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Obstacles to the Free Movement of Rainbow Families in the EU

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STUDY

Requested by the PETI committee

European Parliament

Obstacles to the Free Movement of Rainbow Families in the EU

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Obstacles to the Free Movement of Rainbow Families in the EU

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, examines: (i) the obstacles that rainbow families (same-sex couples, with or without children) face when they attempt to exercise their free movement rights within the EU, including examples in petitions presented to the PETI committee; (ii) how EU Member States treat same-sex married couples, registered partners, unregistered partners, and their children in cross-border situations; and (iii) action that EU institutions could take to remove these obstacles.

This document was requested by the European Parliament's Committee on Petitions.

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LIST OF ABBREVIATIONS

AConHR	American Convention on Human Rights
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EConHR	European Convention on Human Rights
ECPRD	European Centre for Parliamentary Research and Documentation
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
LGB	Lesbian, gay, and/or bisexual[1]
OJ	Official Journal of the European Union
NELFA	Network of European LGBTIQ* Families Associations
PACE	Parliamentary Assembly of the Council of Europe
PACS	*Pacte civil de solidarité* (civil solidarity pact)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHRC	United Nations Human Rights Committee

[1] In this study, the focus is specifically on same-sex couples (with or without children) and the discrimination they face based on their sexual orientation, as it emerged from the petitions examined by the PETI committee. In addition to this study, more research is needed into the obstacles and discrimination that transgender and intersex persons (with or without children) face when they attempt to move freely within the EU.

EXECUTIVE SUMMARY

Findings

This study examines the obstacles that rainbow families (same-sex couples, with or without children) face when they attempt to exercise their free movement rights within the EU, including examples in petitions presented to the PETI committee. These obstacles consist of failure in a minority of Member States to recognise same-sex couples (whether married, registered, or unregistered) as couples, and to recognise that both members of the couple are the legal parents of their child or children in the Member State from which they are moving, or from which they are returning. In many cases, when a border between EU Member States is crossed, the couple ceases to be legally a couple, becoming instead two unrelated individuals, and their child or children go from having two legal parents to only one legal parent or (in a few cases involving surrogacy) no legal parents.

The size of the non-recognising minority of Member States depends on the legal situation of the rainbow family, and the kind of recognition they are seeking. In theory, all Member States accept that they must grant a residence permit to the same-sex spouse of an EU citizen. In practice, this might not be the case, even in Romania, to which the CJEU's 2018 *Coman & Hamilton* judgment[2] was addressed. (Because the EU legal order has failed to enforce their right to a residence permit, the couple have been obliged to take their case to the ECtHR.) Six Member States do not recognise a same-sex spouse for purposes of national law other than a residence permit.[3] Nine Member States might not recognise a same-sex registered partner in some situations.[4] In some Member States, same-sex unregistered partners (who might have no access to marriage or registered partnership in their own Member State) receive very little recognition. In eleven Member States, a child cannot have two women or two men as his or her legal parents (same-sex couples are excluded from joint adoption or second-parent adoption).[5]

Recommendations

- The Commission should launch an infringment procedure on the basis of Article 258 TFEU and take enforcement action against Romania, because of Romania's ongoing failure to comply with *Coman & Hamilton*. The Commission should also examine whether the other 26 Member States comply with *Coman & Hamilton* and take enforcement action against any that do not comply.

- The Commission should bring Article 263 TFEU proceedings seeking the annulment of the phrase 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' (Article 2(2)(b), Directive 2004/38 on free movement[6]) as contrary to Article 21 of the Charter.

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[2] Case C-673/16, *Coman and Hamilton* ECLI:EU:C:2018:385.
[3] Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia.
[4] Bulgaria, France, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia.
[5] Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia.
[6] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

- The Commission should support civil-society strategic litigation to extend the scope of the *Coman & Hamilton* jurisprudence from covering only a residence permit to other rights or benefits, and the ECtHR's 2015 *Oliari & Others* and 2016 *Taddeucci & McCall* judgments from Italy to other EU Member States.

- The Commission should insist on the adoption by the Council of the EU of its 2008 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation'.[7]

- The Commission should propose ordinary-procedure legislation (with Article 21(2) TFEU as the main legal basis) requiring all Member States to recognise same-sex spouses and registered partners from another Member State with regard to matters in relation to which they would have a right to equal treatment under the case law of the ECtHR.

- The Commission should propose ordinary-procedure legislation (with Article 21(2) TFEU as the main legal basis) requiring all Member States to recognise the adults listed in a child's birth certificate as the legal parents of the child, regardless of the adults' sexes or marital status.

[7] COM(2008) 426 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426.

1. INTRODUCTION

Historically, **free movement** in the EU has been based on the assumption that the EU citizen is heterosexual, that her or his partner is a person of the opposite sex, that they are married to each other, and that both opposite-sex spouses are listed on each of their children's birth certificates as the child's legal parents. When a '**traditional family**' of this kind exercises its free movement rights under EU law, by moving to (or returning from) another EU Member State, they can expect a warm welcome. The host Member State (the home Member State if the family is returning) will recognise the parents' marriage certificate and the children's birth certificates. The parents will enjoy all the rights and duties of married couples. Their children will have two legal parents. The family will be able to focus on finding employment or self-employment, and a place to live.

For a '**rainbow family'**, consisting of a same-sex couple and any **children** they might be raising together (as a result of a prior opposite-sex relationship, adoption, or assisted reproduction, including donor insemination and surrogacy), **free movement** can be much less free, and much more **complicated**. Crossing a border between EU Member States can mean that the legal ties within the rainbow **family dissolve**. On one side of the border, the same-sex couple is legally recognised as a married couple, as registered partners, or as unregistered partners (in a durable relationship). On the other side of the border, they become two unrelated individuals, deprived of the rights and duties enjoyed by comparable opposite-sex couples in the host or home Member State. On one side of the border, any children they are raising together have two legal parents, either because both are listed in the children's birth certificates, or because the same-sex couple was able to jointly adopt them or to apply for a second-parent adoption. On the other side of the border, each of their children loses one legal parent (usually the non-genetic parent) or, sometimes, both of her or his legal parents.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, will examine: (i) the **obstacles** that rainbow families face when they attempt to exercise their free movement rights within the EU, including examples in petitions presented to the PETI committee; (ii) how **EU Member States** treat same-sex married couples, registered partners, unregistered partners, and their children in cross-border situations; and (iii) **action** that **EU** institutions could take to remove these obstacles.[8]

The study will be structured as follows. Chapter 2 will consider the **social problem**: the existence of rainbow families and the obstacles they face when they attempt to exercise their free movement rights under EU law. Chapter 3 will explain the relevant **legal framework**. Chapters 4 to 7 will: (i) analyse the responses of national parliaments to a questionnaire distributed by the ECPRD which sought to assess the treatment of rainbow families under national law; (ii) explain the current requirements imposed on Member States by EU law with regard to the cross-border legal recognition of rainbow families; and (iii) make recommendations to the EU institutions for actions they can take to ensure that rainbow families moving within the EU are treated in a way which is compliant with EU law. These chapters will focus on the treatment in cross-border situations of same-sex **married** couples (chapter 4), same-sex **registered**

[8] See also Dr. Neža Kogovšek Šalamon (for the Commission), 'Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU': https://ec.europa.eu/info/sites/info/files/mapping_of_studies_on_the_difficulties_for_lgbti_people_in_cross-border_situations_in_the_eu.pdf.

partners (chapter 5), same-sex **unregistered** partners (chapter 6), and the **children** of same-sex couples (chapter 7). Finally, chapter 8 will set out the different **actions** that **EU** institutions could take to remove the obstacles faced by rainbow families moving within the EU.

2. THE SOCIAL PROBLEM: RAINBOW FAMILIES AND THE OBSTACLES THEY FACE WHEN MOVING WITHIN THE EU

KEY FINDINGS

- Because of **limits on EU competence**, EU Member States are not required, in their territory, and as a matter of EU law, to allow same-sex couples to marry, enter into a registered partnership, or have a child and be legally recognised as the joint parents of that child.

- **Same-sex couples** – whether they are married, in a registered partnership or, simply, in a *de facto* partnership – may have to face the **refusal** of the Member State to which they move to recognise them as a couple for the purpose of **family reunification rights**.

- **Same-sex couples** – whether married, in a registered partnership, or in a *de facto* partnership – **might also be treated worse** than opposite-sex couples **after** exercising EU free movement rights and **gaining access to a Member State**. The problems they face are caused by the refusal of the (host or home) Member State to recognise them as a couple for a number of legal purposes, such as pensions, the award of joint health and accident insurance cover, and succession to tenancies.

- In situations where a **same-sex couple are the joint parents of a child** (and are legally recognised as such in an EU Member State), the host Member State may consider that it is entitled to **refuse** to **legally recognise the parent-child relationship** (with respect to at least one of the parents), if in its territory it does not allow two persons of the same sex to become – and be legally recognised as – the joint legal parents of a child. This can have a host of **negative consequences** for the family, such as the child remaining stateless and unable to acquire a passport, the inability of the family to move within the EU, and more broadly the denial of rights and benefits which the law reserves for 'families'.

2.1. Introduction

This chapter will have as its aim to **present the obstacles that rainbow families face when they move between EU Member States** in exercise of EU free movement rights. Since EU free movement rights are only bestowed on Member State nationals and – through them – their family members, this study will focus on the position of rainbow families comprised of at least one Member State national. Apart from one case involving a married same-sex couple claiming family reunification rights in a free movement context (*Coman and Hamilton*),[1] and two very recent references for a preliminary ruling which involve the cross-border legal recognition of the parent-child relationship,[2] the CJEU has not had any other opportunities to rule in cases involving obstacles faced by rainbow families when they move between EU Member States. For this reason, the analysis in this chapter will mainly focus on presenting such obstacles through the petitions which have been addressed to the European Parliament and

[1] Case C-673/16, *Coman and Hamilton* ECLI:EU:C:2018:385.
[2] Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'* (pending); Case C-2/21, *Rzecznik Praw Obywatelskich* (pending).

which demonstrate the problems faced by rainbow families in a cross-border context.[3] In addition, the chapter will make reference to other sources, such as ECtHR case-law and documents produced by organisations such as NELFA,[4] which shed further light on the difficulties which rainbow families encounter when they cross national borders.

2.2. The obstacles rainbow families face when moving within the EU

The aim of this section is to present the different obstacles that rainbow families often face when they move between EU Member States.

As will be seen in more detail in subsequent parts of this study, the root of the problems faced by rainbow families, when they move between EU Member States, is the continued existence of a wide **diversity in national laws** and regulations regarding the legal recognition of same-sex couples and of the parent-child relationship (with respect to *both* parents) in situations where the legal parents of a child are of the same sex. This is a consequence of the **lack of EU competence** with regard to these matters which – simply put – means that the EU cannot legislate in order to require all EU Member States to afford legal recognition to the familial ties among the members of rainbow families in their own territory in situations which have no link with EU law.

Accordingly, EU Member States can have legislation which refuses to allow same-sex couples to marry or enter into a registered partnership *in their territory*. This is not prohibited *by EU law*.[5] Similarly, EU Member States are not required by EU law to allow same-sex couples *in their territory* to have a child and to be legally recognised as the joint parents of that child – this is a matter that falls outside EU competence.[6] The aim of this study is, therefore, not to challenge the freedom of EU Member States to maintain such legislation. In other words, the study accepts that in situations which have no link with EU law (i.e. where EU free movement rights have not been exercised), EU Member States are free – *under EU law* – to determine whether and, if yes, how, they will afford legal recognition to the ties among the members of same-sex couples and rainbow families.

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[3] Article 227 TFEU provides: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly'. Further information regarding the procedure for addressing a petition to the European Parliament can be found here: https://www.europarl.europa.eu/at-your-service/en/be-heard/petitions.

[4] As noted on its website (http://nelfa.org), 'Nelfa is the Network of European LGBTIQ* Families Associations and was created on 1st of May 2009 – to unite European associations of lesbian, gay, bisexual and transgender parents (LGBT) and their children under one umbrella organisation'.

[5] As will be seen in subsequent chapters, this is, nonetheless, prohibited by the EConHR, at least when the social and legal context of a country requires the introduction of some kind of legal recognition of same-sex relationships – see *Oliari and Others* v. *Italy*, nos. 18766/11 and 36030/11, 21 July 2015. A petition – which is now closed – was submitted to the European Parliament, which called for 'marriages of homosexual couples to be legally recognised' – see Petition No. 0807/2015 by Massimo Frana (Italian) on a request for compensation for homosexuals.

[6] Three petitions – all of which are now closed – were submitted to the European Parliament, arguing that the European Parliament should intervene in order to require EU Member States to allow same-sex couples to become the joint parents of a child. These were Petition No. 0597/2018 by G.T. (Italian) on the ban by Italy on same-sex and LGBT couples adopting children or using assisted reproduction; Petition No. 0624/2014 by Stefano Fuschetto (Italian) on the legalisation of same-sex marriage in Europe; and Petition No. 1513/2016 by Benjamin Rzepka (German) on same-sex lifestyles.

What this study will explore, nonetheless, is **whether EU law can and should offer protection** to rainbow families that move between EU Member States in exercise of EU free movement rights. In other words, when a rainbow family moves between EU Member States in exercise of EU free movement rights, does EU law require the Member State to which the family moves to legally recognise the familial ties among its members, irrespective of whether it allows the establishment of such links (*ab initio*) in its territory?

This section will seek to 'unpack' the problem, by providing **examples** of the difficulties that rainbow families face when they move between EU Member States.

2.2.1. Refusal of family reunification rights to same-sex couples and/or their children

The first problem that same-sex couples may face – whether they are married, in a registered partnership or, simply, in a *de facto* partnership – is the **refusal** of the Member State to which they move to recognise them as a couple for the purpose of the grant of **family reunification rights**. As will be seen in chapter 3 of this study, EU law grants family reunification rights to Union citizens who move between EU Member States: this means that migrant Union citizens are entitled to rely on EU law in order to require the Member State to which they move to admit their spouse, registered partner or – subject to certain conditions – their unmarried/unregistered partner, in its territory and grant him/her a right of residence. Same-sex couples, however, are often refused such family reunification rights on the ground that their civil status and/or relationship is not recognised in the host EU Member State.

Such a refusal is what gave rise to the action brought before a Romanian court in the case which led to the reference to the CJEU in the landmark ***Coman and Hamilton* case**, which will be examined in more detail in chapter 4 of this study.[7] As will be seen, the case arose as a result of the refusal of Romania to grant a right of residence (for more than three months) to the same-sex spouse (Mr Hamilton) of a Romanian national (Mr Coman) who wished to return to Romania after having exercised EU free movement rights. If Mr Coman was married to a woman, it is clear that the Romanian authorities would not have refused to recognise the marriage for the purpose of granting family reunification rights deriving from EU law. As will be seen in chapter 4 of the study, the CJEU in this case made it clear that **same-sex spouses should be recognised as 'spouses'** for the purpose of granting family reunification rights under EU law; however, as will be explained in more detail in the same chapter, some EU Member States have still not fully complied with this ruling as they still refuse to grant a right of residence to the same-sex spouse of an EU citizen who has moved to their territory in exercise of EU free movement rights.

What is interesting to note, nonetheless, is that even some of the EU Member States which have opened marriage to same-sex couples in their territory, may **refuse to recognise a same-sex marriage** contracted in another EU Member State, if the marriage is **not recognised in the Member State of origin** of the couple. An example of such a situation is included in a document produced by NELFA,[8] which refers to real-life stories of same-sex couples and rainbow families who have faced difficulties with legal recognition of the ties that bind them. This document includes the story of a Russian woman

[7] Above n. 1.
[8] Document entitled 'Freedom of Movement in the European Union: Obstacles, cases, lawsuits' – available at http://nelfa.org/inprogress/wp-content/uploads/2020/01/NELFA-fomcasesdoc-2020-1.pdf.

and a Polish woman who had contracted a marriage in the UK while they resided in Poland (which does not allow same-sex couples to marry in its territory). The couple wished to move to Spain (which allows same-sex couples to marry in its territory) and contacted the Spanish authorities to ask whether their marriage would be recognised in Spain for the purpose of determining whether family reunification rights could be derived from EU law. The Spanish authorities noted that in order for their marriage to be recognised in Spain, they should not only provide their marriage certificate (from the UK) but they should also provide a certificate attesting that their marriage is registered with the Civil Registry Office in Poland (where the couple lives). Given that Poland does not allow same-sex couples to marry and does not recognise same-sex marriages contracted elsewhere, the couple are unable to register their marriage with the Polish authorities and, thus, they cannot be recognised as a married couple in Spain.

Although the issue has not been discussed in the media or through petitions before the European Parliament or cases before national courts or the CJEU, it is clear that the **same difficulties of non-recognition** in the host Member State can be faced by **same-sex registered partners** and **de facto partners**: i.e. the host Member State may refuse to recognise them as a couple and may, as a result, refuse to extend to them the family reunification rights that EU law grants in situations where there is an exercise of EU free movement rights. In 2014, the CJEU had the opportunity to rule in a case involving the refusal of the host Member State to recognise a same-sex registered partnership for family reunification purposes; however, the national court withdrew its reference for a preliminary ruling and, thus, no judgment was delivered.[9] Regarding same-sex unregistered partnerships, the issue has not been raised directly in a case referred to the CJEU or a petition submitted to the European Parliament, but cases heard by the ECtHR have demonstrated that there are, still, a number of European States that refuse to recognise unregistered same-sex partners as a couple for family reunification purposes.[10] For instance, in *Taddeucci and McCall v. Italy* (which will be analysed in chapter 6 of the study),[11] Italy refused to grant a residence permit on the basis of family reunification to the same-sex partner – a New Zealand national – of an Italian national. At the time, Italy granted family reunification rights only to married couples and – as is still the case – only allowed marriage between men and women; thus all unmarried couples, whether opposite-sex or same-sex, could not claim family reunification rights in its territory. Although the case did not involve free movement within the EU and, thus, EU law was not relied upon, it is important for the purposes of this study as it demonstrates that some EU Member States refuse to grant family reunification rights to same-sex unmarried partners simply on the basis that they do not recognise their relationship.

Finally, in situations where a **same-sex couple are the joint parents of a child** (and are legally recognised as such in an EU Member State), the host Member State may still consider that it is entitled to **refuse** to legally **recognise the parent-child relationship** (with respect to at least one of the parents), if in its territory it does not allow two persons of the same sex to become – and be legally recognised as – the joint legal parents of a child. This can have a host of negative consequences for the family, including the refusal of the host Member State to extend to them family reunification rights that derive from EU law. To date, no judgment of the CJEU, or petition to the European Parliament, has involved a refusal of family reunification rights to a same-sex couple with children.

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[9] See C-459/14, *Cocaj*.

[10] See the cases *Pajić v. Croatia*, no. 68453/13, 23 February 2016 and *Taddeucci and McCall v. Italy*, no. 51361/09, 30 June 2016, regarding the recognition of unregistered same-sex partners for the purpose of the grant of family reunification rights. These cases will be examined in more detail in Chapter 6 of the study. It should be noted that these cases did not involve the exercise of free movement rights under EU law.

[11] Above n. 10.

2.2.2. Non-recognition of a same-sex couple as a 'couple' for the purpose of receiving benefits and beneficial treatment reserved for 'couples'

Same-sex couples – whether married, in a registered partnership, or in a de facto partnership – can, also, be **treated worse** than opposite-sex couples in situations where they **have gained access to an EU Member State after exercising EU free movement rights**. The problems faced by same-sex couples are caused as a result of the **refusal** of the Member State into which they have been admitted, **to recognise them as a couple for a number of legal purposes**, such as pensions, the award of joint health and accident insurance cover, and succession to tenancies.[12] An additional – and somewhat more complicated – fact is that, as will be seen in subsequent chapters of this study, a number of CJEU cases demonstrate that, although Member States *do* recognise same-sex registered partners as a couple for a number of legal purposes, they may, nonetheless, **refuse to extend to them certain benefits or entitlements** on the ground that these must, still, be **reserved for married couples** – an approach which, as will be seen subsequently, has been ruled by the CJEU to be **contrary to EU anti-discrimination law** in the field of employment benefits.[13]

As regards **married same-sex couples** and their cross-border legal recognition, there are, currently, **two cases which are pending before the ECtHR** (*Handzlik-Rosul and Rosul v. Poland*[14] and *Formela and Formela v. Poland*[15]): in these cases, same-sex couples who married abroad have been faced with the refusal of the Polish authorities to register their marriage in the Polish Marriage Registry, on the basis that this would be contrary to 'basic principles of the Polish law'. Their marriages are, thus, not recognised in Poland *for any legal purposes* which, practically, means that any rights or entitlements reserved for (opposite-sex) married couples are refused to them.

The **different (worse) treatment afforded to married same-sex couples** (when compared to opposite-sex couples who are in a similar position), constitutes the subject-matter of **Petition No. 0402/2020**, which was submitted in April 2020.[16] The summary of the petition states that 'The petitioner points out that homosexual couples are still being treated differently in different Member States and remain at a disadvantage compared with heterosexual couples, notwithstanding the guarantees of equality embodied in the Treaties and the Charter of Fundamental Rights of the European Union. Despite the protection afforded to marriages and families, same-sex bi-national couples find it harder, for example, to obtain recognition of marriage certificates in another Member State. Member States are also adopting laws effectively invalidating the fundamental rights enshrined in the European Convention on Human Rights. The petitioner indicates that the German authorities are refusing to recognise his marriage to a Dutch national, which took place in 2011, issue his partner with

[12] The problems faced by same-sex unmarried partners *because* they are not recognised as a couple for a number of legal purposes are obvious from a number of ECtHR cases, which will be seen in Chapter 6 – see, for instance, *Karner v. Austria*, no. 40016/98, 24 July 2003; *Kozak v. Poland*, no. 13102/02, 2 March 2010; *P.B. and J. S. v. Austria*, no. 18984/02, 22 July 2010; *J. M. v. UK*, no. 37060, 28 September 2010.

[13] Case C-267/06, *Maruko*, ECLI:EU:C:2008:179; Case C-147/08, *Römer* ECLI:EU:C:2011:286; Case C-267/12, *Hay*, ECLI:EU:C:2013:823.

[14] *Handzlik-Rosul and Rosul v. Poland*, no. 45301/19 (pending).

[15] *Formela and Formela v. Poland*, no. 58828/12 (pending).

