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Requirements for a new LGBTI strategy: What should the new EU LGBTI Strategy cover from a legal point of view?

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Observatory for Sociopolitical Developments in Europe

Perspectives on the new LGBTI strategy announced by the European Commission

Editorial

Dear readers,

The European Union is equipped with a good legal basis for non-discrimination and equality for LGBTI persons. However, the measures taken so far at EU level to treat LGBTI people equally and to strengthen their rights have been rather sporadic: There is no overarching coherent strategy. Calls from individual EU member states and civil society organisations for the adoption of such a strategy have become more urgent, particularly with regards to the expiration in 2019 of the schedule of the list of actions to promote equality for LGBTI persons adopted under the Juncker Commission.

When EU Commission President Ursula von der Leyen and her College of Commissioners took office in December 2019, a Commissioner for Equality was appointed for the first time. This new Commissioner, Helena Dalli, announced in a speech on the future of LGBTI rights in February 2020 that she would publish an LGBTI equality strategy in the fourth quarter of 2020, building on the existing list of actions. Due to the current COVID-19-pandemic, the European Commission has announced that it will review its work programme – the consequences for the date of publication of the LGBTI strategy were not clear at the date of publication of this newsletter. The current health crisis will certainly exacerbate the existing inequalities in society. Therefore, the calls for a new LGBTI strategy have become even more, not less, relevant and urgent.

In this newsletter, we would like to start by providing you with an overview of the existing legal framework and current political processes at EU level as well as the situation of LGBTI persons in the EU member states.

Subsequently, two contributions will outline requirements for the announced strategy from a legal and civil society point of view. The focus is on the EU-wide recognition of rainbow families as well as the increasing attacks on and incitement to hatred against LGBTI persons. The ensuing article provides an excursus on another organisation, the Council of Europe, which adopted the world's first instrument to combat discrimination on the basis of sexual orientation or gender identity ten years ago.

Finally, we present an overview of existing LGBTI action plans at national level.

The team of the Observatory wishes you an exciting read.

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Calls for an LGBTI strategy by the European Commission

The implementation period of the list of actions to promote equality for LGBTI persons ended in 2019. This is one of the reasons why the issue has been addressed more strongly again at EU level, particularly in 2019. Since the implementation of the list of actions coincided with the end of the Juncker Commission's term in office, there was also great uncertainty as to when and in what form the rights of LGBTI persons would continue to be addressed by the European Commission.

During the EU Council presidency of Finland in the second half of 2019, under the main topic of fundamental and human rights, a high-level conference with over 400 participants was held on the issue of advancing equality for LGBTI persons in the EU after 2020¹¹. The conference resulted in a clear call for the drafting of an LGBTI strategy by the European Commission. The European Parliament had also adopted a resolution¹² in early 2019 calling on the Commission to adopt a new strategic document to promote equality for LGBTI people. In December 2018, 19 EU member states had already signed a joint non-paper on the future of the list of actions to promote equality for LGBTI persons¹³ including the same demand.



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When EU Commission President Ursula von der Leyen and her College of Commissioners took office in December 2019, an independent department for equality was established for the first time. Helena Dalli was appointed as Commissioner for Equality. Her appointment raises hope, in particular for the LGBTI community, as

Dalli is considered a champion of LGBTI rights in Malta, for instance during her term as Minister for Civil Rights in the Maltese government. In February 2020, she announced in a speech on the future of LGBTI rights 2020–2024 that she would publish an LGBTI equality strategy in the fourth quarter of 2020, building on the existing list of actions.¹⁴ Due to the current COVID-19 pandemic, the European Commission has announced that it will review its work programme – the consequences for the date of publication of the LGBTI strategy were not clear at the date of publication of this newsletter. The current health crisis will certainly exacerbate the existing inequalities in society, thus increasing the need to safeguard and enshrine the rights of vulnerable groups at EU level. The calls for a new LGBTI strategy have therefore become even more, not less, relevant and urgent.¹⁵

Requirements for a new LGBTI strategy

What should the new EU LGBTI Strategy cover from a legal point of view?

Prof. Dr Alina Tryfonidou is Professor of Law at the University of Reading. Her main research interests are EU free movement law, Union citizenship, and protection of LGBT rights. She is also a supporting member of the Network of European LGBTIQ Families Associations, NELFA. In the following article, she will take a closer look at the legal requirements for a new LGBTI strategy with a particular focus on the rights of rainbow families.*

The proposed EU LGBTI strategy will need to revolve around the main axes on which the Commission's List of Actions¹⁶ was based. The latter document did not lack breadth

Joint Non-Paper

The non-paper, an unofficial document without binding formal or legal status, has been signed by Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden and the United Kingdom.

