

The European Union as a Protector and Promoter of Equality: Discrimination on Grounds of Sexual Orientation and Identity

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Introduction

Anybody familiar with the history of European integration will not be surprised to learn that the protection of LGBTI persons was not really an original concern of the EU.

On one side, this has to do with general situation in Europe (and worldwide) at the time of the establishment of the European Communities, i.e. the 1950s. One can certainly claim that the awareness of the discrimination of persons related to their sexual orientation, gender identity and expression or sex characteristics (SOGIESC) was very limited even in Western Europe until the late 1960s/early 1970s. In the United States, the Stonewall riots of 1969 are sometimes seen as the turning point of the general debate, but it took many years before the legal situation of LGBTI persons experienced real improvements.

In addition, the particular differences in the modern history of today's members of the European Union (Cold War, Role of the Church etc.) make it difficult even today to achieve common standards – but this is not only the case with regard to the human rights of LGBTI persons. In 2018/19 the differences among the Member States when it comes to the protection of human rights and in particular specific minorities like LGBTI persons seem even more important. In October 2018, a disagreement among the Council on a wording on LGBTI rights led the Austrian Presidency to publish “Presidency conclusions” instead of the customary “Council conclusions” on the state of human rights in the EU.² On 6 December 2018, only 19 EU Member States signed a common paper prepared by the Maltese government, calling for continued efforts within the EU to ensure full protection of LGBTI rights. The same day afternoon in the

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² See Council of the EU, Presidency Conclusions - The application of the Charter of Fundamental Rights in 2017 (Doc. 13093/18 of 12 October 2018): “The discussions in Council have not led to reaching a consensus on conclusions on the application of the Charter of Fundamental Rights in 2017. However, the Presidency concluded that the text annexed was supported or not objected to by 27 delegations. ... § 37. It is noted that that LGBTI persons are still frequently victims of discrimination, physical violence and incitement to hatred and violence throughout the EU. Therefore, the Council's 2016 Conclusions on LGBTI equality are recalled 7 and the Annual Report 2017 on the list of actions by the Commission to advance LGBTI equality, which was presented on 1 March 2018, on Zero Discrimination Day it is acknowledged with interest. ...” (online at: <http://data.consilium.europa.eu/doc/document/ST-13093-2018-INIT/en/pdf>).

EPSCO Council debate, the signatory member states showed an immediate commitment to ensure that the EU lives up to obligations to protect LGBTI rights, refusing to accept to adopt Council Conclusions regarding “gender equality, youth and digitalization”, from which the Austrian Presidency had deleted a reference to LGBTIQ people on the request of Poland and Hungary.³

On the other side, although it can be argued that the EU was intended from the beginning to guarantee peace, democracy and rule of law in Europe, the focus was on economic integration (maybe as a means to achieve the former, normally referred to as functional approach⁴). Interestingly, the separation between “human rights” and “rule of law” on one side and “economic freedoms” on the other was overcome very quickly, as a truly integrated market very quickly involves the later issues. This was (and still is) also the case with regard to LGBTI persons, as they are entitled to move across Europe and to obtain protection at work as everyone else.⁵

Normally, the discrimination of LGBTI persons is particularly felt in the areas of criminal law (criminalization of certain behaviours, violence against minorities etc.) or family law. Areas where the EU still has no competence to act. At the same time, these areas are indirectly concerned when it comes to the questions of how works shall be protected, be it at work or when they move across Europe (free movement of persons). Even when it comes to the regulation of the internal market for services and goods, non-discrimination issues⁶ can play a role though this category remains of minor importance even today.⁷

The foreign policy of the EU is still less developed today, but even here we can see that a common approach leads to questions involving LGBTI issues. This is particularly true when it comes to security issues and, most importantly a common approach to asylum where the

³ Vgl. European Parliamentary Research Service, The rights of LGBTI people in the European Union, Brussels May 2019 and Council of the EU, Joint non-paper on the future of the LGBTI list of actions, 4 December 2018.

⁴ See Dirk U. Stikker, The Functional Approach to European Integration, Foreign Affairs, April 1951.

