BlogDUE

The Equality Package: has the Hard Law Momentum arrived for LGBTIQ+ Rights in the EU?

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SUMMARY: 1. Introduction. – 2. The Equality package: what is at stake? – 3. The EU old (but soft!) support to LGBTIQ+ rights. – 4. Perspective considerations: is soft law really over with the Package?

1. EU institutions have always been considered as early allies of the LGBTIQ+ community at European level. The history of European integration is characterized by a long list of statements, declarations of principle and political initiatives that stand by LGBTIQ+ revendications. However, this support has rarely corresponded to the adoption of legally binding rules. EU institutions have thus been strongly reliant on soft law instruments when dealing with this issue. Due to a limited supranational competence in the policy areas concerned by LGBTIQ+ claims, the adoption of binding harmonisation rules required a common political consensus. Indeed, despite Directive 2000/78 dealing with discriminations in employment relationships, the Union has not adopted harmonisation rules directly targeted to LGBTIQ+ revendications and the relevant power to deal with these issues still lies upon the Member States. Therefore, the use of soft instruments in this field is overwhelming.

Against this backdrop, the Equality Package recently launched by the European Commission may seem an inversion of this paradigm. Without prejudice to the role that the Court of Justice can play on LGBTIQ+ matters (it should be recalled, for example, the *Coman* judgment, concerning free movement rights in the framework of Directive 2004/38), for the first time a comprehensive framework was proposed to harmonise rules regarding parenthood in cross-border situations. Moreover, the Commission explicitly stresses the objective of enhancing LGBTIQ+ rights' protection with this Package. Several elements suggest, however, that soft instruments still have a crucial role to play. Notably, as it will be highlighted, other than a vast preparatory function, soft law is liable to exercise a complementary and even a substitutive function of the rules at stake. This piece will, first, provide an analysis of the legislative innovations proposed in the Package. Second, it will discuss the progressive incorporation of LGBTIQ+ rights within EU law and

policies, which has mainly been achieved through soft law instruments. Last, the analysis will converge on some perspective considerations concerning the future implementation of the Package, especially as regards its legal basis and scope of application.

2. On 7th December 2022, the European Commission proposed the Equality Package (hereinafter, "the Package"). Based on article 81(3) TFEU, the new rules attempt to provide legal clarity for families who find themselves in a cross-border situation, while reducing times, costs and burdens of recognition proceedings for both families and national judicial systems (on the content of the Package, see also D. DANIELI, *La proposta di regolamento UE sul riconoscimento della filiazione tra Stati membri: alla ricerca di un equilibrio tra obiettivi di armonizzazione e divergenze nazionali*, in *SIDIBlog*, 2023). Indeed, one of the key aspects of the proposal is that "the parenthood established in a Member State of the EU should be recognised in all the other Member States, without any special procedure" (see Commission's press release). Moreover, the proposed rules will apply indistinctly to all types of families, thus representing a steppingstone for the legal protection of children of same-sex parents across the Union.

The Package is built on four core elements.

First, the proposal lays down uniform jurisdiction rules on the establishment of parenthood with a cross-border element. In this context, the driver criterion to determine the competent national authority is the proximity to the child. Jurisdiction can be established, alternatively, in the Member State of habitual residence of the child, of the nationality of the child, or of the habitual residence of any one of the parents. The proposal also provides rules for situations in which the jurisdiction cannot be established on one of the general alternative jurisdiction grounds. According to the Commission, this new set of rules would remedy the risk of parallel proceedings, conflicting decisions, and situations of denial of justice.

Second, the Package aims at enhancing legal certainty and predictability by proposing common rules on the law applicable to the establishment of parenthood in cross-border situations. As a general rule, the law applicable should be the law of the State of the habitual residence of the person giving birth at the time of birth. However, where the application of this rule results in the establishment of parenthood as regards only one parent, the competent courts may apply one of two subsidiary rules: the law of the nationality of any one of the parents, or the law of the State of birth of the child. Against this backdrop, the Commission states that this scheme is explicitly aimed at addressing "the most frequent problems with the recognition of parenthood occurring today" (p. 14 of the Package); namely, the recognition of only one parent for children of same-sex couples.

