
Exploring the Highlights, Limitations and Possibilities of EU Citizenship as a Progressive Status for Gays and Lesbians

Frances Hamilton*

Abstract

Although the original treaties of the European Union ('EU') conceptualised the EU as a trade body, in recent years the competencies granted by Member States to the EU have expanded greatly, not least in the area of equality and non-discrimination. In response to criticisms about a democratic deficit, the concept of EU citizenship was introduced. This entails voting, free movement, residence and non-discrimination rights across Member States for EU citizens and their family members (who do not have to be EU citizens themselves). For non-mobile EU citizens the EU has had a huge influence in expanding non-discriminatory employment rights. Yet in order to be truly democratic the concept of citizenship needs to engage with all citizens in an equal manner. In contrast to the Brexit agenda which researchers consider to be readily aligned with hegemonic masculinity, the EU is portrayed as pro-feminist and lesbian and gay inclusive. This piece tests how much in reality EU citizenship includes those who do not conform with a heteronormative, liberal equality model. Whilst real progress has been made, many difficulties remain. EU soft law in this area offers hope for future development.

1. Introduction

In this article I consider how accessible EU citizenship-associated rights are for lesbians and gays.¹ Although originally conceptualised as a trade body in the three original treaties,² in recent decades Member States have granted the EU many new competencies. To combat increasing criticisms of an alleged democratic deficit,³ the EU introduced and expanded the

* Associate Professor, School of Law, University of Reading, UK. Email f.r.hamilton@reading.ac.uk

¹ I concentrate on these two groups specifically as other members commonly included within the LGBT or similar acronyms have different lived experiences and consequently different legal treatment in EU Law and so deserve dedicated space. This could be an avenue for future research.

² The European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).

³ See Paul Craig and Gráinne De Burca, *EU Law, Text Cases and Materials* (Oxford University Press, 2020), 14.

concept of citizenship to include many new rights in addition to national citizenship. These include free movement and rights of residence in other EU states,⁴ non-discrimination provisions equating to equal treatment with host-country nationals,⁵ allowing family members to take up employment or self-employment,⁶ and extensive schooling provisions for children of EU citizens.⁷ Since 2000, the EU has adopted far-reaching protections from discrimination on the basis of sexual orientation.⁸ By means of powers now contained in Article 19 of the Treaty on the Functioning of the European Union, the EU can implement legislation within its competencies to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.⁹ The EU has also adopted the Charter of Fundamental Rights, Art 21(1) of which includes 'sexual orientation' as a protected characteristic against discrimination.¹⁰ It is important that all citizens are truly included, as otherwise the EU will continue to suffer from a lack of *demos*,¹¹ or a lack of voluntary connection by individuals.¹² A *demos* is needed to ensure the necessary 'coherence, shared objectives, and a propensity for solidarity' to build a common project such as the EU.¹³ As Weiler explains '[i]f there is no demos, there can be no democracy'.¹⁴

Some authors have argued that the EU is pro-feminist and lesbian and gay inclusive, portraying it as the 'most progressive gender regime in the world'¹⁵ and connecting EU

⁴ Citizenship Directive (EC) 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, L 158/77, art 14-16.

⁵ Treaty on the Functioning of the EU ('TFEU'), C 326/47, art 18; Citizenship Directive (n4), art 24.

⁶ *Ibid*, art 23.

⁷ Regulation (EU) 492/2011 on freedom of movement for workers within the Union, L 141/1, art 7 referring to *Casagrande* (Case C-9/74) and *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99).

⁸ Framework Directive(EC) 2000/78 establishing a general framework for equal treatment in employment and occupation, L 303.

⁹ TFEU (n5), art 19.

¹⁰ Charter of Fundamental Rights, 2000/C 364/1, art 21(1).

¹¹ Here I understand *demos* to be defined as 'a people viewed as a political unit'; see Dictionary.com

<https://www.dictionary.com/browse/demos>. The Collins Dictionary also has a relevant definition of *demos* as 'the people of a nation regarded as a political unit'; see

<https://www.collinsdictionary.com/dictionary/english/demos>, although here I am considering *demos* on an EU rather than national level.

¹² Lars-Erik Cederman, 'Nationalism and Bounded Integration: What It Would Take to Construct a European *Demos*' (2001) *European Journal of International Relations* 7(2), 139-174.

¹³ Daniel Innerarity, 'Does Europe Need a *Demos* to Be Truly Democratic?' [2014] LEQS Paper No 77/2014, 2.

¹⁴ Joseph Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), 337.

¹⁵ Gabriele Abels and Joyce Mushaben (eds), *Gendering the European Union. New Approaches to Old Democratic Deficits* (Palgrave Macmillan, 2012), 1.

citizenship with support for gender equality.¹⁶ These arguments came to the fore in the aftermath of Brexit (the process whereby, following a referendum in 2016, the UK withdrew from the EU on 31 December 2020). Researchers analysed Leave campaigns and ‘established the presence of hegemonic masculinity’,¹⁷ here understood by the definition provided by Raewyn Connell as ‘embod[ying] the currently most respected/honoured way of what it means to be a man’ and central to upholding the patriarchal order.¹⁸ More specifically Galpin explains that Brexit Leave campaigns, as exemplified by arch Brexiteer Jacob Rees-Mogg, chose to concentrate upon ‘acceptable notions of the white “masculine” citizen – rational, individualist, aggressive’ and ‘focused primarily on issues of “high politics” – security, economy and immigration’.¹⁹ Pro EU activists considered that ‘voting leave ... was associated with opposition to feminism, social liberalism, and LGBT rights’.²⁰ The debate and discourse around Brexit, commentators concluded, therefore ‘bolster[ed] gendered hierarchies’ and resulted in excluding ‘other’ groups, such as women and lesbians and gays, from participating effectively in the debate.²¹ Pro-EU campaigners concluded that leaving the EU was ‘ultimately worse for women’.²²

In contrast to analysing Leave campaigners, Galpin’s work involved interviewing 11 pro-EU campaigners in 2019 and considering ‘masculinity in pro-European campaigns’.²³ Her interviews with pro-EU campaigners revealed that they opposed the Brexit campaigners’ location of EU citizenship within the masculine space of the market, depicted as ‘neo-liberal

¹⁶ Athena Enderstein, ‘European Identity and Gender Equality Policies: Shaping the Practice of Gender Expertise’ (2017) *Journal of Research in Gender Studies* 7(2), 109-135, 110, referring to Cris Shore, *Building Europe. The Cultural Politics of European Integration* (Routledge, 2000), 19.

¹⁷ Charlotte Galpin, ‘Contesting Brexit Masculinities: Pro European Activists and Feminist EU Citizenship’ (2022) *Journal of Common Market Studies* 60(2), 301-318, 310, referring to Columba Achilleos-Sarll and Benjamin Martill, ‘Toxic Masculinity: Militarism, Deal-Making and the Performance of Brexit’, in Moira Dustin, Nuno Ferreira and Susan Millns (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan, 2019), 15–44 and Michael Higgins, ‘Political Masculinities and Brexit: Men of War’ (2020) *Journal of Language and Politics* 19(1), 89-106.

¹⁸ Raewyn Connell, ‘Masculinities and Globalization’ (1998) *Men and Masculinities* 1(1), 3-23, 5.

¹⁹ Galpin (n17), 301 referencing Roberta Guerrina, Theophonos Exadaktylos, and Simona Guerra, ‘Gender, Ownership and Engagement During the European Union Referendum: Gendered Frames and the Reproduction of Binaries’ (2018) *European Journal of Politics and Gender* 1(3), 387-404.

²⁰ Galpin (n17), 311.

²¹ *Ibid*, 301-302 referring to Achilleos-Sarll and Martill (n17), 32.

²² *Ibid*, 310.

²³ *Ibid*.

inequality',²⁴ and instead constructed the EU as a symbol of 'caring capitalism'.²⁵ Pro-EU campaigners were connected with pro-lesbian and gay activism,²⁶ matching Sloomaeckers' argument that such rights have become an 'identity marker' for the EU.²⁷ Perhaps when contrasted specifically with the Brexit Leave agenda, the EU could be considered to be more pro-feminist and lesbian and gay inclusive. However this article argues that outside of the specific juxtaposition to the Brexit agenda, it is inaccurate to portray the EU concept of citizenship as pro-feminist and lesbian and gay inclusive, as the productivist origins of the EU continues to underpin the EU project. This article considers, however, that soft law development offers a way forward for the EU.

First we must understand what is meant by citizenship. Definitions of citizenship have been extensively analysed over centuries. In ancient times Roman authors deemed political participation to be central to citizenship.²⁸ In *Citizenship and Social Class*, first published in the 1950s, Marshall expanded on earlier definitions to include civil, political and social rights.²⁹ Everyone who fulfilled the definition of citizenship was, in Marshall's view, given equal status as a 'full member of the community'.³⁰ Yet feminist writers exposed weaknesses in Marshall's definition of social citizenship, arguing that it was too closely related to economic productivity, rendering the private space 'invisible' and consequently 'undervalu[ing]' women's conventional responsibilities for the care of children, household and the elderly'.³¹ Behind the notion of citizenship lies the 'abstract notion' of the 'image of a man – and usually that of an able-bodied, heterosexual and middle-class man who engages

²⁴ Ibid, 311 to describe arch-Brexitteer Jacob Rees-Mogg.

²⁵ Ibid, 310.

²⁶ Ibid.

