LGBTIQA+ Equality Ahead of EU Elections: How Many Steps Forward?

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The history of EU institutions is marked by a long list of statements and political initiatives that endorse the legal claims of the LGBTIQA+ community (see, for instance, Kollman and Bell). Over the past decades, these have gradually been mainstreamed within different areas of EU law. Particularly, the current EU legislative term (2019-2024) has witnessed an increased commitment of EU institutions towards the LGBTIQA+ community. This is not only shown by the numerous and recurrent Resolutions of the European Parliament on this topic (see EPRS). It is also evident from several political and legislative initiatives that have been introduced over recent years, which (attempt to) intervene in diverse fields of EU law that are considered as relevant to individuals that identify as LGBTIQA+.

Meanwhile, most EU law scholars focus their research on narrow areas, such as non-discrimination (mainly, in the field of employment) and free movement (of same-sex couples and their children). In other words, LGBTIQA+ issues never appear as the starting point of the analysis but rather as an incidental reference in the context of other research topics (on this point, see Belavusau). This piece aims to provide a deeper overview of the EU’s direct commitment towards the LGBTIQA+ community during the EU legislative term that is now coming to an end. It will thus retrace the different political, legislative, and judicial developments occurred, which have been marked as relevant for, or targeted to, LGBTIQA+ persons. Some contextual challenges of EU law vis-à-vis LGBTIQA+ matters will also be highlighted.

An EU Strategy for LGBTIQA+ Equality

Looking back at the very beginning of this EU legislative term, on 12 December 2020, the European Commission adopted, by way of a Communication, the EU LGBTIQ Equality
Strategy (hereinafter, ‘the Strategy’). Unsurprisingly, the adoption of the Strategy comes during the EU legislative term in which the first-ever Commissioner for Equality was appointed. Likewise, a specific unit working on ‘non-discrimination and LGBTIQ’ matters has been established in the European Commission. Prior to the publication of the Strategy, some had argued that the EU is equipped with adequate legal bases to intervene in the fields of non-discrimination and equality for LGBTIQA+ persons. These are, for instance, the non-discrimination clause in Article 19 TFEU, or Article 81(3) TFEU as regards aspects of family law with cross-border implications. Yet, the potential of these provisions had been restrained by the absence of an overarching and coherent approach. The Strategy seems to have, at least in principle, addressed this gap.

Despite its non-binding nature, the Strategy has been considered a significant development for LGBTIQA+ persons in the EU for the following three main reasons. First, the Strategy has a strong symbolic value. It represents the first instrument in the history of EU integration that targets specifically the LGBTIQA+ community. Second, the Strategy provides a comprehensive approach, as it addresses the topic from different angles. Indeed, it is built on four major axes: i) tackling discrimination against LGBTIQ people; ii) ensuring LGBTIQ people’s safety; iii) building LGBTIQ inclusive societies; iv) leading the call for LGBTIQ equality around the world. Last, the Strategy is very detailed. It precisely identifies legislative and non-legislative initiatives to be achieved within a fixed timeline, thus serving as a planning instrument for the Commission’s action.

More recently, a survey conducted by the EU Fundamental Rights Agency shows that while there are signs of slow and gradual progress, discrimination against LGBTIQA+ persons remain dramatically high. This is also evident in the ILGA-Europe’s annual rainbow map. As the end date of the Commission’s Strategy is approaching and EU elections are coming up, the question remains whether the next European Commission will develop a new instrument for LGBTIQA+ equality; or, as it will be argued below, try at least to fulfil the missed objectives of the current Strategy.

**Recognition of same-sex parents and their children**

On 7 December 2022, the European Commission proposed the Equality Package (hereinafter, ‘the Package’), a proposal for a Regulation to harmonise rules concerning parenthood in cross-border situations. One of the key aspects of the proposal is that once parental bonds are established in one Member State, these must be automatically recognised everywhere in the EU (for a deeper analysis of the Package, see Tryfonidou; see also Marcia).