[16] Petition No. 0402/2020 by Frank Bartz (German) on the fundamental rights of LGBT-EU citizens and their different treatment in different Member States. Another, similar, petition (which is, now, closed) was submitted in 2018 – see Petition No. 0973/2018 by Adolfo Pablo Lapi (Italian) on discrimination against homosexual and LGBTI couples in Europe.

a passport or grant him the right to vote, unless he renounces certain rights, effectively leaving him stateless. Moreover, unlike a heterosexual man, he is not entitled to seek redress before the courts. The petitioner is accordingly seeking the adoption of a European law containing uniform definitions of concepts such as gender and marriage, couples with the recognition of LGTB minority rights'. As will be seen in chapter 6, the **difference in treatment between opposite-sex and same-sex unregistered partners (disadvantaging the latter)** with regard to a number of issues has been **challenged** as a violation of the EConHR before the ECtHR in a number of instances; moreover, a number of cases concerning this matter are, currently, **pending** before the **ECtHR**.[17]

2.2.3. Non-recognition of the parent-child relationship between a child and both parents who are of the same-sex, as this has been legally established elsewhere

Although in a handful of EU Member States the recognition of a same-sex couple as a couple is, still, controversial, the issue of allowing same-sex couples to have children and to be legally recognised as the joint parents of a child, is even more controversial.[18] Hence, it is unsurprising that, although there is a clear majority of EU Member States that recognises same-sex couples as couples, in at least **11 of 27 (40%) of EU Member States, same-sex couples with children may be refused to be legally recognised as the joint parents of their children**.[19] This means that rainbow families which move between EU Member States are often confronted with the possibility that the **familial ties between a child and both parents** which have been legally established elsewhere **will not be legally recognised** and will, thus, **dissolve** once they **cross a national border**.

One (frequent) problem faced by rainbow families is the **refusal to recognise birth certificates** issued in another EU Member State, which indicate two parents of the same sex as the legal parents of a child.

Petition No. 0513/2016, submitted in 2016 and still open, demonstrates very clearly the problems faced as a result of the lack of uniform legal recognition of the familial ties among the members of rainbow families in EU Member States.[20] The summary of the petition states that 'The petitioner believes that LGBT families do not have the same rights across the European Union. She explains that she is married to a British lady and gave birth to a daughter in Spain in 2014. The Spanish birth certificate of her daughter indicates both her and her partner as [legal] mothers. Yet, outside of Spain they are not considered as family, as their daughter has only one parent. In the UK, where they applied

[17] *Grochulski v. Poland*, no. 131/15 (pending); *Meszkes v. Poland*, no. 11560/19 (pending); *Starska v. Poland*, no. 18822/18 (pending).

[18] P. Dunne, 'Who is a Parent and Who is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective', (2017) 30 *Journal of the American Academy of Matrimonial Lawyers* 27, 31 (and the references in footnote 13 of that article). Hodson has also, noted that, although the ECtHR now recognises *de facto* families as valid families that are entitled to the protection of their rights, nonetheless, at present it 'provides too little guidance on matters of family rights and equality for children raised in LGBT families' and 'in short, the ECtHR has failed to grapple adequately with the dynamics of LGBT family life' - L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20 *International Journal of Children's Rights* 501, 519. Since this article, the ECtHR has decided *X & Others* v. *Austria* (2013) (second-parent adoption must be open to same-sex couples if unmarried opposite-sex couples are eligible).

[19] See https://www.ilga-europe.org/sites/default/files/AD-K%20v%20Poland%202019-07-25%20FINAL.pdf, pp. 12-14.

[20] Petition No. 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union.

for a British passport they were told that under UK family law, **the petitioner's married partner is not recognised as the mother** and consequently, if they ever decided to move to the UK, the petitioner's married partner would have to adopt her own daughter. In Greece they were also told that **only the birth mother is recognised as the parent**, since there are no provisions in the Greek law for similar families. For the above reasons, for a long time the petitioner's **daughter did not have a passport and the family was unable to travel**. The petitioner believes that families like hers are being refused their right to free movement and their children are vulnerable, since their parents are not equally recognised across the EU. The petitioner **urges** that the EP and the Commission work towards **making official civil status documents, such as birth certificates, to be accepted de facto across the Member States**. She believes that the children of parents in similar situation deserve the same rights as all the children, with both their parents recognised'. NELFA's document, mentioned earlier,[21] explains the reasons behind the difficulties faced by this family. In particular, it explains that the UK did not recognise the co-mother as a mother because the IVF treatment was undertaken in Spain, not in the UK, and the couple was not married or in a civil partnership at the time: hence, the refusal to recognise the parent-child relationship was, essentially, based on a procedural reason, rather than on a principled approach against the recognition of a same-sex couple as the joint legal parents of a child. Conversely, the Greek refusal was based on a principled approach against accepting that two women can be recognised as the joint legal parents of a child.

The NELFA document, mentioned earlier,[22] provides additional examples of the difficulties that same-sex couples with children have faced in cross-border situations. One of the stories mentioned in this document is one which has, in fact, provided the factual background to a case which is currently **pending** before the **ECtHR: *A.D.-K & Others v. Poland***.[23] This involves a Polish woman and a British woman who are in a civil partnership and reside in the UK. The couple have a child that was born in the UK and has a UK birth certificate which records both women as the child's legal parents. The couple tried to have the UK birth transcribed in Poland so that the child could obtain Polish citizenship, but this was denied by the Polish authorities on the ground that **Polish law** does not provide for civil partnerships and does not recognise same-sex marriages. Because the authorities can only issue birth certificates which specify a 'mother' and a 'father', **the transcription of a birth certificate mentioning a 'mother' and a same-sex 'parent' would be against Polish public policy**.

The matter of the non-recognition of the parent-child relationship, in situations involving rainbow families that move within the EU, is expected to be resolved judicially soon. As noted earlier, there are **two cases currently pending before the CJEU** which involve the **refusal of, respectively, Bulgaria and Poland, to legally recognise Spanish birth certificates** which record two women as the parents of children born in Spain, on the ground that this would be **contrary to public policy**.[24]

Same-sex couples who have become parents as a result of a **surrogacy** arrangement, which is more common for same-sex male couples, are faced with the added complication that **surrogacy is still unregulated in the majority of EU Member States**. This means that same-sex couples, who have legally established their (joint) parental status with regard to a child that was born through a surrogacy arrangement in a country where surrogacy is allowed (for instance the US), may be faced with **non-**

[21] Above n. 8.
[22] Ibid.
[23] Application No. 30806/15 (currently pending).
[24] Above n. 2.

recognition of their status as parents when they return to the EU with their child; this can be the case for both members of the couple or for only one (usually the non-biological parent).[25] This was, in fact, the subject-matter of **Petition No. 1493/2016**[26] – which has been declared inadmissible – where the petitioner called on 'the European Union to take urgent steps to address the issue at hand, and to require Member States to recognise and register all children born through surrogacy abroad, ensuring that their legal relationships are upheld and without forcing them to change their name and family when crossing from one country into another, and to grant parents all the maternity and/or paternity rights and benefits to which they are entitled (irrespective of civil status, gender or sexual orientation) in a bid to ensure optimum care for minors and improve work-life balance'.

More recently, **Petition No. 0712/2020**[27] has been submitted, the summary of which states: 'The petitioner deplores that LGBT families do not have the same rights across the European Union. The petitioner is married to a Polish same-sex partner and they have two children, born by surrogacy in the US in 2016 and 2018. The Spanish birth certificates of their children indicate both partners as parents. Yet, in other Member States, they are not considered as a family, and their children can only have one parent. In Poland, they cannot apply for Polish passports for their children because, under Polish family law, the petitioner's married partner is not recognized as the other parent and, consequently, if they ever decided to move to Poland, their family would not be recognized. The petitioner claims that families in this situation are being denied their right to free movement and that their children are vulnerable, since their parents are not equally recognised across the EU. The petitioner **urges** the EP and the Commission to work towards the **de facto recognition of official civil status documents**, such as birth certificates, **across all Member States**. The petitioner believes that the children of parents in similar situations deserve the same rights as all other children, with both of their parents being recognized.'

The issue of the cross-border recognition of surrogacy orders made by courts *outside the EU* has already – as we shall see in chapter 7 of the study – concerned the ECtHR, which ruled that the **EConHR requires** its signatory **states to recognise surrogacy orders (and the familial links which have been established through them) made in other countries**.[28] This should ***automatically*** be the case when it comes to the legal parent-child relationship between the child and the ***biological* parent**, whereas with regard to the other **(non-biological) parent**, signatory states must **provide a way for such a relationship to be recognised** (e.g. through second-parent adoption, if not transcription of the foreign birth certificate).[29]

[25] For an excellent demonstration of these difficulties, see D. Sobovitz, 'Long way to go for gay rights in Europe', The Brussels Times, 21 June 2020, available at https://www.brusselstimes.com/opinion/117865/long-way-to-go-for-gay-rights-in-europe/. Dan Sobovitz has, also, very recently submitted Petition No. 1179/2020 by Dan Sobovitz (Hungarian) bearing 2 signatures, on the protection of the right of rainbow families to free movement within the EU.

[26] Petition No. 1493/2016 by Javier Diez (Spanish) on surrogacy and the relevant legal framework.

[27] Petition No. 0712/2020 by R.A.P. (Spanish) on the fundamental rights of rainbow families and free movement within the EU.

[28] *Mennesson v. France*, no. 65192/11, 26 June 2014. See also *Labassee v. France*, no. 65941/11, 26 June 2014 and *Laborie v. France*, no. 44024/13, 19 January 2017.

[29] ECtHR Advisory Opinion Request No P16-2018-001 (10 April 2019); *D v. France*, no. 11288/18, 16 July 2020.

As explained in **Petition No. 0657/2020**,[30] the refusal of the host Member State to legally recognise the familial links within an LGB family (usually, by refusing to recognise the parent-child relationship between a child and one of the parents), can create **restrictions to free movement** in two ways: (i) refusal of **family reunification rights**; and (ii) denial of a number of **rights or entitlements** (such as social and tax benefits) to which the family would have been entitled, if the legal ties among its members had been recognised.[31] Moreover, such **(legal) severance of the familial ties** between a child and one of their parents when the child moves to another EU Member State can, in fact, **enable one parent** – in situations where the relationship has broken down – to **exclude the other parent** from the child's life simply by strategically moving to a Member State where the parent-child relationship between the two will not be legally recognised. This appears to have been the situation which led to the recently submitted **Petition 1038/2020.**[32]

Having explained the types of obstacles which rainbow families often face when they move between EU Member States, we shall now proceed to present the legal framework which is relevant for the purposes of this study, as a necessary background to the main legal analysis that will follow in chapters 4-7.

[30] Petition No. 0657/2020 by Catalina Pallàs Picó (Spanish), on behalf of the Association of LGBTI Families of Catalonia, on the right of free movement for LGBTI families in the EU.

[31] For a document explaining the leave policies of Member States for non-traditional (including rainbow) families, see N. Picken and B. Janta, 'Leave Policies and Practice for Non-Traditional Families' (Rand Europe) (2019), prepared for the European Commission: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8239&furtherPubs=yes.

[32] Petition 1038/2020 by Björn Sieverding (German), on behalf of the Network of European LGBTIQ* Families Associations, signed by one other person, on the mutual recognition of legal guardians in LGBTIQ families in the EU.

3. THE RELEVANT LEGAL FRAMEWORK

KEY FINDINGS

- Articles 21, 45, 49 and 56 TFEU are collectively known as 'the free movement of persons provisions' and grant to Union citizens the right to move to, and reside in, the territory of another Member State.

- Directive 2004/38 grants to all Union citizens who move to, and reside in, the territory of another Member State automatic (Art. 2(2)) and discretionary (Art. 3(2)) family reunification rights. Union citizens who return to their Member State of nationality after having exercised free movement rights derive family reunification rights from the free movement of persons provisions and in those instances Directive 2004/38 applies 'by analogy'.

- Laws must comply with all legal acts which are above them in the hierarchy of legal norms. In the EU legal system at the apex of the hierarchy sit the constituent EU Treaties together with the Charter of Fundamental Rights of the EU, below these come the general principles of EU law, and secondary legislation comes lower down the hierarchy of legal norms.

- The principle of supremacy of EU law requires that when there is a conflict between EU law and national law, EU law prevails over any type of national law including over conflicting national constitutional provisions.

- According to the principle of conferral, the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties. However, even in areas where the Member States maintain full competence and the EU does not have the competence to make legislation, the Member States need to ensure that they exercise their competence in a way which is compliant with EU law.

- The EU is not a human rights organisation. However, there are two sources of fundamental rights protection under EU law: fundamental (human) rights which form part of the general principles of EU law and the EU Charter of Fundamental Rights.

- Although initially all EU initiatives aiming to protect LGB rights consisted of the adoption of soft law measures, since 1999 a number of binding instruments and provisions which aim to prohibit discrimination on the ground of sexual orientation and to achieve equality for LGB persons within the EU have been introduced: Article 19 TFEU, Directive 2000/78, Article 21 of the EU Charter of Fundamental Rights, and Article 10 TFEU.

- The EConHR is not an EU instrument and is not binding on the EU but has a special position in the EU legal order. It constitutes a significant source of inspiration for the CJEU and Article 6(3) TEU provides that fundamental rights guaranteed by the EConHR constitute general principles of EU law. Article 6(2) TEU provides that the EU shall accede to the EConHR, whilst Article 52(3) of the EU Charter of Fundamental Rights provides that in so far as the Charter contains rights which correspond to the rights guaranteed by the EConHR the meaning and scope of those rights shall be the same as those laid down by the EConHR.

3.1. Introduction

This chapter will aim to provide a basic **explanation of the legal framework** which is relevant for the purposes of this study as a necessary background to the main legal analysis that will follow in the next four chapters.

The chapter will begin with a description of the legal framework that governs the **free movement rights** that Union citizens enjoy under EU law and the **family reunification rights** that are attached to them. This is necessary given that this study aims to explore the position of rainbow families (comprised of at least one Union citizen) when they exercise free movement rights deriving from EU law. The chapter will, subsequently, proceed to explain the **hierarchy of EU acts**, as in subsequent chapters of the study, recommendations will be made which will have as their basis the need for EU legal instruments to comply with all legal acts which are above them in the hierarchy of EU legal norms. The chapter will also briefly present **the principle of attributed competence**, according to which the EU is a supranational organisation which can only do what the Member States have given it the competence to do, and will present the important **distinction between EU competence**, on the one hand, **and the scope of application of EU law**, on the other. It will be stressed that although the laws which determine the rights enjoyed by same-sex couples and rainbow families often fall in areas which are within the exclusive domain of Member State competence, this does not mean that they are completely insulated from the effects of EU law: in situations which fall within the scope of application of EU law (which is the situation in all cases where there is an exercise of EU free movement rights), there is a need to ensure that the application of national laws (even in areas which continue to fall within the exclusive realm of national competence) does not violate EU law.

The final parts of the chapter will explore the **relationship between the EU and fundamental human rights** as well as the **EU's position towards the protection of LGB rights**. It will be explained that although the EU is not a human rights organisation, it has, nonetheless, developed a legal framework which requires the EU institutions and, in certain circumstances, the Member States to comply with fundamental rights guarantees; this is particularly important when considering how EU and national legislation with an impact on the rights of rainbow families must be interpreted. The EU legal framework concerning the protection of LGB rights will, also, be briefly described. The chapter will, then, conclude with a section which explores the **relationship between fundamental rights protection under EU law and the EConHR:** this is important since many of the issues arising in situations involving rainbow families, have not been resolved at EU level and guidance, therefore, needs to be sought from the EConHR and, in particular, from the rulings of the ECtHR.

3.2. EU citizenship and the Right to Free Movement of Union Citizens

The **seeds for what is today the EU** were, first, sown in the 1950s, when – following Europe's devastation as a result of the Second World War – it was decided that any war between France and Germany should become 'not merely unthinkable, but materially impossible'.[1] For this reason, following the Schuman Declaration in 1950,[2] the European Coal and Steel Community (ECSC) was established in 1952, which had as its aim to pool together the coal and steel resources of Germany and France and to create a common market in coal and steel among the participating European States. A

[1] The Schuman Declaration, 9 May 1950. The full text of the declaration can be found here: https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.
[2] Ibid.

few years later, in 1958, two additional Communities were established: the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Whilst the latter had the specific aim of encouraging cooperation in the peaceful use of nuclear energy, the former had the broader, ambitious, aim of building an internal market among the participating States.[3]

In order **to build an internal market**, the free movement (among the participating States) of goods, economic actors, services, and capital, must be ensured. For this purpose, the original EEC Treaty included a number of provisions – the so-called **'free movement provisions'** – which prohibited Member States from raising or maintaining obstacles to free movement. Today, following a number of Treaty revisions, the (economic) free movement provisions are found in the TFEU: Articles 34 and 35 TFEU prohibit obstacles to the free movement of goods,[4] Articles 45,[5] 49[6] and 56 TFEU (aka 'the economic free movement of persons provisions') prohibit obstacles to the free movement of Member State nationals who are economically active, obstacles to the free movement of services are prohibited, also, by Article 56 TFEU,[7] whilst, obstacles to the free movement of capital are prohibited by Article 63 TFEU.[8] For obvious reasons, **for the purposes of this study**, only **the free movement *of persons* provisions are of interest**.[9]

[3] For more on the early steps in the history of the EU and, in particular, the creation of the three Communities see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials (UK Version)* (OUP, 2020), pp. 3-5. See, also, L. Van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press, 2014), chapter 4.

[4] Article 34 TFEU provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Article 35 TFEU provides: 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States'.

[5] Article 45 TFEU provides: '1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service'.

[6] Article 49 TFEU provides: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital'.

[7] Article 56 TFEU provides: 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union'.

[8] Article 63 TFEU provides: '1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited'.

[9] For a detailed analysis of all the free movement provisions see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, 2019). For an analysis of the free movement of persons provisions see, in particular, chapters 6 to 9 of this book.

In the 1980s, it was decided that **European integration should expand** beyond the fields that were, until then, covered by the three original Communities. For this purpose, the **Treaty of Maastricht**, which came into force in 1993, brought **significant, institutional and substantive, changes**.[10] It established the EU which – at the time – was based on three pillars: the first pillar (the 'Communities pillar') which would continue to be of a supranational nature and which would consist of the already existing Communities, together with two new, intergovernmental, pillars: the Common Foreign and Security Policy pillar and the Justice and Home Affairs pillar.[11] Although the pillar structure was abolished as a result of the Treaty of Lisbon changes in 2009,[12] the EU still has the same, broad, range of, competences it was bestowed with in 1993, with a number of additions made through subsequent Treaty revisions.

Most importantly, however, the Treaty of Maastricht also introduced a **new status for *all* Member State nationals** - the status of **Union citizenship** - and added a new Part Two to the European Community (EC) Treaty (now Part Two TFEU), which includes the core citizenship provisions.[13] Accordingly, although, **until 1993**, **only** Member State nationals who contributed in some way to the economic aims of the EEC (**workers, employees and service providers**), could derive free movement rights from the Treaties, **since 1993, *all* Member State nationals** – irrespective of their contribution to the economic aims of the EU – can claim the **right to move freely between EU Member States**. This right is, now, laid down in **Article 21 TFEU**,[14] which together with the economic free movement of persons provisions (Articles 45, 49 and 56 TFEU) form the free movement of persons provisions, which bestow **free movement rights only on Union citizens**: persons who do not hold Union citizenship cannot, therefore, rely on the free movement provisions of the Treaty, unless they are a **family member of a Union citizen**, in which case they enjoy such rights *through the Union citizen*.

[10] R. Corbett, *The Treaty of Maastricht* (Longman, 1993).
[11] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17.
[12] J-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP, 2010) 65-70.
[13] Articles 20-25 TFEU.
[14] Article 21 TFEU provides: '1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament'. It should be emphasised that – as noted in Article 21(1) TFEU – the right to move and reside freely in the territory of the Member States is subject to the limitations and conditions laid down in the Treaties and by secondary legislation measures.

Accordingly, all Union citizens (including LGB Union citizens[15]) can, today, rely on EU law in order to move freely between EU Member States.[16] However, **which of the free movement of persons provisions is applicable, in a particular situation, depends on the purpose of the movement**.[17] Union citizens who move between EU Member States for an economic purpose, can still rely on the more specific, economic, free movement of persons provisions, as laid down in the original EEC Treaty (as explained, the current Articles 45, 49 and 56 TFEU). All other Union citizens who are not covered by the above provisions, can rely on the *lex generalis* provision, which is Article 21 TFEU. For the purposes of this study, however, there will be no need to distinguish among the free movement of persons provisions: the findings and suggestions that will be made will apply to situations involving any of these provisions.

As has been established through CJEU case-law, the free movement of persons provisions can be relied on by Union citizens in order to **challenge measures** laid down by the **host Member State**,[18] but, also, by the **home Member State**, when the latter deters or prevents its own nationals from moving to another Member State.[19] Moreover, the CJEU has made it clear that the **free movement of persons provisions** do not merely **prohibit** measures which are **directly or indirectly discriminatory on the grounds of nationality** (or of having exercised free movement rights), but also **genuinely non-discriminatory obstacles to the free movement of persons** between Member States.[20] The free movement of persons provisions can be relied on by Union citizens, not only when they are faced with an **obstacle to their movement to the territory of another Member State**, but also when they are challenging an **obstacle to their return to their home Member State**.[21] As made clear in the TFEU[22] and in CJEU case-law,[23] obstacles to the free movement of persons may be justified on non-economic

[15] As Jessurun D'Oliveira has put it, 'freedom of movement is granted in Article 3 EEC to persons (workers and others); lesbians and gay men are persons; thus lesbians and gay men enjoy freedom of movement' – H. U. Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993) 294. Similarly, Kochenov has noted that 'The main right of EU citizenship, which is free movement, cannot be made dependent on the sex or, for that matter, the sexual preferences of citizens' – see D. Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 *Fordham International Law Journal* 156, p. 184.

[16] It should be noted that the Treaty free movement of persons provisions are only concerned with movement *between EU Member States* – therefore, movement *within* an EU Member State (see e.g. Case 175/78, *The Queen v. Saunders* ECLI:EU:C:1979:88) and movement between a Member State and a third country (e.g. movement between the US and an EU Member State) do not count as 'free movement' for the purposes of these provisions. Situations which only involve such movement are considered purely internal to a Member State and, thus, the EU free movement provisions do not apply. Given that in such purely internal situations EU law does not apply, the protection offered by the latter may not be applicable, which can result in purely internal situations being treated (under national law) worse than situations which fall within the scope of EU free movement law; the term used to describe this is 'reverse discrimination'. For an analysis of the so-called purely internal rule and the notion of reverse discrimination in EU free movement law see A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009).

[17] Although, in recent years, the Court appears to have blurred the distinction among the various free movement of persons provisions, disregarding the aim for which the movement was exercised – see A. Tryfonidou, 'In search of the aim of the EC free movement of persons provisions: Has the Court of Justice missed the point?', (2009) 46 *Common Market Law Review* 1591.

[18] See, for instance, Case 139/85, *Kempf* ECLI:EU:C:1986:223; Case C-413/99, *Baumbast and R* ECLI:EU:C:2002:493.