²⁷ Koen Sloomaeckers, 'Constructing European Union Identity through LGBT Equality Promotion: Crises and Shifting Othering Processes in the European Union Enlargement' (2020) *Political Studies Review* 18(3), 346-361, 354.

²⁸ Aristotle, *Politics*, Book 1, section 1253a states that man is a social animal and for the development of his personality he needs to participate in affairs of the polis.

²⁹ Thomas Humphrey Marshall, *Citizenship and Social Class: And Other Essays* (Cambridge University Press, 1950).

³⁰ Ibid, 72.

³¹ Heli Askola, 'Tale of Two Citizenships? Citizenship Migration and Care in the European Union (2012) *Social and Legal Studies* 21(3), 341-356, 343; Ruth Lister, 'Citizenship: Towards a Feminist Synthesis' (1997) *Feminist Review* 57(1), 28-48; Ruth Lister, *Citizenship: Feminist Perspectives* (Macmillan, 2003); Nira Yuval-Davis, 'Intersectionality, Citizenship and Contemporary Politics of Belonging' (2007) *Critical Review of International Social and Political Philosophy* 10(4), 561-574.

with his peers in the public space'.³² As the EU concept of citizenship remains primarily centred on the idea of a mobile citizen able to move internationally to take up new work opportunities, EU law has been criticised as being 'gender blind'.³³ Perhaps gender blindness is not the specific difficulty, as EU law has made advances in setting out formal equality in law through prohibiting for instance sexual discrimination in an employment context.³⁴ It does need to be recognised, however, that formal equality does not always equate to substantive equality because of the different social roles and economic power between different groups in society. For instance, Lovenduski explains that it 'shouldn't be assumed that all genders engage with the EU in the same way'.³⁵ Authors such as Ackers consider that EU law excludes female citizens.³⁶ Solanke conducted an intersectional analysis of EU citizenship law and Brexit's impact on Black women and children, demonstrating their struggles for inclusion.³⁷ Tryfonidou has written extensively on EU engagement with lesbian and gay freedom of movement and expanding non-discrimination law.³⁸ Yet following Brexit, and the renewed conception of EU citizenship as pro-lesbian and gay, there has been little analysis of how correct this view is, and the possibilities for future action. This is the gap that I intend to fill here.

It is crucial to examine this now. Whilst there are many reasons for Brexit, authors argue that the perception of a 'democratic deficit', encompassing the idea of a lack of demos was an important element to the successful Brexit campaign.³⁹ Hobolt further explains that the

³² Askola, *ibid.*

³³ Roberta Guerrina, Toni Hastrup, Katharine AM Wright, Annick Masselot, Heather MacRae and Rosalind Cavaghan, 'Does European Union Studies Have a Gender Problem? Experiences from Researching Brexit' (2018) *International Feminist Journal of Politics* 20(2), 252–257, 253.

³⁴ Equality Framework Directive (n8).

³⁵ Joni Lovenduski, *Feminizing Politics* (Polity, 2005), 53.

³⁶ Louise Ackers, 'Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions' (1994) *Journal of Social Welfare and Family Law* 16(4), 391–406; Louise Ackers, 'Citizenship, Gender, and Dependence in the European Union: Women and Internal Migration' (1996) *Social Politics* 3(2), 316–330. See also Askola (n31).

³⁷ Iyiola Solanke, 'The Impact of Brexit on Black Women, Children and Citizenship' (2020) *Journal of Common Market Studies* 58, 147–159.

³⁸ Eg, Alina Tryfonidou, 'The Parenting Rights of Same-Sex Couples Under European Law' (2020) *Marriage, Families and Spirituality* 25(2), 179–194; Alina Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) *Yearbook of European Law* 38, 220–226, 222.

³⁹ Jan Pieter Beetz, 'From Practice to Principle and Back: Applying a New Realist Method to the European Union's Democratic Deficit' (2018) *Political Studies* 66(2), 339–355; Sara Hobolt, 'The Brexit Vote: A Divided Nation, a Divided Continent' (2016) *Journal of European Public Policy* 23(9), 1259–1277.

argument raised in the Brexit campaign about ‘regaining control’ was an influential reason to vote leave.⁴⁰ A ‘precondition’ to making this argument ‘persuasive’ was a ‘widespread perception of the EU’s so-called democratic deficit’.⁴¹ This article is timely as 2024 saw populist right-wing politicians making gains in the European Parliament elections following similar results in elections across Europe. For example, in 2022 a populist right-wing Prime Minister (Giorgia Maloni) was elected in Italy and Hungary’s populist right wing Prime Minister (Viktor Orbán) was re-elected. In 2023 a populist right-wing party became the largest political party in the Netherlands House of Representatives. Whilst there are many reasons for the rise of the far right, including difficult economic circumstance and high immigration, Euroskepticism also plays a part. This has led to the EU experiencing increasing challenges to its authority, known as the ‘EU’s Rule of Law crisis’.⁴² The EU’s Rule of Law enshrined under Article 2 of the Treaty of the European Union is described by the European Commission as being a ‘cornerstone of the European Union’.⁴³ The Rule of Law requires uniform application of EU law across Europe and is linked to important concepts such as legality, legal certainty and effective judicial protection, separation of powers and equality before the law.⁴⁴ One of the key areas of challenge to the EU’s Rule of Law is resistance from certain EU Member States to EU legislation prohibiting discrimination against lesbians and gays. This can be demonstrated by the Commission commencing legal action against Hungary and Poland in 2021 for violations of fundamental rights of LGBTIQ people contrary to EU law.⁴⁵ Whilst the case against Poland has been dropped, the EU Commission case against Hungary (with interventions from 15 EU Member States) is now proceeding before the Court of Justice of

⁴⁰ Hobolt, *ibid.*

⁴¹ Beetz (n39).

⁴² See for further discussion Renáta Uitz, ‘The Rule of Law in the EU: Crisis, Differentiation, Conditionality’ (2022) *European Papers* 7(2), 929-948.

⁴³ European Commission, ‘What is the Rule of Law?’ (2024), available at [What is the rule of law? - European Commission \(europa.eu\)](https://europeancommission.europa.eu).

⁴⁴ *Ibid* contains further detail explaining these concepts including ‘legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts with effective judicial review including respect for fundamental rights; separation of powers; and equality before the law’.

⁴⁵ European Commission Press Release, ‘EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people’ (2024) available at [IP_21_3668_EN.pdf \(europa.eu\)](https://europeancommission.europa.eu). The case against Hungary concerned a law which prohibits access to materials for under 18s promoting so-called ‘divergence from self-identity corresponding to sex at birth, sex change or homosexuality’. In relation to Poland, the Commission considered that Polish authorities failed to adequately address its inquiry regarding so-called ‘LGBT-ideology free zones’ adopted by several Polish regions and municipalities.

the European Union (CJEU).⁴⁶ In addition, despite EU soft law (non binding) support for lesbians and gays,⁴⁷ right wing governments in Europe have recently enacted legislation which impacts negatively on lesbians and gays. In 2021, Prime Minister Viktor Orban of Hungary supported legislation to partially ban adoption by same-sex couples.⁴⁸ In Autumn 2023, Italy under rightwing Prime Minister Giorgia Meloni limited recognition of parental rights to the biological parent only in the case of same-sex couples.⁴⁹

In the next section, I examine the challenges in portraying EU citizenship as inclusive of lesbian and gays, given the economic origins of the predecessors of the EU and the continuing views of many that the EU is primarily still a trade agreement. I argue that freedom of movement of the factors of production (including labour) at the basis of the original trade agreements has continued to inform understandings of EU citizenship. This means that important social advances which have followed have been tied to such a conceptualisation. In section 3, I consider the accessibility of EU free movement rights for lesbians and gays, and in section 4, I analyse how inclusive of lesbian and gay family relationships EU law currently is. In section 5, I consider the EU citizenship rights of EU ‘stayers’, who comprise the vast majority of the EU population, and analyse whether these rights are equally as accessible for lesbians and gays. In section 6, I consider how soft law offers a promise to move us beyond the impasse of the ‘economically active subject’. In my conclusion I consider how EU citizenship could evolve to be more inclusive. Perhaps a new idea of citizenship is needed, moving away from a rights definition and instead more closely allied to accessibility for individuals.⁵⁰ This would include evaluating the practices of inclusion, to include both social and legal methods such as soft law expansion.

⁴⁶ See for further explanation Institut Jacques Delors, ‘The Legal Case Against Hungary’s Anti-LGBTQIA Law’ (2023) available at [PB_230705_Recours-visant-la-loi-hongroise-anti-LGBT_Chopin_Leclerc_EN.pdf \(institutdelors.eu\)](#).

⁴⁷ European Commission, *LGBTIQ Equality Strategy 2020-2025* (2020) available at [LGBTIQ Equality Strategy 2020-2025 - European Commission \(europa.eu\)](#).

⁴⁸ Human Rights Watch, ‘Hungary’s Path Puts Everyone’s Rights in Danger’ (2021) available at [Hungary’s Path Puts Everyone’s Rights in Danger | Human Rights Watch \(hrw.org\)](#).

⁴⁹ Los Angeles Times, ‘Italian Government Limits Parental Rights of Gay Couples’ (2023) available at [Italian government limits parental rights of gay couples - Los Angeles Times \(latimes.com\)](#).

⁵⁰ Brenda Cossman also discusses the process of becoming recognised subjects, in *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007).