⁵ See Andreas R Ziegler, LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights? in: Alexander Schuster (ed.), Equality and Justice - Sexual Orientation and Gender Identity in the XXI Century (Editrice Universitaria Udinese srl, Udine, 2011), p. 219-240, available online at: https://serval.unil.ch/notice/serval:BIB_43FBC19C3180.

⁶ See for details Robert Wintemute, European Law against Discrimination on Grounds of Sexual Orientation, in: Katharina Boele-Woelki and Angelika Fuchs (eds.), Same-Sex Relationships and Beyond - Gender Matters in the EU (Intersentia, 3rd edition 2017), 180-203 or Dorota Pudzianowska and Krzysztof Smiszek, Combating sexual orientation discrimination in the European Union, 2014.

⁷ See below.

question whether persons prosecuted for the sexual orientation or gender identity shall be entitled to protection by the EU.⁸

While this contribution focuses on the role of the EU as such, one should not forget that all Member States of the EU are members of the Council of Europe and as such have ratified the European Convention of Human Rights (ECHR). In particular, the case law of the European Court of Human Rights has contributed to many achievements regarding the non-discrimination and respect of LGBTI persons that must be seen as an integral part of the EU system.⁹

Legal Foundations in the Treaties

As of today, the following treaty provisions are particularly relevant for the protection of LGBTI persons in and by the EU.

Art. 2 of the Treaty on European Union (TEU) in its current version adopted 2007¹⁰ speaks of the respect of human dignity and the rights belonging to minorities, pluralism, non-discrimination and tolerance¹¹ – all terms that are particularly important in today’s debate on LGBTI rights.¹²

Art 3.3 TEU refers to the fight against “social exclusion and discrimination” and “cultural and linguistic diversity” and “Europe’s cultural heritage” – depending on how one interprets these notions it can be used as an argument against or in favour of the acceptance of different “life styles”.

⁸ See below.

⁹ See for example Damian A. Gonzalez-Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing, 2019); Johnson, Paul James; Falcetta, Silvia, *Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities*. In: *European law review*, Vol. 43, No. 2, 04.2018, p. 167-185; Masuma Shahid, *The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights*, *Erasmus Law Review*, no.3, December 2017, available at: http://elr.tijdschriften.budh.nl/tijdschrift/ELR/2017/3/ELR_2017_010_003_006.pdf.

¹⁰ Most of this language (and the one found now in Art. 3.3 and 10) was originally introduced by the Treaty of Amsterdam in 1997 (OJ C 340, 10.11.1997) and later also incorporated into the Charter of Fundamental Rights of the European Union (in 2000) and the Draft Treaty establishing a Constitution for Europe (OJ C 169, 18.7.2003, p. 1–150). For the time before see Kees Waaldijk/Andrew Clapham (eds.), *Homosexuality: A European Community Issue*, Dordrecht, 1993.

¹¹ 2The 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.²

¹² See for example the language used in the so-called Yogyakarta Principles, a set of principles developed by LGBTI in 2007 (updated in 2017) by activists that relate the specific situation of LGBT persons to the more general human rights discussion. See <https://yogyakartaprinciples.org/>.

However, it is Art. 10 and 19 of the Treaty on the Functioning of the European Union (TFEU) that contain the clearest statement for the protection of sexual minorities. Art. 10 TFEU defines the “aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. This provision is rather exceptional in a world where very few domestic Constitutions (even in the EU Member States) contain such clear wordings, especially regarding the explicit mentioning of the term “sexual orientation”.¹³ Art. 10 TFEU must be seen in conjunction Art. 19 TFEU which no clearly empowers the EU “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Due to this exceptional character, such action may only be taken “to unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament”. This obviously is a major obstacle to achieving progress due to the differences among (current) governments of the EU Member States.

In this context, one should also take note of the relevance of the reference to the Charter of Fundamental Rights of the European Union (equally as adopted in 2007) in Article 6 TEU. Art. 6 of the Charter prohibits “any discrimination based on any ground such as ...sexual orientation”. Again, this was seen as almost revolutionary at the time of its adoption in 1997 (for the Treaty of Amsterdam) and 2000 (for the Charter) - though today one would regret the absence of the other relevant criteria SOGIESC criteria.¹⁴ Neither intersex persons nor trans persons are officially mentioned in any of these documents, though the European Court of Justice (ECJ) has filled certain of these gaps in its case law – for some too little, for others too much (as always).¹⁵

The EU Actors

Based on the above provision the EU institutions involved in the law-making have adopted a few specific instruments and the ECJ has used these provisions in its case law. These developments will be discussed in the next section.