[19] See, for instance, Case C-415/93, *Bosman* ECLI:EU:C:1995:463; Case 370/90, *Surinder Singh* ECLI:EU:C:1992:296; Case C-60/00, *Carpenter* ECLI:EU:C:2002:434. See F. Strumia, 'Supranational citizenship's enablers. Free movement from the perspective of home Member States' (2020) 45 *European Law Review* 507.

[20] See, for instance, *Bosman*, above n. 19; Case C-55/94, *Gebhard* ECLI:EU:C:1995:411; *Carpenter*, above n. 19.

[21] See, for instance, Case C-673/16, *Coman and Hamilton* ECLI:EU:C:2018:385.

[22] Articles 45(3) TFEU, 52 TFEU, 62 TFEU; and, implicitly, in Article 21(1) TFEU.

[23] See, for instance, Case 33/74, *Van Binsbergen* ECLI:EU:C:1974:131; *Gebhard* above n. 20; *Bosman* above n. 19.

grounds,[24] provided that the national measures that create the obstacle are proportionate to the aim sought to be achieved.[25]

The free movement of persons provisions have always been complemented by a long list of pieces of **secondary legislation**. For the purposes of this study, the **most important** such instruments are **Directive 2004/38**,[26] which provides a more elaborate explanation of the right of residence and other rights (such as family reunification rights) that Union citizens who move to or reside in a Member State other than that of which they are a national enjoy under EU law,[27] and **Regulation 492/2011**,[28] which further develops the prohibition of discrimination on the ground of nationality, in situations involving the free movement of workers. Parts of these instruments will be analysed in more detail in this and in subsequent chapters, where they are relevant.

3.3. Family Reunification Rights under EU Free Movement Law

It was recognised early on that, if the free movement of Member State nationals was to be secured, provision should be made for them to be joined in the Member State to which they move by their close family members. For this purpose, **family reunification rights** were recognised as secondary rights, attached to the primary right to move freely between EU Member States bestowed by the free movement of persons provisions.[29] Such rights were – and still are – not mentioned anywhere in the Treaties, but have instead been explicitly provided through secondary legislation.[30]

Currently, family reunification rights for Union citizens who exercise free movement rights are laid down in **Directive 2004/38**.[31] The 2004 Directive provides for two different **types of family reunification rights**: a) ***automatic*** family reunification rights, which are granted with respect to the categories of family members laid down in Article 2(2) of the Directive; and b) ***discretionary*** family reunification rights, which are granted with respect to two categories of persons who have a certain (familial or quasi-familial) relationship with a Union citizen, as laid down in Article 3(2) of the Directive: under this latter category, the host Member State merely has the **duty to 'facilitate'** the entry and residence of the family members to its territory.

Article 2(2) of Directive 2004/38 (which lays down the categories of family members that enjoy ***automatic* family reunification rights**) provides that for the purposes of Directive 2004/38:

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[24] For instance, the obstacles must not seek to exclude economic actors from other Member States so as to protect the national economy.
[25] For an analysis of justifications see P. Koutrakos, N. Nic Shuibhne, and P. Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart, 2016).
[26] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
[27] Article 3(1) of Directive 2004/38, ibid.
[28] Regulation (EU) 492/2011/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[29] For a detailed analysis of family reunification rights under EU free movement law see C. Berneri, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens* (Hart, 2017).
[30] G. Barrett, 'Family matters: European Community law and third-country family members' (2003) 40 *Common Market Law Review* 369, 375-376.
[31] Above n. 26.

'"Family member" means
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)'.

When a Union citizen exercises free movement rights, (s)he has the **automatic right** to be accompanied or joined in the host Member State by the above family members. What this means in practice is that the **host Member State is *required* by EU law to admit** those family members into its territory and to grant them a right of residence, **without applying its own immigration requirements**.

Article 3(2) of Directive 2004/38, on the other hand, provides:

'Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.
The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people'.

Unlike persons who fall within the term 'family member' under Article 2(2) of Directive 2004/38, and with whom the Union citizen enjoys *automatic* family reunification rights, persons who qualify for the protection offered under Article 3(2) of the same Directive, **are not *guaranteed* admission** into the host Member State.[32] Rather, the requirement to '**facilitate'** their entry and residence, merely requires the host Member State to undertake an **extensive examination of the personal circumstances of family member(s) and their relationship with the Union citizen** and to **justify** any **denial of entry or residence** to the family member(s).[33] Recital 6 of the Directive further elaborates on this requirement, noting that the situation of those persons 'should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'. The CJEU has, also, provided additional clarification, by noting that Article 3(2) of Directive 2004/38 'imposes an obligation

[32] For a discussion of this see H. Toner, 'Migration Rights and Same-Sex Couples in EU Law: A Case Study' in K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives* (Intersentia, 2012), p. 288.
[33] See Case C-83/11, *Rahman and Others*, ECLI:EU:C:2012:519, for a more detailed analysis of what obligations are imposed on Member States by this provision.

on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen'.[34]

It should be underlined here that Articles 6(2), 7(2) and 16(2), of Directive 2004/38, provide that the **family members of a Union citizen 'who are not nationals of a Member State' shall enjoy a right of residence in the host Member State** which is commensurate with that enjoyed by the Union citizen. The rationale behind the inclusion of the above proviso ('who are not nationals of a Member State') is that **it is only family members who do not possess the nationality of an EU Member State that need to rely on EU law to derive family reunification rights through the EU citizen**: family members who are Union citizens themselves, enjoy in their own right free movement rights and, thus, do not generally need to claim derivative rights based on their relationship with the Union citizen.

Another important point to note is that, as mentioned earlier, Directive 2004/38 applies only to Union citizens (and their family members) who move to and reside in a Member State other than that of the nationality of the Union citizen.[35] Therefore, **the Directive does not apply** to situations **where a Union citizen**, in exercise of EU free movement rights, has moved to another EU Member State and **wishes to return to his/her Member State of nationality**.[36] In fact, this is not a specificity of Directive 2004/38, given that prior legislation (which complemented the free movement of persons provisions of the Treaty and from which family reunification rights were derived) only applied in such instances of outward movement from a Union citizen's Member State of nationality to another Member State.[37] The CJEU has, however, made it clear that, although Directive 2004/38 does not apply in situations involving 'returnees' (i.e. Union citizens who, after exercising free movement rights, wish to return to their Member State of nationality where they wish to rely on EU law to claim family reunification rights) and, thus, family reunification rights cannot be derived directly from the Directive, **the Treaty free movement of persons provisions *do* apply** in such situations and, thus, **family reunification rights can be derived directly from them**.[38] For this purpose, **Directive 2004/38 applies 'by analogy'**, and, thus 'returnees' enjoy the same family reunification rights as Union citizens who move to a Member State other than that of their nationality (to whom the Directive applies directly).[39]

Finally, apart from the above categories of family members who enjoy derivative rights of family reunion with migrant Union citizens via Directive 2004/38 (or its application 'by analogy'), the **CJEU has added to the categories of family members in respect of whom a Union citizen (*who is a child*)**

[34] Ibid, para. 21.

[35] Article 3(1) of Directive 2004/38, above n. 26. It should be noted that the purely internal rule mentioned in n. 16 above, is, of course, also applicable in situations where Union citizens and their family members wish to rely on EU law to claim family reunification rights: if the Union citizen has not exercised free movement rights and, thus, the situation is deemed purely internal to a Member State, then family reunification rights cannot be derived from EU law and, thus, the right of the family member(s) to enter the relevant Member State is entirely dependent on national immigration law which very rarely grants *automatic* family reunification rights: for this reason, in purely internal situations there is often reverse discrimination as regards the enjoyment of family reunification rights – for an example see Joined Cases 35 and 36/82, *Morson and Jhanjan* ECLI:EU:C:1982:368.

[36] See, for instance, *Coman and Hamilton*, above n. 21, para. 20; Case C-456/12 *O. and B.* ECLI:EU:C:2014:135, para. 37; Case C-156/16, *Lounes* ECLI:EU:C:2017:862, para. 33.

[37] See for instance, *Carpenter*, above n. 19, paras 31-36.

[38] *O. and B.*, above n. 36, para. 49.

[39] Ibid, para. 50.

can enjoy family reunification rights *in specific circumstances*.[40] This point is particularly relevant to the analysis in chapter 7 of the study, so more details on this issue will be provided there.

3.4. The Hierarchy of EU Norms and the Relationship between EU law and national law

Like all legal systems, the EU legal system has its own **hierarchy of legal norms**. At the **apex** of the hierarchy sit the constituent **EU Treaties** (currently, the TEU and the TFEU) together with the **Charter of Fundamental Rights** of the European Union (the Charter),[41] which, as noted in Article 6(1) TEU, has the same legal value as the Treaties.[42] Despite the fact that the Treaty provisions and the Charter sit at the same level of the hierarchy, it is clear that the former must be construed in the light of the latter.[43] **Below** these come the **general principles of EU law** (which include, inter alia, fundamental (human) rights, the principle of proportionality, and the principle of equality).[44] **Secondary EU legislation**, which consists of legislative acts, delegated acts, and implementing acts, comes **lower down the hierarchy** and can take the form of Regulations, Directives, or Decisions.[45]

Laws must comply with all legal acts which are above them in the hierarchy of legal norms. This means, for instance, that Directives and Regulations need to comply with the general principles of EU law, with the EU Treaties, and with the Charter. This is an important point to bear in mind when reading subsequent chapters of this study, where it will be explained, for instance, that EU secondary legislation must be compliant with acts which are higher up in the hierarchy of legal norms.

The relationship between EU law and national law should also be briefly explained here. It is a well-established principle of EU law that whenever there is a **conflict between EU law and national law, EU law must prevail**. This is **the principle of supremacy or primacy of EU law**, which was established in 1964 in the case of *Costa v. ENEL*.[46] The principle requires that when such a conflict exists, the conflicting national provision should be disapplied in situations which fall within the scope of EU law and there is a conflict with EU law, whereas it can continue to be applied in purely internal situations where there is no conflict with EU law.[47] This demonstrates that EU law requires EU Member States to disapply national provisions which violate the rights of rainbow families in situations which fall within the scope of EU law – which is the case when rainbow families exercise free movement rights – but not in purely internal situations which have no link with EU law. It should be emphasised that the CJEU has made it clear that, under the principle of supremacy, **EU law prevails over *any* type of national law, including** over conflicting **constitutional provisions**.[48] This is significant for the purposes of this study, as it means that **Member States cannot hide behind a constitutional ban on same-sex marriage,**

[40] See, in particular, *Baumbast and R*, above n. 18; Case C-200/02, *Zhu and Chen* ECLI:EU:C:2004:639; Case C-34/09, *Ruiz Zambrano* ECLI:EU:C:2011:124.
[41] Charter of Fundamental Rights of the European Union [2016] OJ C202/2 (consolidated version).
[42] Article 6(1) TEU provides: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.
[43] P. Craig and G. de Búrca, above n. 3, 148.
[44] T. Tridimas, *The General Principles of EU Law* (OUP, 2006).
[45] P. Craig and G. de Búrca, above n. 3, 147-159.
[46] Case 6/64, *Costa v. ENEL* ECLI:EU:C:1964:66.
[47] For more on the principle of supremacy see P. Craig and G. de Búrca, above n. 3, chapter 10.
[48] Case 11/70, *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.

or constitutional protection of 'morals' or 'public policy', in order to violate the rights of rainbow families that move to their territory in exercise of EU free movement rights.[49]

3.5. EU Competence and the Scope of Application of EU law

Article 5(2) TEU provides that '[u]nder the **principle of conferral**, the Union shall act only within the limits of the **competences** conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'. Articles 2 to 6 TFEU enumerate the categories and areas of EU competence. The **discrimination that LGB persons face is particularly felt in fields which fall within the exclusive domain of Member State competence, such as family law**.

When rainbow families exercise the free movement rights they enjoy under EU law, the **legal issues** that arise (and which we shall see in more detail subsequently in this study) **touch** on a number of different areas, the main ones being the **internal market and free movement, social policy (which includes anti-discrimination law), as well as family law and the protection of fundamental (human) rights**.

According to Article 4(2)(a) TFEU, the **internal market** is an area where the **EU shares its competence with the Member States**. Similarly, according to Article 4(2)(b) TFEU, **social policy** is also an **area of shared EU competence**. Hence, the **EU *can* make legislation in order to remove obstacles to free movement** which are contrary to the Treaty free movement provisions, provided that – in accordance with the principle of subsidiarity laid down in Article 5(3) TEU[50] – it does so 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States … but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.[51] The same is the case for **legislation which** – as part of the EU's social policy - **aims to prohibit discrimination** on a number of suspect grounds, including discrimination **based on sexual orientation**.[52] Accordingly, if – as will be suggested subsequently in this study – the diversity in national laws, regarding the legal recognition of same-sex relationships and rainbow families, gives rise to obstacles to the free movement of Union citizens and their families, the **EU legislature can pass legislation to remove such obstacles**. Similarly, if such diversity gives rise to discrimination against LGB persons on the basis of their sexual orientation, legislation can be adopted to prohibit this under EU law and/or to require Member States **to prohibit such discrimination** in their territory. This is so, in particular, given that – as a result of the great diversity in approaches with regard to this matter – it is unlikely that a satisfactory solution which will remove obstacles to free movement and unjustified

[49] A. Tryfonidou, 'The ECJ recognises the right of same-sex spouses to move freely between EU Member States: the *Coman* ruling' (2019) *European Law Review* 663, pp. 673-674.

[50] The principle of subsidiarity applies in areas of shared competence between the EU and the Member States and its aim is, exactly, to determine whether the EU *should* exercise its competence. P. Craig, 'Subsidiarity: A Legal and Political Analysis' (2012) 50 *Journal of Common Market Studies* 72 .

[51] The legal basis for ensuring the free movement of *all* Union citizens is Article 21(2) TFEU (which provides for legislation to be made using the ordinary legislative procedure which requires qualified majority voting), however, there are, also, a number of more specific legal bases (e.g. Article 46 TFEU which is the legal basis for legislation aiming to set out the measures requires to bring about the freedom of movement for workers in particular).

[52] As will be seen subsequently, Article 19 TFEU is the legal basis for legislation which prohibits discrimination based on, inter alia, sexual orientation. This provides for legislation to be made using the special legislative procedure and requires unanimity in the Council.

instances of discrimination on the ground of sexual orientation can be achieved through action taken at national level.

On the other hand, **family law and the protection of fundamental (human) rights** are areas where the **EU does not have legislative competence** and, thus, EU legislation cannot be made if its sole aim is to regulate these areas. Hence, the EU cannot, for instance, make legislation which requires all EU Member States to open marriage to same-sex couples in their territory.[53] Nonetheless, it is important to emphasise here that, even in areas where the Member States do have exclusive competence, their actions are not fully insulated from the effects of EU law.[54] As has been repeatedly noted by the CJEU, **even in areas where the Member States maintain full competence, they need to ensure that the exercise of this competence is in compliance with EU law**.[55] Hence, even if EU Member States are free – under EU law – to determine whether or not they will open marriage or registered partnerships to same-sex couples *in their territory*, and whether or not they will allow rainbow families *within their territory* to legally establish a parent-child relationship with respect to both parents, they are not allowed to apply their laws with regard to these matters in situations where this will lead to a violation of EU law by, for instance, creating an obstacle to the free movement of Union citizens. These points will be explored in more detail in subsequent parts of the study.

3.6. Fundamental Rights Protection under EU law

It is clear that the **EU is not a human rights organisation**. As explained earlier, its original aims were mainly economic and it is, therefore, unsurprising that the founding Treaties did not make any reference to the need to respect or protect fundamental (human) rights.[56] And although, at first, the CJEU refused to rule that EU law imposes any obligations with regard to the protection or respect of fundamental rights,[57] in the case of *Stauder* in 1969,[58] it ruled that **fundamental (human) rights form part of the general principles of EU law**. As clarified in subsequent case-law, these fundamental rights guarantees are binding on the EU institutions in all instances and on Member States when they are implementing EU law,[59] or when they rely on the Treaty derogations or the mandatory requirements/objective justifications to depart from the obligations imposed by the free movement provisions.[60]

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[53] This is reflected, inter alia, in Recital 22 of Directive 2000/78. In Case C-147/08, *Römer* ECLI:EU:C:2011:286, para. 38, the CJEU noted 'as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment'.

[54] A. Tryfonidou, 'The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights for the Union Citizen' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017).

[55] See, inter alia, Case C-279/93, *Schumacker* ECLI:EU:C:1995:31, para. 21; Case C-148/02, *Garcia Avello* ECLI:EU:C:2003:539, para. 25; *Coman and Hamilton*, above n. 21, paras. 37-38.

[56] P. Craig and G. de Búrca, above n. 3, 430-432.

[57] Case 1/58, *Stork* ECLI:EU:C:1959:4; Case 40/64, *Sgarlata* ECLI:EU:C:1965:36.

[58] Case 29/69, *Stauder* ECLI:EU:C:1969:57.

[59] Case 5/88, *Wachauf* ECLI:EU:C:1989:321.

[60] Case C-260/89, *ERT* ECLI:EU:C:1991:254; Case C-368/95, *Familiapress* ECLI:EU:C:1997:325.

Since 2000, in addition to fundamental rights as general principles of EU law, there is a **second source of fundamental rights protection under EU law: the Charter**, which, since 2009, has been legally binding.[61] According to its **Article 51**, the **Charter is binding on the EU institutions, bodies, offices and agencies, as well as on the Member States 'only when they are implementing Union law'**. The interpretation of the latter has been a cause of controversy, as its narrower language suggests that the scope of application of the Charter may be narrower than that of the general principles of EU law: the words 'implementing EU law' in their strict sense can be taken to include, only, situations which entail the promulgation of national legislation which has as its aim to implement an EU instrument, namely a Directive.[62] However, the **CJEU** in the majority of its rulings has chosen to read Article 51 of the Charter broadly, holding that it **binds the Member states when they act within the scope of EU law**.[63]

However, when does a situation fall within the **scope of EU law**? This is something that is often determined judicially, on a case-by-case basis. However, what is clear from CJEU case-law to date is that, whenever there is an exercise of EU free movement rights, the situation falls within the scope of EU law.[64] Accordingly, **the situation of rainbow families who exercise free movement rights** – which is the subject-matter of this study – **clearly falls within the scope of EU law**. This means that the fundamental rights laid down in the Charter, as well as those protected as general principles of EU law, are applicable and binding on the EU institutions and the Member States. In other words, **when rainbow families move between EU Member States in exercise of EU free movement rights, EU law requires the EU institutions and the Member States to respect the fundamental (human) rights of the members of these families which are laid down in the Charter or which constitute part of the general principles of EU law**.

3.7. EU law and LGB rights[65]

As the **founding Community Treaties did not contain any reference to fundamental (human) rights, they also did not make any reference to LGB rights either**.[66] Despite this, some tentative steps aiming to protect the rights of this segment of the population were taken by the EU already in the 1980s although, **until 1999**, all initiatives to this effect consisted of the adoption of **soft law measures** which, whilst of symbolic value, achieved very little in practical terms.[67]

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[61] Article 6(1) TEU.

[62] P. Craig and G. de Búrca, above n. 3, 462.

[63] See, inter alia, Case C-617/10, *Fransson* ECLI:EU:C:2013:105; Case C-390/12, *Pfleger* ECLI:EU:C:2014:291. For comments see B. de Witte, 'The scope of application of the EU Charter of Fundamental Rights' in M. González Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge, 2017).

[64] See, inter alia, *Garcia Avello*, above n. 55, para. 24: 'The situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC'. For an explanation see A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart, 2016) 34.

[65] A large part of the analysis in this section is taken from A. Tryfonidou, 'Law and sexual minority rights in the EU: navigating a political minefield' in P. J. Cardwell and M-P. Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar, 2020).

[66] G. de Búrca, 'The Language of Rights and European Integration' in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (OUP 1995) 36-37.

[67] A. Tryfonidou, 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU law' in U. Belavusau and K. Henrard, *EU Anti-Discrimination Law Beyond Gender* (Hart, 2018) 231-232.

Nonetheless, the gradual development of **EU anti-discrimination law** has, clearly, contributed to the protection of LGB persons and same-sex couples from discrimination under EU law.[68] The foundations for this protection were laid on 1 November 1999, when the Treaty of Amsterdam entered into force and introduced a **new legal basis** – now **Article 19 TFEU** – giving **competence to the EU to make legislation prohibiting discrimination based on** sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**.[69] This provision – which made the EC Treaty the first international agreement to explicitly make reference to discrimination based on sexual orientation – was **the legal basis for Directive 2000/78**, which is still in force today and prohibits discrimination on a number of grounds, including sexual orientation.[70] The Directive, nonetheless, has a limited material scope – it **only** applies in the context of **employment and vocational training** (including university-level education). For this reason, there have been calls for another Directive which would prohibit discrimination on the same grounds, but in a broader number of areas: education, social protection (including healthcare and social security), social advantages, and access to goods and services (including housing). These calls led to a proposal for such a Directive in 2008 (the 'proposed Equality Directive'), however the opposition of a number of Member States has meant it has yet to be adopted and remains in a state of political limbo.[71]

The **interpretation of Directive 2000/78** has been the **CJEU's focus in the majority of its rulings involving claims by LGB persons**.[72] In the first group of rulings involving same-sex couples (*Maruko*, *Römer*, *Hay*),[73] the Court held that in situations where a Member State has not opened marriage to opposite-sex couples but national legislation treats same-sex registered partnerships as equivalent to marriage for a certain purpose (e.g. pensions), employers must extend – for that purpose – the treatment they afford to married couples to registered partners. If they do not, there is *direct* discrimination on the ground of sexual orientation contrary to the Directive. It is interesting to note that, in these three cases, the Court's approach has positively evolved, from giving, initially, a carte blanche to national courts to determine whether they would extend the treatment afforded to (opposite-sex) married couples to (same-sex) registered partners, to one where this determination was

[68] A. Tryfonidou, 'Discrimination on the Grounds of Sexual Orientation and Gender Identity' in S. Vogenauer and S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017).
[69] For an analysis of the steps that led to the introduction of this provision see M. Bell and L. Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article' (1996) *25 Industrial Law Journal* 320; M. Mos, 'Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam' (2014) 52 *Journal of Common Market Studies* 632.
[70] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. For an analysis of the prohibition of discrimination on the grounds of sexual orientation under the Directive see D. Pudzianowska and K. Smiszek, Report 'Combating Sexual Orientation Discrimination in the European Union', European Network of Legal Experts in the Non-discrimination field (2015) available at: https://op.europa.eu/en/publication-detail/-/publication/c01db252-847d-474b-b397-d0f41eccecd1.
[71] Commission Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (2008) COM 426 final. This was accompanied by a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Non-Discrimination and Equal Opportunities: A renewed commitment' (2008) COM 420.
[72] To date, the prohibition of discrimination on the ground of sexual orientation laid down in the Directive, has been interpreted by the CJEU in the following cases: Case C-267/06, *Maruko* ECLI:EU:2008:179 ; *Römer*, above n. 53; Case C-267/12, *Hay* ECLI:EU:C:2013:823; Case C-81/12, *Asociația Accept* ECLI:EU:C:2013:27; Case C-443/15, *Parris* ECLI:EU:C:2016:897; Case C-258/17, *E.B.* ECLI:EU:C:2019:17 ; Case C-507/17, *NH* ECLI:EU:C:2020:289.
[73] *Maruko*, above n. 72; *Römer*, above n. 53; *Hay*, above n. 72.

taken out of the hands of national judges and placed in the hands of the CJEU. Whereas in the first two judgments (*Maruko* and *Römer*), the Court left it to the national court to assess whether for a specific purpose national law treated registered partnerships as equivalent to marriage, in the third judgment (*Hay*), the CJEU conducted the equivalence assessment itself.