2. The Original Economic Origins of the Predecessors of the EU

The difficulty with depicting the EU as inclusive of lesbians and gays can be illustrated by understanding that the main purpose of the three original European communities was trade.⁵¹ The three original communities, together with the European Convention of Human Rights, were all founded in the 1950s with the desire to avert another war.⁵² However, whilst the latter was concerned with human rights, the core content of the three original European communities was to establish an internal market with free movement of goods and persons. There was no notion of citizenship. From the beginning, and continuing to the present day, the future development of the EU incites tensions between intergovernmentalists and supranationalists. Intergovernmentalists prefer power to be retained by the nation state and view the EU as primarily an economic body. In contrast, supranationalists consider that the union takes precedence, and stress citizenship as a central concept with common status and identity.⁵³ It is the latter group who offer most hope for the future conception of EU citizenship as gay and lesbian inclusive.

Over the last seven decades the EU has enjoyed an increasing array of competencies beyond the scope of the economic sphere, not least in the area of equality and non-discrimination. Yet, with Member States granting increasing powers to the EU, criticism became louder that the EU was suffering from a democratic deficit with no voice being given to citizens.⁵⁴ Whether a democratic deficit actually exists has been much debated.⁵⁵ In any event, the introduction of European citizenship became a 'major priority' of the EU in order to address these concerns and for the EU to 'legitimize itself'.⁵⁶ In 1992, the Maastricht Treaty introduced the concept of citizenship alongside other attempts to produce a *demos* including a flag, anthem and European Health card.⁵⁷ The Treaty on the Functioning of the EU ('TFEU') now

⁵¹ See n2.

⁵² For example, see the Preamble to the Treaty Establishing the European Economic Community (1957), which states that one of the purposes was that by 'pooling their resources' they would 'preserve and strengthen peace and liberty.'

⁵³ Willem Maas, 'The Origins, Evolution and Political Objectives of EU Citizenship' (2014) *German Law Journal* 15(5), 797-819, 798.

⁵⁴ See Craig and De Burca (n3), 14.

⁵⁵ David Marquand, *Parliament for Europe* (Jonathan Cape, 1979).

⁵⁶ Liza Tsaliki, 'The Construction of European Identity and Citizenship through Cultural Policy' (2007) *European Studies: A Journal of European Culture, History and Politics* 24(1), 157-182.

⁵⁷ Enderstein (n16), 110.

determines that anyone is an EU citizen who holds the nationality of a Member State (however defined).⁵⁸ No barriers to participation, and no mention of economic productivity, are therefore contained in this definition. However, formal equality in law does not equate to substantive equality and certain groups continue to engage with EU citizenship rights less, due to their differing social roles and economic power. For example, whilst all EU citizens have the ability to vote in European Union Parliamentary elections,⁵⁹ in reality voter engagement is low, and ‘younger, more socially deprived, and less educated people vote less’ as they already feel ‘out of the game’ and lacking power at national level and even more at EU level.⁶⁰ In 2024 voter turnout was over 51% and this was the highest level since 1994, with participation dropping below 50% in the years between 1994 and 2019.⁶¹

3. EU Free Movement Rights

The most significant extra dimension of EU citizenship, in addition to national citizenship, is that associated with freedom of movement.⁶² However, in practice certain groups face difficulties in actually exercising free movement rights. Under EU Citizenship Directive 2004/38, all EU citizens have a general right of residence in any other EU country for up to three months (article 6) with further rights of residence after three months for those who are employed, self-employed, of independent means or students (article 7) and with permanent residence in another Member State being obtained after five years (article 16).⁶³ Family members of EU citizens (even if not EU citizens themselves) obtain the right to move with the EU citizen to the new Member State, not to be discriminated against and to enjoy equal treatment in employment.⁶⁴ Yet not all EU citizens find it equally easy to exercise free movement rights. This is exacerbated by the fact that although the EU definition of citizenship under Article 20 TFEU provides that any citizen of a Member State is also a citizen of the EU,

⁵⁸ TFEU (n5), art 20.

⁵⁹ Ibid, art 20(2)(b).

⁶⁰ Politico, ‘Vote for me! Why Turnout is the EU Parliament’s Biggest Challenge’ (2024) available at [Vote for me! Why turnout is the EU Parliament’s biggest election challenge – POLITICO](#) with quotes from Camille Kelbel, an Associate Professor of Political Science at the Catholic University of Lille.

⁶¹ Statista, ‘Voter turnout in the European Parliament Elections in the European Union (EU) from 1979 to 2024’ (2024) available at [Turnout in European elections 1979-2024 | Statista](#).

⁶² Askola (n31), 342.

⁶³ Citizenship Directive (n4), arts 6, 7 and 16.

⁶⁴ Ibid, arts 23 and 24.

in practice EU citizenship continues to be available only to those who are economically active in their host Member State and consequently not a 'burden' on economic resources.⁶⁵ Statistics demonstrate that only a minority exercise free movement rights. From the EU population of 446.8 million inhabitants, in 2020, only 3.8% of EU citizens of working age (20-64) resided in another EU country, although this was up from 2.4% in 2009.⁶⁶

Polls demonstrate that 'women are less likely to exercise freedom of movement rights'.⁶⁷ This results in a 'feminist' problem for EU citizenship which continues to be rooted in 'market citizenship'⁶⁸ disadvantaging women 'on account of their caring and domestic roles'.⁶⁹ Although it has been illegal across the EU to discriminate against lesbians and gays at work since legislation introduced from 2000,⁷⁰ lesbians and gays continue to experience wide ranging discrimination, as evidenced by the equality data gathered by the European Fundamental Rights Agency's EU LGBTIQ survey in 2023.⁷¹ As part of soft law provisions through the European Commission LGBTIQ Equality Strategy 2020-2025 the European Fundamental Rights Agency is tasked with monitoring the success of EU non-discrimination, equality and diversity strategies. The third wave of the EU LGBTIQ survey was launched in 2023 and led to the participation of 100,577 LGBTQIA respondents across 30 countries.⁷² The survey found that 36% of participants (down from 42% in 2019) experienced discrimination in one area of their life in the previous 12 months.⁷³ Specifically in relation to economic factors, the 'rate of perceived discrimination (when looking for work) was similar across the three survey waves (2012, 13%; 2019, 10%; 2023, 9%)'. When in work, 18% of survey respondents continued to feel discriminated against in 2023 as compared to 21% in 2019.⁷⁴

⁶⁵ Ibid, art 7.

⁶⁶ European Parliament, 'Free Movement of Workers' (Fact Sheet, 2020) available at [Free movement of workers | Fact Sheets on the European Union | European Parliament \(europa.eu\)](https://europa.eu/european-union/fact-sheets/free-movement-workers)

⁶⁷ Eurobarometer, 'Eurobarometer 79.2' (2013) available at [GESIS-Suche: Eurobarometer 79.2 \(2013\)](https://ec.europa.eu/eurobarometer/surveys/index.cfm?id=688).

⁶⁸ Askola (n31), 344, referring to Michelle Everson, 'The Legacy of the Market Citizen', in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Oxford University Press, 1995), 73–90.

⁶⁹ Askola (n31), 344, referring to Ackers (1994) (n36); Isabel Shutes and Sarah Walker, 'Gender and Free Movement: EU Migrant Women's Access to Residence and Social Rights' (2018) *Journal of Ethnic and Migration Studies* 44(1), 137-153.

⁷⁰ See ns 8-10.

⁷¹ EU Fundamental Rights Agency, 'LGBTIQ Equality at a Crossroads – Progress and Challenges' (2024) available at [A long way to go for LGBTI equality \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/infographic/infographic_lgbtiq_equality_at_a_crossroads_progress_and_challenges_2024).

⁷² Ibid.

⁷³ Ibid, 16.

⁷⁴ Ibid.

This high level of reported discrimination in employment⁷⁵ impacts on lesbians' and gays' working conditions and consequently their ability to exercise freedom of movement where this is connected to being economically active.

It is crucial to examine how the CJEU has interpreted the meaning of citizenship. Prior to the introduction of the umbrella category of citizens in the Maastricht Treaty in 1992, EU law firmly linked freedom of movement to being economically active. The EU gave free movement rights to workers⁷⁶ and self-employed persons (establishment and services).⁷⁷ These categories continue to exist in the present-day EU treaties, alongside the new category of citizens. EU law categorises workers as those who provide services to another in return for a monetary reward.⁷⁸ Economic criteria are therefore paramount, although monetary reward has been interpreted extensively to include (for example) part-time work,⁷⁹ and for payment in kind.⁸⁰ Despite this wide definition, a connection to an economic activity continues to exist. Case law began to interrogate what rights would attach to citizenship itself, outside of economic criteria.

A series of cases in the 2000s at first gave an expansive interpretation of citizenship rights, even for those who did not fall within the category of worker.⁸¹ It was held that as long as EU citizens were lawfully resident within a host Member State according to national law, then they could invoke the EU principle of non-discrimination to claim benefits.⁸² This can be exemplified by *Martinez-Sala*, which concerned an unpaid carer who successfully relied upon EU citizenship non-discrimination provisions to claim benefits.⁸³ Any limitations had to be applied in a proportionate manner.⁸⁴ Other examples include work-seekers being able to be

⁷⁵ Ibid.

⁷⁶ TFEU (n5), art 45.

⁷⁷ Ibid, art 56.

⁷⁸ *Laurie-Blum v Land Baden-Wurtemberg* (Case 66/85).

⁷⁹ *Kempf v Staatsecretaris van Justitie* (Case 139/85).

⁸⁰ *Steymann v Staatsecretaris van Justitie* (Case 196/87).