As a preliminary observation, one should, however mention the more political approach taken, in particular, by the European Parliament. It often adopts specific declarations regarding the

¹³ As an example, one can mention the revised Swiss Constitution of 1998 where the wording “life style” was used to avoid clear reference to “sexual orientation” (and even more so “gender identity”).

¹⁴ See on the parallel development of a Directive establishing a general framework for equal treatment in employment and occupation in 2000 below.

¹⁵ See Henri de Waele/Anna van der Vleuten, Judicial activism in the European Court of Justice: the case of LGBT rights. In: *Journal of International Law and Practice*, vol. 19 (2011), no. 3, 639-666.

rights of LGBTI person in the Member States and (even more importantly) around the world.¹⁶ In this activity the existence of the “European Parliament - Intergroup on LGBTI Rights” is worth to mention.¹⁷ Often the Parliament is active (with on-binding) resolutions and declarations where the Member States (and other EU institutions) are not yet willing or capable to act.¹⁸

Of the special institutions created by the EU for a better protection of Human Rights one should note the European Union Agency for Fundamental Rights (FRA) in Vienna¹⁹ and the European Institute for Gender Equality (EIGE) in Vilnius. In the latter’s establishment a clear reference was made to “sexual orientation” (though again not to the other SOGIESC criteria).²⁰

As part of the actors in the EU, though not official ones, one should mention the existence of specific NGOs like ILGA Europe (headquartered in Brussels)²¹ and ECSOL (European Commission for Sexual Orientation Law)²² who do not limit their work to the EU but dedicate a lot of their work to it.

Main Areas of Activities

Economic Freedoms, Non-discrimination and LGBTI

Goods and Services

As we mentioned in the introduction, in the absence of a clear mandate to harmonize the human rights policies of the Member States, also in this area the relevance of the EU comes often from its economic integration activities. This is most important when it comes to the regulations of

¹⁶ E.g. the Resolution (04.02.2014) on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity 2013/2183(INI), OJ C 93, 24.3.2017, 21.

¹⁷ European Parliament - Intergroup on LGBTI Rights: <http://www.lgbt-ep.eu/about/>

¹⁸ For example, in February 2019, the European Parliament adopted a resolution on the rights of intersex people: European Parliament resolution on the rights of intersex people (2018/2878(RSP)). In addition, in March 2018, a majority of representatives in the European Parliament passed a resolution in a 435-109 vote condemning conversion therapy and urging European Union Member States to ban the practice (European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)).

¹⁹ <http://fra.europa.eu/en/theme/lgbt>. See for an early report: European Union Agency for Fundamental Rights, Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015, Vienna 2015.

²⁰ Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality". Official Journal of the European Union (30 December 2006).

²¹ <http://www.ilga-europe.org>.

²² <http://www.sexualorientationlaw.eu>.

workers and their rights (more recently the treatment of European citizens) but it can also be of relevance regarding the integration of the internal market for goods and services.²³

An interesting (though exceptional) example is the free movement of blood and blood components. The European Union had harmonized certain aspects of this market in 2002 and 2004²⁴ and the ECJ had an opportunity in 2015 to discuss the relevance of these instruments with regard to a ban for gay men to donate blood.²⁵ In its judgment the ECJ made it clear that a different treatment of gay blood owners was only justified if it was scientifically proven that a higher risk of transferring diseases existed. Without such a justification an inadmissible discrimination (and thus violation of EU law) would exist. From a legal perspective one can say, that here a harmonization of the production methods of certain products was used to exclude unjustified discrimination against certain persons involved in the production of a good. This debate is known to international economic lawyers as the relevance of so-called processes and production methods (PPMs) affecting the characteristics of a product which can lead to unwanted technical barriers to trade (TBT).²⁶

The most important development in this sphere would certainly be a general prohibition of discrimination when it comes to the consumption of goods and services. Today, there exists no harmonized rule in the EU which would make it illegal to discriminate against persons because of the SOGIESC.²⁷ Such a rule, however, has been proposed in 2008.²⁸ The draft “Horizontal Anti-discrimination Directive” would forbid discrimination based on religion or belief, disability, age or sexual orientation in access to goods and services, education, and access to social benefits in a wider area of fields while now the protection “due to sexual orientation” is basically limited to the workplace.²⁹ But due to the lack of support this project is currently not moving forwards.