Third, the proposed regulation will automatise the recognition of parenthood across the EU. In other words, courts decisions and authentic instruments establishing parenthood with binding legal effects issued in a Member State will be recognised in all the Member States, without any special

procedure being required. This point also stems from the conclusions of the Court of Justice in case *Pancharevo*, as regards the recognition of same-sex parenthood for the purpose of exercising the freedom of movement (A. TRYFONIDOU, *The Cross-Border Recognition of the Parent-Child Relationship in RAINBOW Families under EU Law: A Critical View of the ECJ's V.M.A. ruling*, in *European Law Blog*, 2021). Furthermore, the package also provides for the acceptance of authentic instruments regarding parenthood with evidentiary effects.

Last, the proposal creates a European Certificate of Parenthood, issued in a uniform standard template which is attached to the proposal. The certificate is optional, as it will be issued only if the child or a legal representative asks for it. However, once a European Certificate of Parenthood has been issued in a Member State, it must be recognised in all the other Member States.

3. Unsurprisingly, the Equality Package has immediately been embraced by a variety LGBTIQ+ activists and movements across the Union. These legislative innovations, if adopted, would apply to all types of families and therefore impact the every-day-life of same-sex parents; even though, as mentioned, the scope of this legislative package is limited to cross-border situations.

Historically, EU institutions have explicitly endorsed LGBTIQ+ revendications on several occasions. Indeed, it has been argued how "LGBT rights are included bot formally and rhetorically in European institutions" and how this institutional approach "can and has been claimed by activists" (P. AYUB, D. PATERNOTTE, *Europe and LGBT rights: A Conflicted Relationship*, in *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, 2020, p. 5). However, as mentioned above, this supportive approach had to deal with the limited supranational competence in the policy areas concerned. In this context, soft law instruments have played a crucial role. As an example, the European Commission has often financed civil society organisations operating in this field, formally endorsed diverse political initiatives, and gave financial support to research projects on LGBTIQ+ rights in Europe (R. HOLZHACKER, *The Europeanization and Transnationalization of Civil Society Organizations Striving for Equality: Goals and Strategies of Gay and Lesbian Groups in Italy and the Netherlands*, in *EUI Working Papers*, 2007). Likewise, the approach of the European Parliament (EP) is characterized by a long list of declarations of principle to stress the importance of LGBTIQ+ rights' protection. For instance, in 1984 the EP published "sexual discrimination in the workplace", a working document to condemn discriminations based on sexual orientation in employment relationships. Moreover, in 1994 the same institution published the historical "Equal rights for homosexuals and lesbians in the EC". This resolution aimed at combating discriminations based on sexual orientation and explicitly encouraged the Member States to take appropriate measures.

Despite the soft nature of these instruments and practices, EU institutions have developed over the years a supranational *répertoire* on LGBTIQ+ rights

(see, for example, P. DE PASQUALE, *Cittadini LGBTIQ tra uguaglianza e discriminazioni*, in *Studi sull'integrazione europea*, 2021). More importantly, as underlined by authoritative doctrine, this soft approach has led to the subsequent creation of hard law instruments at EU level. Notably, the anti-discrimination clause introduced in Article 19 of the Amsterdam Treaty is considered as a symbol of these dynamics (K. KOLLMAN, *European institutions, transnational networks and national same-sex unions policy: when soft law hits harder*, in *Contemporary Politics*, 2009).

Even in recent times, EU institutions have consolidated the soft approach towards LGBTIQ+ rights. The most relevant example is probably represented by the LGBTIQ+ Equality Strategy 2020-2025 (hereinafter, "the Strategy"). The Strategy has been overwhelmingly welcomed by the members of the European Parliament with the Resolution on the protection of the rights of the child in civil, administrative and family law proceedings and the Resolution on LGBTIQ rights in the EU. These instruments have exercised a comprehensive preparatory function of the Equality Package. Indeed, in the Strategy the Commission committed itself to proposing, by the end of 2022, a "legislative initiative to support the mutual recognition of parenthood between Member States" (p. 17 of the Strategy). Moreover, the proposed rules also stem from the 2021 EU Strategy on the rights of the child. Likewise, reference to the legislative issues addressed in the Package can be found in the 2010 European Council Stockholm programme, the 2010 Green Paper entitled "Less bureaucracy for citizens", or the 2017 Resolution of the European Parliament on the cross-border recognition of adoption orders. In an attempt to enhance legitimacy and consistency of the Commission's proposal, all the aforementioned instruments are largely illustrated in the explanatory memorandum of the Package.

