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The Trojan Horse of Free Movement Law

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On 25 November 2025, the EU Court of Justice (CJEU) confirmed in [Trojan](#) that Member States are obliged to recognise the marriage between two same-sex EU citizens lawfully concluded in another Member State in the exercise of their freedom of movement, even if their national legislation does not itself allow such marriage. While this outcome was largely foreseeable given the Court's recent case law and the [Opinion](#) of Advocate General Richard de la Tour pointing to the same direction, the CJEU's reliance on Article 21(1) of the EU Charter of Fundamental Rights on the prohibition of discrimination on grounds of sexual orientation is striking. For the first time in a case involving mobile EU citizens of the LGBTIQ+ community, the Court based its judgment not only on the TFEU's free movement provisions but also on the Charter's right to non-discrimination, introducing a new, potentially transformative approach to equality in EU law.

Background to the dispute and previous case law

The dispute in *Trojan*, referred to the CJEU for a preliminary ruling by the Supreme Administrative Court of Poland, concerned the request of two male spouses of Polish nationality to have their marriage certificate that was issued in Germany transcribed into the Polish civil register in order to have their status as married persons recognised in Poland. However, that request was refused by the competent authorities on the grounds that Polish law does not provide for marriage between persons of the same sex and, accordingly, does not permit the recognition of a same-sex marriage legally established in another Member State nor the transcription for that purpose of the relevant marriage certificate in the national civil register. The question thus arose as to the compatibility of that national legislation with the right conferred on every EU citizen under EU law to move and reside freely within the territory of the Member States.

The CJEU had already had the chance to deal with similar issues relating to the recognition of the civil status of LGBTIQ+ persons established in another Member State, in accordance with the law of that State, in previous instances. More specifically, in [Coman](#), the Court ruled that the Member State of origin of an EU citizen is required to grant a derived right of residence to a third-country national of the same sex married to that citizen in the host Member State. Similarly, as per the Court's judgment in [Pancharevo](#), Member States are also obliged to recognise the birth certificate of a child drawn up abroad which designates as that child's parents two persons of the same sex. Lastly, the Court found in [Mirin](#) that the Member State of origin of a transgender person must recognise and register a change of first name and legal gender that has been lawfully carried out in the host Member State during that person's exercise of their freedom of movement. It is therefore against the

background of these “rainbow cases” that the CJEU’s ruling in *Trojan* may be better understood.

Combining Articles 20 and 21(1) TFEU with Article 21(1) of the Charter

In its preliminary question in *Trojan*, the Polish court had expressly asked the CJEU to review the national legislation in question by reference to Articles 20 and 21(1) TFEU read in conjunction with Articles 7 and 21(1) of the Charter (see para. 36). While the Advocate General advised the Court not to analyse the discrimination dimension (see para. 24 and footnote 19 of his Opinion), the Grand Chamber decided to examine the Polish law at issue in light of both the right to private life and that to non-discrimination based on sexual orientation (see para. 63 of the judgment). Interestingly enough, although the Court referred at this point to its judgments in *Coman*, *Pancharevo*, and *Mirin* as the relevant precedents, the prohibition of discrimination is nowhere mentioned in the Court’s reasoning in these cases. Instead, although the CJEU had been asked by the respective referring courts to provide its interpretation of the EU free movement rules combined with Articles 7 and 21(1) of the Charter (see *Coman*, para. 17; *Mirin*, para. 35), it eventually relied solely on the right to private life (see, however, Advocate General Wathelet’s suggestion in his [Opinion](#) in *Coman*, para. 98).

The approach adopted by the CJEU in *Trojan* vis-à-vis Article 21(1) of the Charter thus marks a departure from its previous case law. This is particularly so, considering that the Court deployed the fundamental rights to non-discrimination and to private life in a complementary manner, prescribing a distinct role for each one when it comes to ensuring the recognition of marriage between EU citizens of the same sex under EU free movement law: whereas Article 7 of the Charter requires that such marriages be recognised across the EU through the existence of appropriate procedures (see paras. 67-69), Article 21(1) guarantees that such procedures are not discriminatory on grounds of sexual orientation (see para. 70).

The existence of (direct) discrimination

The Court found that, where a Member State provides in its national law for a single procedure for recognising marriages entered into by EU citizens in the exercise of their freedom movement in another Member State – such as the transcription of the marriage certificate in the civil register – that procedure must apply equally to same-sex and opposite-sex marriages (see para. 75). Accordingly, in situations like those arising under the Polish legislation at issue in *Trojan*, the lack of a recognition procedure for same-sex couples equivalent to the one granted to heterosexual couples amounts to prohibited discrimination on grounds of sexual orientation under Article 21(1) of the Charter.

Albeit not specified in the Court’s reasoning, this constitutes an instance of direct discrimination. Direct discrimination occurs where a person or a group is treated less favourably than another person or group in a comparable situation because of

a characteristic protected under non-discrimination law. The CJEU has established that a Member State's rules limiting certain benefits to married individuals, when marriage is legally possible in that State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual persons (see [Maruko](#), para. 73; [Römer](#), para. 52; and [Hay](#), paras. 41, 44). In such circumstances, homosexual persons are completely excluded because they cannot meet the condition required for obtaining the benefit claimed (see in detail [Tobler](#), pp. 83-86, 88).

In a similar vein, the Court pointed out in *Trojan* that, unlike heterosexual couples who are entitled under Polish law to have their marriage certificate transcribed in the Polish civil register where the marriage was concluded in another Member State, same-sex couples cannot meet the national requirements for such transcription on account of their sexual orientation (see para. 74). However, the Court did not link this finding to its earlier case law.