²³ See for an early and general assessment: Olivier Dubos (ed.), *Sexe, sexualité et droits européens: enjeux politiques et scientifiques des libertés individuelles*, Paris, Pedone 2007.

²⁴ Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (OJ 2004 L 91, p. 25).

²⁵ Judgment C-528/13, *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes* (29.04.2015). See Uladzislau Belavusau and Ivana Isailović, *Gay Blood: Bad Blood? A Brief Analysis of the Léger case* [2015] C-528/13, *European Law Blog* 26 August 2015, online at: <https://europeanlawblog.eu/2015/08/26/gay-blood-bad-blood-a-brief-analysis-of-the-leger-case-2015-c-52813/>.

²⁶ See for example David Sifonios, *Processes and Production Methods (PPMs) in WTO Law - Interfacing Trade and Social Goals*, CUP, Cambridge 2011).

²⁷ But there exists a 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, p. 37.

²⁸ European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief*, COM(2008)0426 - 2008/0140(CNS).

²⁹ See below.

Persons

Free Movement

Of the four basic freedoms, the one with most relevance for LGBTI persons is today certainly the free movement of persons.³⁰ Many questions regarding LGBTI persons (and their families), however, remain controversial between the Member States (due to the absence of a harmonization in this field of at least a common approach). The issue of highest relevance is probably the question of the rights of a same-sex spouse³¹ of an EU citizen who herself or himself is not an EU citizen (or where dependent family members are not EU citizens or not recognized as family members³²). The free movement of EU citizens and their relatives has developed over time and is since 2004 regulated in a comprehensive Directive (the Citizens' Rights Directive 2004/38/EC).³³ Already during the adoption, the questions relating to SOGIESC led to controversies and they increased with many EU member States introducing civil partnerships and ultimately even marriage. Only recently, in a judgment of 2018³⁴ the ECJ declared that at least for married partners no discrimination was justified even if the Member State concerned does not allow same-sex marriage.³⁵

³⁰ See Ziegler, LGBT Rights and Economic Migration, above.

³¹ See for an early assessment of this problem Henrik Bull, Free Movement of Persons and the recognition of Foreign Marriages, in: Werner Meng/Gregor Ress/Torsten Stein (eds.), *Europäische Integration und Globalisierung* (Baden-Baden, Nomos, 2011), 51-66 or Christian Kohler, Vom Markt zum Menschen: Das internationale Familienrecht der Europäischen Union nach dem Vertrag von Lissabon in: Werner Meng / Gregor Ress / Torsten Stein (eds.), *Europäische Integration und Globalisierung* (Baden-Baden, Nomos, 2011) or early on Daniel Borrillo, Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l'Union européenne, *Revue de droit de McGill* 2001, 875–922.

³² See Elena Falletti, LGBTI Discrimination and Parent–Child Relationships: Cross-Border Mobility Of Rainbow Families in the European Union, *Family Court Review*, vol. 52 no. 1, January (2014), 28–45.

³³ 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77–123).

³⁴ Judgment C-673/16, *Coman & Hamilton*, Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării. See Alina Tryfonidou, Free Movement of Same-Sex Spouses within the EU: The ECJ's *Coman* judgment, *European Law Blog* of 19 June 2018, online at: <https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/> and Jean-Yves Carlier, Vers un ordre public européen des droits fondamentaux – l'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt *Coman* (obs. sous C.J.U.E., Gde Ch., arrêt *Coman*, 5 juin 2018), *Revue trimestrielle des droits de l'homme*. No 117, 1, January 2019, 203-221.