Furthermore, the Commission maintains that extensive consultations have been conducted in preparing the proposal. In this context, several stakeholders have been involved, representing children's rights, rainbow families, legal practitioners, civil registrars and other NGOs or relevant interest groups. According to the Commission, these actors overall supported the legislative proposal (p. 7 of the Package). In addition to these preparatory – and soft – instruments, stakeholders' consultation is also aimed at strengthening legitimacy of the EU legislative action. Furthermore, it integrates the consolidated soft practice of involving non-institutional actors in the legislative process (see, for example, O. STEFAN, *Covid-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda*, in *European Papers*, 2020). Against this backdrop, the crucial point becomes understanding the substantive nature of the proposed rules, and how these are liable to impact LGBTIQ+ rights' protection at EU level.

4. Despite the Equality package may be interpreted as a transition towards hard law on LGBTIQ+ rights' protection at EU level, several elements suggest that soft law is not completely over.

First, attention must be paid to the legal basis of the Equality Package. Article 81(3) TFEU provides a special legislative procedure and requires the Council to act unanimously. Therefore, it goes without saying that the veto power of each Member State will probably be the greatest challenge to overcome. Indeed, this treaty provision gave rise to similar complications in the past. In 2006, the Commission proposed a Regulation on jurisdiction and applicable law in matrimonial matters, using the Treaty provision corresponding to the current Article 81(3) TFEU as a legal basis. Two years later, the Council concluded that there was a lack of consensus on the proposal and that there were insurmountable difficulties that made unanimity impossible to achieve (see press release of the Council's meeting of 5-6 June 2008, p. 22). Subsequently, a group of fourteen Member States opted for an enhanced cooperation, which resulted in the adoption of Regulation 1259/2010 as regards the law applicable to divorce and legal separation. Moreover, the challenges of consensus have already shown their potential in the political and institutional debate around the Equality Package. For instance, the Committee for EU policies of the Italian Senate ('*4ª Commissione permanente - Politiche dell'Unione europea*') has examined the Commission's proposal. The members of the Committee approved a final resolution that gives a negative evaluation to the proposed regulation, maintaining that this is not consistent with the principle of subsidiarity (G. BIAGIONI, *Malintesi e sottintesi rispetto alla proposta di regolamento UE in tema di filiazione*, in *SIDIBlog*, 2023). This conclusion, which will probably be reflected in the country's position within the Council, perfectly shows the challenges of article 81(3) TFEU as a legal basis. Another example of these dynamics emerge from the recent debate around the infringement procedure triggered by the European Commission against Hungary, as regards a national law which is liable to discriminate LGBTIQ+ minorities. Fifteen Member States and the European Parliament are supporting the Commission's lawsuit before the Court of Justice, whereas the others backed the position of the Hungarian government. Consensus over sensitive political issues such as LGBTIQ+ rights seem therefore particularly difficult to achieve. In this context, several scholars have already pointed out that soft law is suitable to those situations in which the adoption of legally binding rules is not a practicable option (A. GUZMAN, T. MEYER, *International Soft Law*, in *The Journal of Legal Analysis*, 2010). Therefore, in the event of an overwhelming lack of political consensus on the Package, soft law may remain the only practicable option. Nonetheless, the Commission explicitly states that the legislative measures of the Package will be "accompanied by certain non-legislative measures to raise awareness, promote good practices and improve cooperation between Member States authorities dealing with parenthood matters" (p. 9 of the Package). A complementary function for soft law is thus already envisaged. Indeed, monitoring and reporting mechanisms are included in the proposal, even though the Commission does not dwell on this point. However, it points out that external experts and relevant stakeholders will be involved within these mechanisms.