More recently, in the ***Coman and Hamilton* case**,[74] the CJEU was asked for the first time to rule on the interpretation of Directive 2004/38 and, in particular, the availability of family reunification rights to same-sex couples, in a case involving a **same-sex married couple who had exercised EU free movement rights**. The judgment delivered by the Court will be analysed extensively in chapter 4 of the study, and for this reason no further explanation of the case will be provided here.

Finally, it should be noted that, despite the advances made in *some* of the Court's rulings in relation to the protection of the rights of LGB persons and same-sex couples, there was no *primary* EU legislation provision which aimed to protect the rights of sexual minorities. This, nonetheless, changed with the entry into force of the **Treaty of Lisbon in 2009**, which brought two important developments.

The first is that the Treaty of Lisbon inserted into the **TFEU** a new **mainstreaming** provision – **Article 10** – which provides that, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on, inter alia, sexual orientation. This is hugely important because it obliges the EU, not only to provide reactive protection to sexual minorities after their rights have been violated, but also to ensure that in all its activities it takes into account their rights.

The second development is that the Treaty of Lisbon amended **Article 6 TEU** to provide – as we saw earlier – that the **Charter** has the same legal value as the Treaties, meaning that the Charter is **legally binding**. This is important because **Article 21** of the Charter provides that any **discrimination based on**, inter alia, **sexual orientation** shall be **prohibited**,[75] in this way also reinforcing the argument that LGB rights are human rights. Moreover, it means that Article 21 serves as an important complement to the prohibition of sexual orientation discrimination laid down in Directive 2000/78. This is because the Directive, as noted earlier, has a limited material scope (it applies only in the context of employment and vocational training, including university-level education), whereas the Charter is not limited in this way: **Article 21 can be relied on in situations outside the employment context**.[76] It is important to emphasise, nonetheless, that, as we saw in the previous section, the scope of application of the Charter is not unlimited either: its Article 51 provides that it applies to all actions of the EU institutions, bodies, and agencies, and to Member States *only when they are implementing EU law*.

[74] Above n. 21.
[75] Article 21(1) of the Charter provides: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political of any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.
[76] The CJEU only had the opportunity to rule once on the prohibition of discrimination on the ground of sexual orientation under Article 21 of the Charter in one case, Case C-528/13, *Léger* ECLI:EU:C:2015:288, paras. 47-51.

3.8. The Relationship between the EU and the EConHR

The EConHR is not an EU instrument but is, rather, a regional human rights treaty that was drafted by the Council of Europe in 1949, signed by the original ten member states of the Council of Europe in 1950, and entered into force in 1953.[77] To ensure the observance of the obligations imposed on the contracting states, the Convention created two part-time institutions, the European Commission of Human Rights and the ECtHR. However, in 1998, with the entry into force of Protocol No. 11, the Commission was abolished and effectively merged into a new full-time Court, the ECtHR, which is based in Strasbourg. The EConHR focuses primarily on civil and political rights.

As noted previously, although the original Community Treaties did not include any reference to fundamental (human) rights, the CJEU established that fundamental rights form part of the general principles of EU law. And although this newly-instituted system of fundamental rights protection was entirely independent of the EConHR, the CJEU was quick to demonstrate that, **although the EConHR is not an EU instrument and is not binding on the EU, it nonetheless has a special position in the EU legal order**. According to the CJEU, it constitutes a **significant source of inspiration** when the CJEU determines which fundamental (human) rights should be recognised as forming part of the general principles of EU law.[78] Since 1993, this has been reflected in the **TEU**, which, currently, provides in **Article 6(3)** that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms …, shall constitute **general principles of the Union's law'**. In addition, following the changes made by the Treaty of Lisbon in 2009, **Article 6(2) TEU** provides that the **EU shall accede to the ECHR**, though, to date, this has not been realised.[79] Finally, as regards the **Charter and its relationship with the EConHR**, there is a specific Charter provision dedicated to this question: **Article 52(3) of the Charter** provides that 'In so far as this Charter contains rights which correspond to rights guaranteed by the [EConHR], the meaning and scope of those rights shall be the same as those laid down by the [EConHR]. This provision shall not prevent Union law providing more extensive protection'.

The above points regarding the relationship between the EConHR, on the one hand, and the fundamental rights protection offered by the EU, on the other, are important for the purposes of this study. This is because the EU institutions and the CJEU have been confronted to date with only a few situations involving violations of the fundamental rights of same-sex couples, whilst it has been faced with no situations involving same-sex couples and their children. Conversely, the ECtHR has already

[77] For a detailed explanation of the EConHR see E. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, (OUP, 2010); B. Rainey, P. McCormick, C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, (OUP, 2020); D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, (OUP, 2018).

[78] Case 4/73, *Nold* ECLI:EU:C:1974:51, para. 13: 'As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.

[79] In 2014, the CJEU declared that the Draft Agreement on Accession of the EU to the ECHR was incompatible with Article 6(2) TEU in *Opinion 2/13 on EU Accession to the ECHR* ECLI:EU:C:2014:2454. Since then, there has been no attempt to draft a new Agreement.

ruled in many more such situations, or has delivered rulings which can be transplanted into situations involving rainbow families. Accordingly, it is important to bear in mind that, **where the ECtHR has ruled on an issue that (directly or indirectly) relates to the rights that rainbow families can and should enjoy when they cross borders, the protection it has afforded constitutes the *floor of protection* that the CJEU or the EU institutions (in situations in which the matter is not resolved judicially) must offer**.

4. SAME-SEX MARRIED COUPLES

KEY FINDINGS

- **Six Member States** do not recognise a same-sex marriage from another Member State for any purpose of national law other than a residence permit.
- Courts in **Bulgaria, Lithuania, and Romania** have **applied *Coman & Hamilton***, but the administration appears not to have changed its policy, and has **yet to issue a residence permit** to Mr. Hamilton, over two years after the CJEU's judgment.
- As many as **twelve Member States** might prefer to grant the right of residence to a same-sex spouse without attaching the name 'spouse' to the right, thereby '**downgrading' the spouse to 'registered partner' or 'partner in a durable relationship'**.
- Some differences between registered partnership and marriage in Member States that treat a same-sex spouse like a registered partner under their own legislation could constitute **obstacles** to free movement.

4.1. Introduction

This chapter focuses on **the position of same-sex married couples who move between EU Member States**. The married couples who can benefit from family reunification rights under EU law on freedom of movement, discussed in Chapter 3 (part 3.3), are those consisting of an EU citizen and her or his (third-country national) same-sex spouse. If both spouses are EU citizens, they enjoy independent free movement rights and generally will not need to insist on recognition of their marriage under EU law, at least for family reunification purposes. If neither spouse is an EU citizen, they cannot claim free movement rights under EU law. They must instead rely on national immigration law and challenge any obstacles to entry and residence that are contrary to the EConHR.

In 1968, EU law first recognised the right of a worker who is a national of one Member State to be accompanied by her or his spouse (a national of a third country), when moving to work in another Member State, through Article 10(1)(a) of Regulation 1612/68/EEC. In 2018, fifty years after this right was first introduced (it was later generalised beyond workers to all situations in which EU citizens exercise freedom of movement and consolidated in Directive 2004/38), the CJEU extended it to a spouse of the same sex of an EU citizen exercising freedom of movement (or returning to their own Member State after doing so). The secondary right of the same-sex spouse (derived from the primary right of the EU citizen to whom she or he is married) includes the automatic (not discretionary) rights to enter, reside, and work in another EU Member State (the one to which the EU citizen has moved or to which the EU citizen has returned after exercising freedom of movement) under Articles 5, 7, and 23 of Directive 2004/38/EC.

4.2. The Derived Right of Same-Sex Spouses of EU Citizens to Enter, Reside, and Work in Another EU Member State

4.2.1. The 2018 Coman & Hamilton judgment of the Court of Justice of the EU

When Directive 2004/38/EC on free movement of EU citizens and their family members was adopted (29 April 2004), **only two** of the then 15 EU Member States (the Netherlands and Belgium) permitted same-sex couples to marry. The European Parliament and the Council decided not to define the term 'spouse' in Article 2(2)(a) of the Directive, either by expressly including or expressly excluding a spouse of the same sex as the EU citizen. Some of those involved in the legislative process might have assumed that the CJEU would not depart from its **ruling in 2001 in *D. & Sweden* v. *Council*** (when only the Netherlands permitted same-sex couples to marry): '34. ... [A]ccording to the definition generally accepted by the Member States, the term "**marriage**" means a union between two persons of the **opposite sex**. ... '[80]

But legislation in EU Member States changed dramatically between 2001 and 2018, when the CJEU delivered its judgment in ***Coman & Hamilton* v. *Inspectoratul General pentru Imigrări***.[81] (By June 2018, same-sex couples had, or were about to have, access to **marriage in 14 of the then 28 Member States**: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom (except for Northern Ireland). They had access to some form of registered partnership in a further 8 Member States: Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, and Slovenia. They had no access to marriage or registered partnership in 6 Member States: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia.)[82] The case concerned Adrian Coman, a male citizen of Romania who had worked in Belgium (at the European Parliament). While he was working there, he married Clabourn Hamilton, a male citizen of the USA,[83] which was possible under Belgian law in 2010. After Mr. Hamilton was refused a Romanian residence permit (for more than three months), the **Constitutional Court of Romania** referred four questions to the CJEU, of which the CJEU answered two:[84]

> '(1) Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter [of Fundamental Rights of the EU], include the same-sex spouse, from a State which is not a Member State of the [EU], of a citizen of the [EU] to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?
>
> (2) If the answer is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant

[80] Joined Cases C-122/99 P and C-125/99 P ECLI:EU:C:2001:304 (31 May 2001).
[81] Case C-673/16 ECLI:EU:C:2018:385 (5 June 2018).
[82] Opinion of Advocate General Wathelet in *Coman & Hamilton* ECLI:EU:C:2018:2 (11 January 2018), para. 58, n. 37.
[83] In Case C-127/08, *Metock* v. *Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2008:449 (25 July 2008) established that a valid marriage to an EU citizen is sufficient to rely on Directive 2004/38. The spouse does not have to demonstrate lawful residence in another Member State prior to the marriage.
[84] The following discussion is taken from Robert Wintemute, 'Universal Humanity vs. National Citizenship: The Example of Same-Sex Partner Immigration in Europe', in Richard Mole (ed.), *Queer Migration and Asylum in Europe* (University College London Press, 2021).

the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the [EU]?'

The **CJEU** began its analysis by holding that Mr. Coman and Mr. Hamilton **could not rely on Directive 2004/38/EC**, which provides in Article 3(1) that it applies to 'Union citizens who move to or reside in a Member State other than that of which they are a national'. They could rely on the Directive if they were seeking a residence permit for Mr. Hamilton in Bulgaria, Poland or any other Member State, but not in Romania (the Member State of which Mr. Coman is a national).[85]

Even though the Directive did not apply, they could **rely on Article 21(1) TFEU** ('Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States ...'), under conditions no stricter than those in **Directive 2004/38**, which must be applied **by analogy**: 'during the period of his genuine residence in Belgium [as a worker] pursuant to Article 7(1) of Directive 2004/38, Mr Coman created or strengthened a family life with Mr Hamilton'.[86] Mr. Coman's Article 21(1) TFEU rights 'include the right to lead a normal family life, together with [his] family members, both in the host Member State [Belgium] and in the Member State of which [he is a] national[] when [he] return[s] to that Member State [Romania]'.[87] (For over twenty-five years, since 1992, the CJEU had recognised the right of an EU citizen returning to their own Member State, after exercising their freedom of movement in another Member State, to rely on EU law in relation to their family members.[88])

Does Mr. Hamilton qualify as a 'family member' of Mr. Coman, ie, his '**spouse'**, under Article 2(2)(a) of Directive 2004/38? The CJEU finally answered the question left open when the EU legislature chose not to define 'spouse' in 2004: 'As to whether ... ["spouse"] includes a third-country national of the same sex as the Union citizen ..., it should be pointed out ... that the term "spouse" within the meaning of Directive 2004/38 is gender-neutral and **may therefore cover the same-sex spouse** of the Union citizen concerned.'[89]

Under the current text of Article 2(2)(b) of Directive 2004/38 (and current case law), Romania would not be obliged to recognise a same-sex registered partnership from another EU member state, because Romania has no such law 'treat[ing] registered partnerships as equivalent to marriage'. But the absence of a reference to 'the legislation of the host Member State' in Article 2(2)(a) means that Romania 'cannot rely on its national law as justification for refusing to recognise ..., for the sole purpose of granting a ... right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state'.[90] This is true

[85] *Coman & Hamilton,* above n. 2, paras. 19-21.
[86] Ibid, paras. 24-26.
[87] *Coman & Hamilton,* above n. 2, para. 32.
[88] Case C-370/90, *The Queen* v. *Immigration Appeal Tribunal and Surinder Singh* ECLI:EU:C:1992:296 (7 July 1992): '19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed … in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under … [EU law] in the territory of another Member State. 20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by [Union] law in the territory of another Member State.'
[89] *Coman & Hamilton,* above n. 2, para. 35.
[90] Ibid, para. 36.

even though Romania, exercising its competence over family law, is '**free to decide** whether or not to allow **marriage for persons of the same sex' in Romania**.[91]

EU law intervenes because the effect of refusing to recognise a same-sex marriage from another member state is that 'a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse'.[92] The recognition required by Article 21(1) TFEU 'does not undermine the institution of marriage' in Romania, because it is 'for the sole purpose of enabling persons [of the same sex] to exercise the rights they enjoy under EU law'.[93] This obligation 'does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[94]

What is striking about *Coman & Hamilton* is that the CJEU was determined to base its judgment on **liberty** (the right of an EU citizen to freedom of movement), rather than on **equality** (the right of an EU citizen to be free from discrimination based on sexual orientation). Even though Romania recognises opposite-sex marriages from other Member States, the word 'discrimination' does not appear in the CJEU's reasoning. It appears only in references to Recital 31 of Directive 2004/38, and to the proceedings in the Romanian courts. Article 21 of the Charter ('Any discrimination based on any ground such as ... sexual orientation shall be prohibited.') is not cited, even though it was cited by the Constitutional Court of Romania in its first two questions, and should influence the interpretation of the term 'spouse' in Directive 2004/38.

The CJEU was also careful not to cite two relevant judgments of the **ECtHR**: ***Taddeucci & McCall* v. *Italy*** (30 June 2016), probably because it **found sexual orientation discrimination** in Italian immigration law (a male citizen of Italy living in Italy, whose partner was a male citizen of New Zealand, and who could not rely on EU law because there had been no movement between EU member states, had to be granted some means of applying for a family-member **residence** permit for his partner); and ***Oliari & Others* v. *Italy*** (21 July 2015) (Italy may exclude same-sex couples from marriage but **must create 'a specific legal framework'** for them which can have a name other than marriage), to avoid appearing to suggest that Romania is also obliged under Article 8 (respect for family life) of the EConHR to introduce 'a specific legal framework' for same-sex couples. The obligation in *Oliari & Others* to create a 'specific legal framework' applies equally to same-sex couples who have married in another country under *Orlandi & Others*.[95]

Advocate General Wathelet's Opinion (11 January 2018), which considered both free movement and human rights, and therefore cited Article 21 of the Charter, sought to avoid sexual orientation **discrimination**: 'A definition of the term "spouse" that was limited to heterosexual marriage would inevitably give rise to situations involving discrimination on grounds of sexual orientation.'[96] He concluded that 'refusal to grant the application for ... residence of a third-country national, of the same

[91] *Coman & Hamilton*, above n. 2, para. 37.
[92] Ibid, para. 40.
[93] *Coman & Hamilton*, above n. 2, para. 45.
[94] Ibid, para. 46.
[95] *Orlandi & Others* v. *Italy* (ECtHR, 14 December 2017) (the 'specific legal framework' must also be extended to same-sex couples who have married outside of Italy, in lieu of recognising their marriages as marriages). See also four cases pending against Poland in the ECtHR concerning refusals to recognise the Danish or UK marriages of two women (*Handzlik-Rosuł & Rosuł*, No. 45301/19; *Formela & Formela*, No. 58828/12), or to facilitate the marriages in Spain of two men (*Szypuła*, No. 78030/14; *Urbanik & Alonso Rodríguez*, No. 23669/16).
[96] *Coman & Hamilton*, above n. 2, paras. 5, 75.

sex as the citizen of the [EU] to whom he or she is married ..., may not be ... based on his or her sexual orientation, without infringing Articles 7 [respect for family life] and 21 [non-discrimination] of the Charter'.[97] He cited *Taddeucci & McCall* seven times, and *Oliari & Others* five times.

Coman & Hamilton* is a landmark judgment because, for the first time, the CJEU has included same-sex couples in the concepts of 'spouse' and 'marriage'**. But it is important to recognise the judgment's **limits**. It requires Romania to recognise a same-sex marriage from another member state 'for the sole purpose*** of granting a derived right of **residence** to a third-country national'. The CJEU used the phrase 'for the sole purpose' four times.[98] The CJEU does not yet require Romania to recognise a same-sex married couple for any other purpose of Romanian law (for instance in relation to family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law, e.g. hospital visitation and consultation).

Nor does *Coman & Hamilton* help the majority of Romanian same-sex couples who are in **'internal situations'** (see chapter 3, footnote 35): they have yet to exercise their EU law right to reside in another Member State (such as Belgium), have stayed in Romania, and have not been able to marry (because Romania does not yet allow same-sex couples to marry). Such couples may rely on *Taddeucci & McCall*, who were also in an 'internal situation' to which EU law did not apply, but to which the EConHR did apply.

As for their having access neither to marriage nor to registered partnership, same-sex couples have taken cases to the **ECtHR**, seeking to extend *Oliari & Others*, *Orlandi & Others*, and the requirement of 'a specific legal framework' to Romania and Poland.[99]

4.2.2. Compliance with Coman & Hamilton in Romania

One would expect that the first Member State to comply with *Coman & Hamilton* would be Romania. On the contrary, as of 28 February 2021, more than two years after the CJEU's 5 June 2018 judgment, and the 18 July 2018 judgment of the Constitutional Court of Romania (applying *Coman & Hamilton*), **Mr. Hamilton had yet to receive his Romanian residence permit**. No Romanian court has ordered a member of the executive or the administration to issue the permit to him, and no member of the executive or the administration has invited him to complete any necessary formalities prior to the issuance of his residence permit. The *Inspectoratul General pentru Imigrări*, which has not changed its policy, continues to deny residence permits to the same-sex spouses of EU citizens (and returning nationals). **This is a shocking failure of a Member State to comply with EU law, which would justify enforcement action by the European Commission under Article 258 TFEU**. In the absence of such action, Mr. Coman and Mr. Hamilton have taken their case to the ECtHR (Application no. 2663/21 against Romania, lodged on 23 December 2020, communicated on 9 February 2021).

[97] Ibid, para. 98.
[98] *Coman & Hamilton*, above n. 2, paras. 36, 40, 45, 46 (emphasis added).
[99] *Buhuceanu & Ciobotaru* v. *Romania*, No. 20081/19, http://hudoc.echr.coe.int/eng?i=001-200952; *Przybyszewska* v. *Poland*, No. 11454/17, http://hudoc.echr.coe.int/eng?i=001-203744.

4.2.3. Compliance with Coman & Hamilton in other EU Member States

As mentioned above (footnote 3 of this chapter), the now 27 Member States can be divided into three groups (for citations to the legislation, see Annex 3):

(1) **six with neither marriage nor registered partnership** for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia;

(2) **eight with registered partnership but not marriage** for same-sex couples: Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, and Slovenia; and

(3) **thirteen with marriage** for same-sex couples: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, and Sweden.

The Member States in the first group are those where there is reason for particular concern about compliance with *Coman & Hamilton*. Romania has been mentioned above (4.2.2). Replies from the other five Member States to the questionnaire sent by the ECPRD to national parliaments on 15 June 2020 revealed the following:

- Bulgaria – on 24 July 2019, 'with a final decision in case № 11558/2018, the [Supreme Administrative Court] confirmed the right of a same-sex couple (married in another EU Member State) to reside on the territory of the Republic of Bulgaria'

- Latvia – the 29 October 2018 Opinion of the Ombudsman of the Republic of Latvia does not mention *Coman & Hamilton* or freedom of movement under EU law, but does cite *Oliari & Others*: 'The Ombudsman … [recommends]: [1] to fulfil the positive obligation of the state to provide a legal framework for the recognition of different family models in accordance with the latest ECHR findings and Article 110 of the [Constitution] …'

- Lithuania – the Constitutional Court of Lithuania ruled on 11 January 2019,[100] that 'a temporary residence permit for an alien who is not a citizen of [an EU] Member State may be issued in case of family reunification … when a family member of the same sex family resides in the Republic of Lithuania and their marriage or a registered partnership is lawfully concluded in the other state'

- Poland – '[i]n principle, same-sex spouses have access to residency rights as guaranteed by EU law'

- Romania – 'Article 277 of the Civil Code, paragraphs (2) and (4) - Declared partially unconstitutional on 18th of July 2018 by the Constitutional Court of Romania [in the judgment that applied *Coman & Hamilton*] which … found that [these paragraphs] … are constitutional as far as they allow the granting of the right of residence on Romanian territory … to spouses – citizens of Member States of the European Union and/or citizens of third countries – from same – sex marriages concluded or contracted in a Member State of the European Union'

- Slovakia – 'According to Article 2 par. 5 letter h) of the Act on the Residence of Foreigners, if the third-country national has the right of residence in the Member State in which his partner (a Slovak national) with whom he has a [emphasis added] <u>permanent, duly attested relationship</u> has the right of residence,

[100] See https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1898/content.

the third-country national may exercise the right of a family member of a EU citizen if he accompanies his partner (Slovak national) or joins him in the territory of the Slovak Republic. … Third country national has family member of EU citizen status according to the Article 2 par. 5 letter g) of the Act on the Residence of Foreigners as he has durable, duly attested relationship with EU citizen. …'

All six Member States **appear to be willing, in theory, to comply** with *Coman & Hamiton* by granting a residence permit to the same-sex spouse of an EU citizen (or a returning national). This is an assumption in the case of Latvia (the reply is silent on this question). What is **not clear** in any of these Member States is **whether or not the residence permit would state that the spouse is the 'spouse', 'registered partner', or 'partner in a durable relationship' of the EU citizen (or returning national).**

In the other twenty-one Member States (even though no replies were received for four Member States: Denmark, Belgium, Luxembourg, Malta), the authors have no reason to believe that a residence permit would be denied to the same-sex spouse of an EU citizen (or a returning national), except in the cases of **Greece and Cyprus**. The Hellenic Parliament replied to the questionnaire as follows:

> '1) When a same-sex married couple moves to your country, does your country recognise their marriage:
> (a) for free movement purposes (family reunification), by automatically granting entry and residence also to the third-country national spouse of the EU citizen exercising free movement rights, as required by the 2018 *Coman & Hamilton* judgment of the CJEU? …
>
> No.'