³⁵ “In a situation in which a Union citizen has made use of his freedom of movement... whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex. ...“Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for

Non-discrimination (at the Workplace)

On the basis of the treaty provisions introduced originally in 1997 (Treaty of Amsterdam) the EU can now action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation – but as this can only be done when all EU Members agree the resulting protection “relating to sexual orientation” remains rather limited. While a number of instruments have been adopted under this provisions (originally referred to as Article 13 Directives due to the original numbering under the Treaty of Amsterdam³⁶), the only one clearly applying in cases of discrimination based on sexual orientation is Directive 2000/78 of 27 November 2000³⁷ while other instruments are limited in their scope to criteria such as race or sex.³⁸

Non-discrimination at the workplace can be seen as a component of the EU’s role in the area of the free movement of persons (workers) and the adoption of certain common standards regarding the production of goods and services. In this field the EU as adopted several instruments over time and the ECJ has used them (at least since the mid-1990s but even before the explicit reference to SOGIESC in the treaties) to protect also LGBTI persons against discrimination.³⁹ Interestingly here, the very first case concerned a trans person⁴⁰ and many similar cases avoiding discrimination of trans persons were to follow.⁴¹

Similarly, the ECJ has played an important role in making the non-discrimination rules of these instruments available to those discriminated against due to their sexual orientation. While in

more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.’

³⁶ See Barry Fitzpatrick, *The "Mainstreaming" of Sexual Orientation into European Equality Law*. In: *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, Cambridge [etc.], Cambridge University Press 2007, p. 313-343.

³⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁸ There is as controversy as to the legitimacy of this difference in the scope of protection ('hierarchy of grounds') is legitimate and consistent with international human rights law. See e.g. Erica Howard, *EU anti-discrimination law: Has the CJEU stopped moving forward?* *International Journal of Discrimination and the Law*, 8 October 2018 online and Sara Benedi Lahuerta and Ania Zbyszewska, *EU equality law: looking ahead after twenty years of policy-making*, *European Law Blog*, 8 April 2019.

³⁹ See Kees Waaldijk/Matteo Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, The Hague 2006.

⁴⁰ Judgment C-13/94, *P v S and Cornwall County Council*, ECR [1996] I-2143: trans persons protected under sex equality law (Article 5(1) of the Directive of the European Council 76/207/EEC of 09.02.1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal L 039, 14/02/1976, 40

⁴¹ Judgment C-117/01, *K.B. v. National Health Service Pensions Agency*, 07.01. 2004: sex equality and inability to change one’s legal gender (Directive 75/117); Judgment C-423/04, *Richards v. Secretary of State for Work and Pensions* (judgment of 27 April 2006): Directive 79/7; Judgment C-451/16, *MB v Secretary of State for Work and Pensions* (judgment of 26 June 2018).

the beginning the Court was hesitant (at least in delicate areas such as the armed forces⁴² or the non-availability of marriage⁴³) the Court became more active once the applicable secondary law, most importantly Directive 2000/78 of 27 November 2000⁴⁴, was in place⁴⁵, most recently even giving it a wider room of application for ongoing discrimination based on decisions taken before its entry into force.⁴⁶

Staff Regulations Cases

A specific application of the non-discrimination of workers is obviously at stake when the EU itself is the employer. While the discrimination in the Member States is governed by the (limited) rules just described, the staff rules of the contain the relevant provision applying in this case. They evolved over time and this gave the ECJ the possibility to interpret them and apply them also to LGBTI persons. In particular, questions arose here when certain benefits were only available to married persons (while marriage was normally not available to same-sex partners). Here again one can see that in early times the staff rules were silent and the ECJ

⁴² Judgment C-168/97 *R. v. Secretary of State for Defence, ex parte Perkins* [1997], Application: OJ C 199 from 28.06.1997, 11; Removal from the register: OJ C 358 from 21.11.1998, 12. [Industrial Relations Law Reports 297; (1997) 3 CMLR 310]: discrimination in the army still considered justified.

⁴³ Judgment C-249/96, *Grant v South-West Trains Ltd* [1998] ECR I-621. travel concessions for her same-sex partner: no discrimination on the grounds of sex (too), but only on the grounds of sexual orientation, which was not protected.

⁴⁴ The adoption of the so-called “Employment Directive” obliged all Member States to introduce legislation banning discrimination in employment on a number of grounds, including sexual orientation by December 2003. See Suzanne Baer, *Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member states — Report of the European Group of Experts Combating Sexual Orientation Discrimination about the Implementation up to April 2004 of Directive 2000/78EC Establishing a General Framework Treatment in Employment and Occupation*, Berlin 2004.

