following the launch of an infringement procedure in December 2021, the Commission transmitted on 15 July 2022 a reasoned opinion to Poland concerning the Polish Constitutional Tribunal which, in its judgments of 14 July 2021 and 7 October 2021, had held the provisions of the EU Treaties incompatible with the Polish Constitution. The Commission considers that the Polish Constitutional Tribunal has violated the general principles of autonomy, primacy, efficiency, uniform application of Union law and the binding effect of judgments of the CJEU and that the Tribunal no longer meets the requirements of an independent and impartial court.<sup>69</sup>

## Conclusions

This paper takes stock of the EU non-discrimination law with respect to sexual minorities as well as enforcement mechanisms applied by the EU to safeguard its enforcement in Member States, based on the examples of Hungary and Poland.

As has been shown, the protection of sexual minorities in the EU is partly safeguarded under the umbrella of Internal Market freedoms. This is helpful in individual cases, but does not fill the regulatory gap related to the limited material scope of existing EU anti-discrimination rules. Adopting the horizontal Equal Treatment Directive would be essential to extend protection of sexual minorities beyond the context of employment. From a legal standpoint, notably the principle of equality, different levels of protection provided to minority groups under EU law may not reasonably be justified. Potentially the protection of sexual minorities could additionally be enhanced by the introduction of EU-wide human rights due diligence obligations for business (the respec-

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<sup>68</sup> See <<https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/>>.

<sup>69</sup> Agence Europe, Bulletin of 16 July 2022.

tive legislative proposal has been put forth by the Commission in February 2022).<sup>70</sup> Corporate actors (including platform companies<sup>71</sup> operating biased algorithms) could be held liable for instances of discrimination they have the duty to prevent within their own structures, their subsidiaries and their supply chains.<sup>72</sup>

The existing judicial mechanism of the enforcement of EU law in Member States has two major systematic weaknesses. Where a national court of last instance disregards the obligation to refer a matter to the CJEU, there is no effective remedy. In order to better safeguard proper enforcement of individual rights flowing from EU law, the Treaty provisions concerning the preliminary ruling procedure could be supplemented by a provision enabling individuals to exceptionally refer a question directly to the CJEU, when their request to refer that question to the CJEU was unlawfully declined by a national court deciding in the last instance, thus obliging the latter court to stay its procedures until the CJEU has ruled on that question. Another systemic challenge is posed by the case law of several national constitutional courts<sup>73</sup> creating ambiguity on the primacy of application of EU law. Since primacy results from the doctrine elaborated by the CJEU,<sup>74</sup> a possible way to strengthen its effect would be to enshrine it in the EU Treaties, as was already proposed in Article 10 of the 2003 Convention Draft

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70 Proposal for a Directive of the European Parliament (EP) and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

71 On 9 December 2021 the EU Commission proposed a Directive on improving working conditions in platform work, COM(2021) 762 final.

72 Silvia Borelli, “EU anti-discrimination law and the duty of care: fellows in the regulation of MNEs’ business relationships”, *Revue de droit comparé du travail et de la sécurité sociale*, no. 4. 2018: 40. The condition for such liability under the current corporate liability regime would be that the company knew or should have known about the instances of discrimination if it had exercised its duty of care properly. See Izabela Jędrzejowska-Schiffauer, “Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?”, *European Law Review* 46, no. 4. 2021.

73 Cf. the influential judgment of the German Federal Constitutional Court of 5 May 2020, 2 BvR 859/15.

74 See declaration 17 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. OJ 2016, C 202, 335.

Treaty Establishing a Constitution for Europe.<sup>75</sup> In the same vein, a treaty change would be necessary to introduce the aforementioned institution of rights-holders' referral for a preliminary ruling. Leaving aside the prospects of such treaty changes to be endorsed and ratified by all 27 Member States, the proper enforcement of EU non-discrimination rules in Member States requires *prima facie* the independence and impartiality of the national judiciary.

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<sup>75</sup> OJ 2003, C 169, 10.

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