A subsequent answer states that 'their marriage is assimilated to a civil partnership' ('common life pact' is a more accurate translation of the terms in the Greek language, used in both Greece and Cyprus), but gives no detail as to how that would lead to the issuance of a residence permit to the same-sex spouse of an EU citizen (or a returning national). Similarly, the Cypriot Parliament replied: 'No, between same-sex persons only registered partnerships are recognized. Cypriot legislation does not recognize marriage between persons of the same sex.'

Among the eight Member States that offer registered partnership but not marriage to same-sex couples, **the only Member States that appear to recognise a same-sex marriage from another Member State *as a marriage* are Estonia and Croatia**. The reply of the Estonian Parliament states: 'If the same-sex marriage contracted in abroad is valid according to the Estonian law, then the same-sex couple has the same rights and obligations as heterosexual married couples in Estonia.' The reply of the Croatian Parliament states: 'a … marriage between persons of the same sex who are citizens of a member state of the European Economic Area, or those in which one of the persons has citizenship of a state outside the European Economic Area, concluded and registered pursuant to the regulations of the member state in which that relationship was concluded, shall enjoy equal possibilities of access to the rights and privileges included in the scope of the guarantee of fundamental freedom of movement within the European Economic Area to marital relationships concluded in the Republic of Croatia'.

It appears (although it is not entirely clear in each case) that **Cyprus, Czechia, Greece, Hungary, Italy,**[101] **and Slovenia treat the same-sex spouse as a registered partner** for the purpose of a residence permit.

The *Coman & Hamilton* judgment does not state expressly that the residence permit of the same-sex spouse of an EU citizen (or a returning national) must describe the spouse as a 'spouse' in the national language, rather than a 'registered partner', or a 'partner in a durable relationship'. **It is likely that nearly half (12 of 27) of the Member States might prefer to grant the right of residence without attaching the name 'spouse' to the right.**

But there is nothing in *Coman & Hamilton* to suggest that this form of '**downgrading'**[102] of a same-sex marriage from another Member State, from marriage to registered partnership or durable relationship, would demonstrate sufficient respect for the marriage, and be acceptable under EU law, especially in view of the prohibition of **discrimination** based on sexual orientation in Article 21 of the Charter.[103]

4.2.4. Equal Treatment of Same-Sex Married Couples Under National Law (Other than Immigration Law) in Another EU Member State

Given that EU law is supreme over national law (see chapter 3), all 27 Member States can be expected to comply with *Coman & Hamilton*, sooner or later. (In theory, a judgment of the CJEU is binding immediately on all public authorities in all Member States but, in practice, compliance at the ground level can take time.)

The issuance of a **residence (and work) permit** to the same-sex spouse of an EU citizen (or a returning national) removes the greatest, legal, obstacle to the exercise of the right to freedom of movement within the EU. But it is not the only obstacle.[104] As the CJEU observed in *Bosman* in 1995:[105]

'Provisions which **preclude or deter** a national of a Member State from leaving his country of origin in order to exercise his right to **freedom of movement** therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned …'

There can be no doubt that **non-recognition of the same-sex marriage** of an EU citizen (or a returning national), for purposes of **national law** other than immigration law, could 'preclude or deter' the citizen or national from exercising her or his right to freedom of movement (today the statement in *Bosman*

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[101] *Legge 20 maggio 2016* (Law of 20 May 2016), n. 76, *Regolamentazione delle unioni civili tra persone dello stesso sesso*, https://www.gazzettaufficiale.it/eli/gu/2016/05/21/118/sg/pdf, Art. 1, para. 20; Art. 1, para. 28(b); '*Circolare n.3511 del 5 agosto 2016* [Circular of 5 August 2016] *che fornisce indicazioni operative ai fini del rilascio del nulla osta al ricongiungimento familiare*': http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/circ._prot._nr._3511_del_05.08.2016.pdf.

[102] The ECtHR permitted 'downgrading' in *Orlandi & Others*.

[103] The fact that this 'downgrading' may lead to the existence of different civil statuses in different Member States could constitute, in itself, an obstacle to free movement, in that it can be perceived as a 'serious inconvenience'. See Case C-353/06, *Grunkin and Paul* ECLI:EU:C:2008:559, paras. 23-29.

[104] The term 'obstacle' appears in Article 46(b) TFEU ('an obstacle to liberalisation of the movement of workers') and in Article 50(2)(c) TFEU ('an obstacle to freedom of establishment').

[105] Case C-415/93, *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman* ECLI:EU:C:1995:463, para. 96.

clearly applies, not just to workers, but to all movement by EU citizens), and therefore constitute an **obstacle** to that freedom.

This is true even if the obstacle applies 'without regard to the nationality of the workers concerned': even if the legislation of the Member State treats same-sex couples that include one of its own nationals (who have not exercised their right to freedom of movement) equally badly, by not allowing them to register their relationships, at all or under the name 'marriage'. For example, non-recognition of a same-sex marriage under national legislation relating to tax, social security, pensions, inheritance, or medical law (e.g. hospital visitation and consultation) might **'preclude or deter' the citizen or national** from exercising her or his right to freedom of movement, because it could cause her or him 'serious inconvenience'. (The CJEU does not treat a difference between the law of the home Member State and the law of the host Member State, such as a difference between rates of taxation, as an 'obstacle', unless it causes 'serious inconvenience'.)[106]

In which Member States do obstacles of this kind exist? One would not expect to find any in the thirteen Member States that allow same-sex couples to marry. A difference in the treatment of a marriage from another Member State could be challenged under the prohibition of nationality discrimination in Article 18 TFEU.

One would expect more obstacles in the six Member States that offer neither marriage nor registered partnership to same-sex couples. Replies to the questionnaire revealed the following:

- Bulgaria – 'if the conditions for marriage under Bulgarian law [man and woman] were not present … at the time of the marriage, then this marriage, although permissible under the laws of the state in which it was concluded, will not give rise to legal consequences in Bulgaria - art. 4, para. 1 of [Family Code]. … The **Supreme Administrative Court … has a consistent practice of not recognizing same-sex marriages abroad**.'

- Latvia – 'Article 110 of the Constitution stipulates that marriage is a union between a **man and a woman**. The Ombudsman recalls that no international law binding on the Republic of Latvia imposes an obligation on the state to extend the institution of marriage to same-sex partners.'

- Lithuania – 'For other purposes of national law, the **same-sex marriage is not recognized**.'

- Poland – 'Article 18 of the Polish Constitution states that 'marriage, being a union of a **man and a woman**, as well as the family [...] shall be placed under the protection and care of the Republic of Poland'. Article 18 is widely interpreted as banning same-sex marriage. Subsequently, Polish law does not legally recognize same-sex unions, either in the form of marriage or registered partnerships.'

- Romania – 'Provisions of Law no. 287/2009 of the Civil Code of Romania, article no. 277, paragraphs (1) – (4) state that same-sex marriages are not recognized and are **forbidden** in Romania. Furthermore, civil partnerships or civil unions between same-sex persons are not recognized in Romania.'

[106] *Grunkin & Paul*, above n. 24, note 23.

- Slovakia – 'Slovak national law does **not recognize** either marriage between same-sex couples, or any other kind of partnership between them. That means there are no specific provisions in national law relating to such situations.'

It is clear that, in these six Member States, the same-sex spouse of an EU citizen (or a returning national) should be granted a **residence (and work) permit** under *Coman & Hamilton*, but that the couple's same-sex marriage will **not be recognised for any other purpose** of national law.

In the eight Member States that offer **registered partnership but not marriage** to same-sex couples, a same-sex marriage from another Member State will be treated like a **registered partnership** in the host Member State (allegedly, to avoid nationality discrimination contrary to Article 18 TFEU). This means that the spouses might be granted many but not all of the rights and obligations that are accorded to opposite-sex married couples. Under the *Bosman* principle mentioned above, rights and obligations that are withheld from same-sex spouses (because they are treated as registered partners) could constitute obstacles to freedom of movement for same-sex married couples, if they cause 'serious inconvenience'.[107]

Replies to the questionnaire from five of the eight Member States revealed the following:

- Cyprus – for other purposes of national law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation): 'Yes, the registered partnership is **recognized** for all of the above purposes.'

- Czechia – 'The spouse of the same sex will be assigned the same rights as 'registered partners' … The model case was decided by the Czech Supreme Administrative Court (judgement As 230/2017-41 of 30. 5. 2018). In the respective case the married same sex couple demanded to be entered in the registry book as spouses. The court ruled that according to Czech law their marital status transfer to the status of registered partners. … The rights and duties of registered partners can be mostly found in the Act on registered partnership. The rights and duties are **almost identical** to the rights and duties in marriage … Sec. 656 and following of the Czech Civil Code (Act. No 89/2012 Coll. Civil Code).'

- Estonia – 'If the same-sex marriage contracted in abroad is valid according to the Estonian law, then the same-sex couple has the **same rights and obligations as heterosexual married couples** in Estonia.'

- Greece – '… [T]heir marriage is assimilated to a civil partnership. … Please note that civil partnership in Greece has **different** legal effects to marriage in a series of legal fields. For example, a common tax declaration of the couple is not mandatory in civil partnerships and even inheritance rights can be waived by a member of the couple.'

- Hungary – 'Same-sex marriages conducted abroad shall be recognized in Hungary as registered partnerships as a general rule in all field of the law. … [R]egistered partnership[] … with a few exceptions **grants same-sex couples all the rights and obligations that come with marriage**.'

[107] See footnote 26 (and accompanying text).

4.3. Recommendations

(1) The European Commission should take enforcement action against Romania under Article 258 TFEU for failing to comply with the judgment of the CJEU in *Coman & Hamilton*. The Commission should also examine whether the other 26 Member States comply with *Coman & Hamilton* and take enforcement action against any that does not comply.

(2) With a view to removing the obstacles to freedom of movement that non-recognition of a same-sex marriage (or a registered partnership of the kind that will be discussed in chapter 5) can create, and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should propose legislation, on the basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU (as will be explained in chapter 8), requiring all Member States to recognise a marriage (or a registered partnership) formed in another Member State for the purposes of national law, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the ECtHR (as will be explained in chapter 8).

5. SAME-SEX REGISTERED PARTNERS

KEY FINDINGS

- Same-sex registered partners **cannot rely on Article 2(2)(b)** of Directive 2004/38 in the six Member States that offer **neither marriage nor registered partnership** to same-sex couples (but Lithuania voluntarily recognises them).
- For different reasons, three Member States that allow same-sex couples to marry appear to be unwilling to recognise same-sex registered partners from other Member States, except by '**downgrading**' them to 'partners in a durable relationship'.
- In view of what was expected in 2004, it is **anomalous** that a same-sex 'spouse' must now be recognised by all Member States, but that a **same-sex 'registered partner' may be ignored** by (at least) 6 Member States.
- After *Coman & Hamilton*, the condition 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' in Article 2(2)(b) of Directive 2004/38/EC **should be annulled as direct or indirect sexual orientation discrimination** contrary to Article 21 of the Charter.

5.1. Introduction

This chapter focuses on the position of **same-sex registered partners who move** between EU Member States. The registered partners who can benefit from family reunification rights under EU law on freedom of movement, discussed in Chapter 3 (part 3.3), are those consisting of an EU citizen and her or his same-sex registered partner. If both registered partners are EU citizens, they enjoy independent free movement rights and generally will not need to insist on recognition of their registered partnership under EU law, at least for family reunification purposes. If neither registered partner is an EU citizen, they cannot claim free movement rights under EU law. They must instead rely on national immigration law and challenge any obstacles to entry and residence that are contrary to the EConHR.

The secondary right of the same-sex registered partner (derived from the primary right of the EU citizen with whom she or he registered a partnership) includes the **automatic (not discretionary) rights to enter, reside, and work in another EU member state** (the one to which the EU citizen has moved or to which the EU citizen has returned after exercising freedom of movement) under Articles 5, 7, and 23 of Directive 2004/38/EC.

5.2. The Derived Right of Same-Sex Registered Partners of EU Citizens to Enter, Reside, and Work in Another EU Member State

5.2.1. 'Spouse' vs. 'registered partner' vs. 'partner in a durable relationship'

When Directive 2004/38/EC was adopted on 29 April 2004, it was not obvious that the same-sex partner of an EU citizen would ever enjoy a *right* (under EU rather than national law) to enter, reside, and work in another EU Member State. As mentioned in chapter 4, some of those involved in the legislative process might have assumed that the category of 'spouse' in Article 2(2)(a) of the Directive would never apply to a same-sex spouse, because the CJEU would not depart from its ruling in 2001 in *D. & Sweden* v. *Council*: '34. ... [A]ccording to the definition generally accepted by the Member States, the term "marriage" means a union between two persons of the opposite sex. ... '[108]

Article 2(2)(b) was carefully drafted to **make the category of 'registered partner' effectively voluntary, because of the condition 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage'.**[109] In EU Member States that did not allow same-sex couples to marry, and did not have an alternative to marriage (a registered partnership law for same-sex couples or for all couples), there would be no obligation to grant a residence permit to a same-sex registered partner. Therefore, in May 2004, Article 2(2)(b) **could be relied on in at most 7 out of 25 Member States**: the Netherlands and Belgium had marriage, while Denmark, Finland, France, Germany, and Sweden had registered partnerships 'equivalent to marriage'.

In May 2004, some would have thought that 'spouse' would never apply to any Member State, and would have noted that 'registered partner' only applied then to 7 out of 25 Member States. In this context, the third category, **'the partner** with whom the Union citizen has a **durable relationship**, **duly attested'**, seemed to serve as a form of '**compensation'** for the legal or political limits on 'spouse' and 'registered partner'. It would be a residual category that would apply to all 25 Member States. But it would only allow a same-sex partner to claim a **non-automatic, discretionary right of residence** based on Directive 2004/38, because the obligation in Article 3(2) is merely to '**facilitate** entry and residence'. After 'an extensive examination of the personal circumstances', a Member State may '**justify [a] denial** of entry or residence'. (See chapter 3.) As of December 2020, there is still no CJEU case law explaining *precisely* what 'facilitate' means, or when a denial of entry or residence could be justified.

5.2.2. Compliance with Article 2(2)(b) of Directive 2004/38/EC in EU Member States

As mentioned above, the now 27 Member States can be divided into three groups (for citations to the legislation, see Annex 3):

(1) six with **neither marriage nor registered partnership** for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia;

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[108] Joined Cases C-122/99 P and C-125/99 P, ECLI:EU:C:2001:304 (31 May 2001).
[109] The only request for a preliminary ruling regarding Article 2(2)(b), from a court in Hungary, was withdrawn. See Case 459/14, *Cocaj* (lodged with the CJEU on 3 October 2014).

(2) eight with **registered partnership but not marriage** for same-sex couples: Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, and Slovenia; and

(3) thirteen with **marriage** for same-sex couples: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, and Sweden.

Subject to the Charter argument in 5.2.4 below, Article 2(2)(b) cannot be relied on in the six Member States that offer neither marriage nor registered partnership to same-sex couples. Replies from these six Member States to the questionnaire sent by the ECPRD to national parliaments on 15 June 2020 revealed the following:

- Bulgaria, Latvia, Poland, Romania – the reply does not refer to the registered partners of EU citizens (or returning nationals), so **we conclude that they are not recognised** for the purpose of a residence permit

- Slovakia – 'Slovak Republic does not recognize any other partnership status other than marriage between a man and a woman (between different sexes). There is no other type of registered partnership, civil union or other type of partnership which can be entered into either by different-sex couple, or same-sex couples under Slovak law.' (it seems that a registered partnership would only be treated as evidence of a 'durable relationship')

- Lithuania – the Constitutional Court of Lithuania ruled on 11 January 2019, that 'a temporary **residence permit** for an alien who is not a citizen of [an EU] Member State may be issued in case of family reunification … when a family member of the same sex family resides in the Republic of Lithuania and their marriage *or a registered partnership* is lawfully concluded in the other state' (emphasis added)

Of these six Member States, only Lithuania appears to be willing, despite the condition in Article 2(2)(b), to grant a residence permit to the same-sex registered partner of an EU citizen (or a returning national).

Of the other twenty-one Member States, seventeen sent replies to the questionnaire. These seventeen Member States can be divided into the following four groups:

(1) **both marriage and registered partnership** exist for same-sex couples (at the national or regional level) – Austria, the Netherlands, France, Spain;

(2) **only marriage** exists for same-sex couples (registered partnership has been **repealed**) – Finland, Germany, Ireland, Sweden;

(3) **only marriage** exists for same-sex couples (registered partnership has **never existed**) – Portugal; and

(4) **only registered partnership** exists for same-sex couples – Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, Slovenia.

In the first group, it seems that Austria, the Netherlands, and Spain would issue a **residence permit** to the same-sex registered partner (registered at the regional level in Spain) of an EU citizen (or a returning national), but that **France would not**. The reply for France states:

's'agissant des diverses formes de pactes civils étrangers, ils sont inopérants pour les partenaires étrangers s'installant en France' (in the case of the various forms of foreign civil pacts, similar to France's civil solidarity pact, they are inoperative for foreign partners settling in France).

This failure to recognise a registered partnership (or civil pact) from another Member State, at least for the purpose of a residence permit, appears to be **incompatible with Article 2(2)(b) of Directive 2004/38**. France might recognise a registered partnership as a 'durable relationship' which, however, would not give *automatic* family reunification rights.

In the second group, each country has had a registered partnership law in the past, and still has same-sex couples who are registered partners, because they have chosen not to convert their registered partnerships to marriages. It seems that Finland, Germany (despite the absence of information about residence permits in the reply), and Sweden would issue a residence permit to the same-sex registered partner of an EU citizen (or a returning national), but that **Ireland would not**, unless the partnership was registered before 16 May 2016. The reply for Ireland states:

'if a same-sex couple were granted a civil partnership in a foreign jurisdiction on or after 16 May 2016, even if that status was equivalent to marriage in that jurisdiction …, the couple would not be recognised as a civil partnership in Ireland; a non-EU partner in such a relationship would not be considered a qualifying family member for the purposes of the 2015 Regulations. However, if the couple … had been living together in a durable relationship, duly attested, the non-EU partner would be considered a 'permitted' family member. … From an immigration perspective, the main difference between a qualifying family member and a permitted family member is the degree of scrutiny applied to the relationship – the two groups are expected to complete different forms when applying for … a residence card [there is more scrutiny for a durable relationship than for a registered partnership?]'

Ireland appears to **'downgrade' a registered partnership to a 'durable relationship'**, because registered partnerships can no longer be formed in Ireland, even though some same-sex couples in Ireland continue to live as civil partners rather than as spouses. The example of Ireland suggests that some Member States may seek to exempt themselves from Article 2(2)(b), because they interpret 'treats' in the condition ('if the legislation of the host Member State treats registered partnerships as equivalent to marriage') as referring only to treatment by current legislation, and not as meaning 'treats or has treated in the past'.

In the third group, Portugal can say that it has marriage for same-sex couples, but that it has never had a registered partnership law for same-sex couples, only a law on cohabiting couples. The broader interpretation of Article 2(2)(b), 'treats or has treated in the past', would therefore not apply to Portugal. The reply for Portugal states that '[c]ivil partnerships are regulated by Law n.º 7/2001, 11th of [M]ay', but in reality this law, which is about 'protection of de facto unions', confers certain rights on opposite-sex and same-sex couples after two years of cohabitation. No form of public registration of the relationship is required or is possible. Like France and Ireland, **Portugal seems to 'downgrade' a registered partnership to a 'durable relationship'**.

In the fourth group, it seems that Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy,[110] and Slovenia would all treat a registered partnership from another Member State **in the same way** as one under national law, for the purpose of a residence permit.

To summarise, the 27 Member States can be classified as follows with regard to the grant of a **residence permit** to a same-sex registered partner under Article 2(2)(b) of Directive 2004/38:

No reply - 4 Member States – Belgium, Denmark, Luxembourg, Malta

No – 8 Member States - Bulgaria, France, Ireland, Latvia, Poland, Portugal, Romania, Slovakia - a same-sex registered partner would not be granted a residence permit under Article 2(2)(b) (despite an existing registered partnership law in France, a past registered partnership law in Ireland, and an existing marriage law in Portugal)

Yes - 15 Member States – Austria, Croatia, Cyprus, Czechia, Estonia, Finland, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Slovenia, Spain, Sweden - a same-sex registered partner would be granted a residence permit under Article 2(2)(b) (despite the absence of a registered partnership law in Lithuania)

5.2.3. Equal Treatment of Same-Sex Registered Partners Under National Law (Other than Immigration Law) in Another EU Member State

The issuance of a residence (and work) permit to the same-sex registered partner of an EU citizen (or a returning national) removes the greatest, legal, obstacle to the exercise of the right to freedom of movement within the EU. But it is not the only obstacle.[111] As the CJEU observed in *Bosman* in 1995:[112]

'Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned …'

There can be no doubt that **non-recognition of the same-sex registered partnership** of an EU citizen (or a returning national), for purposes of national law other than immigration law, **could 'preclude or deter' the citizen or national from exercising her or his right to freedom of movement** (today the statement in *Bosman* clearly applies, not just to workers, but to all movement by EU citizens), and therefore constitute an obstacle to that freedom. This is true even if the obstacle applies 'without regard to the nationality of the workers concerned'. For example, non-recognition of a same-sex registered partnership under national legislation relating to **tax, social security, pensions,**

[110] *Legge 20 maggio 2016* (Law of 20 May 2016), n. 76, *Regolamentazione delle unioni civili tra persone dello stesso sesso*, https://www.gazzettaufficiale.it/eli/gu/2016/05/21/118/sg/pdf, Art. 1, para. 20; Art. 1, para. 28(b); '*Circolare n.3511 del 5 agosto 2016* [Circular of 5 August 2016] *che fornisce indicazioni operative … ai fini del rilascio del nulla osta al ricongiungimento familiare*': http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/circ._prot._nr._3511_del_05.08.2016.pdf.