⁴⁵ Judgment C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (01.04.2008); Judgment C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* (10.05.2011): in search of the specific comparability between marriage and civil union; Judgment C-81/12, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* (25.4.2013) ; Judgment C-267/12, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (12.12.2013); Judgment C-443/15, *David Parris v. Trinity College Dublin*, 24.11.2016).

⁴⁶ Judgment C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA* (15 January 2019): Article 2 of Council Directive 2000/78/EC of 27 November 2000 ... must be interpreted as applying, after the expiry of the time limit for transposing that directive, namely from 3 December 2003, to the future effects of a final disciplinary decision, adopted before the entry into force of that directive, ordering the early retirement of a civil servant, accompanied by a reduction in his pension entitlement. ... Directive 2000/78 must be interpreted as meaning that, in a situation such as that referred to in point 1 of the operative part of the present judgment, it obliges the national court to review, with respect to the period starting on 3 December 2003, not the final disciplinary decision ordering the early retirement of the civil servant concerned, but the reduction in his pension entitlement, in order to calculate the amount he would have received in the absence of any discrimination on the ground of sexual orientation.”

remained relatively inhibited.⁴⁷ When the staff rules were amended, the ECJ changed its attitude.⁴⁸

Foreign Relations

Relations to Third Countries in General

Even if the protection of LGBTI persons in the EU remains uneven due to the differences between the member States and the limited competences of the EU in the field, its Member States still belong to the group with the best protection worldwide. This must therefore influence the relations of the EU as a whole with third countries.⁴⁹

Accession

The foreign relations law of the EU is a rather recent creation and also in this field the competences of the EU remain limited. A particular situation arises where the EU enters into treaty negotiations and diplomatic processes with a view to future membership (accession) of a third country. Here, the EU regularly demands specific results regarding the protection of human rights and the rule of law. This can involve the protection of LGBTI persons. Countries wishing to join the Union will be obliged to introduce specific legislation. On the whole, one can say that the non-discrimination of LGBTI persons and the respect of their rights have become an ever more salient and controversial part of the EU enlargement process: Some would even argue that the EU is more demanding regarding the situation in accession candidates than with regard to some of its Member States. Especially in this field, the European Parliament often makes statements and expresses conditions regarding its approval of the accession treaty. Also upon accession, the EU normally has made available important resources to improve the situation of vulnerable groups, including LGBTI persons. E.g. over the period 2001 to 2006 (following the accession of many new members) a “Community Action Programme to Combat

⁴⁷ Judgment Case T-264/97 (28.01.1999); Judgments C-122/99 P & C-125/99 P D and Kingdom of Sweden v Council of the European Union (Judgment of the ECJ of 31.05.2001; non-recognition of registered relationships in Union Law justifies different domestic treatments).

⁴⁸ Judgment Case F-86/09, W v. Parliament, judgment of the EU Civil Service Tribunal (Second Chamber) of 14 May 2010 (ECLI:EU:F:2010:125). Annex VII to the Staff Regulations had in the meantime been altered, providing benefits for spouses independently of their sex.

⁴⁹ See Council of the European Union, Promoting the enjoyment of all human rights by lesbian, gay, bisexual and transgender people - Promoting the enjoyment of all human rights by lesbian, gay, bisexual and transgender people, Brussels 2010, online: <https://www.consilium.europa.eu/en/documents-publications/publications/promoting-enjoyment-all-human-rights-lesbian-gay-bisexual-transgender-people/> or EU Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex persons adopted by the Foreign Affairs Council of 24 June 2013.