Second, a crucial issue concerns the scope of application of the proposed rules which, as anticipated, is limited to the existence of a cross-border element. Therefore, the new rules will not affect or alter the establishment of parenthood in purely internal situations. In other words, the Member States will remain free to regulate – or not to regulate – access to filiation for same-sex couples and the recognition of same-sex parenthood in their respective national legal orders. This difference of treatment seems liable to lead to a reverse discrimination between parenthood established in cross-border situations and parenthood established domestically. The phenomenon of reverse discriminations is common in the context of the operation of EU law and has fascinated scholars since the early days of European integration (see, for example, F. SPITALERI, *Le discriminazioni alla rovescia nel diritto dell'Unione europea*, Roma, 2010). This consists in a difference of treatment that arises between subjects acting in a pure internal situation and those who find themselves in a situation characterised by a transnational (or cross-border) element. The basis of reverse discriminations is therefore constituted by the limitation of the scope of application *ratione personae* of the rules on free movement, which apply only to those situations that are marked by a cross-border element. More practically, the adoption of the Equality Package would lead to the formation of two blocks. On the one hand, families who find themselves in a cross-border situation would benefit from the application of the proposed rules; families who act in a purely internal situation, on the other hand, would be confined to the applicable national law regarding parenthood. Therefore, as regards LGBTIQ+ rights' protection, only same-sex parents that demonstrate the existence of a cross-border element would benefit from the neutrality of the rules contained in the Package (namely, the fact that the proposed rules would apply indistinctly to all types of parenthood). Moreover, it is not clear whether a reverse discrimination is an issue of EU law and, therefore, need to be addressed by the Union's judiciary. Some scholars argue that reverse discriminations can be seen as the "unavoidable, normal consequence of the division of competences" between the Union and the Member States (D. HANF, *'Reverse discrimination' in EU law: constitutional aberration, constitutional necessity or judicial choice?*, in *Journal of European and Comparative Law*, 2011). Tolerating these discriminations, therefore, can be interpreted as a reflection of the principle of conferral. Likewise, other scholars believe that reverse discriminations are dramatically different than discriminations based on nationality and the principle of non-discrimination enshrined in article 18 TFEU seems not applicable to these situations (F. SPITALERI, *Le discriminazioni*, cit.). On the other hand, a vast literature maintain that reverse discriminations represent a temporary phenomenon in the gradual development of the EU legal order (see, for example, K. MORTELMANS, *La discrimination à rebours et le droit communautaire*, in *Diritto comunitario e degli scambi internazionali*, 1980; E. AMBROSINI, *Reverse Discrimination in EU Law: An Internal Market Perspective*, in L.S. ROSSI, F. CASOLARI (eds.), *The Principle of Equality in EU Law*, Cham, 2017). Accordingly, these discriminations have been

described as something which is "clearly impossible in the long run" (see AG Mischo in *Edah*, joined cases 80/85 and 159/85). Against this backdrop, if the Package will be concretely adopted, it will be crucial to understand the approach that the Court of Justice decides to undertake – whether to address, totally or partially, reverse discriminations, or to leave the issue in the hands of the Member States' administrations, legislatures and judiciaries.

Last, it must be highlighted that the new rules are not intended to affect or alter the existing rights that a child derives under Union law on free movement. Notably, article 21 TFEU as interpreted by the Court of Justice and other instruments of EU secondary law will continue to apply unaffected (on this point, see case *Pancharevo*, C-490/20; see also I. MARCHIORO, *Quali prospettive per il legislatore europeo dopo Coman e Pancharevo?*, in *I Post di AISDUE*, 31 gennaio 2023). Therefore, as the Commission explicitly points out, a Member State cannot refuse to recognise same-sex parenthood for the purposes of exercising the rights that the child derives under Union law on free movement (p. 11 of the Package).

In conclusion, even though the Equality Package has been widely welcomed among LGBTIQ+ activists and movements, the objective of a Union of Equality seems far from being achieved. As underlined, if unanimity cannot be reached within the Council, a number of Member States can still adopt the proposal in enhanced cooperation. In this case, however, the objective of providing the same rights for all children would probably be undermined, especially in those Member States often associated with more conservative convictions (T. KRUGER, *European Commission Proposal for a Regulation on Private International Law Rules Relating to Parenthood*, in *Conflict of Laws*, 2022). Furthermore, the potential emergence of reverse discriminations would also jeopardize (at least, partially) the objective of providing legal clarity for all types of families. Therefore, when facing reluctant national laws towards same-sex parenthood, political pressure and soft law will probably remain the only realistic option for the EU action in this field.