[111] The term 'obstacle' appears in Article 46(b) TFEU refers to ('an obstacle to liberalisation of the movement of workers') and in Article 50(2)(c) TFEU ('an obstacle to freedom of establishment').

[112] Case C-415/93, *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman*, ECLI:EU:C:1995:463 (15 December 1995), para. 96.

inheritance, or medical law (e.g. hospital visitation and consultation) might 'preclude or deter' the citizen from exercising her or his right to freedom of movement, because it could cause her or him **'serious inconvenience'**. (The CJEU does not treat a difference between the law of the home Member State and the law of the host Member State, such as a difference between rates of taxation, as an 'obstacle' unless it causes 'serious inconvenience'.)[113]

In which Member States do obstacles of this kind exist? One would expect Member States that currently have, or have had in the past, registered partnership for same-sex couples to extend all the rights of registered partners under national law to registered partners from another Member State. A difference in the treatment of a registered partnership from another Member State could be challenged under the prohibition of **nationality discrimination** in Article 18 TFEU.

One would expect more obstacles in the six Member States that offer neither marriage nor registered partnership to same-sex couples. Replies to the questionnaire revealed the following:

- Bulgaria, Latvia, Poland, Romania – the reply does not refer to the registered partners of EU citizens (or returning nationals), so it seems that they are **not recognised** for any purpose of national law, other than immigration law

- Slovakia – same - 'Slovak Republic does not recognize any other partnership status other than marriage between a man and a woman (between different sexes). There is no other type of registered partnership, civil union or other type of partnership which can be entered into either by different-sex couple, or same-sex couples under Slovak law.'

- Lithuania – 'For other purposes of national law, the same-sex partnership is **not recognized**.'

As in 5.2.2 above, the 27 Member States can be classified as follows with regard to recognition of a same-sex registered partner from another member state for purposes of national law, other than immigration law:

No reply - 4 Member States – Belgium, Denmark, Luxembourg, Malta,

No – 9 Member States - Bulgaria, France, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia - a same-sex registered partner from another member state <u>would not</u> be recognised for any purpose of national law, other than immigration law (despite an existing registered partnership law in France, a past registered partnership law in Ireland, and an existing marriage law in Portugal; a same-sex registered partner in these 9 Member States would have the same rights as same-sex and opposite-sex cohabiting partners, which could be extensive or almost non-existent; Lithuania recognises a registered partnership only for the purpose of a residence permit)

Yes - 14 Member States – Austria, Croatia, Cyprus, Czechia, Estonia, Finland, Germany (we assume , although the reply has no information on recognition in areas other than immigration law), Greece, Hungary, Italy, Netherlands, Slovenia, Spain, Sweden - a same-sex registered partner from another member state <u>would</u> be recognised for some or all purposes of national law, other than immigration law, in the same way as registered partners under national law

[113] See Case C-353/06, *Grunkin & Paul* ECLI:EU:C:2008:559 (14 October 2008), paras. 23-29.

5.2.4. After Coman & Hamilton, should the condition 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' in Article 2(2)(b) of Directive 2004/38/EC be annulled as contrary to Article 21 of the Charter?

Have developments since 2004 caused the condition in Article 2(2)(b) to become direct or indirect discrimination based on sexual orientation, contrary to Article 21 of the Charter? As of December 2020, Article 2(2)(a) can be relied on in all 27 Member States, while (if the condition is still valid) Article 2(2)(b) can be relied on in no more than 21 Member States, the 13 with marriage and the 8 with registered partnership, but (as was seen in 5.2.2 and 5.2.3 above) not necessarily all of those Member States.

In view of what was expected in 2004, **it is anomalous that a same-sex 'spouse' must now be recognised by all Member States, but that a same-sex 'registered partner' may be ignored** by (at least) 6 Member States: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia (Lithuania's Constitutional Court has voluntarily decided that Lithuania may not do so for the purpose of a residence permit). Three other Member States (France, Ireland, and Portugal) seem to ignore registered partnerships from other Member States either because they are 'foreign' (France), because registered partnerships may no longer be formed under national law (Ireland), or because there has never been a registered partnership law (Portugal).

Given that 21 of 27 (77.8%) of Member States should have no objection to complying with Article 2(2)(b), and that the 6 Member States likely to object will probably be found to be violating Article 8 (respect for family life) of the EConHR by not passing a registered partnership law for same-sex couples (under the reasoning of the ECtHR in *Oliari & Others* v. *Italy*),[114] it can be argued that, in a suitable case, **the CJEU should reconcile Article 2(2)(a) and Article 2(2)(b) by annulling the condition in Article 2(2)(b), as discrimination based on sexual orientation that is no longer permitted by Article 21 of the Charter**. This would resemble the outcome in *Association Belge des Consommateurs Test-Achats*,[115] in which the CJEU annulled an exception in a Directive that had permitted direct sex discrimination in setting insurance premiums. Other relevant case law would include *Maruko*, *Römer*, and *Hay* (see Chapter 3, part 3.7), in which the CJEU concluded that failures to treat a same-sex registered partner in the same way as an opposite-sex spouse (with regard to matters for which registered partnership under national law 'places persons of the same sex in a situation comparable to that of spouses') were direct discrimination based on sexual orientation in relation to employment benefits, contrary to Directive 2000/78/EC.

Because it is not clear when, if ever, a suitable case brought by a same-sex couple would reach the CJEU, it would be preferable for the condition to be removed by judicial review proceedings brought by the Commission against the European Parliament and the Council under Article 263 TFEU, or by a voluntary legislative amendment to Directive 2004/38/EC that would reduce Article 2(2)(b) to 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State'.

[114] 21 July 2015.
[115] Case C-236/09, ECLI:EU:C:2011:100 (1 March 2011).

5.3. Recommendation

In view of the patchwork of recognition of same-sex registered partners discussed in 5.2.2 above, the Commission should bring judicial review proceedings under Article 263 TFEU against the European Parliament and the Council, seeking the annulment of the condition 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' in Article 2(2)(b) of Directive 2004/38/EC, as contrary to Article 21 of the Charter. Alternatively, the Commission should propose an amendment to Directive 2004/38 that would remove the condition (as will be explained in chapter 8).

6. SAME-SEX UNREGISTERED PARTNERS

KEY FINDINGS

- Currently, **most EU Member States** treat **opposite-sex and same-sex unregistered partners** in the **same manner** for family reunification purposes and **facilitate their admission** into their territory.
- However, the **legal position** of same-sex unregistered partners for **other legal purposes** (e.g. taxation, pensions, insurance, hospital visiation) is **less clear**, as in most EU Member States it is unclear whether they are granted the same legal rights as opposite-sex unregistered partners.
- Article 3(2)(b) of Directive 2004/38 provides that the host Member State shall facilitate entry and residence for 'the partner with whom the Union citizen has a durable relationship, duly attested'. However, it is **not clear if the term 'partner'** – for the purposes of this instrument – **includes both opposite-sex and same-sex partners**. Therefore, there is a need for a clarification that the term 'partner', for the purposes of Article 3(2)(b) of Directive 2004/38, includes the same-sex unregistered partner of a Union citizen.
- Unregistered partners can, also, rely on the principle established in the ***Reed* case** in order to require the host Member State to grant them the **right to be joined by their partner in the host Member State, if it provides this right to its own nationals**. However, it is **not clear if the term 'partner'** – for the purposes of this principle – **includes both opposite-sex and same-sex partners**. Therefore, there is a need for a clarification that the term 'partner' in this context as well, includes the same-sex unregistered partner of a Union citizen.
- At the moment, there is a **lack of clarity** as to the **exact requirements that EU law imposes** on EU Member States regarding the rights that incoming Union citizens and their same-sex unregistered partners can claim once they have gained entry and residence in their territory.

6.1. Introduction

This chapter focuses on the position of **same-sex unregistered partners of Union citizens who move between EU Member States**. If neither unregistered partner is an EU citizen, they cannot claim free movement rights under EU law. They must, instead, rely on national immigration law and challenge any obstacles to entry and residence as well as the refusal of other rights and entitlements which amount to a violation of the EConHR.

The analysis will begin with an explanation of the position of same-sex unregistered partners under national law. As will be seen, currently, **most EU Member States treat opposite-sex and same-sex unregistered partners in the same manner for family reunification purposes and facilitate their admission into their territory**. However, the legal position of same-sex unregistered partners for **other legal purposes** (e.g. taxation, pensions, insurance, hospital visitation) is more **muddled**, as in most EU Member States it is unclear if they are granted the same legal rights as opposite-sex unregistered partners.

The chapter will then proceed to consider the **current position of same-sex unregistered partners under EU law:** what rights does EU law currently require EU Member States to provide to same-sex

unregistered partners who move to their territory from another EU Member State? The chapter will also examine the **requirements currently imposed by the EConHR**, given that – as explained in chapter 3 of the study – the protection offered by the EConHR constitutes a floor of protection which the EU must take as the basis of protection that it offers. The main aim of the chapter will be to make **recommendations as to how the position of same-sex unregistered partners *should* be regulated under EU law**: what requirements should EU law impose on Member States with regard to same-sex unregistered partners who exercise free movement rights under EU law?

6.2. The position of same-sex unregistered partners under national law

As seen in chapters 4 and 5, there are currently **six EU Member States which do not provide any form of civil status for same-sex couples under their legislation**: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia. Accordingly, in those Member States, in situations which are purely internal and have no link with EU law, same-sex couples can – *if at all* – only be legally recognised as unregistered partners. The important **question** for the purposes of this chapter, however, is **what happens to same-sex couples (comprised of at least one EU citizen) who have not entered into a marriage or a registered partnership anywhere, and who wish to exercise their EU free movement rights** to enter and reside in the territory of one of these six EU Member States: will the unregistered partners be recognised as a couple for the purpose of the grant of family reunification rights under EU law and, once they are within the territory of the host Member State, for other legal purposes?

Replies to the questionnaire sent by the ECPRD to national parliaments on 15 June 2020 did **not** make it **clear** what is the status of the unregistered partner of a Union citizen who moves to their territory (both for the purpose of the grant of family reunification rights as well as for other legal purposes) in **Latvia, Lithuania, Romania and Poland**. On the other hand, the reply from **Slovakia** demonstrated that the same-sex unregistered partner of a Union citizen who moves to its territory **may be allowed to join the Union citizen there**, after an examination of the personal circumstances of the couple. Similarly, in **Bulgaria**, **actual cohabitation is a legal basis for entry and residence** irrespective of whether the couple is comprised of two persons of the same or of a different sex. It is nonetheless unclear what is the position of same-sex unregistered partners for other legal purposes in these two Member States.

Responses to the same questionnaire[116] revealed that the **remaining 21 EU Member States** offer to same-sex couples the option of marrying and/or entering into a registered partnership. Couples who choose not to formalise their relationship in the above ways, **may be legally recognised as unregistered partners**[117] and, in **some** Member States, a **legal status** will be attached to them (e.g. 'cohabitants' in Ireland and Sweden, 'cohabitants' or 'registered cohabitants' in Hungary, 'de facto cohabitants' in Italy, or 'informal life partners' in Croatia). Nonetheless, there is a **diversity in the legal entitlements** that unregistered partners in general, and unregistered same-sex partners in particular, enjoy in these Member States, **though a number** of those that have responded to the questionnaire

[116] A number of Member States did not provide a reply to the questionnaire (Belgium, Denmark, Luxembourg, Malta), whilst the responses of some Member States did not give a clear answer to all questions.
[117] The replies to the questionnaire have revealed that Cyprus and Greece do not recognise (opposite-sex or same-sex) de facto partnerships for any legal purpose.

(i.e Austria, Croatia, Czechia, Estonia, Finland, Hungary, Ireland, Sweden) have positively indicated that they provide for **equality under the law between same-sex and opposite-sex unregistered partners**. With regard to family reunification rights, it seems that **most of these Member States**[118] **facilitate** the **admission** of the same-sex unregistered partner of the Union citizen who exercises EU free movement rights, by taking into account all the circumstances of the case, before deciding whether they will admit the partner;[119] one Member State (Finland) even goes further and treats 'durable relationships' as equivalent to marriage for the purpose of granting family reunification rights under EU law.[120]

6.3. The current EU legal framework regarding the position of same-sex unregistered partners who move between EU Member States in exercise of EU free movement rights

Since there are still some EU Member States which do not legally recognise partners of the same sex as a couple, **Union citizens who are in an unregistered partnership with a person of the same sex**, and wish to move to one of those EU Member States, **may be faced with a situation in which their relationship is not legally recognised for family reunification or other legal purposes**. As seen in the previous section, this is possibly the case in, at least, most of the six EU Member States which do not allow same-sex couples to either marry or enter into a registered partnership.

The question, now, is: can EU law be of assistance to Union citizens who are in an unregistered partnership with a person of the same sex and require the Member State to which they move to grant to them: a) **family reunification rights** so that their partner will be admitted and allowed to reside in its territory; and b) a number of **other rights/entitlements** which are reserved for couples?

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[118] The replies to the questionnaire have revealed that Cyprus, Greece, Portugal and Spain do not recognise (opposite-sex or same-sex) de facto partnerships for family reunification rights purposes.

[119] The information provided in this section is, primarily, derived from the answers received to a questionnaire distributed to national parliaments by the ECPRD. Other sources of information regarding the position of same-sex unregistered partners under national laws are the annual ILGA-Europe Rainbow Map and Index, the latest version (2020) of which is available here: https://www.ilga-europe.org/rainboweurope/2020; and K. Waaldijk, *More and more together: Legal family formats for same-sex and different-sex couples in European countries: Comparative analysis of data in the LawsAndFamilies Database*, Working Paper 75 (2017) in the Families and Societies Working Paper Series, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3> , the findings of which were analysed in M. Digoix (ed.), *Same-Sex Families and Legal Recognition in Europe* (Springer, 2020). The position of same-sex couples under national laws has been analysed, also, in a number of books, though the quick change of the laws in this context means that the data offered in such publications becomes quickly outdated – see, for instance, R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001); A. Weyembergh and S. Carstocea, *The gays' and lesbians' rights in an enlarged European Union* (Editions de L'University de Bruxelles, 2006). For literature analysing the position of, inter alia, unregistered/unmarried opposite-sex and same-sex partners in Europe (in different national contexts) see K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives* (Intersentia, 2012) (chapters in Part One); K. Boele-Woelki, N. Dethloff and W. Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia, 2014) (chapters in Part Two); K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Intersentia, 2017) (chapters in Part One).

[120] This might also be the case in Sweden, but it is not entirely clear from the response to the questionnaire.

In order to answer this question, we shall examine **the *current* position** of same-sex unregistered partners under EU law with regard to family reunification, and with regard to other benefits or entitlements which they may wish to claim once admitted into the territory of the host Member State.

6.3.1. Family reunification rights

Directive 2004/38[121] **does not provide *automatic* family reunification rights** to Union citizens who wish to be joined in the host Member State by their **unregistered partners**.[122] This instrument, however, makes *explicit* reference to unregistered partners, providing that they ***may*** be able to **join the Union citizen in the host Member State**. In particular, as seen in chapter 3 of the study, **Article 3(2)(b)** of Directive 2004/38 provides that the host Member State shall ***facilitate* entry and residence** for 'the **partner** with whom the Union citizen has a **durable relationship, duly attested**. The host Member State shall undertake an **extensive examination of the personal circumstances** and shall **justify any denial** of entry or residence to these people'. This requirement – which applies in situations where a Union citizen leaves his Member State of nationality to move to and reside in the territory of another EU Member States[123] – also applies, by analogy, to situations involving Union citizens who wish to be joined by their unregistered partner in their Member State of nationality, to which they return after they have exercised free movement rights: such situations, as we saw in chapter 3, do not fall within the material scope of Directive 2004/38, but are governed by the free movement provisions of the TFEU.[124] As has been explained, the Article 3(2)(b) category 'does not produce a genuine right. It only triggers an obligation of the Member State to "facilitate" admission'.[125]

Like the terms 'spouse' and 'registered partner', which were examined, respectively, in chapters 4 and 5 of this study, the term (unmarried/unregistered/in a durable relationship) '**partner' is gender-neutral and sexual orientation-neutral**. Accordingly, it is broad enough to include both the opposite-sex and the same-sex partner of a Union citizen. However, Directive 2004/38 does not state this explicitly. Moreover, the CJEU has not been confronted, to date, with a question regarding *same-sex* unregistered partners and, thus, it has not been clarified judicially whether the term 'partner' – for the purposes of this instrument – includes both opposite-sex *and* same-sex partners. Therefore, there is a **need for a clarification** that the term 'partner', for the purposes of Article 3(2)(b) of Directive 2004/38, includes the *same-sex* unregistered partner of a Union citizen.

An alternative legal basis on which the unregistered partner of a Union citizen can rely, to claim a derived right to join the latter in the territory of the host Member State, is **Article 7(2) of Regulation**

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[121] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
[122] Article 2(2) of Directive 2004/38 (ibid), which as we saw in previous chapters does provide *automatic* family reunification rights, does not include unregistered partners.
[123] Article 3(1) of Directive 2004/38 (above n. 6).
[124] Case C-89/17, *Banger*, ECLI:EU:C:2018:570, paras. 18-35.
[125] K. Waaldijk, 'Free Movement of Same-Sex Partners' (1996) 3 *Maastricht Journal of European and Comparative Law* 271, 278-280. See, also, M. Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships Within the European Union' (2004) 12 *European Review of Private Law* 613, p. 625.

492/2011,[126] which provides that a worker who is a national of a Member State 'shall enjoy the same social and tax advantages as national workers'. In ***Reed***,[127] the CJEU held that the right to bring an unmarried partner into the host Member State falls within the concept of a 'social advantage' for the purposes of this provision.[128] Accordingly, ***if the host Member State allows its own nationals* to be joined in its territory by their unregistered partner, workers who come from other EU Member States should be allowed to do so as well**.[129] It should be noted that Regulation 492/2011 applies only to 'workers' and, thus, does not cover the **self-employed and economically inactive Union citizens**. However (and although there is no case-law on this point to date), the above categories of Union citizens can – possibly – claim the same right by relying on (the more broadly-worded) **Article 24(1) of Directive 2004/38**, which provides that 'all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy **equal treatment** with the nationals of that Member State within the scope of the Treaty'. However, when claiming family reunification rights via this route, same-sex couples are faced with the same lack of clarity that exists with regard to Article 3(2)(b) of Directive 2004/38: the *Reed* case involved an opposite-sex unregistered partner and thus it is **not clear** whether the same requirement applies to **same-sex unregistered partners**.

6.3.2. Other rights to which the couple is entitled once admitted into the territory of the host Member State

The admission of a Union citizen and his or her same-sex unregistered partner into the territory of the host Member State, does not always signal the end of the problems that the couple may face in the host Member State.[130] It may, in fact, constitute the beginning of a new series of difficulties, arising from the fact that two partners of the same sex cannot be legally recognised as a couple in the host Member State and, as a result of this, cannot claim entitlements which are reserved for couples.

There is **no provision in primary or secondary EU law which *explicitly and specifically*[131] requires the host EU Member State to legally recognise a couple comprised of a Union citizen who has**

[126] Regulation (EU) 492/2011/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[127] Case 59/85, *Netherlands v. Reed* ECLI:EU:C:1986:157.
[128] Given that the ruling in *Reed* (ibid) was delivered in the 1980s, when it was the predecessor to Regulation 492/2011 (above n. 11) – i.e. Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2 (now repealed) – that was applicable, the interpretation provided by the Court was for Article 7(2) of the latter instrument. Nonetheless, since Article 7(2) of Regulation 492/2011 is worded in exactly the same manner as Article 7(2) of Regulation 1612/68 was, it is clear that the same interpretation can be applied for the purposes of Article 7(2) of Regulation 492/2011.
[129] It should be noted that at the relevant time, no other applicable legislation (namely, Directives 93/96, 90/365, 90/364 and Directive 73/148) included a provision similar to Article 7(2) of Regulation 1612/68 (above n. 13). Accordingly – and until Directive 2004/38 (above n. 6) came into force – Member State nationals who could not be considered 'workers' (within the meaning of, what is now, Article 45 TFEU) would need to rely on the general right to non-discrimination on grounds of nationality, which is now found in Article 18 TFEU. See M. Bell, *Anti-Discrimination Law and the European Union* (OUP, 2002), p. 98 (footnote 58) and H. Toner, *Partnership Rights, Free Movement and EU Law* (Hart, 2004), pp. 50-51.
[130] In practice, most of the problems are faced once the couple has been admitted into the territory of the host Member State, given that – as noted earlier in this chapter – most Member States 'facilitate' the admission of the Union citizen's partner within their territory.
[131] Of course, as will be suggested subsequently, a number of primary and secondary EU law provisions can be employed in order to require the host EU Member State to legally recognise as a couple unregistered same-sex partners who come from other EU Member States in exercise of EU free movement rights.

come from another EU Member State and his/her same-sex unregistered partner under the same circumstances as for unregistered opposite-sex couples. Moreover, apart from one case (*Grant*[132]) in which it was called on to rule on discrimination experienced by a same-sex unregistered couple in the context of employment, the **CJEU has not had the opportunity to apply and/or interpret EU law in situations involving same-sex unregistered partners**.

Accordingly, at the moment, there is a **lack of clarity** as to the exact requirements that EU law imposes on EU Member States regarding the rights that incoming Union citizens and their same-sex unregistered partners can claim once they have gained entry and residence in their territory.[133]

6.4. Same-sex unregistered partners under the ECHR

In 2010, in its ruling in *Schalk & Kopf* v. *Austria*, the **ECtHR** held that the relationship of 'a **cohabiting same-sex couple living in a stable *de facto* partnership**, falls within the notion of "**family life**", just as the relationship of a different-sex couple in the same situation would.'[134] Since then, this has formed the basis for most claims brought by unregistered same-sex couples seeking to require EConHR signatory states to treat them in the same way as unregistered opposite-sex partners and, in some cases, even in the same way as married opposite-sex couples, with regard to a number of legal rights and entitlements. Of course, it should be noted that even prior to the *Schalk & Kopf* v. *Austria*

[132] In Case C-249/96, *Grant v. South-West Trains Ltd*, ECLI:EU:C:1998:63, para. 35, the CJEU held that 'in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex' and, on this basis, 'an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex'. For comments on *Grant* see A. Koppelman, 'The Miscegenation Analogy in Europe, or, Lisa Grant meets Adolf Hitler' in R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001); N. Bamforth, 'Sexual Orientation After *Grant v Southwest Trains*' (2000) 63 *Modern Law Review* 694; M. Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice' (1999) 5 *European Law Journal* 63. The case is now only important for historical purposes: shortly after the case was decided, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 was promulgated, which prohibits discrimination based on sexual orientation in the area of employment.