The mutual recognition of same-sex parents and their children had also been addressed, just a year earlier, by the Court of Justice (CJEU) in the Pancharevo case (C-490/20).
The dispute concerned a same-sex couple, a Bulgarian and a UK national. They gave birth to S.D.K.A. in Spain, where the couple had been married and was legally residing. Spain thus issued a birth certificate, as Spanish law recognises same-sex parenthood. Yet, Bulgarian authorities refused to issue a passport/ID for S.D.K.A since Bulgarian law does not recognise same-sex parenthood. This led to a preliminary question referred to the CJEU, namely whether such a refusal constituted a breach of EU free movement rights (notably, Articles 20 and 21 TFEU and Directive 2004/38). The Court ruled that the refusal to issue a passport or ID to S.D.K.A. would indeed alter the effectiveness of her right to move and reside freely within the Union. National authorities are thus required to recognise the parental bonds legally established in another Member State. This obligation, however, applies only for the purposes of the exercise of the right to free movement, while Member States remain free (not) to recognise same-sex parenthood within their internal legal orders (for a full overview of the judgment, see Tryfonidou; see also De Groot).

Despite the obligation stemming from this judgment, in practice, same-sex parents often experience long and expensive proceedings before national authorities. Indeed, the Commission stated that the key objective of the Equality Package is to reduce times, costs, and burdens of recognition proceedings for both families and national judicial systems. The proposed regulation would, in other words, ‘automatise’ the requirements introduced by the Court in Pancharevo (for the purposes of the exercise of the right to free movement). However, one of the biggest challenges to the adoption of the Package is its legal basis: Article 81(3) TFEU. This requires the Council to act unanimously under a special legislative procedure, after obtaining the consent of the European Parliament. If reaching unanimity among the 27 Member States is generally challenging, this becomes even more complex when the file concerns a topic on which Member States’ sensibilities and approaches differ dramatically. Indeed, some national governments, such as the Italian one, have already declared their unwillingness to support the Commission’s initiative (see, for instance, Marcia).

**Combating hate crime and hate speech**

Current EU law criminalises hate crime and hate speech only if related to the grounds of race and ethnic origin. Yet, national laws differ significantly when it comes to such conduct in relation to sex, sexual orientation, age, and disability (see EPRS). To implement the Strategy’s objective of ‘ensuring LGBTIQ people’s safety’, on 9 December 2021, the Commission proposed to include hate crime and hate speech against LGBTIQA+ persons within EU crimes. This initiative requires a two-step procedure. First, Article 83(1) TFEU contains a list of areas of ‘particularly serious crime’ with a ‘cross-border dimension’ that justify a common action at EU level. This list can only be updated by a Council decision, taken by unanimity, after receiving the consent of the European Parliament. Second, once hate crime and hate speech have been included in this list, the Commission can follow up
with a proposal for a directive to be adopted through the ordinary legislative procedure. This would establish minimum rules concerning the definition of criminal offences and sanctions (for a full analysis of the proposal, see Peršak).

The European Parliament addressed the problem of hate crime and hate speech against LGBTIQA+ persons on different occasions. Accordingly, in a Resolution of 18 January 2024, the Parliament positively welcomed the Commission’s initiative and urged the Member States to make progress on it. The Justice and Home Affairs Council of 3–4 March 2022 had previously discussed the proposal, concluding that ‘a very broad majority was in favour of this initiative’. Yet, the file has never been scheduled for further discussion or vote since then. Significantly, not even the Belgian Presidency of the Council managed to make any progress, despite the declared intention to make of LGBTIQA+ equality a priority during the country’s six-month lead of the institution. The Commission’s proposal is therefore far from being accomplished, with unanimity being – once again – the greatest challenge to overcome.