⁸¹ *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99); *Zhu and Chen v Secretary of State for the Home Department* (Case C-200/02).

⁸² *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-a Neuve* (Case C-184/99); *Trojani v CPAS* (Case C-456/02); *Brey* (Case C-140/12).

⁸³ *Martinez-Sala v Freistaat Bayern* (Case C-85/96).

⁸⁴ Ibid.

resident in order to claim work-seeker's benefits providing they were 'for a reasonable period, genuinely seeking work'.⁸⁵ These much celebrated extensions allowed non-economically active EU citizens to rely on non-discrimination provisions to claim access to state welfare. However, even at this high point of the case law, citizenship rights belonging to all EU citizens remained much more limited than those based on being economically active.⁸⁶ Richer states also began to express concerns that this line of case law would lead to benefits tourism,⁸⁷ despite little evidence for this. 2016 figures demonstrate that out of all EU immigrants in the UK, only 5% were claiming jobseeker's allowance, while less than 10% were claiming other working age benefits,⁸⁸ with a total employment rate of 77.5%.⁸⁹ However, such fears did demonstrate the 'fragil[ity]' of a commitment to EU citizenship.⁹⁰ Instead of a supranational conception of citizenship, many EU Member States preferred an intergovernmental system, with a limited conception of EU citizenship, closely tied to economic status.

In response, the CJEU began to take a stricter approach to those seeking to rely upon citizenship rights when not economically active. In *Dano*, for instance, it was held that in order to claim EU non-discrimination rights, claimants not only had to be lawfully resident but comply with economic self-sufficiency criteria so as not to be a burden on Member States.⁹¹ The CJEU made a clear distinction from workers who could automatically stay longer than three months.⁹² The court distanced itself from previous case law which had stressed that Member States had to carry out a proportionality balancing test before expelling claimants on the basis of being a burden on resources. Commentators have therefore concluded that

⁸⁵ *Collins* (Case C-138/02); *Ioannidas* (Case C-258/04).

⁸⁶ Askola (n31).

⁸⁷ Peter Dominiczak 'Britain and Germany Demand EU Cracks Down on 'Benefits Tourism'', *Daily Telegraph* (24 April 2013) available at [Britain and Germany demand EU cracks down on 'benefits tourism' \(telegraph.co.uk\)](https://www.telegraph.co.uk/news/ukandireland/1081111/Britain-and-Germany-demand-EU-cracks-down-on-benefits-tourism.html) reporting on a letter signed by the Home Secretaries / Ministers for the Interior of Austria, Germany, the Netherlands, and the UK and sent to the Commission and the President of the Council of Europe.

⁸⁸ Carlos Vargas-Silva and Rob McNeil, 'Hard Evidence: Does 'Benefits Tourism' Exist?', *The Conversation* (2016) available at [Hard Evidence: does 'benefits tourism' exist? \(theconversation.com\)](https://www.theconversation.com/hard-evidence-does-benefits-tourism-exist/) 2023, citing ONS, *Annual Population Survey, 2012*; ONS, *Labour Force Survey, 2013 Q2*; DWP, February 2013; Eurostat, *European Labour Force Survey, 2013 Q2*.

⁸⁹ *Ibid.*

⁹⁰ Askola (n31), 350.

⁹¹ *Dano v Jobseeker Leipzig* (Case C-333/13).

⁹² *Ibid.*

EU citizenship represents a ‘highly differentiated opportunity’,⁹³ excluding ‘implicitly many who are not economically active’.⁹⁴ This line of case law, proceeding on the basis of ‘formal equality’ before the law – and the idea that individuals should all be treated ‘alike’ – is a clear demonstration of liberal equality.⁹⁵ As such, the CJEU drew back from stressing non-discrimination criteria, as seen in *Martinez-Sala*,⁹⁶ instead stressing economic criteria. It can be argued that this disadvantages women who are more likely to be care-givers and therefore more likely to be less economically active and to work part-time.⁹⁷ This exemplifies feminist criticisms of law according to which ‘[n]o one represented women’s interest as women in creating [the law], and few have considered women’s interests in applying it’.⁹⁸ In addition, given the level of discrimination which lesbians and gays report in their general life, when looking for work and at work, as recorded by the European Fundamental Rights Agency in 2023,⁹⁹ it also ignores the difficulties that lesbians and gays may face in finding and then when performing paid employment across different EU Member States. Pinning free movement (one of the most crucial aspects of EU citizenship) to economic activity serves to illustrate the continuing difficulties of EU law in not considering substantive barriers to certain groups in trying to access EU rights. In this context soft law provisions offer potential to deal with this issue with further analysis on this point in section 6.

⁹³ Louise Ackers, ‘Citizenship, Migration and the Valuation of Care in the European Union’ (2004) *Journal of Ethnic and Migration Studies* 30(2), 373-396, 391; Dimitry Kochenov, ‘Ius tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights’ (2009) *Columbia Journal of European Law* 15(2), 169-237.

⁹⁴ Askola (n31), 344.

⁹⁵ Katharine Bartlett and Deborah Rhode, *Gender and the Law: Theory, Doctrine, Commentary* (Aspen, 2006) explain ‘formal equality is a principle of equal treatment: individuals who are alike shall be treated alike, according to their actual characterisations rather than assumptions based on sex, race, ethnicity, sexual orientation or other impermissible characteristics’.

⁹⁶ *Martinez- Sala v Freistaat Bayern* (Case C-85/96).

⁹⁷ Askola (n31), 344 referring to Ackers (1994) (n36) and Shutes and Walker (n69). In the UK, the House of Commons Library, *Women and the UK Economy Report* (2023), available at [SN06838.pdf \(parliament.uk\)](#), 4 states that ‘overall the female employment rate for ages 16-64 was 72.3% compared to 79% of men’. However women were much more likely to work part time due to caring responsibilities according to the Fawcett Society, *Gender Pay Gap Report* (2020) available at <https://www.fawcettsociety.org.uk/pages/news/category/gender-pay-gap> which states that women comprise 73% of part time employees.

⁹⁸ Catharine MacKinnon, *Women’s Lives, Men’s Laws* (Harvard University Press, 2007), 33.

⁹⁹ EU Fundamental Rights Agency (n71).

4. EU Free Movement Rights and Family Status

A key part of EU free movement rights, essential to EU citizenship, is the right of family members (even if not EU citizens themselves) to move with the EU citizen to a new Member State, be able to take up work and school and not to be discriminated against.¹⁰⁰ As Tryfonidou explains, the 'rationale' behind family reunification rights is to ensure that citizens will not be deterred from exercising their EU free movement rights.¹⁰¹ Free movement rights become meaningless if an EU citizen's family cannot move with them. It is therefore essential to understand who is a family member under EU law. The EU Citizenship Directive defines family members to include under Article 2(2) '(a) spouse, (b) ... registered partnerships ... if the legislation in the host Member State treats registered partnerships as equivalent to marriage, (c) direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'.¹⁰² Further, Article 3 includes other family members 'who are dependants or members of the household of the EU citizen ... and the partner with whom the EU citizen has a durable relationship duly attested'.¹⁰³ Extensive interpretation of family membership has been criticised by EU states who take an intergovernmentalist approach in wishing to keep close control on family law.¹⁰⁴ From a queer point of view, criticism has centred on the heteronormative aspect of how family members are defined. For example, queer theorist Lisa Duggan has argued that marriage does not 'accommodate [the] elaborate, innovative forms of intimacy, interconnection, and dependency' on which gay and lesbian relationships are built.¹⁰⁵ As such the emphasis placed on 'spouse' by EU law would never suit her point of view.

EU law has no competency with regard to Member State family law and consequently cannot dictate to Member States whether to legalise same-sex marriage or civil partnership.¹⁰⁶ Across

¹⁰⁰ Citizenship Directive (n4), arts 23 and 24.

¹⁰¹ Tryfonidou (2019) (n38), 242.

¹⁰² Citizenship Directive (n4), art 2(2).

¹⁰³ Ibid, art 3.

¹⁰⁴ See for example the debate in the European Parliament on rainbow families: European Parliament, 'Legal protection for rainbow families exercising free movement: The "Baby Sara" case' (2022) available at [Legal protection for rainbow families exercising free movement: The 'Baby Sara' case \(europa.eu\)](https://www.europa.eu/legislation/summaries/legal_protection_for_rainbow_families_exercising_free_movement_the_baby_sara_case).

¹⁰⁵ Lisa Duggan, 'Beyond Same Sex Marriage' (2008) *Studies in Gender and Sexuality* 9(2), 155-157, 156.

¹⁰⁶ Member States have, through successive treaties (starting with the three original treaties from the 1950s and expanding over decades to the more recent treaties such as the Lisbon Treaty of 2009), granted the EU more extensive competencies to act over many areas. However Member States have never granted the EU

the EU's 27 Member States, 17 recognise same-sex marriage, and in addition eight recognise some form of civil partnership.¹⁰⁷ There is less recognition of children of same-sex couples, as can be demonstrated by ILGA Europe's Rainbow map.¹⁰⁸ Whilst advances in medical science can lead to joint parenting in a number of ways including donor insemination and surrogacy, and some jurisdictions now allow for same-sex couple adoption and step-child adoption, same-sex couples are generally 'still incapable of having children who will be genetically related to both members of the couple'.¹⁰⁹ Whilst heterosexual couples may also have children who are not genetically related to both parents, it is always an assumption that the man is the father to the children when he may not be. Same-sex couples do not benefit from this same approach. All EU Member States are members of the Council of Europe, and the legal rights protections set out by the European Court of Human Rights ('ECtHR') form a minimum line of protections which the EU must adhere to.¹¹⁰ The ECtHR jurisprudence is also a source of law for CJEU jurisprudence and its case law must be analysed when considering the impact on EU citizenship in this regard, but this only applies in relation to matters within the EU's competence.¹¹¹

Yet whilst the ECtHR has led the way in developing human rights protections for lesbians and gays, including decriminalising sex between men¹¹² and equalising the age of consent for opposite sex and same-sex couples¹¹³ in other areas of family law, the ECtHR continues to

competency over domestic family law (as separate from where families cross EU borders) and this is re-stated on the EU Commission website: 'Family law is the competence of EU countries, and EU rules apply only in cross-border cases' (2024) available at [Overview of family matters - European Commission \(europa.eu\)](#).