¹¹ Conference report; see [here](#).

¹² European Parliament resolution 2019/2573(RSP) from 14 February 2019; see [here](#).

¹³ See [here](#).

¹⁴ See [here](#).

¹⁵ See also: ILGA-Europe Open Letter to Commission President Ursula von der Leyen; see [here](#).

¹⁶ See [here](#).

of coverage: it was comprehensive, with the proposed actions listed covering all policy areas relevant for LGBTI persons: non-discrimination, education, employment, health, free movement, asylum, hate speech/hate crime, enlargement and foreign policy. Nonetheless, it did lack in detail as for each policy area, only a limited number of measures were proposed, and those measures were described in an abstract manner. Accordingly, although the proposed strategy should cover the same areas as those enumerated in the Commission's List of Actions, the list of measures suggested should be longer, more precise, and more ambitious.

One area that the new LGBTI strategy should treat as a matter of priority is the safeguarding of the free movement rights of rainbow families. The European Parliament's LGBTI Intergroup, has recently written a letter¹⁷ to the new Commissioner for Equality, Helena Dalli, underlining the need for the Commission to take action in this field, after the matter was discussed at a meeting¹⁸ between the two earlier this year.

At the moment, rainbow families crossing borders in the EU are experiencing difficulties in having their family ties legally recognised, even when such ties have already been legally established elsewhere. This is because it is not clear if, for the purposes of EU law, rainbow families are considered equal to families established by opposite-sex couples. Accordingly, EU member states that do not make provision for rainbow families within their own legal system, believe that they are free to refuse to recognise the (already legally established) familial links between the members of such families when they move to their territory in exercise of their EU free movement rights. What this means, in practice, is that in some cases, an LGB parent who is a third-country national may not be allowed to join their child – who is an EU citizen – in the host state, as the latter refuses to legally recognise the already legally established parent-child relationship, simply because the parents of the child are of the same sex. Or, the child of same-sex parents may be deprived of entitlements which they would enjoy (e.g. acquiring the nationality of one of the parents) simply because a birth certificate listing two mothers is not recognised in the member state to which the family moves.¹⁹



As argued elsewhere²⁰, although the EU does not have the competence to require EU member states to enable rainbow families to *legally establish* familial links among their members if this is not provided under national law, it can, nonetheless, require them to recognise such links if they have *already* been legally established *elsewhere*. This is because failure to recognise such links can lead to a breach of EU free movement law (as it can create an unjustified obstacle to free movement between EU member states); and a violation of fundamental human rights protected under EU law, namely, the right to private and family life and the right not to be discriminated against on the grounds of sexual orientation, which are both laid down in the EU Charter of Fundamental Rights.

There is, currently, reason for optimism, as the newly appointed Commissioner Dalli – who is a devoted advocate of LGBTI rights – has announced²¹ that among her priorities is the adoption of an EU LGBTI strategy, in the fourth quarter of 2020. Accordingly, the Commission will soon adopt a comprehensive LGBTI strategy, which, it is hoped, will fill the gaps in the protection of LGBTI rights that have already been identified – including the protection of the rights of rainbow families – whilst it will mainstream LGBTI rights across EU policies. This will be a significant step, not merely practically but also sym-

Network of European LGBTIQ* Families Associations (NELFA)

The **Network of European LGBTIQ* Families Associations**, NELFA, is an umbrella organisation of 41 associations of LGBT parents and their children across 33 European countries. The organisation fights for legal regulation and equal opportunity policies as well as free movement for LGBTIQ* families. NELFA also assists national organisations with capacity building and the exchange of information.

LGBTI Intergroup Letter

Key demands of the European Parliament's LGBTI Intergroup letter:

- 1) Extension of recognition of same-sex marriages for all legal purposes (i.e. not just for family reunification purposes, as per Coman),
- 2) Recognition of familial ties of Union citizens that have already been legally established in another country by the host EU member state when Union citizens move to its territory,
- 3) Validity of certificates issued in one EU member state for all purposes of national law in all other member states,
- 4) Legal ties between children and their same-sex parents – as these have already been legally established in another country – are maintained when the family moves to the host EU member state.