Discrimination” was adopted, involving the expenditure of EUR100 million, to fight discrimination in a number of areas, including sexual orientation.⁵⁰

Common Commercial Policy (CCP)

The most developed area of the external relations law of the EU is the so-called Common Commercial Policy. While it is more difficult to integrate the protection of LGBTI rights into multilateral instruments (in particular the WTO) or treaties with developed and emerging economies, the EU is more likely to make requests in its commercial policy towards developing countries, especially where it provides unilateral concessions based on the fulfilment of certain conditions. The most important instrument is the so-called Generalised Scheme of Preferences (GSP), an instrument available to WTO members in order to give benefits to specific developing countries. The EU’s GSP removes import duties from products coming into the EU market from vulnerable developing countries. In the view of the EU, this helps developing countries to alleviate poverty and create jobs based on international values and principles, including labour and human rights. When reviewing whether specific partners should still be entitled to benefits under this program, the EU regularly makes request regarding the treatment of LGBTI persons.⁵¹

Asylum

A rather specific (and more recent) competence of the EU that can be seen as part of its relations with third States but also as a consequence of its internal integration (and the abolishment of border controls) relates to the common policies regarding refugees. Due to its emotional perception and the problems related to migration in general, this area is particularly difficult when it comes to taking into account specific LGBTI issues.⁵²

⁵⁰ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006). From 1 January 2007, this programme was replaced by the so-called “PROGRESS Community programme” (Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, OJ L 315, 15.11.2006, p. 1–8).

⁵¹ A recent example would be the analysis made of Paraguay: European Commission, Fact Sheet - EU trade policy encourages sustainable development and respect for human rights in vulnerable economies (Brussels, 19 January 2018): “Further attention is needed, in particular regarding the rights of indigenous peoples, violence and discrimination against women, child labour, discrimination against LGBT persons as well as the overall functioning of the justice system.”

⁵² See for example S. Jansen, Thomas Spijkerboer, *Fleeing Homophobia. Asylum Claims related to sexual orientation and gender identity in Europe*. COC Nederland, Free University Amsterdam; 2011. online at: www.rechten.vu.nl/fleeinghomophobia.

The EU has taken measures⁵³ that have an impact on the treatment of refugees related to their gender identity and sexual orientation.⁵⁴ In the currently applicable norms, “gender identity” was expressly included in its hypernym “gender”⁵⁵ whereas lesbians and gays are considered to be included in the category “particular social group”. As a consequence, the ECJ has had various occasions to address the measures taken by Member States and their compatibility with the harmonized rules. In this context the ECJ has clearly states, that homosexuals may be granted asylum if homosexuality is criminalised and actually punished in their country of origin⁵⁶, that human dignity and privacy of LGBTI persons should be respected in the evidentiary procedure⁵⁷, and most recently that it is inadmissible to assess a person’s sexual orientation only on the basis of “a psychologist’s expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant”.⁵⁸

Conclusions

While as a group the EU Member States are among the most advanced countries when it comes to protection and non-discrimination of LGBTI (lesbian, gay, bisexual, trans, intersex) persons, there remain huge differences among them. This is reflected in the limited competences of EU in this field (e.g. family law, education etc.). Even when the EU is competent to take concrete measures, they are normally subject to unanimity rules which makes progress slow. At the same time, the achievement of certain accepted goals with regard to other policies (internal market, security and asylum, staff regulations etc.) has made possible certain compromises between the Member States that have improved the situation (sometimes only after a clarification through the case law of the ECJ). In addition, despite the uneven acceptance within the UE, in its foreign relations the EU (or at least certain actors like most importantly the Parliament) the EU is

⁵³ Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12–23; Repealed by Directive 2011/95/EU of the European Parliament and the Council (13.12.2011) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, 9).

⁵⁴ Here as in other areas, the role of the ECHR should not be forgotten: see Falcetta, S. & Johnson, P. J., Migration, Sexual Orientation, and the European Convention on Human Rights, *Journal of Immigration, Asylum and Nationality Law*, 4 Jun 2018; Christine Byron, *The European Court of Human Rights: A Living Instrument as Applied to Homosexuality*, *The Judges' Journal*, Vol. 55, No. 3 (2016).

⁵⁵ Article 10 §1 Letter d.

⁵⁶ Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v. Minister voor Immigratie en Asiel, 07.11.2013.

⁵⁷ Joined Cases C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie, 2.12.2014.

⁵⁸ Case C-473/16, Judgment of the Court (Third Chamber) of 25 January 2018: F v Bevándorlási és Állampolgársági Hivatal.

increasingly demanding a minimum threshold regarding the respect of human rights (also of LGBTI persons). This is particularly important for so-called candidate countries and in commercial relations with developing countries.