¹⁰⁷ In September 2024 the following EU states recognise same-sex marriage: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovenia, Spain and Sweden. The following EU states have some level of civil partnership: Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia.

¹⁰⁸ International Lesbian, Gay, Bisexual, Trans, and Intersex Association ('ILGA'), 'Europe Map' available at [Rainbow Europe \(rainbow-europe.org\)](#)

¹⁰⁹ Tim Amos and Jo Rainer, 'Parenthood for Same-Sex Couples in the European Union: Key Challenges', in Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia, 2012), 79-122.

¹¹⁰ EU Charter of Fundamental Rights (n7), art 52(3) provides '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention ..., the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

¹¹¹ The Treaty of the European Union formally acknowledges this. Further explained by John Fairhurst, *Law of the European Union* (Pearson, 9th edition, 2012), 71.

¹¹² *Dudgeon v UK* (App No 7525/76).

¹¹³ *Sutherland v UK* (App. No 25186/94).

allow a large margin of appreciation, or area of discretion, which it justifies due to a lack of consensus across Council of Europe States. The Council of Europe is wider than the EU and has even less homogeneity. The Council of Europe does not require its members to legalise same-sex marriage,¹¹⁴ although they must now recognise some form of civil partnership.¹¹⁵ Similarly, on the issue of rainbow families (in the context of this article, families composed of a same-sex couple and their child[ren]) there is a wide margin of appreciation, leaving much discretion to contracting states to the European Convention of Human Rights ('European Convention').¹¹⁶ However, more recent ECtHR case law has been favourable to rainbow families. For instance, where signatory states allow a person or a couple to adopt, they must do so without discrimination on the grounds of sexual orientation.¹¹⁷ If a state allows unmarried opposite sex couples to adopt, then they must also allow this right to same-sex unmarried couples.¹¹⁸ The ECtHR also tries to avoid 'limping' situations where a parent-child relationship is recognised in one jurisdiction, but not in another,¹¹⁹ and the ECtHR has recognised the best interests of the child as 'paramount'.¹²⁰ In the recent case of *DB v Switzerland*, the ECtHR considered that Switzerland had violated the European Convention due to its refusal to recognise parentage established abroad and not to allow the step-child adoption of the child of the same-sex partner.¹²¹ However, the ECtHR has interpreted the European Convention to determine that it does not impose an obligation on signatory states to allow same-sex couples to adopt when considering families who have not moved cross-border. The ECtHR confirmed in *Alekseyev v Russia* that there is a wide margin of appreciation in respect of those issues.¹²² Therefore, the EU is under no obligation from the ECtHR's current jurisprudence concerning the European Convention to recognise either same-sex spouses or rainbow families. Yet, over time the EU has adopted a dynamic and far-reaching interpretative perspective, although perhaps ultimately the nuclear family remains the gold standard against which the others are judged.

¹¹⁴ *Schalk and Kopf v Austria* (App. No 301414/04).

¹¹⁵ *Oliari v Italy* (App. Nos 18766/11 and 36030/11).

¹¹⁶ Eg, *Alekseyev v Russia* (App. Nos 4916/07, 25924/08, 14599/09), para. 83.

¹¹⁷ *EB v France* (App No 43546/02).

¹¹⁸ *X and Others v Austria* (App No 19010/07)

¹¹⁹ *Wagner v Luxembourg* (App. No. 76240/01); *Menesson v France* (App No 65192/11).

¹²⁰ Tryfonidou (2019) (n38), 255.

¹²¹ *DB v Switzerland* (App Nos 58252/15 and 58817/15).

¹²² Tryfonidou (2020) (n38), 179, referring to *Alekseyev v Russia* (n116), para 83.

4.1 Spouse, Civil Partner and Long Time Partner

Citizenship Directive 2004/38 specifically includes the spouse as a family member under Article 2(2). Initial case law took a very traditional view of marriage. This was defined as a formalised marital status in *Netherlands v Reed*.¹²³ Marriage bonds meant that the non-EU citizen partner could rely upon them to exercise freedom of movement and residence in another Member State, even where separated but not yet divorced.¹²⁴ Despite a slow start, same-sex spouses were expressly recognised as spouses in the *Coman* case for the purposes of freedom of movement.¹²⁵ This 'landmark' case demonstrates the expanding nature of EU citizenship.¹²⁶ When compared to other international courts such as the ECtHR, which continues to rely on a margin of appreciation, the CJEU has taken a leading approach.¹²⁷ However, due to the limited competence of EU law, this resulted in freedom of movement (with associated rights such as work and non-discrimination) but crucially did not result in any change in the law of the host Member state. Judgments from international courts also do not immediately change the culturally conservative nature of the countries in question. In the *Coman* case, in fact, the couple struggled to have the CJEU judgment enforced, leading to questions about the Rule of Law in Romania.¹²⁸

The *Coman* case concerned marriage and did not deal with other types of recognised relationship status. Registered partners are specifically referred to in the Citizenship Directive, with the limitation that EU states should allow registered partners to move with EU citizens only where 'the host Member State treats registered partnerships as equivalent to marriage'.¹²⁹ EU law only provides freedom of movement and associated rights, yet what

¹²³ *Netherlands v Reed* (Case 59/85).

¹²⁴ *Diatta v Land Berlin* (Case 267/83).

¹²⁵ *Coman* (Case C-673/16).

¹²⁶ Alina Tryfonidou, 'The ECJ Recognises the Right of Same Sex Spouses to Move Freely Between EU Member States: the *Coman* Ruling' (2019) *European Law Review* 44(5), 663-679.

¹²⁷ Frances Hamilton, 'The Potential of European Union Law to Further Advance LGBTQ+ Persons and Same-Sex Couples' Rights and the Resulting Consequence of Brexit', in Frances Hamilton and Guido Noto La Diega (eds), *Same-Sex Relationships, Law and Social Change* (Routledge, 2020), 11-32.

¹²⁸ Dimitry Kochenov and Uladzislau Belavusau, 'After the Celebration: Marriage Equality in EU Law Post-*Coman* in Eight Questions and Some Further Thoughts' (2020) *Maastricht Journal of European and Comparative Law* 27(5), 549-572.

¹²⁹ Citizenship Directive (n4), art 2(2)(b).

rights are included within civil partnership varies massively jurisdictionally and might not include national citizenship or parental rights. EU law alignment with family status and marriage and civil partnership does not always suit the lifestyles chosen by all lesbians and gays. Some queer theorists reject marriage, as their lives are (in the words of Duggan) ‘intertwined in ways that do not fit with one-size-fits-all marriage’.¹³⁰ Until a few decades ago, as illustrated by the enactment of the UK Civil Partnership Act 2004, civil partnership, as opposed to same-sex marriage, was still the ‘preferred’ status for many lesbians and gays themselves, as well as some of their representative organisations including Stonewall (at the time a leading gay rights organisation in the UK).¹³¹ Prior to the Same-Sex Marriage Act 2013, a government consultation demonstrated that a majority (53%) of those surveyed in England and Wales had now moved to support same-sex marriage.¹³² This follows trends in other European countries. However, still today many do not wish to enter into marriage. This is due to varying reasons. Marriage continues to be associated with patriarchal baggage¹³³ due to its long history of controlling women, for example in England and Wales through the system of coverture.¹³⁴ Others would never support any system of recognised relationship status, including civil partnership in all its forms, believing that rights should attach to individuals rather than be obtained through another person.¹³⁵ Although driven by different motivations, these perspectives challenge liberal (legal) assumption of a unitary and coherent ‘LGBTQ+ community’ that can be represented meaningfully through identity politics. Statuses such as marriage and /or civil partnership and the heteronormativity implied by equality are rejected and instead such individuals prefer a more ‘thoroughgoing resistance to regimes of the

¹³⁰ Duggan (n105), 156.

¹³¹ See Erez Aloni, ‘Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage’ (2010-2011) *Duke Journal of Gender Law and Policy* 18, 105-143; *Wilkinson v Kitzinger* [2006] EWHC 835, para 51, referring to Baroness Scotland (Hansard, HL 22 April 2004, Col 388).

¹³² HM Government, ‘Equal Marriage: The Government’s Response’ (2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1.pdf 11.

¹³³ *R (on the Application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development* [2018] UKSC 32; Rosemary Auchmuty, ‘What’s So Special About Marriage? The Impact of *Wilkinson v Kitzinger*’ (2008) *Child and Family Law Quarterly* 20(4), 475-498.

¹³⁴ Coverture was defined by the eighteenth-century jurist Sir William Blackstone, *Commentaries on the Laws of England, in Four Volumes*, (Oxford, 1765, repr New York, 1978) vol 1, 442 in his statement that ‘the husband and wife are one person in law’. These laws started to be removed by the Married Women’s Property Act 1870 (33 & 34 Vict, c 93) and the Married Women’s Property Act 1882 (45 & 46 Vict, c 75).