Parental rights of same-sex couples

To date, there has been no comprehensive study regarding national legislations on the parental rights of same-sex couples in EU member states. However, information provided by **ILGA-Europe** demonstrates that, currently, there is a legal patchwork regarding the parental status of same-sex couples in EU member states, with only a minority of EU member states granting full parental rights to same-sex couples.

Legal provisions on EU level

Legal provisions concerning the **free movement of persons**: Articles 21, 45, 49 and 56 of the Treaty on the Functioning of the European Union (TFEU)

Legal provisions concerning the right to **private and family life** as well as **non-discrimination on grounds of sexual orientation**: Article 7 and 21 of the Charter of Fundamental Rights of the European Union

¹⁷ See [here](#).

¹⁸ NELFA press release from 7 February 2020; see [here](#).

¹⁹ There are many such examples: NELFA exemplary cases [here](#).

²⁰ Tryfonidou (2020): *The cross-border legal recognition of rainbow families under EU law*; see [here](#).

²¹ Speech by Helena Dalli on 4 February 2020; see [here](#).

bolically, as it will signal that the EU is taking LGBTI rights seriously and wishes to work together with the member states in areas in which it has no competence in order to eradicate discrimination against LGBTI persons.

The civil society perspective: Representation of interests with regard to LGBTI rights in Europe

Katrin Hugendubel, Advocacy Director at ILGA-Europe, takes a look at the announced LGBTI strategy from a civil society standpoint. ILGA-Europe has been collecting data on the situation of LGBTI people and making fact-based assessments of ongoing developments and trends available to the public since 2009.

In today's European Union, discrimination and inequality continue to be widespread, undermining social cohesion and fundamental EU values. There has undoubtedly been improvement when it comes to the legal protection and public acceptance of LGBTI people, documented clearly in the ILGA-Europe Rainbow Europe Map. The issue of bodily integrity for intersex people continues to gain more prominence on the political agenda of governments and institutions. 2019 was a year of positive developments for rainbow families in the region, with an expansion of family rights in a few countries; and important advancements continue to be made on reforming or establishing legal gender recognition procedures, even if progress is slowing down in many countries. However, the development of the first EU LGBTI strategy takes place at a time when the erosion of the human rights of LGBTI people along with the rise of anti-LGBT hate rhetoric in countries across Europe is putting European democracy at risk and eroding core principles of what the European Union stands for – human rights, equality, freedom and human dignity.

Building on the new mandate of the Commissioner on Equality, Helena Dalli, and the clear commitments for Fundamental Rights and Equality in the European Commission President's "Agenda for Europe"²², the Commission needs to step up and reaffirm its role as a leader on LGBTI rights over the next five years. The EU has yet to fully tap into its competences and all instruments at hand – from existing legislation and policy frameworks, the right of legislative initiative to financial instruments and technical support to member states and relevant stakeholders – to make a difference for the lives of people in Europe and beyond.

There is wide support for the EU Commission to take such action. The majority of member states want to see progress towards equality for LGBTI people in Europe, as was clearly shown by the call from 19 member states in December 2018 on the European Commission²³ to develop an ambitious EU LGBTI strategy. The European Parliament has reaffirmed its call for an EU strategy several times, including in its February 2019 resolution.²⁴

In a context of rising hate and attacks on the human rights of LGBTI people, it is more important than ever to reconfirm and strengthen the political and financial commitment to the protection and advancement of equality and human rights for LGBTI people by the European Commission. Now is the time to do more, not less. The current coronavirus pandemic is highlighting the inequalities in our societies, as the negative impact on people's health and well-being, physical and economic safety, is disproportionately experienced by people who are under-privileged in our societies, especially where socio-economic inequalities enhance the marginalisation experienced because of other aspects of one's identity. Coming out of the crisis, it will be more important than ever to have targeted measures to meet the needs of the most marginalised in society, including initiatives tackling LGBTI homelessness, addressing the overrepresentation of LGBTI people in unemployment and highly precarious employment.



ILGA-Europe is an international non-governmental umbrella organisation comprised of over 600 LGBTI organisations from 54 European and Central Asian countries. The organisation fights for human rights and equality for LGBTI people at the international level, for instance in the European Union, Council of Europe and United Nations. ILGA-Europe is committed to strengthening the LGBTI movement through capacity building and support with strategic litigation in European courts.

ILGA-Europe also monitors – with the cooperation of national activists – the situation of LGBTI people in Europe and Central Asia. You can access the interactive Rainbow Europe Map as well as the annual reports [here](#).

²² See [here](#).

²³ See [here](#).

²⁴ See [here](#).