[133] A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) 21 *Columbia Journal of European Law* 195, pp. 214 and 221-222; J. Rijpma and N. Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?' in D. Gallo, L. Paladini, P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), p. 103. It has been noted that '[v]ery few comprehensive sources that address a cross-border element exist in the fields of property, succession, taxation, inheritance, employment benefits and pensions' – Report 'Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU' (November 2019) (prepared by Dr Neža Kogovšek Šalamon), available at https://ec.europa.eu/info/sites/info/files/mapping_of_studies_on_the_difficulties_for_lgbti_people_in_cross-border_situations_in_the_eu.pdf, pp. 3 and 37.

[134] *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, para. 94. For an analysis of the evolution of the concept of 'family life' in ECtHR case-law (especially in relation to same-sex couples) see L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR', (2012) 20 *International Journal of Children's Rights* 501; P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014), pp. 113-118.

pronouncement, the ECtHR had required EConHR signatory states to treat same-sex and opposite-sex couples in the same way, with regard to specific entitlements.[135]

6.4.1. Family reunification rights

In ***Pajić v. Croatia***,[136] the **ECtHR** held that Croatia was in breach of Article 8 EConHR read in conjunction with Article 14 EConHR, as a result of the fact that it **discriminated against unregistered same-sex couples with regard to family reunification**.[137] The impugned Croatian legislation reserved the possibility of applying for a residence permit for family reunification to different-sex couples (whether married or not) and in this way tacitly excluded same-sex couples from its scope. This amounted to discrimination based on sexual orientation with regard to the enjoyment of the right to respect for private and family life which – according to the ECtHR – could not be justified. This demonstrates that, **although EConHR signatory states are free to determine their immigration policies and the categories of family members that can be admitted and granted a residence permit on the basis of family reunification, their policies and categories must not discriminate on the basis of** any of the grounds prohibited by Article 14 EConHR, including **sexual orientation**. Accordingly, if a State grants family reunification rights to the unregistered opposite-sex partners of persons who reside in its territory, the EConHR requires it to do the same with respect to their unregistered same-sex partners. This is **in line with a previous recommendation of the PACE**, according to which the Committee of Ministers of the Council of Europe should urge Member States of the latter 'to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples'.[138]

However, what happens when **unregistered same-sex partners are treated in the same way as unregistered opposite-sex partners, but worse than spouses, *in a State which does not allow same-sex marriage*?** Should the unregistered same-sex partners be treated in the same way as unregistered opposite-sex partners, or should they receive the same treatment that is reserved for married (obviously opposite-sex) couples? The ECtHR was confronted with this question in ***Taddeucci and McCall v. Italy***.[139] The case concerned the refusal of Italy to grant a residence permit on the basis of family reunification to the third-country national same-sex partner of an Italian national. At the time, Italy granted family reunification rights only to married couples and – as is still the case – only allowed marriage between men and women. Accordingly, as the ECtHR observed, **all unmarried couples – whether opposite-sex or same-sex – were treated in the same way** under the impugned Italian legislation. However, according to the ECtHR, **Italy treated in the same way two categories of couples (unregistered opposite-sex and same-sex partners) which were *not* in an analogous position**: opposite-sex couples had the option of contracting marriage in Italy, whereas this was not possible for same-sex couples. This meant that these two categories of couple could not be treated in the same way for the purposes of family reunification – **unregistered same-sex partners** had a **legal disability** (no access to marriage) which precluded them from choosing to bring themselves into a

[135] This was in two cases involving the issue of succession to tenancies: *Karner v. Austria*, no. 40016/98, 24 July 2003 and *Kozak v. Poland*, no. 13102/02, 2 March 2010.
[136] *Pajić v. Croatia*, no. 68453/13, 23 February 2016.
[137] For an analysis of the use by the ECtHR of Article 14 ECHR in cases involving LGB individuals and same-sex couples see P. Johnson, above n. 19,, chapter 5 (note, however, that this only covers case-law until 2014).
[138] PACE Recommendation 1470 (2000) 'Situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe', para. 7.2.e.
[139] *Taddeucci and McCall v. Italy*, no. 51361/09, 30 June 2016.

position to claim family reunification rights under Italian law, whereas this was possible for unmarried/unregistered opposite-sex couples. The Court held that by treating these two categories of couples in the same way, **Italy was discriminating against same-sex couples on the basis of their sexual orientation** with regard to the enjoyment of the **right to respect for private and family life** and was thus in violation of Article 14 EConHR read in conjunction with Article 8 EConHR. Hence, **States which have not opened marriage to same-sex couples, can reserve family reunification rights for married opposite-sex couples and, thus, deny these to *unmarried opposite-sex* couples, but must extend family reunification rights to unmarried same-sex couples (who, simply, do not have the option of getting married)**.[140]

6.4.2. Other benefits and entitlements

In ***Karner v. Austria***,[141] the Austrian Supreme Court's interpretation of the term 'life companion' – for the purposes of the Austrian legislation governing **succession to tenancies** – as *not* including the same-sex partner of the deceased official tenant while it did include opposite-sex partners, was held by the ECtHR to breach Article 14 EConHR read in conjunction with Article 8 EConHR.[142] This was because it discriminated against same-sex couples on the basis of their sexual orientation with regard to the enjoyment of their right to respect for their home. Accordingly, the ECtHR has held that opposite-sex and same-sex unregistered partners cannot be treated differently when it comes to succession to tenancies. This, according to a commentator, 'certainly emphasises the point that all unmarried and unregistered couples must presumptively be treated equally'.[143]

Similarly, in ***P.B. & J.S. v. Austria***,[144] the Court held that opposite-sex and same-sex unregistered partners must be treated in the same way for the purposes of **joint health and accident insurance cover**. In that case, the refusal of Austrian authorities to extend the health and accident insurance of a person to his/her same-sex partner when this was possible in the case of opposite-sex couples, was held to amount to a violation of Article 14 EConHR read in conjunction with Article 8 EConHR.

In a similar vein, in ***J.M. v. UK***,[145] the ECtHR held that the UK authorities were in violation of Article 14 EConHR read in conjunction with Article 1 of Protocol 1 of the EConHR, because they failed to recognise the same-sex relationship a woman had entered into after her divorce – even though they would have recognised an *opposite-sex* relationship under the same circumstances – when setting the level of **child maintenance** she was required to pay to her former husband. In other words, when setting the level of child maintenance in situations where a person has entered into another relationship following divorce, same-sex and opposite-sex relationships must be taken into account in the same way.

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[140] It is interesting to note that – as will be seen in the next chapter – the same approach of requiring States which do not allow same-sex marriages, to treat (opposite-sex) married couples in the same way as (same-sex) unmarried couples, has not yet been extended to the more controversial area of parenting rights – see *Gas and Dubois v. France*, no. 25951/07, 31 August 2010.
[141] Above n. 20.
[142] This was affirmed in *Kozak v. Poland*, above n. 20.
[143] H. Toner, above n. 14, p. 293.
[144] *P.B. and J.S. v. Austria*, no. 18984/02, 22 July 2010.
[145] *J. M. v. UK*, no. 37060, 28 September 2010.

Finally, in the more controversial context of parenting, the ECtHR held in ***X and others v. Austria***,[146] that Article 8 EConHR read in conjunction with Article 14 EConHR requires that the unmarried female partner of a woman be granted the **right to apply for step-parent adoption** of the latter's child, if such a right is granted to the *unmarried* male partner of a woman.

The **PACE** has recently called on Council of Europe member states to '**align** their constitutional, legislative and regulatory provisions and policies with respect to same-sex partners' with the **case law** of the **ECtHR** regarding the grant of **family reunification rights as well as other benefits** such as succession to a tenancy and qualifying as dependants for the purposes of health insurance cover.[147] In the same Resolution, the PACE also invited States to 'ensure that other basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship are provided for without discrimination on the grounds of sexual orientation', such as **property entitlements, access to survivor's pensions and entitlements to inherit when one's partner dies intestate, exemption from inheritance tax, applicability of rules on alimony, recognition of same-sex partners as next of kin for medical purposes**.[148]

In addition, the **Committee of Ministers of the Council of Europe** has recommended that 'Where national legislation confers **rights and obligations on unmarried couples**, member states should ensure that it applies in a **non-discriminatory** way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights'.[149]

6.5. Same-sex unregistered partners under other international instruments

The **same approach** as that followed by the ECtHR when interpreting the EConHR in cases involving claims by same-sex unregistered partners, has been followed, also, by the **UNHRC** when interpreting the **ICCPR**, and by the **IACtHR** when interpreting the **AConHR**. Accordingly, in *Edward Young v. Australia*,[150] the UNHRC held that by making survivors' pensions available to opposite-sex unmarried couples, but not to same-sex unmarried couples, States Parties to the ICCPR violate the prohibition on discrimination enshrined in Article 26 ICCPR. Similarly, the IACtHR held that Colombia failed to comply with its obligations under Article 24 AConHR, read in conjunction with Article 1(1) AConHR, when it

[146] *X and others v. Austria*, no. 19010/07, 19 February 2013.

[147] PACE Resolution 2239 (2018) 'Private and family life: achieving equality regardless of sexual orientation', para. 4.3.

[148] Ibid, para. 4.4. See, also, the earlier PACE Resolution 1728 (2010) 'Discrimination on the basis of sexual orientation and gender identity', para. 16.9.

[149] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, para. 23.

[150] *Edward and Young v. Australia*, 6 August 2003, CCPR/C/78/D/941/2000. This was confirmed subsequently in *X v. Colombia*, 30 March 2007, CCPR/C/89/D/1361/2005. Article 26 ICCPR provides that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The UNHRC held in *Toonen v. Australia*, 31 March 1993, CCPR/C/50/D/488/1992 that 'sex' in Articles 26 and 2 ICCPR covers 'sexual orientation'.

refused the petitioner (who had been in a same-sex relationship) the right to a survivor's pension on the basis that this was only available to opposite-sex couples.[151]

6.6. What requirements must EU law impose on EU Member States with regard to same-sex unregistered partners who exercise free movement rights under EU law?

The preceding analysis has demonstrated that, currently, **when a Union citizen moves** from one EU Member State to another, it is **not *certain*** that (s)he will be **able to be joined there by his/her same-sex unregistered partner**, as there are still a handful of EU Member States that may not recognise the couple as a couple, for family reunification purposes . Moreover, once the couple is within the territory of the host EU Member State, the partners may not be able to claim rights granted to unregistered *opposite-sex* couples, due to the fact that the national law does not recognise them as a couple.

The aim of this section will be to suggest the **requirements that EU law *should* impose** on EU Member States with regard to same-sex unregistered partners who exercise free movement rights under EU law: what rights should EU law require the host EU Member State to grant to unregistered same-sex couples that move to its territory?

6.6.1. Family reunification rights

As we saw in section 6.3.1. above, under the current legal framework, Article 3(2)(b) of Directive 2004/38 requires Member States to 'facilitate' the entry of the unregistered partners of Union citizens who move and reside in their territory. The same right has been extended, judicially, to the unregistered partners of Union citizens who return to their Member State of nationality, after having exercised free movement rights, in which case Article 3(2)(b) of the 2004 Directive 'applies by analogy'.[152] Moreover, following *Reed*,[153] the host EU Member State must allow the unregistered partner of a Union citizen to join him or her in the host EU Member State, *if it provides such a right to the unregistered partner of its own nationals*.

However, it has **not** been explicitly **stated** that the word '**partner'** in Article 3(2)(b) of Directive 2004/38, and for the purposes of the principle established in the *Reed* case, **includes** the ***same-sex* partner** of a Union citizen.

[151] *Duque v. Colombia* (Preliminary Exceptions, Merits, Reparations and Costs), judgment of 26 February 2016, Series C No. 310. The judgment is only available in Spanish. For an analysis of the judgment see 'Inter-American Court: Colombian Same-Sex Partners Entitled to Equal Social Benefits', 25 April 2016, International Justice Resource Center, available at https://ijrcenter.org/2016/04/25/inter-american-court-colombian-same-sex-partners-entitled-to-equal-social-benefits/.

[152] *Banger*, above n. 9, para. 33.

[153] Above n. 12.

Accordingly, we recommend that the EU institutions provide a clarification that the term 'partner', in Article 3(2)(b) of Directive 2004/38[154] and for the purposes of the principle established in the *Reed* case, includes both the same-sex and the opposite-sex partners of Union citizens. In this way, same-sex and opposite-sex unregistered partners will enjoy the same family reunification rights under EU law.[155]

This is required by a number of EU law provisions:

- **Article 21(1) of the Charter**, which provides: 'Any **discrimination** based on any ground such as […] **sexual orientation** shall be **prohibited**'. As explained in chapter 3 of the study, situations which involve the exercise of EU free movement rights by an EU citizen always fall within the scope of EU law, and, thus, on a broad construction of Article 51 EUCFR, they fall within the scope of the Charter. Moreover, as was briefly explained in chapter 3, when reference was made to the hierarchy of EU legal norms, all pieces of secondary EU legislation (including Directive 2004/38 and Regulation 492/2011) must be read in a way which complies with the Charter. Accordingly, the provisions of these instruments must be interpreted in a way which is, inter alia, free from discrimination on the ground of sexual orientation. **When a piece of secondary legislation includes the term 'partner', the term should, therefore, be interpreted as including both opposite-sex and same-sex partners**.
    - Such a reading is **also required by the EConHR**, as it has been interpreted by the ECtHR in *Pajić v. Croatia*[156] *and Tadeucci and McCall v. Italy*.[157] Given that – as per Article 52(3) of the Charter – the Charter should be interpreted as bestowing *at least* the same protection as is granted by the EConHR with respect to rights which appear in both instruments, Article 21(1) of the Charter must be interpreted as requiring the host EU Member State to provide, as a minimum, the guarantees required by the above ECtHR rulings, when it comes to the family reunification rights of same-sex unregistered partners.

- **Recital 31 of Directive 2004/38**, which applies Article 21 of the Charter in the specific context of Directive 2004/38, and which provides: 'This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as […] sexual orientation'. From this it is clear

[154] That this is the case is supported in the European Union Agency for Fundamental Rights Report 'Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights' (2018), p. 22, available at https://fra.europa.eu/en/publication/2018/making-eu-citizens-rights-reality-national-courts-enforcing-freedom-movement-and.
[155] This has, also, been suggested in academic literature. See, inter alia, A. Tryfonidou, above n. 18. And for *Reed* (above n. 12), in particular, see E. Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC' in R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001), p. 684; H. U. Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993), pp. 310-311.
[156] Above n. 21.
[157] Above n. 24.

that all the **provisions of Directive 2004/38**, including Article 3(2)(b), **must be read in a way which does not discriminate on the ground of sexual orientation**.[158]

- The **free movement of persons provisions of the TFEU** (Arts. 21, 45, 49, 56 TFEU): Like the Charter, the EU Treaties (i.e. the TFEU and TEU) are at the top of the hierarchy of EU legal sources and, thus, all pieces of secondary legislation (including Directive 2004/38 and Regulation 492/2011) must comply with them. Accordingly, **Directive 2004/38 must comply, inter alia, with the free movement of persons provisions in the TFEU** which prohibit obstacles to the free movement of persons between EU Member States. When an **EU citizen** is **not allowed to be joined or accompanied in the Member State to which (s)he moves by his/her unregistered same-sex partner**, this will clearly constitute an **obstacle to the exercise of his/her free movement rights**, unless the refusal is justified (e.g. because the behaviour of the partner is such that his or her admission into the territory of the host State will pose a threat to public security). After all, as the CJEU noted in *Metock,*[159] 'if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed'. This, according to another commentator, 'adds considerable weight to the suggestion that non-portability of partnerships, marriages and parental ties, particularly but not necessarily confined to entry and residence of such third country national family members is both something that the EU has competence to address, and even that Member States can and should be called upon to justify with compelling reasons of public interest'.[160] Obstacles to free movement can be justified on a number of non-economic grounds, such as public policy or public security. However, the *en bloc* exclusion of a specific category of persons from a Member State cannot satisfy the requirement, laid down in Article 27(2) of Directive 2004/38, that measures taken on grounds of public policy or public security must 'be based exclusively on the personal conduct of the individual concerned'. Accordingly, the **free movement of persons provisions of the TFEU also require that the same-sex unregistered partners of Union citizens are not *automatically* excluded from the territory of the host Member State simply because the couple are in a same-sex relationship but – like the opposite-sex partners of Union citizens – they can only be excluded if the individual assessment of their circumstances demonstrates that the exclusion of that particular person is warranted**.

The above provisions also require that when EU Member States undertake an examination of the personal circumstances of the couple for the purpose of 'facilitating' the admission of the unregistered partner of the Union citizen into their territory according to Article 3(2)(b) of Directive 2004/38, their assessment must be free from discrimination on the grounds of sexual orientation.[161]

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[158] A. Tryfonidou, above n. 18, p. 230.
[159] Case C-127/08, *Metock* ECLI:EU:C:2008:449, para. 62.
[160] H. Toner, above n. 14, p. 308.
[161] This has, also, been suggested in academic literature. See, inter alia, A. Tryfonidou, above n. 18, p. 214; M. Bell, above n. 10, p. 625; A. Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union' (2007) 41 *Columbia Journal of Law and Social Problems* 81, p. 105.

6.6.2. Other benefits and entitlements that the couple may wish to claim in the host EU Member State

There is **no** piece of **EU legislation** which lays down the **benefits and entitlements that unregistered partners** in general – and same-sex unregistered partners in particular – **must be granted** by EU Member States. After all, this is a **family law matter** that falls within the scope of national competence and, thus, the EU can only interfere when the exercise of national competence is in violation of EU law.[162] In addition, the CJEU has not, to date, been confronted with a case involving an unregistered same-sex couple who seeks to rely on EU law to claim benefits or entitlements in the host Member State.

Accordingly, at the moment, it is **unclear** what **rights**, other than (non-automatic) family reunification rights, **unregistered same-sex partners who move from one EU Member State to another, can claim in the territory of the latter.**

As was seen in section 6.4. of this chapter, the **EConHR** (as interpreted by the ECtHR) requires that **unregistered same-sex partners are treated in the same way as unregistered opposite-sex partners for a number of legal purposes** (namely, succession to tenancies, calculation of child maintenance, step-parent adoption, health and accident insurance cover). This is because a difference in treatment between same-sex and opposite-sex couples which disadvantages the former, is directly based on sexual orientation and is, thus, generally prohibited. In EU law, discrimination on the ground of sexual orientation is – as seen above – prohibited by Article 21 of the Charter. As explained earlier, situations which involve the exercise of EU free movement rights by an EU citizen always fall within the scope of EU law, and, thus, on a broad construction of Article 51 of the Charter, they fall within the scope of the Charter. Moreover, as noted previously, Article 52(3) of the Charter requires that the provisions of the Charter which contain rights which correspond to the rights guaranteed by the EConHR, must be interpreted as affording *at least* the same protection as the ECtHR has ruled that the corresponding EConHR provisions provide. **Accordingly, the EU institutions must make it clear that once same-sex unregistered couples are admitted into the territory of the host Member State, they must be treated in the same way as opposite-sex unregistered partners.**

Finally, same-sex unregistered couples who wish to claim employment-related benefits (as a couple) in the host Member State, can rely on an *additional* EU legal basis, namely, Directive 2000/78.[163] The latter instrument prohibits discrimination on, inter alia, the ground of sexual orientation in the area of employment.[164] Accordingly, **when the host Member State treats unregistered same-sex couples differently than unregistered opposite-sex couples *with regard to employment-related issues* and/or does not require private employers to treat unregistered same-sex and opposite-sex couples in the same way when it comes to employment-related issues, this amounts to a violation of Directive 2000/78**.

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[162] Case C-147/08, *Römer* ECLI:EU:C:2011:286, para. 38.

[163] Above n. 17.

[164] For more detailed explanations of the prohibition of discrimination on the grounds of sexual orientation under Directive 2000/78 see, inter alia, A. Tryfonidou, 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law' in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2019); K. Waaldijk and M. Bonini-Baraldi, *Sexual orientation discrimination in the European Union: National laws and the Employment Equality Directive* (TMC Asser Press, 2006).

Unlike cases involving registered same-sex partners, since 2000, no cases involving same-sex *unregistered* partners have reached the CJEU and thus no guidance has been provided with regard to their position. However, the reasoning applied in *Maruko*,[165] *Römer*,[166] and *Hay*,[167] should be transplanted into this context. As seen in chapter 3, it was held in these cases that in a Member State, which has not opened marriage to same-sex couples but has made available to them registered partnerships which are considered equivalent to marriages for certain legal purposes (e.g. survivor's pensions), then for those legal purposes, same-sex registered partnerships and marriages must be treated in the same way. The claimed benefit must therefore be extended to both (same-sex) registered partners and spouses. Applying this reasoning to claims made by same-sex unregistered partnerships, the requirement would be that **in Member States which have not opened marriage or registered partnerships to same-sex couples, but which treat unregistered partnerships as equivalent to marriages and/or to registered partnerships for specific (employment-related) legal purposes, same-sex unregistered partnerships must be treated in the same way as marriages and/or registered partnerships for those legal purposes. Otherwise, there will be discrimination on the ground of sexual orientation contrary to Directive 2000/78.**

6.7. Recommendations

6.7.1. Family reunification rights

- The European Commission should issue a **Communication** clarifying that the term '**partner**', in Article 3(2)(b) of Directive 2004/38 and for the purposes of the principle established in the *Reed* judgment, must be read as **including** both the opposite-sex and the **same-sex partner** of the Union citizen.
- In the same vein, if the **CJEU** is given the opportunity to rule on the interpretation of the term '**partner**', in Article 3(2)(b) of Directive 2004/38 and for the purposes of the principle established in the *Reed* judgment, we would argue that it should make it clear that the **term must be read as including both the opposite-sex and the same-sex partner of the Union citizen**.
- The European Commission should issue a **Communication** clarifying that, when EU Member States undertake an **examination of the personal circumstances of the couple** for the purpose of 'facilitating' the admission of the unregistered partner of the Union citizen into their territory according to Article 3(2)(b) of Directive 2004/38, their assessment must be **free from discrimination** on the ground of sexual orientation.
- In the same vein, if the **CJEU** is given the opportunity to rule on the requirements imposed on EU Member States, regarding the **examination of the personal circumstances of the couple** that must be undertaken for the purposes of 'facilitating' the admission of the unregistered partner of the Union citizen into their territory according to Article 3(2)(b) of Directive 2004/38, we would argue that it should require that this assessment must be **free from discrimination** on the ground of sexual orientation.

[165] Case C-267/06, *Maruko*, ECLI:EU:C:2008:179.
[166] Above n. 48.
[167] Case C-267/12, *Hay*, ECLI:EU:C:2013:823.

- The European **Commission** should ensure that **Directive 2004/38** is correctly implemented and should **monitor its correct implementation** in accordance with the recommendations made in this chapter.