¹³⁵ Rosemary Auchmuty, ‘The Feminist Case Against Marriage’, in Rebecca Probert and Sharon Thompson (eds), *Research Handbook on Marriage and Cohabitation* (Edward Elgar, 2024), 37-56.

normal'.¹³⁶ For lesbians and gays who are not the 'marrying kind',¹³⁷ EU legal protections dependent on statuses such as marriage or civil partnership would never be suitable. Any couple without a recognised relationship status, seeking to rely upon EU law is then left only with the provisions of Article 3(2) of the Citizenship Directive. This provides that Member States shall in accordance with their national legislation, 'facilitate' entry and residence for 'the partner with whom the EU citizen has a durable relationship duly attested'.¹³⁸ Here, rights are much more limited. Persons who claim to fall within Article 3(2) cannot require the host state to automatically accept them. Instead, the provisions require the host state to 'undertake an extensive examination of their personal circumstances'.¹³⁹ Commission Guidance from 2023 does include same-sex couples within the potential couples who could fill the criterion of 'durable relationship'.¹⁴⁰ However the lack of an automatic right of entry for such partners is demonstrated by the Guidance going on to explain that 'national legislation must provide for a careful examination of the relevant personal circumstances' and factors taken into consideration are 'their relationship with the EU citizen or any other circumstances such as their financial or physical dependence'.¹⁴¹

4.2 Rainbow Families

Tryfonidou concludes that rainbow families, remain 'controversial' and challenge some of the main assumptions that underpin the idea of a nuclear family comprised of an opposite-sex couple and their biological descendants.¹⁴² The Citizenship Directive 2004/38 sets out family members who are explicitly covered. Article 2(2)(c) defines family members as direct descendants (children, grandchildren, etc.) who are under the age of 21 or who are dependants (*Lebon*) and also includes step-children (*Baumbast*).¹⁴³ Therefore, the link between 'children and their (heterosexual) stepparents' is explicitly recognised under Article

¹³⁶ Michael Warner, *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press, 1993).

¹³⁷ Duggan (n105).

¹³⁸ Citizenship Directive (n4), art 3(2).

¹³⁹ *Rahman* (Case C-83/11).

¹⁴⁰ European Commission, 'Commission Notice: Guidance on the right of free movement of EU citizens and their families' (2023) (C/2023/1392), 17.

¹⁴¹ *Ibid.*

¹⁴² Tryfonidou (2020) (n38), 176.

¹⁴³ *Lebon* (Case 316/85); *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99).

2(2)(c). Upon exercising free movement, children of EU citizens are entitled to access education and not to be discriminated against.¹⁴⁴ Minor EU citizens, utilising rights directly derived from citizenship under Article 21 TFEU, can also not only exercise their right to move and reside in their new host EU territory, but can also 'claim the right to be joined or accompanied by their primary carer'.¹⁴⁵ Once adults, EU citizen children can then also 'sponsor' their parents or step-parents in the ascending line to join them in their new host Member State.¹⁴⁶

Criticism has been levelled at the heterosexual framing of the categories of family members entitled to exercise freedom of movement, as children who come from 'nuclear families' can most 'clearly qualify'.¹⁴⁷ It was far less easy to understand how children from rainbow families would be treated, especially given the lack of recognition of such family statuses across the EU and the lack of explicit assistance from ECtHR case law in this respect.¹⁴⁸ Up until recently there had been no case law on this issue and academics were split in their view as to how the EU would interpret law in this area. On the one hand, McGlynn was pessimistic, given that the phrasing of the Directive referred specifically to 'direct descendant'.¹⁴⁹ On the other hand, Stalford was 'more optimistic', arguing that 'direct descendant' could include those with 'no direct biological link' as previous case law refers to 'stepchildren, adopted or foster children, or even the children of the migrant's unmarried partner'.¹⁵⁰ In this area positive progress has been made by the EU.

'The Baby Sara case' saw the CJEU obliging Bulgaria to recognise the free movement rights of a daughter of a same-sex couple born in Spain, whose lesbian parents were of UK and Bulgarian nationality and both named on the Spanish birth certificate.¹⁵¹ On 24 June 2022,

¹⁴⁴ Citizenship Directive (n4), arts 23 and 24.

¹⁴⁵ Tryfonidou (2019) (n38), 231, referring to *Zhu and Chen* (n60).

¹⁴⁶ *Ibid*, 232, referring to the Citizenship Directive (n4), art 2(2)(d).

¹⁴⁷ *Ibid*, 232.

¹⁴⁸ *Alekseyev v Russia* (n116), para 83.

¹⁴⁹ Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006), 48.

¹⁵⁰ Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart, 2012), 24.

¹⁵¹ *VMA v Stolichna obshtina, rayon 'Pancharevo'* (Case C-490/20).

the CJEU reiterated its arguments in a similar case concerning Poland.¹⁵² This followed a resolution by the European Parliament on 5 April 2022 calling upon Member States to enforce judgments in cross-border family disputes concerning children, in line with Article 24 of the EU's Charter of Fundamental Rights.¹⁵³ As part of soft law and the EU Commission's 2020-2025 LGBTIQ equality strategy, Members of the European Parliament pushed the European Commission to craft a proposal to enshrine the cross-border rights of 'rainbow families' into EU law.¹⁵⁴ Yet, in the debate in parliament, whilst some MEPs urged the Commission to 'pursue infringement proceedings and impose sanctions against states that do not comply with the CJEU ruling', other MEPs stressed that 'parenthood recognition rules currently fall under the competence of Member States' and expressed concerns about the Commission over-stepping its mandate.¹⁵⁵ In December 2022, the Commission proposed a Regulation to support the mutual recognition of parenthood between Member States,¹⁵⁶ although acceptance is not likely given that unanimity from Member States is required.¹⁵⁷

This action by the EU and case law from the CJEU are successes for rainbow families and go some way to ameliorating Tryfonidou's pre-existing concerns that in not recognising rainbow families, 'the legal ties binding their members are put in jeopardy'.¹⁵⁸ Yet there are clear limitations with EU law. The proposed EU Regulation would only affect rainbow families who move across borders where EU freedom of movement provisions come into play. EU law does not apply to recognition of family member status in purely 'internal situations' where the couple in question has not moved cross-border and has no connection with EU law. Hence, whilst EU institutions can aspire towards greater rights for lesbians and gays as part of the

¹⁵² *Rzecznik Praw Obywatelskich v KS and Others* (Case C-2/21).

¹⁵³ European Parliament Resolution on the protection of the rights of the child in civil, administrative and family law proceedings (2022 C 434/11).

¹⁵⁴ See Celidh Kern, 'MEPs Push for Legislation on Rainbow Families' Cross-Border Rights', *Euro – Active* (2022), available at <https://www.euractiv.com/section/non-discrimination/news/meps-push-for-legislation-on-rainbow-families-cross-border-rights/>

¹⁵⁵ *Ibid.*

¹⁵⁶ See European Commission 'Recognition of Parenthood between Member States' (2022) available at [Recognition of parenthood between Member States - European Commission \(europa.eu\)](https://ec.europa.eu/commission/press-room/detail/2022/12/16-recognition-of-parenthood-between-member-states). Also see for discussion Alina Tryfonidou, 'Who is Family Law for? Exploring Legal Approaches to Family Diversity' (2024) *Journal of Social Welfare and Family Law* 46(2), 267-285.

¹⁵⁷ Jens Scherpe, 'Is There a "European Family Law"?' (2023) *Victoria University of Wellington Law Review* 54(1), 317-332, 325.

¹⁵⁸ Tryfonidou (2019) (n38), 234.

soft law strategy under the LGBTIQ Equality Strategy 2020-2025, they cannot make Member States legalise same-sex marriage or allow same-sex couples in their territory to become the *de jure* joint parents of a child. It remains true that the nuclear family, consisting of different-sex married spouses and their biologically-linked children, is 'the gold standard'.¹⁵⁹

5. EU Citizenship Rights for EU Citizen Stayers

As previously stated, in practice it is only a minority of EU citizens who actually utilise free movement. This section therefore analyses the impact of EU law for those who stay at home ('stayers'), who comprise 96.2% of EU citizens.¹⁶⁰ The conception of EU citizenship rights being portrayed as pro-feminist and lesbian and gay inclusive¹⁶¹ is perhaps most influenced by the impact that the EU has had in the area of paid employment, which falls within the area of EU competencies. However, the EU has limited impact in other areas, as Member States retain competency over family law and welfare and benefits. The tension between the intergovernmental and supranationalist approaches remains. Leading author Gillian More has analysed the different economic and constitutional justifications for EU expansion in this area.¹⁶² Intergovernmentalists would be more likely to support More's 'market unifying' or 'regulatory' approaches. The necessity of a 'unified market' emphasises 'equality of access for products, services and persons'.¹⁶³ EU regulatory approaches ensure that interventions in the market should always be undertaken in accordance with the principle of equal treatment. However, supranationalists would prefer More's 'constitutional' justification for EU expansion.¹⁶⁴ On this basis they would refer to the EU development of a general principle of non-discrimination with no link to economic circumstances of free movement at all. It is the latter approach which is given most emphasis in recent case law. Equality is now viewed by the CJEU very much as a fundamental right,¹⁶⁵ as further emphasised by Article 19 TFEU and the Preamble to the 'Recast' Equality Directive 2006/54. Yet, closer examination of the

¹⁵⁹ Ibid, 223, referring to Susan Golombok, *Modern Families: Parents and Children in New Family Forms* (Cambridge University Press, 2015), 4.

