**Follow-up to the European Parliament non-legislative resolution on
LGBTIQ rights in the EU**

**1. Resolution tabled pursuant to Rules 227(2) of the European Parliament's Rules of procedure**

**2. Reference number:** 2021/2679 (RSP) / B9-0431/2021 / P9\_TA-PROV(2021)0366

**3. Date of adoption of the resolution:** 14 September 2021

**4. Competent Parliamentary Committee:** Committee on Petitions (PETI)

**5. Brief analysis/assessment of the resolution and requests made in it:**

This resolution raises concerns about discrimination faced by LGBTIQ persons in the EU in general and in particular in relation to freedom of movement and the mutual recognition of their relationship and their parenthood.

First, the resolution welcomes the adoption of the LGBTIQ Equality Strategy 2020-2025 and in particular the reference to a legislative initiative on parenthood and the update of the 2009 Guidelines on Free Movement. It also addresses its support to the Commission in its willingness to propose a legislative initiative that would aim at adding hate crimes and hate speeches to the list of EU crimes of Article 87(1) of the Treaty on the Functioning of the European Union (TFEU).

The resolution also raises concerns on several aspects related to possible discrimination against LGBTIQ persons and recalls that work from different actors (EU institutions and Member States) is needed to ensure that LGBTIQ persons in the EU enjoy fully their fundamental rights. The resolution identifies several fields were progress need to be made in relation to recognition of family ties (marriage, partnership, parenthood) in cross border situations and formulates demands for action by the Commission in this particular field.

Thirdly, the resolution refers to the blockage of the negotiations of the proposal for a Council directive on Equal Treatment. While mostly addressing the Council, this reference also includes all institutions whose inaction sends the wrong signal in terms of fighting against discrimination of LGBTIQ persons.

Eventually, the resolution mentions the situation in Hungary and Poland and ask the Commission to address it by urging these two Member States to respect EU legislation on non-discrimination.

**6. Response to requests and overview of action taken, or intended to be taken, by the Commission:**

Paragraph 2

The Commission acknowledges that due to differences in family law across the Member States, family ties may cease to be recognised in cross-border situations. The Commission therefore committed, in the LGBTIQ Equality Strategy adopted in November 2020 to ensure the correct application of EU rights of LGBTIQ people and to improve the legal protection of all families in cross-border situations.

Paragraphs 7 and 8

Under the Treaties, substantive law on family matters, which governs matters such as the establishment of family ties, falls within the competence of the EU Member States and is therefore governed by national law. While a majority of national legislations contain provisions applying to rainbow families, the Commission is aware of the difficulties the latter may face in cross-border situations.

The Commission will continue to support the Member States in their implementation of the Free Movement acquis in a way that fully takes into account the diversity of families and that it is in line with existing Union law and case law. In addition, the Commission will explore possible measures to support the mutual recognition of same-gender spouses and registered partners’ legal status in cross border situations.

Paragraph 8

As regards the recognition of marriages, the Court of Justice already recognised in the Coman judgment that a marriage of a same-sex couple was to be recognised for the purpose of granting a residence right, and indeed for the purpose of enabling exercise of all rights granted under Union law[[1]](#footnote-1), by all Member States, even those whose national legislation limits marriage to different-sex couples.

Regarding the recognition of the birth certificates in cross-border situations, the Commission is also expecting the judgment to be delivered by the Court of Justice of the European Union in the VMA case (C-490/20). This judgment should bring clarifications on the interpretation of relevant provisions of EU law on that matter.

In addition, as the Union has competence over measures concerning family law with cross-border implications, the Commission is working on a legislative initiative to facilitate the recognition of parenthood between the Member States. While, in accordance with the Treaties, each Member State will continue to decide the conditions under which parenthood can be established, once a Member State has validly established parenthood, this legislative initiative will facilitate the recognition of that parenthood in cross-border situations. This will ensure that children’s rights (such as their rights to maintenance or inheritance) are upheld in other Member States.

Paragraph 10

Implementation of the judgments of the Court of Justice of the European Union is an essential part of the implementation of the Free Movement acquis. The Commission will therefore continue to ensure its correct application by the Member States in general as well as regarding specific issues that could prevent members of the LGBTIQ community and their families from fully enjoying their free movement rights. On this specific aspect, clarifications will be added to the Guidelines on Free Movement[[2]](#footnote-2) through the revision planned for 2022 in order for all relevant actors in the Member States to be fully aware of the latest case law developments. The Commission is confident that a better information will help in a better implementation in particular as regards the fact that the term spouse in Directive 2004/38/EC is gender-neutral.

