LGBTI rights in the EU, recent developments following the Hungarian law

On 15 June 2021, the Hungarian Parliament adopted a law originally intended to fight paedophilia, which, following amendments proposed by Members from the ruling Fidesz party, contains clauses prohibiting the portrayal of homosexuality and gender-reassignment to minors. Additionally, the law prohibits homosexuality and gender reassignment from being featured in sex education classes, and stipulates that such classes can now only be taught by registered organisations. Furthermore, changes to the Business Advertising Law and to the Media Law require that adverts and content featuring LGBTI people must be rated as Category V (i.e. not recommended for minors). The law is due to come into force on 8 July and has generated widespread criticism at EU level. The law is due to be discussed during the European Parliament’s July 2021 plenary session, following statements from the European Commission and the Council.

Background
On 15 June 2021, the Hungarian Parliament adopted Act LXXIX of 2021 on ‘tougher action against paedophile offenders and amending certain laws to protect children’. On 8 June, Members (MPs) from the ruling Fidesz party had proposed amendments, which were eventually included in the final version of the law. As adopted, the law now contains some clauses prohibiting content portraying homosexuality and gender-reassignment from being made available to minors. Additionally, the law amended existing legislation on national public education, prohibiting homosexuality and gender-reassignment from being ‘promoted’ in sex education classes, and stipulating that such classes can now only be taught by organisations listed in an official register. Furthermore, the law amended the Business Advertising Law and the Media Law, requiring that advertising and content featuring LGBTI people must be rated as Category V (not recommended for minors), which means that they can only be shown after 23h00. Most sections of the law should come into force on 8 July 2021.

EU reactions
On 16 June, the European Commission President, Ursula von der Leyen, expressed her concern, and the Commissioner for Equality, Helena Dalli, launched an inquiry into the new law. Moreover, the Commissioners for Justice, Didier Reynders, and for the Internal Market, Thierry Breton, sent a joint letter to the Hungarian Minister for Justice, Judith Varga, on 15 June, in which they consider that the law departs from the values enshrined in Article 2 of the Treaty on European Union (TEU). They consider that the law directly violates the principle of non-discrimination on the basis of sex and sexual orientation set out in Article 21 of the Charter of Fundamental Rights of the EU. They also consider that the law would violate the free movement of goods (Articles 34 to 36 TFEU) and services (Article 56 TFEU), the Audiovisual Media Services Directive and the e-Commerce Directive.

On 22 June 2021, in a letter signed by 18 EU Member States, the signatories directly criticised the Hungarian law, stating that they expressed their ‘grave concern about the adoption by the Hungarian Parliament of amendments which discriminate against LGBTIQ persons and violate the right to freedom of expression under the pretext of protecting children’. At the 24 June European Council meeting, the Hungarian Prime Minister, Viktor Orbán, was confronted over the law by his fellow EU leaders. Leaders of 17 EU Member States signed a further letter that same day, in which they reaffirmed their commitment to defending LGBTI rights. This letter did not mention the Hungarian law directly.

European Court of Human Rights case law on similar legislation
Previously, the European Court of Human Rights (ECtHR) considered similar provisions in Russia a violation of freedom of expression, and discrimination on the basis of sexual orientation. In fact, in the case Bayev
The European Parliament is given prior notice and sent a copy of the deterioration of rights of LGBTIQ people in some EU Member States, including Hungary. In this context, MEPs will ask the Council and European Commission on 7 July, MEPs will assess whether EU laws are being breached, and what action is envisaged to protect the rights of children and LGBTIQ persons. MEPs will also ask the Council and Commission about the two hearings held by the Council on the rule of law in Hungary and Poland on 24 June, the outcome of which has not been disclosed. The Parliament is expected to vote on a resolution following the debate.

European Parliament position

Concerning the similar Russian provisions, the European Parliament stated in its resolution of 13 June 2013 that it was deeply concerned at the negative consequences of the adoption of the Russian federal law on ‘homosexual propaganda’. In its resolution of 12 September 2018, Parliament determined, in accordance with Article 7(1) TEU, that there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU. In the annex to this resolution, intolerance against LGBTI was specifically noted.

In its resolution of 11 March 2021 declaring the Union an LGBTIQ Freedom Zone, Parliament considered that ‘LGBTIQ persons everywhere in the European Union should enjoy the freedom to live and publicly show their sexual orientation, gender identity, gender expression and sex characteristics without fear of discrimination, persecution or discrimination on those grounds’. In the same resolution, Parliament took note of the deterioration of rights of LGBTIQ people in some EU Member States, including Hungary. In this resolution, Parliament considered specifically that the 'legal developments in Hungary have severely hindered the fundamental rights of LGBTIQ people'. Parliament referred to the adoption of Article 33 of the Hungarian Omnibus Bill T/9934, which de facto prevented legal gender recognition for trans and intersex persons. Parliament considered that such an article would generate discrimination and also infringe the right to privacy. Parliament also took note of the fact that, at the end of 2020, constitutional amendments were adopted in Hungary which resulted in limitations of the rights of LGBTIQ people. In the words of Parliament, such amendments ‘neglect the existence of transgender and non-binary persons and restrict their right to family life, and a law that will strip non-married couples of the right to adoption’.

On 22 June 2021, at the initiative of Parliament’s LGBTI Intergroup, 61 MEPs co-signed and tabled an oral question to the European Commission concerning potential breaches of EU legislation. Liesje Schreinemacher (Renew Europe), vice-president of the Intergroup stated that, 'The Hungarian government frames sexual orientation and gender realignment with paedophilia and “attacks on children’s rights”. Equality and diversity are part of our European identity – therefore we cannot accept these legislative attacks. When you are a member of the European Union, you sign up to our values. It is not an “a la carte” menu. Maria Walsh (EPP), also a vice-president of the Intergroup, stated that ‘remaining silent in the face of such attacks is being complacent’ and that ‘only with unity can we counter the backtracking on the rights of LGBTIQ persons in Hungary.’

The Hungarian law is due to be discussed in plenary in July 2021. In a debate with the Council and the European Commission on 7 July, MEPs will assess whether EU laws are being breached, and what action is envisaged to protect the rights of children and LGBTIQ persons. MEPs will also ask the Council and Commission about the two hearings held by the Council on the rule of law in Hungary and Poland on 24 June, the outcome of which has not been disclosed. The Parliament is expected to vote on a resolution following the debate.