¹⁶⁰ See European Parliament, 'Free Movement of Workers' (n66).

¹⁶¹ Abels and Mushaben (n15); Enderstein (n16).

¹⁶² Gillian More, 'The Principle of Equal Treatment from Market Unifier to Fundamental Rights?', in Craig and De Burca (n3), 517.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ *Deutsche Telekom v Shroder* (Case C-50/96).

enacted legislation and case law still reveals necessarily a divide between, on the one hand, legislation related to employment law and associated economic activities falling within the area of EU competency and, on the other hand, wider based welfare provisions or family law provisions, falling outside EU competency. This relates to the original economic conception of the EU in the first three trade agreements, and continues to inform our understanding of EU citizenship. In the next section, I examine the challenges in portraying EU citizenship as inclusive of lesbian and gays, given the economic origins of the predecessors of the EU and the continuing views of many that the EU is primarily still a trade agreement. Ultimately, this limits how accessible EU rights are for all EU citizens and reveals a crucial tie to economic activity. Once again, this disadvantages groups such as lesbians and gays who, according to the EU Fundamental Rights Agency survey are more likely to suffer discrimination in accessing and during employment.¹⁶⁶

Where there is an economic link demonstrated, and therefore crucially falling within the EU competencies, the EU has taken an expansive approach towards increasing the protections offered by non-discrimination provisions. This was first done in relation to equal pay provisions between men and women. In the original EEC treaty the sole protection for women was Article 119 EEC on equal pay (now Article 157 TFEU). Even that had only originally been included because of economic concerns about ‘regulating the internal market’¹⁶⁷ and in order ‘to assuage the concern that some countries might use cheaper “female” labour to [pursue] competitive advantage’.¹⁶⁸ However, despite the original economic aim, the inclusion of gender equality has been analysed by some as the ‘arrival of “women’s inequality” as a social problem’.¹⁶⁹ This was strengthened by the famous *Defrenne v Sabena* case (litigation begun before the Conseil d’Etat in Belgium in 1970, with judgment from the CJEU in 1975),¹⁷⁰ where equal pay provisions were given direct effect, meaning that EU law was now judicially enforceable in each Member State against private employers. The importance of this case law has been described in glowing terms by various authors as ‘becoming the site for an expansive

¹⁶⁶ See nn53 and 54.

¹⁶⁷ Enderstein (n16), 112.

¹⁶⁸ Ibid, referring to Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press, 2007).

¹⁶⁹ Carol Bacchi, *Women, Policy and Politics. The Construction of Policy Problems* (Sage, 1999), 75.

¹⁷⁰ *Defrenne v Sabena* (Case 43/75).

rights discourse’ and the ‘driving force behind EC sex equality legislation in the 1970s and 1980s’.¹⁷¹ In *Defrenne* itself the CJEU set out the ambitious nature in terms of gender equality explaining that the EU was no longer concerned with being a purely economic union but that gender equality now formed one of the ‘social objectives of the Community... [in order] to ensure social progress’.¹⁷²

The *Defrenne* case paved the way for further legislation in the 1970s focussing on equal opportunities between the sexes in employment, including the Equal Pay Directive 1975¹⁷³ and the Equal Treatment Directive 1976.¹⁷⁴ The latter expanded equal treatment to many wider issues related to employment including access, training, promotion and conditions of work.¹⁷⁵ Subsequently, the EU began adopting numerous related directives to tackle specific areas of gender discrimination.¹⁷⁶ Following the Amsterdam Treaty in 1999, equality between men and women became a ‘major mission’ at the same level in some commentators’ views as ‘economic development and cohesion’.¹⁷⁷ The ‘Recast’ Equal Treatment Directive 2006/54 systemised and simplified the existing legislation into one place,¹⁷⁸ clarifying the EU’s prohibition of direct and indirect discrimination.¹⁷⁹ The Lisbon Treaty in 2009 and EU Charter on Fundamental Rights both emphasised gender equality. Article 153 TFEU makes equal treatment of men and women in the labour market a sphere of supportive and ‘complementary’ EU action, allowing for the adoption of ‘minimum requirement’ directives. Article 23 of the Charter, which has equal status to that of the Treaties, now provides that

¹⁷¹ Enderstein (n16), 122, referring to Cichowski (n168).

¹⁷² *Defrenne v Sabena* (n170), 461.

¹⁷³ Council Directive (EC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

¹⁷⁴ Council Directive (EC) 76/207 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.

¹⁷⁵ Enderstein (n16).

¹⁷⁶ Including, for example, Council Directive (EC) 86/373 on equal treatment in occupational pension schemes and Council Directive (EC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

¹⁷⁷ Enderstein (n16), 116.

¹⁷⁸ Council Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

¹⁷⁹ Direct discrimination is where an employer treats someone less favourably because of gender. Indirect discrimination is where an employer’s policy applies to everyone but results in people of a certain gender being put at a disadvantage.

‘equality between men and women should be ensured in all areas including employment, work and pay’.¹⁸⁰

However, this legislation did not provide any opportunities for lesbians and gays seeking equality at work. It is true that for several decades (until the Amsterdam Treaty 1999) EU law involvement concentrated almost exclusively on sex equality in the employment context. Initially, the CJEU followed a very conservative or ‘reticent’ approach towards lesbians and gays.¹⁸¹ The first case brought to the CJEU claiming sexual orientation discrimination in employment failed because the EU at the time did not prohibit discrimination on the basis of sexual orientation and did not consider same-sex relationships as ‘equivalent to opposite-sex marriages’.¹⁸² Following the Amsterdam Treaty 1999, Article 19 TFEU gave the EU competence to create legislation prohibiting discrimination on a number of protected characteristics. The Framework Employment Directive 2000/78 was subsequently enacted prohibiting employment-based discrimination on a range of protected characteristics including sexual orientation.¹⁸³ Article 21 of the EU Charter on Fundamental Rights 2009 now prohibits discrimination on a wide range of grounds including sexual orientation. Several authors have therefore concluded that following Amsterdam, ‘gender equality and non-discrimination’ are the ‘guiding legal principles of the union’.¹⁸⁴ It could also be argued that the specific reference to sexual orientation as a protected characteristic is further reaching than the European Convention on Human Rights which has no reference to this specific criterion and depends on case law interpretation.

The EU Framework Employment Directive (2000) prohibits discrimination in the area of employment, including for lesbians and gays. It is correct to state that what is deemed to fall within the scope of employment has been interpreted widely. This includes (i) access to employment including selection criteria, recruitment and promotion, (ii) access to vocational guidance training and retraining, (iii) employment and working conditions, including dismissal

¹⁸⁰ EU Charter of Fundamental Rights (n7), art 23.

¹⁸¹ Tryfonidou (2020) (n38), 188.

¹⁸² Ibid referring to *Grant* (Case C-249/96) and *PD and Sweden v Council* (Cases C-122 and 125/99).

¹⁸³ Equality Framework Directive (n8).

¹⁸⁴ Enderstein (n16), 116.

and pay and membership of and involvement in workers' or employers' organisations.¹⁸⁵ Case law has also given extensive interpretation to the Framework Employment Directive to include statements made outside of a recruitment context. For example in *Associtua Accept*, the homophobic remarks made by a shareholder of a football club to the effect that he would never hire a gay person, were found by the CJEU to fall within the Framework Employment Directive, and to be attributed to the club, despite no recruitment procedure being underway.¹⁸⁶ A similar approach was taken in relation to homophobic comments made by a senior lawyer in a law firm in the course of a radio interview, even where no recruitment procedure was underway.¹⁸⁷ Yet, actions under the Framework Employment Directive are limited to prohibiting discrimination in the area of employment. This is unlike the Race Directive (2000), adopted shortly before the Framework Employment Directive, but with a wider remit to prohibit discrimination not only in the area of employment but also concerning social protection, health care, housing, and education.¹⁸⁸ Further, whilst the Race Directive only allows discrimination to be justified on the basis of genuine occupational requirements and positive action,¹⁸⁹ the Framework Employment directive allows more general justifications.¹⁹⁰ Yet, when the European Commission's proposal for a wider reaching directive¹⁹¹ was discussed in the European Parliament, meaning that the Framework Employment Directive would be expanded to replicate the wider scope of the Race Directive outside of the remit of employment, Germany stood against this, due to concerns about costs.

The EU's expanding protections in the employment context still continue to be related to citizens being economically active, maintaining the original understanding of EU Treaties as being of an economic nature, and placing a constraint on our understanding of EU citizenship. The EU has sought to extend its competencies where possible, including for example giving

¹⁸⁵ Equality Framework Directive (n8), art 3.

¹⁸⁶ *Associtua Accept* (Case 81/12).

¹⁸⁷ *NH v Associazione Avvocatura per i dritti LGBT – Rete Lenford* (Case 507/18).

¹⁸⁸ Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁸⁹ *Ibid*, arts 4-5.

¹⁹⁰ Equality Framework Directive (n8), arts 4-7.