The discovery of a new general principle

In a surprising turn, the CJEU declared the prohibition of any discrimination on grounds of sexual orientation, guaranteed in Article 21(1) of the Charter, to be a general principle of EU law (see para. 70). It is well known that, following the Court's seminal rulings in [Mangold](#) and [Kücükdeveci](#), the general principle of non-discrimination under Article 21(1) of the Charter has so far been expressly recognised only for the grounds of age (see e.g. [Association de médiation sociale](#), para. 47; [Dansk Industry](#), para. 22) and religion (see [Egenberger](#), para. 76; [IR](#), para. 69; and [Cresco Investigation](#), para. 76). This inference of a specific prohibition of discrimination from the general principle of equal treatment has been severely criticized. In his [Opinion](#) in *Palacios de la Villa*, Advocate General Mazák argued – or predicted – that if the Court's reasoning in *Mangold* were closely followed, then “all specific prohibitions of the types of discrimination referred to in Article 1 of Directive 2000/78 would have to be regarded as general principles” (see paras. 87-96).

Although the existence of a principle of non-discrimination on grounds of sexual orientation was already implied by the CJEU in *Römer* (see para. 60) and by Advocate General Ruiz-Jarabo Colomer in his [Opinion](#) in *Maruko* (see para. 78 and footnote 82), its explicit recognition in *Trojan* is truly unprecedented. This is particularly striking given that the level of protection granted to sexual orientation as a prohibited ground of discrimination significantly differs among Member States' legislation (see eg ILGA Europe's [RainbowMap](#)). It follows *a fortiori* that a general prohibition of discrimination on this ground could hardly be inferred from the constitutional traditions common to the Member States, as is usually the case for general principles of EU law. Yet this did not prevent Advocate General #apeta from finding in her [Opinion](#) in *Commission v. Malta* that the prohibition of discrimination based on sexual orientation forms part of the shared EU values, being “firmly rooted in the EU constitutional framework” (see paras. 261-263, 268). A similar rationale may well explain the Court's approach in *Trojan*, even though the CJEU remained entirely silent on the principle's exact origins.

The combined reading of Articles 20 and 21(1) TFEU with Article 21(1) of the Charter enables the right to non-discrimination to unfold its full potential beyond the limited reach of Directive 2000/78, which prohibits discrimination on grounds of sexual orientation only in the area of employment. By finding that national legislation which fails to recognise a marriage between EU citizens of the same sex restricts those citizens' freedom of movement, the Court brought the dispute under the scope of the Charter as per Article 51(1) thereof, triggering the application of Article 21(1). In doing so, the CJEU thus paved the way for the prohibition of discrimination based on sexual orientation to enter the vast field of EU free movement law, using Articles 20 and 21(1) TFEU as a "Trojan horse".

Incorporating Article 21(1) of the Charter in its reasoning also allowed the Court to specifically target the discriminatory effects that Member States' legislation may have on mobile EU same-sex couples in many aspects of their daily life – administrative, professional and private (see *Trojan*, paras. 51, 53, 73). Had the Court adjudicated on the case at hand solely through the lens of free movement law, it would have failed to properly condemn the social "stigma" embedded in the disadvantageous treatment suffered by homosexual couples with regard to the recognition of their marital status (for the "anti-stigma" theory of non-discrimination law see [Solanke](#)). Since such stigmatisation contravenes the very nature of the principle of equality and undermines the purpose of the rules prohibiting discrimination (see Opinion of Advocate General #apeta in *Commission v. Malta*, para. 81), the approach followed by the Court's Grand Chamber in *Trojan* has a strong signalling function.

Furthermore, in accordance with what is now settled case law, the newly discovered principle of non-discrimination on grounds of sexual orientation and/or Article 21(1) of the Charter are mandatory and sufficient in themselves to confer enforceable rights on individuals, without needing to be specified by other provisions of EU or national law (see paras. 70, 76; see also e.g. *Egenberger*, paras. 76-77; *Cresco Investigation*, paras. 76-77). Until now, such direct effect had been recognised only in situations falling under the scope of Directive 2000/78 relating to employment and in order to safeguard individuals' rights in the absence of the Directive's horizontal direct effect (see e.g. *Cresco Investigation*, paras. 72 et seq). In *Trojan*, however, the Court extended these findings to the much broader free movement context.

Finally, as confirmed in *Egenberger* and *Cresco Investigation*, the principle of non-discrimination and/or Article 21(1) of the Charter may be invoked by individuals even in private disputes in a field covered by EU law, including where discrimination arises from contracts. While the prohibition of discrimination based on sexual orientation under Directive 2000/78 has already been applied in private employment relations (see e.g. [Asocia#ia Accept](#) and [NH](#)), its elevation to the status of a general principle is likely to facilitate its application in other horizontal situations as well.

Conclusion

Overall, the ruling in *Trojan* is to be welcomed. It adds to the judicial trend I have noted [before](#), whereby substantive equality claims for LGBTIQ+ minorities are increasingly advanced not on the basis of "traditional" non-discrimination rules but

through recourse to alternative legal paths under EU law. While the TFEU's free movement provisions lie at the core of the dispute, the explicit inclusion of Article 21(1) of the Charter in the CJEU's reasoning contributes to paying due regard to the underlying discrimination concerns.

One can only hope that the Court will apply the same reasoning *mutatis mutandis* in other "rainbow cases" with a cross-border dimension – notably in the pending [Shipov](#) on the [compatibility with EU law](#) of the lack of legal gender recognition procedures in a Member State's national law. Although the CJEU has never before relied on Article 21(1) of the Charter to protect transgender individuals from discriminatory treatment, the Court's evolving case law in both non-discrimination and free movement law suggests that we may expect the unexpected.