The return to EU values

In December 2022, the European Commission referred Hungary to the Court of Justice in the context of an infringement procedure (C-769/22). The contested legislation, approved by the Hungarian Parliament in June 2021, was depicted as a tool to combat paedophilia. As highlighted by the Commission and several NGOs, however, the law directly targets the LGBTIQA+ community. Indeed, it limits minors’ access to content that ‘promote(s) divergence from self-identity corresponding to sex at birth, sex change or homosexuality’ and bans or limits media content that concerns homosexuality or gender identity. It also introduces a set of penalties for organisations that breach these rules (see Bonelli and Claes).

During the past decade, Viktor Orbán made Hungary very (un)popular for the multiple violations of the rule of law and fundamental rights, including attacks to the LGBTIQA+ community. Thus, the introduction of – another - infringement procedure against Hungary seems business as usual. However, EU law scholars have immediately pointed out how this could be a landmark case. For the first time, the Commission has directly relied on Article 2 TEU, proposing a direct link between LGBTIQA+ equality and the ‘founding values’ of the EU. If there is no doubt that this is of high symbolical and political importance, questions have been raised as regards the ‘added legal value’ of article 2 TEU. In other words, the judicial mobilisation of Article 2 TEU does not seem to bring more legal benefits than an infringement procedure based only on the Charter of Fundamental Rights and other provisions of EU law.
It must be noted that the Commission’s reliance on EU values has encouraged a significant **political and judicial mobilisation**. In an unprecedented move, the European Parliament and fifteen Member States have asked to intervene before the CJEU. This is the first time in the history of EU integration that so many Member States have asked to intervene in support of the Commission’s action against another Member State. For some of them, including France and Germany, this is the first-ever intervention in a case related to fundamental rights’ protection (see Chopin and Leclerc). However, it should also be underlined that the group of countries that participate in the lawsuit has a **markedly Western component**. This clearly shows the existence (and the persistence) of an East-West divide when it comes to the controversial topic of LGBTIQA+ rights’ protection. Therefore, considering the unanimity requirements mentioned above, even the high participation the Member States to the infringement procedure seems insufficient to advance coherent action at EU level.

**Conclusions**

EU institutions, in particular the Commission and the Parliament, seem increasingly committed to offer more robust protection to LGBTIQA+ persons. This is shown by the first-ever EU comprehensive Strategy and the related legislative proposals, as well as the numerous calls of the European Parliament. Whereas this is clearly positive for the visibility and legal claims of the LGBTIQA+ community, the legal outcome appears however limited. All legislative proposals are blocked by the failure to reach unanimity in the Council. Indeed, the only changes occurred in terms of legal obligations seem to stem from the CJEU ruling in case Pancharevo (and other minor developments related to anti-discrimination case-law). If it is true that, in principle, the EU is equipped with good legal bases to legislate in the fields of non-discrimination and equality for LGBTIQA+ persons, the feasibility of EU intervention seems challenged by the type of legislative procedure provided and the unanimity requirement. Therefore, further research is needed to identify the actual potential of EU competences to deal with the legal claims advanced by the LGBTIQA+ community.

The pending ‘EU values case’ (C-769/22 Commission v Hungary) shows the existence of highly divergent cultural and political views between the Member States, especially when it comes to issues such as LGBTIQA+ equality which seemingly continues to be controversial. At the end of this week (6-9 June 2024), EU citizens will be called to elect the new Members of the European Parliament (MEPs). As current polls show, far-right parties are likely to gain an increased number of seats. Accordingly, this could lead to a more conservative composition of the next European Commission. These dynamics may constitute a significant shift in the commitment of these institutions to enhance LGBTIQA+ rights’ protection. Indeed, the European Parliament and the European Commission are considered two early [LGBTIQA+] movement allies, as they have been supporting the
claims of this community on numerous occasions before and during this term. Therefore, the question is whether these potential political changes will result in a softening of their commitment. If so, the CJEU may remain the only and last resort for LGBTIQA+ individuals at EU level.