¹⁹¹ European Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation', COM(2008) 426 (2 July 2008).

the EU equal pay provisions (directly effective under Article 157 TFEU), a wide scope to include, for example, travel facilities,¹⁹² severance grants¹⁹³ together with occupational pension schemes (paid through the employer).¹⁹⁴ With reference to lesbian and gay rights, the CJEU has taken a leading approach in determining in *Maruko* that the surviving partner of a same-sex couple was entitled to occupational pension rights on a non-discriminatory basis.¹⁹⁵ However, as family law remains outside EU competency,¹⁹⁶ a crucial caveat was imposed in *Maruko*, stating that this only applied, providing that the host country treated same-sex marriage and civil partnership as equivalent to heterosexual marriage.¹⁹⁷ The dividing line between EU competencies relating to paid work and state competencies relating to benefits remains. State pension schemes and other welfare benefits are crucially not included.¹⁹⁸

6. EU Soft Law Provisions

Perhaps there is a way forward moving beyond the impasse of the economically active subject. The EU has sought to ameliorate the political difficulties surrounding its lack of competencies by introducing wider reaching social provisions utilising soft-law or non-binding provisions. In the decade prior to the introduction of citizenship by Maastricht in 1992, with the EU moving from a 'predominantly economic project into a more political project',¹⁹⁹ gender-equality concerns were prioritised. This was done by the establishment of the Equal Opportunities Unit of the European Commission and the European Parliament Committee on Women's Rights and Equal Opportunities. Nowadays the EU social pillar, endorsed in November 2017, sets out 20 key principles structured around equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. Expectations regarding lesbian and gay rights have led to the LGBTIQ Equality Strategy 2020-2025²⁰⁰ on

¹⁹² *Garland v British Rail Engineering Ltd* (Case 12/81).

¹⁹³ *Kowalska v Freie und Hansestadt Hamburg* (Case 33/89).

¹⁹⁴ *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* (Case 170/84).

¹⁹⁵ *Maruko* (Case 267/06).

¹⁹⁶ See further n106.

¹⁹⁷ *Ibid.*

¹⁹⁸ When considering what is 'pay' within the concept of Article 157, whilst employee benefits such as occupational pension schemes (through the employer) are included, state pension schemes are not: see *Bilka-Kaufhaus GmbH* (n194) and *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

¹⁹⁹ *Ibid.*

²⁰⁰ See EU Commission, 'LGBTIQ Equality Strategy 2020-2025' (n47).

which there are yearly updates.²⁰¹ Core priorities include (1) tackling discrimination against LGBTIQ people, (2) ensuring LGBTIQ people's safety, (3) building LGBTIQ inclusive societies (around ensuring the rights for LGBTIQ people in cross-border situations) and (4) leading the call for LGBTIQ equality around the world.²⁰² Although implementation of these soft law policies remains with Member States, a growing number of European bodies support the LGBTIQ Equality Strategy, allowing more possibility of accessing and supporting development of how EU lesbian and gay citizenship should be understood in practice. This paper has analysed the role played by the CJEU and the ECtHR, and other core stakeholders include the European Parliament, the Council of the EU, the European Economic and Social Committee and the European Committee of the Regions and civil society organisations who have 'all welcomed the Commission's LGBTIQ equality strategy'.²⁰³ The European Commission has taken many actions including appointing an Equality Commissioner, creating a task force on equality and the LGBTIQ Equality subgroup and bringing infringement proceedings against Hungary for violating the EU Rule of Law in relation to LGBTIQ+ rights.²⁰⁴ The Commission also prepares progress reports²⁰⁵ and requires yearly update reports on progress from the European Parliamentary Research Service.²⁰⁶ The Commission directs the European Fundamental Rights Agency to monitor levels of discrimination across the EU and this has included several reports, the latest of which details the lived experiences of 100,577+ LGBTQIA persons across 30 EU countries in 2023.²⁰⁷ All of these soft law interventions contribute towards increasing the accessibility of what it means to be an EU citizen.

7. Conclusions

Citizenship inclusivity is essential for the EU in order to increase the *demos* behind the EU project and to secure its own future. EU citizenship could be a way of 'potential[ly]

²⁰¹ See, for instance, European Commission (2023) [Progress Report on the implementation of the LGBTIQ Equality Strategy 2020-2025 \(europa.eu\)](#).

²⁰² European Commission Factsheet (2020-2025), available at [lgbtiq factsheet 2020-2025 en.pdf \(europa.eu\)](#)

²⁰³ Ibid.

²⁰⁴ As further explained in the Introduction. See nn45-46.

²⁰⁵ For example, European Commission, 'On the implementation of the LGBTIQ Equality Strategy 2020-2025' – Progress report (12 April 2023).

²⁰⁶ For example, European Parliamentary Research Service, 'The 2020-2025 LGBTIQ Equality Strategy: Implementation Overview' (2023), available at [The 2020-2025 LGBTIQ equality strategy](#).

²⁰⁷ See n71.

overcoming at least some of the shortcomings of traditional, state-centred citizenship, seen to be too exclusive of outsiders'.²⁰⁸ Rights-based approaches towards citizenship demonstrate progress by the EU, but also limitations as the EU legal conception of citizenship continues to be related to a productivist model. Positive successes include extensive legislation prohibiting discrimination against LGBTIQ+ persons, important judgments from the CJEU including far-reaching conceptions of spouse to include same-sex spouses,²⁰⁹ more extensive rights for rainbow families,²¹⁰ and proposals for relevant legislative reforms.²¹¹ However all of these rights-based approaches come with limitations as the EU can only operate within the bounds of its competencies as agreed through successive Treaties.²¹² In recent years, the intergovernmentalist model has been emphasised by the Subsidiarity Protocol, which increases Member States' role in EU legislation.²¹³ Member States have resisted EU expansion into broader areas of welfare, tax and family issues which remain under Member States' control.²¹⁴ Where EU prohibitions on sexual orientation discrimination are concerned, these have been resisted by more culturally conservative EU Member States.²¹⁵ As *Coman* demonstrates, far reaching CJEU judgments can be difficult to enforce in practice, resulting in knock-on consequences for the EU Rule of Law.²¹⁶ When exercising freedom of movement, it remains an essential requirement not to be a burden on the host Member State.²¹⁷ This results in a detriment to those who are less able to be economically mobile,

²⁰⁸ Askola (n31), 342.

²⁰⁹ *Coman* (n125).

²¹⁰ Baby Sara case (n151).

²¹¹ See, for example, European Commission, 'Recognition of Parenthood between Member States' (2022), available at [Recognition of parenthood between Member States - European Commission \(europa.eu\)](https://european-commission.eu/Recognition-of-parenthood-between-Member-States)

²¹² See n106.

²¹³ Subsidiarity is the principle laid down in the Treaty on European Union. A briefing from the European Parliament, 'European Parliamentary Briefing Sheet' (2024), available at [The principle of subsidiarity \(europa.eu\)](https://european-parliament.eu/The-principle-of-subsidiarity), explains that the principle 'seeks to safeguard the ability of the Member States' to take action in circumstances where the EU does not have exclusive competence'. The Subsidiarity Protocol (No 2) 12008E/PRO/02 sets out Member States' role in safeguarding subsidiarity including reviewing proposed legislation coming from the EU.

²¹⁴ This is illustrated by Brexit, and by the earlier Constitutional Treaty, which failed following referenda in Denmark and France, indicating resistance from citizens to the single market.

²¹⁵ See discussion in Introduction.

²¹⁶ Kochenov and Belavusau (n128).

²¹⁷ *Dano* (n91).

including women²¹⁸ and, as section 2 has demonstrated, lesbians and gays who continue to experience discrimination when applying for and when at work.²¹⁹

However if a new idea of citizenship is considered not just to be concerned with rights, but also based on accessibility,²²⁰ soft law provisions assist in reaching a wider range of individuals. Soft law enables the EU to set aspirational targets via its LGBTIQ Equality Strategy 2020-2025.²²¹ A whole range of EU bodies working with community groups and individuals on the ground seek to understand (through data gathering), monitor and aim to improve conditions for lesbians and gays who are EU citizens.²²² Whilst the rise of the populist right in recent years certainly does give pause for thought, the overall sweep of lesbian and gay history within Europe over the last seven decades since its inception documents positive progress.²²³ This is not just for individual European nations but the EU itself compared to the first EU bodies established in the 1950s.²²⁴ Some have argued that gender blindness of EU law is 'part and parcel of how Union citizenship is currently conceived making it difficult to change'.²²⁵ It is important to be realistic and clear that we are some way from achieving European Commission President Ursula Van der Leyen's vision of equality, described as 'a Union where you can be who you are and love who you want – without the fear of recrimination or discrimination'.²²⁶

However, a new concept of citizenship consisting of not just legal rights but also accessibility for individuals, motivated by increasing soft law aspirations and allowing monitoring for progress, allows greater engagement with lesbians and gays across Europe and offers future hope. We can take encouragement from the EU LGBTIQ Equality Strategy 2020-2025 that a

²¹⁸ Askola (n31); Everson (n68); Shutes and Walker (n69).

²¹⁹ EU Fundamental Rights Agency (n71).

²²⁰ See also Cossman (n50).

²²¹ EU Commission, 'LGBTIQ Equality Strategy 2020-2025' (n47).

²²² See section 6.

²²³ See n107.

²²⁴ See Introduction and nns 8-10 on the non discrimination against lesbian and gay legislation passed by the EU.

²²⁵ Askola (n31), 341.

²²⁶ Ursula von der Leyen, President of the European Commission, State of the Union Address (2020), available at [State of the Union 2020 - European Commission](#).

pro-lesbian and gay 'direction of travel' has been set.²²⁷ EU soft law provisions set expectations and the EU itself can serve to mobilise social and legal change across EU Member States.

²²⁷ Scherpe (n157) at 325.