The Commission is aware that Mr Coman and Mr Hamilton brought their case before the European Court of Human Rights (ECHR) following the refusal of Romanian Courts to issue Mr Hamilton with a residence card. Based on publicly available information and in particular on the application lodged to the ECHR, the Romanian authorities seem to have refused the issuance of the residence card based on procedural grounds. However, it needs to be highlighted that the Constitutional Court of Romania has, in the meantime, ruled that, based on the judgment of the Court of Justice of the European Union, the relevant provisions of the Romanian Civil Code are to be interpreted in the light of European law and that they should allow to grant a right of residence to spouses of the same sex of Romanian citizens moving back to Romania after having exercised their right of free movement[[3]](#footnote-3). The Constitutional Court of Romania has therefore drawn the consequences of the Coman judgment delivered by the Court of Justice of the European Union.

Paragraph 11

As explained in the Guidelines themselves, their aim is to provide guidance to the Member States on how to apply correctly Directive 2004/38/EC 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, with the objective of bringing a real improvement for all EU citizens and of making the EU an area of security, freedom and justice. The scope of the Guidelines does not extend to the implementation of Directive 2000/78/EC. In addition, the Maruko, Römer and Hay judgments of the European Court of Human Rights do not involve cross-border elements and do not refer to situations falling within the scope of free movement. The Taddeucci and MacCall judgemnts of the same court address issues arising in Italy where free movement provisions did also not apply to the applicants, the EU citizen being Italian.

Paragraph 12

The Commission considers that Article 2(2)(b) of the directive does not infringe the principle of non-discrimination as regards sex and sexual orientation as laid down in Article 21 of the EU Charter of Fundamental Rights. The provisions of this paragraph apply indistinctly to register partnerships, whether of different sex or same sex persons, and cannot therefore constitute a discrimination based on sexual orientation.

Partners whose partnerships would not meet the criteria of Article 2(2)(b) have the possibility to fall into the scope of the directive, as extended family members, by relying on its Article 3(2)(b).

Hence, the Commission does not see the need to change Article 2(2)(b) to address the alleged incompatibility with Article 21 of the Charter.

Paragraph 13

The reviewed Guidelines will provide updated guidance for all interested parties, in particular EU citizens, and support the work of national authorities dealing with citizens’ rights, as well as courts and legal practitioners. It is intended to integrate the interpretations made since 2009 by the Court of Justice of the European Union of key concepts and provisions of Directive 2004/38/EC. The reviewed guidelines should reflect the diversity of families and therefore help al families - including rainbow families – exercise their right to free movement.

The review of the Guidelines will be an opportunity to remind the Member States that the EU free movement right enshrined under Article 21 TFEU, which the directive implements, includes the right to conduct a normal family life[[4]](#footnote-4). In turn, the notion of “family life”, which corresponds to the one resulting from the case law of the European Court of Human Rights, may include family life developed in the framework of a same sex relationship.

Paragraph 14

The Commission has a clear position on resolutions adopted in Poland regarding the so-called ‘LGBT ideology-free zones’, expressed at various occasions, including by the Commission’s President: these zones are humanity free zones and they have no place in the European Union.

The Commission is examining carefully the compatibility with EU law of these resolutions and, for this purpose, has sought from Poland information relating to their scope and effects. As the Polish authorities had failed to fully and appropriately provide the requested information, the Commission sent a letter of formal notice on 15 July 2021 for lack of cooperation.

On the same day, the Commission sent two letters of formal notice to Hungary: one concerning the violation of several provisions of EU law, including the EU Charter of Fundamental Rights, by the Hungarian Act LXXIX of 2021 on taking more severe action against paedophile offenders and amending certain Acts for the protection of children; and one concerning the violation of the Unfair Commercial Practices Directive and of the Charter by the decision to impose an obligation to put on a children’s book with LGBT content a disclaimer that it depicts forms of ‘behaviour deviating from traditional gender roles’.

The Commission is currently assessing the replies received from the two Member States to these three letters of formal notice.

1. C-673/16, Coman, para. 45. [↑](#footnote-ref-1)
2. Communication from the Commission to the European Parliament and the on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final. [↑](#footnote-ref-2)
3. [Decision of the Constitutional Court of Romania](https://legislatie.just.ro/Public/DetaliiDocumentAfis/205439) No. 534 of July 18, 2018, published in the Official Gazette of Romania no. 842 of 3 October 2018 [↑](#footnote-ref-3)
4. Judgment of 5 June 2018, Coman, case C-673/16, para. 32; of 14 November 2017, Lounes, case C-165/16, para. 52. [↑](#footnote-ref-4)