6.7.2. Other benefits and entitlements which the couple may wish to acquire in the host Member State

Employment-related benefits and entitlements

- The European **Commission** should issue a **Communication** clarifying that **Directive 2000/78** must be read as requiring EU Member States to make legislation which **prohibits any discrimination against same-sex unregistered partners** with regard to matters that fall within the area of **employment**. The Commission should ensure that Directive 2000/78 is correctly implemented and should monitor its correct implementation.
    - In the Communication it should clarify that
        - such discrimination will ensue when same-sex unregistered partners are treated worse than opposite-sex unregistered partners; and
        - in Member States which have not opened marriage or registered partnerships to same-sex couples whilst these are available to opposite-sex couples, discrimination on the ground of sexual orientation arises when same-sex unregistered partners are treated worse than opposite-sex married couples or registered partners, with regard to matters for which all three categories of couple are considered equivalent.
- In the same vein, if the **CJEU** is given the opportunity to rule on the **interpretation of Directive 2000/78** in cases involving same-sex unregistered partners, we would argue that the Directive should be interpreted as requiring EU Member States' legislation to prohibit any discrimination against same-sex unregistered partners with regard to matters that fall within the area of employment.
    - It should also clarify that
        - such discrimination will ensue when same-sex unregistered partners are treated worse than opposite-sex unregistered partners; and
        - in Member States which have not opened marriage or registered partnerships to same-sex couples, whilst these are available to opposite-sex couples, discrimination on the ground of sexual orientation arises when same-sex unregistered partners are treated worse than opposite-sex married couples or registered partners, with regard to matters for which all three categories of couple are considered equivalent.

Other (non-employment-related) benefits and entitlements

- The European Commission should issue a **Communication** clarifying that the host EU Member State should **at least comply** with the obligations imposed by the **EConHR** when determining **which benefits/entitlements it should grant to unregistered same-sex couples who moved to its territory from another EU Member State**.
- In the same vein, if the **CJEU** is given the opportunity to rule in cases involving same-sex unregistered partners, who have moved within the EU and who are claiming non-employment-related benefits and entitlements, we would argue that it should rule that the **host EU Member State should at least – as a minimum – comply with the obligations imposed by the**

EConHR, when determining which benefits/entitlements it should grant to unregistered same-sex couples who moved to its territory from another EU Member State.[168]

- The proposed **Equality Directive**[169] **must remain a top priority** and the EU legislature should ensure that the proposal becomes law, as this will ensure that there is legislation in all EU Member States that prohibits discrimination on the ground of sexual orientation in relation to matters outside employment.

[168] This is not unlikely given that '[w]ith regard to discrimination on grounds of sexual orientation (and other human rights issues), the CJEU tends to wait for guidance from the ECtHR, and then follow this guidance once the ECtHR has taken a position on a particular issue' – R. Wintemute, 'European law against discrimination on grounds of sexual orientation' in K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Intersentia, 2017), p. 196. For a more detailed analysis of this see R. Wintemute, 'In Extending Human Rights, which European Court is Substantively "Braver" and Procedurally "Fitter"? The Example of Sexual Orientation and Gender Identity Discrimination' in S. Morano-Foadi and L. Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart, 2015).

[169] 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)0426.

7. CHILDREN OF SAME-SEX COUPLES

KEY FINDINGS

- The **parental rights that same-sex couples enjoy under national law vary considerably throughout the EU**. When rainbow families move to a large number of EU Member States, they will encounter significant **obstacles** which are caused by the **lack of legal recognition of the parental ties between a child and (usually) one of the parents**, despite the fact that these ties have been **legally established elsewhere**. **Children** who come from a **traditional, nuclear, family** with parents who are of different sexes, can clearly qualify as the children of their parents for the purposes of EU free movement law. In addition, certain 'non-traditional' families (e.g. step-families or families where the parents are not biologically related to the child) are also covered by EU free movement law. Such families can, therefore, feel certain that their decision to exercise EU free movement rights, will not give rise to a separation of the members of the family, as all will have the right – deriving from EU law – to be **admitted** to the territory of the host Member State and to be allowed to **reside** there. What is more, they are aware that they will be entitled to **claim all rights** reserved for families, once they are admitted into the territory of the host Member State, since they will be legally recognised as a 'family'.
- However, the **position of** the members of **rainbow families** under **EU free movement law** is **not clear**. In particular, it is not clear **whether** the term '**family**' – for the purposes of EU free movement law – **includes rainbow families** and whether the various terms used in Directive 2004/38 and CJEU case-law, and which refer to parents and their children, include the members of rainbow families.
- Research has shown that, **once the parents are admitted** to their territory, host **Member States tend to facilitate the entry and residence also of the children** of a rainbow family, even if their laws do not recognise them as the children of their parents. Hence, in most cases, the **main question** appears to be **whether**, once admitted within the territory of the host State, **rainbow families will be recognised as a 'family' for all legal purposes**, with the legal ties connecting the parents and their child(ren) remaining intact.

7.1. Introduction

This chapter focuses on the position of the **children of same-sex couples** in situations where the **family** (which is comprised of at least one Union citizen) **moves between EU Member States**. If none of the family members is an EU citizen, they cannot claim free movement rights under EU law. They must, instead, rely on national immigration law and challenge any obstacles to entry and residence as well as the refusal of other rights and entitlements which amount to a violation of the EConHR.

As will be seen in section 7.2., there is currently a **great divergence among the laws of EU Member States** regarding the **parenting rights of same-sex couples**. Moreover, in situations involving the exercise of EU free movement rights, Member States have **different approaches regarding the cross-border legal recognition of the parent-child relationship** (as this has been legally established in another country) in situations where the parents of the child are of the same sex.

The chapter will then consider what is the **position of same-sex parents and their children under EU free movement law**: it will be seen that, currently, it is **unclear** whether EU law requires the host Member State to legally recognise the parent-child relationship between a child and both parents (who are of the same sex), as this has been legally established elsewhere. The chapter will consider also the **requirements** currently **imposed** regarding this matter **by international law and by the EConHR**. The main aim of the chapter will be to make **recommendations** as to how the position of the children of same-sex couples *should* be regulated under EU law: what requirements should EU law impose on Member States with regard to the legal recognition of the familial ties among the members of rainbow families who exercise EU free movement rights?[170]

7.2. The position of the children of same-sex couples under Member State laws

Despite impressive advances in medicine and technology, **same-sex couples are still incapable of having children who will be genetically related to both members of the couple**. Such couples **can, however, become joint parents (in the social rather than genetic sense) in a number of ways**, such as through donor insemination (known or anonymous donor), assisted reproductive technologies, surrogacy, by becoming the joint parents of children from a prior relationship of one of the members of the couple (step-child or second-parent adoption), or through joint adoption.[171] This means that in some situations, one of the members of the couple will be biologically connected to the child (e.g. when one of the female partners in a same-sex couple undergoes medically assisted procreation using her own egg or the egg of her partner), whilst in other situations (e.g. adoption) the child will be genetically linked to neither of the members of the couple.[172]

The **parental rights that same-sex couples enjoy under national law vary considerably throughout the EU** and – as was seen in chapter 2 of this study – **when rainbow families move to some EU Member States, the legal ties between a child and one or both parents, will be dissolved**. With the exception of situations involving surrogacy, which is largely prohibited in EU Member States, and which might cause some Member States to refuse to recognise the familial ties between a child and *both* parents, it is usually the relationship between a child and *one* of the parents (the non-biological parent) that is not legally recognised.

Replies to the **questionnaire** sent by the ECPRD to national parliaments on 15 June 2020 demonstrate that in a **large number of EU Member States**, rainbow families will encounter **significant obstacles**

[170] The main arguments made in this chapter were first presented in the article A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38 *Yearbook of European Law* 220.
[171] For an explanation of these options see T. Amos and J. Rainer, 'Parenthood for Same-Sex Couples in the European Union: Key Challenges' in K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Intersentia, 2017).
[172] For literature analysing new concepts of parentage (applicable to both opposite-sex and same-sex couples) see K. Boele-Woelki, N. Dethloff and W. Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia, 2014) (the chapters in Part Three).

which are caused by the **lack of legal recognition of the parental ties between a child and (usually) one of the parents**, despite the fact that these ties have been legally established elsewhere.[173]

For example, **Poland** does **not recognise** a **same-sex couple as the joint legal parents of a child**. A common problem faced by rainbow families is the **refusal** of Polish authorities to **register foreign birth certificates of children who have two parents of the same sex**.[174] In December 2019**,** the Polish Supreme Administrative Court (NSA) adopted a resolution which confirmed that Polish law does not recognise transcripts of foreign civil status acts in which both parents are of the same sex. However, it also stated that the refusal to transcribe a foreign birth certificate with same-sex parents cannot lead to the situation where a Polish citizen (i.e. the child at least one of whose parents is a Polish citizen) would be deprived of a Polish passport or identity document or PESEL number (the identification number assigned to every citizen in Poland). **It is, nonetheless, unclear what is the position regarding family reunification and other rights that rainbow families that move to Poland from other EU Member States may wish to claim**.

Similarly, in **Slovakia and Greece**, only one of the same-sex parents of a child will be legally recognised as the parent. In **Italy**, same-sex couples are not recognised as the joint parents of the child and step-parent adoption is not expressly authorised by legislation, but has been allowed through case law. In **Lithuania**, it has been established judicially, by the Constitutional Court, that a temporary residence permit for a third-country national may be issued in a case of family reunification, even in situations involving rainbow families. Nonetheless, it is not yet clear whether the familial links – as established elsewhere – among the members of rainbow families are legally recognised for other legal purposes and for the grant of more extensive residence rights. Likewise, the position in **Romania** is not clear, though it seems that the familial ties between a child and *both* his/her same-sex parents are not legally recognised for any legal purposes, including family reunification. Joint parenting by same-sex couples is also not allowed under **Croatian** law. Nonetheless, a parent who is in a (registered) life partnership (and, thus, in a same-sex relationship) may be granted parental responsibility for a child. Moreover, the life partner of the parent of a minor child may become the parent-guardian of the child, after the death of the life partner who is the parent of the child or, exceptionally, during the life of the life partner who is the parent of the child, if the other parent is unknown or has been divested of parental responsibility

[173] The information provided in this section is, primarily, derived from the answers received to a questionnaire distributed to national parliaments by the ECPRD. Other sources of information regarding the parenting rights which are granted to same-sex couples by national laws are the annual ILGA-Europe Rainbow Map and Index, the latest version (2020) of which is available here: https://www.ilga-europe.org/rainboweurope/2020; and K. Waaldijk, *More and more together: Legal family formats for same-sex and different-sex couples in European countries: Comparative analysis of data in the LawsAndFamilies Database*, Working Paper 75 (2017) in the Families and Societies Working Paper Series, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3> , the findings of which were analysed in M. Digoix (ed.), *Same-Sex Families and Legal Recognition in Europe* (Springer, 2020). The parenting rights of same-sex couples under national laws have been analysed, also, in a number of books, though the quick change in the laws in this context means that the data offered in such publications becomes quickly outdated – see, for instance, K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives* (Intersentia, 2012) (chapters in Part Two); K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Intersentia, 2017) (chapters in Part One).

[174] European Union Agency for Fundamental Rights Report 'Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights' (2018), p. 20, available at https://fra.europa.eu/en/publication/2018/making-eu-citizens-rights-reality-national-courts-enforcing-freedom-movement-and.

due to child abuse. Croatian legislation prohibits discrimination on the basis of marital and family status, and thus different treatment of the children of same-sex and opposite-sex couples would potentially be contrary to this prohibition.

Hungary does not legally recognise two parents of the same sex as the joint legal parents of a child. However, although the legislation does not allow for a child to have two legal parents of the same sex, most regulations do recognise the registered or cohabiting partner of a child's parent as a step-parent. Moreover, in response to the question whether 'the children of same-sex couples who move from another EU Member State' to Hungary are 'treated in the same way as the children of different-sex couples who move from another EU Member State to' Hungary, the response to the questionnaire was that they are, indeed, treated in the same way. In **Bulgaria**, in situations involving the exercise of EU free movement rights, the links between same-sex parents and children are taken into account for the purpose of family reunification under EU law, though it is unclear whether they are recognised, also, for other legal purposes. In **Czechia**, the position is currently unclear. However, in 2017, there was a Constitutional Court judgment (reversing a previous Supreme Court judgment) holding that the parent-child relationship between a child born through surrogacy and his/her two fathers – as recognised in the US birth certificate – should be legally recognised in Czechia.

The responses to the questionnaire suggest that **Austria, Cyprus, Estonia, Finland, Ireland, Poland, Slovenia and Spain** treat the children of same-sex couples in the same way as the children of opposite-sex couples for all legal purposes. Sweden, in its response, noted: 'In most cases, yes [the children of same-sex couples who move to Sweden from another EU Member State are treated in the same way to children of opposite-sex couples who move to Sweden]. There may, however, be differences as an effect of the possibilities to recognise foreign parental confirmations.'

7.3. The current (unclear) EU legal framework regarding the position of the children of same-sex couples who move between EU Member States in exercise of EU free movement rights

Children can derive rights from EU free movement law, either as **direct beneficiaries** (i.e. they enjoy rights in their own right as Union citizens)[175] or as **indirect beneficiaries** (when they are granted derivative rights through their relationship with a Union citizen who exercises free movement rights).[176] The important question for the purposes of this study, however, is **whether the children of same-sex couples can derive rights from EU free movement law (as direct or indirect beneficiaries) in the same way that the children of opposite-sex couples can**.

There are **four ways** in which **children can benefit from the grant of family reunification rights** under EU free movement law.

[175] See, for instance, Case C-200/02, *Zhu and Chen* ECLI:EU:C:2004:639 and Case C-34/09, *Ruiz Zambrano* ECLI:EU:C:2011:124. For comments see C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (CUP, 2006), pp. 56-57.

[176] See, for instance, Case C-413/99, *Baumbast and R* EU:C:2002:493; Joined Cases C-389-390/87, *Echternach and Moritz* ECLI:EU:C:1989:130; Case C-7/94, *Gaal* ECLI:EU:C:1995:118.

First, a child can fall under the **Article 2(2)(c) category of Directive 2004/38**,[177] and claim the ***derivative* right** to join the Union citizen in the host Member State, when (s)he is the '**direct descendant**' of a Union citizen who exercises free movement rights or of the spouse or registered partner of that Union citizen.[178] The child can fall within this category irrespective of whether (s)he is a Union citizen, but only if (s)he is **under the age of 21 or a dependant** of his/her parent(s). If these conditions are satisfied, there is no discretion left to the host Member State, as the child enjoys the **automatic right** to be admitted into its territory.

Secondly, under the **Article 2(2)(d) category of Directive 2004/38**, if the **child is a Union citizen and is *not* dependent** on his/her **parent(s)**, but they are **dependent on him/her**, (s)he can act as the '**sponsor'** of family reunification rights for the latter, if they are not EU citizens and thus do not enjoy free movement rights themselves. If these conditions are satisfied, the child enjoys automatic family reunification rights and, thus, no discretion is left to the host Member State as to whether it will admit the parents.

Thirdly, in ***Zhu and Chen***,[179] the Court held that **minors who are Union citizens** and wish to exercise their right to move and reside in the territory of another Member State in their own right, can claim the right, derived from Article 21 TFEU, to **be joined or accompanied by their primary carer** in the host State, provided that the family is economically self-sufficient. Prior to this, in ***Baumbast and R***,[180] it was held that the **children** (whether they are EU citizens or not, and whether they are minors or not) **of a 'worker'** (within the meaning of Article 45 TFEU) who have moved to the host Member State with him and have exercised their derivative right to enrol in full-time education there, **can themselves 'sponsor' a right of residence for their primary carer** (irrespective of whether the primary carer is an EU citizen or not), if they need the presence and the care of that person in order to be able to continue to pursue and complete their education in that Member State.[181] It should be noted, however, that this is so only where one of the parents of the child is a 'worker' (or, as on the facts in *Baumbast and R*, a *former* 'worker') and – thus – applies in a narrower set of circumstances than the *Zhu and Chen* principle

[177] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

[178] Article 2(2)(c) of Directive 2004/38 (ibid) provides that 'family member' means 'the direct descendants who are under the age of 21 or are dependants *and those of the spouse or partner as defined in point (b)*' (emphasis added). As seen in chapter 4 of the study, in Case C-673/16, *Coman and Hamilton* ECLI:EU:C:2018:385, the CJEU interpreted the term 'spouse' for the purposes of Article 2 of Directive 2004/38, to include the same-sex spouse of a Union citizen who moves and resides in the territory of another Member State. Accordingly, it should follow from this that when the parents of a child in a rainbow family are married, the host Member State should recognise them as such, and, hence, even if the host Member State refuses to legally recognise the child as the child of one of his/her parents, if the parent who is not legally recognised as such is the Union citizen, the child can still derive family reunification rights from that parent, as it is considered as the child of that person's spouse.

[179] Above n. 6, paras. 26-34.

[180] *Baumbast and R*, above n. 7. Another commentator has noted that *Baumbast and R* has revealed 'the extraordinary reach which Article 12 [TEC] is capable of having' – see G. Barrett, 'Family matters: European Community law and third-country family members' (2003) 40 *Common Market Law Review* 369, 388.

[181] *Baumbast and R*, above n. 7, paras 68-75. See, also, Case C-310/08, *Ibrahim* EU:C:2010:80; Case C-480/08, *Teixeira* EU:C:2010:83 For an analysis of these principles see H. Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart, 2012), pp. 72-78; H. Toner, 'Migration Rights and Same-Sex Couples in EU Law: A Case Study' in K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives* (Intersentia, 2012), pp. 299-300.

does.[182] In the *Baumbast and R* context, however, unlike in *Zhu and Chen*, it is not necessary that the family is economically self-sufficient.[183]

Finally, if a child does not fall within any of the above categories, (s)he can rely on **Article 3(2)(a) of Directive 2004/38** (which, as we saw in chapter 3, requires the host Member State to simply '**facilitate**' admission), **as a dependant or member of the household of the parent(s) who is a Union citizen**.[184] Alternatively, **if the child is a Union citizen**, (s)he can rely on the same provision and be the **sponsor of (non-automatic) family reunification rights, if his/her parents can prove that they are members of the child's household in the home Member State or are dependent on the child**.[185] However, in both these cases, the host Member State merely has to 'facilitate' admission and, thus, as seen in chapter 3, the decision whether to admit the child or his/her parents falls within the **discretion** of the host Member State. Moreover, a decision to admit the child or the parents under this category does not presuppose recognition of their familial ties as they are simply considered to be 'dependants' or 'members of the same household'.

Children who come from a **traditional, nuclear, family with parents who are of different sexes**, can, clearly, qualify as 'direct descendants' – and their parents as 'direct relatives in the ascending line' or as 'primary carers' – for the purposes of the above categories, as there has never been a case where the familial links between children and their biological parents who are of the opposite sex have been legally questioned. In addition, **certain 'non-traditional' families are, also, covered by Directive 2004/38**; for instance, Article 2(2)(c) of the Directive recognises the link between children and their step-parents, as it explicitly provides that a Union citizen has the right to be joined in the host State by, inter alia, the children of his/her spouse or registered partner. Such families can, therefore, feel certain that their decision to **exercise EU free movement rights, will not give rise to a separation of the members of the family**, as all will have the right – deriving from EU law – to be admitted to the territory of the host Member State and to be allowed to reside there. What is more, they are aware that they will be **entitled to claim all rights reserved for families**, once they are admitted into the territory of the host Member State, since they **will be legally recognised as a 'family'**.

However, **the position of the members of rainbow families is not clear**. In particular, it is not clear **whether** the term **'family'** – for the purposes of EU free movement law **– includes rainbow families and whether the various terms used in Directive 2004/38 and CJEU case-law, and which refer to parents and their children, include the members of rainbow families**. As regards family reunification (and related) rights, the applicable EU legislation – Directive 2004/38 – simply speaks about 'direct descendants' and 'relatives in the ascending line', without interpreting these terms in more detail. Moreover, there is no established EU definition for the words 'parent', 'primary carer', or,

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[182] *Baumbast and R*, above n. 7, paras. 47-63.
[183] This was made clear in *Ibrahim* (above n. 12) and *Teixeira* (above n. 12). For commentary see P. Starup and M. J. Elsmore, 'Taking a logical step forward? Comment on *Ibrahim and Teixeira*' (2010) 35 *European Law Review* 571.
[184] Article 3(2)(a) of Directive 2004/38 (above n. 8) provides that the host Member State shall facilitate entry and residence for 'any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'.
[185] However, if the child is a minor, it is unlikely that a relationship of dependency satisfying the requirements of this provision (i.e. the parent being (materially) dependent on the child) will be found – see *Zhu and Chen* (above n. 6), paras 43-44; Case C-40/11, *Iida* ECLI:EU:C:2012:691, paras 54-56.

even, 'child'[186] – as used, especially, in CJEU case-law – which means that it is not clear whether, for the purposes of EU law, the relationship between a child and *both* (same-sex) parents is recognised. From CJEU case-law, we know that a biological link between a child and the Union citizen from whom the family reunification rights are derived, is not required, as it has been made clear that the step-children of the Union citizen who exercises free movement, can join or accompany him or her in the host Member State and can enjoy a number of additional rights, such as the right to have access to education in the host State under the same terms as nationals of that State.[187] Moreover, children who are Union citizens can 'sponsor' the right of residence of a third-country national primary carer *who is not genetically linked to them*.[188] More recently, the Court held that the concept of 'direct descendant' in Article 2(2)(c) of Directive 2004/38 must be interpreted broadly and covers 'any parent-child relationship, whether biological or legal'.[189] Accordingly, as a general rule, **a parent-child relationship can be recognised under EU law, irrespective of whether there is a biological link between the child and the parent**. This is potentially very **important for rainbow families, given that in these families one of the parents is always not biologically related to the child, and in many instances both parents lack a biological connection to the child**.

As noted in chapter 2, it is only **very recently that two cases have been referred to the CJEU** involving the cross-border legal recognition of the parent-child relationship in cases involving a rainbow family,[190] and, hence, the Court has only now been given the opportunity to provide some clarification on the matter. Moreover, the **petitions** referred to the Committee of Petitions of the European Parliament regarding this matter – which we saw in chapter 2 of this study – are, still, **pending**. Accordingly, although it seems that the absence of a biological connection between a child and his/her parent does not, in itself, negate the parent-child relationship for the purposes of EU law, it is not clear whether this is the case, also, in situations where the parents of the child are of the same sex.[191]

The lack of clarity in the terms used in Directive 2004/38 and the judge-made category of 'primary carer', and the absence of any clarification by the EU regarding the position of the children of rainbow families, have caused some Member States, which do not make provision for such families within their own legal system, to believe that they are free to refuse to recognise the familial links among the

[186] See para. 7 of the Opinion of AG Tesauro in *Gaal* above n. 7.
[187] *Baumbast and R*, above n. 7, para. 57.
[188] Joined Cases C-356-357/11, *O, S and L* EU:C:2012:776, para. 55. On the facts of the case, this right was derived from Article 20 TFEU, as the case did not involve the exercise of free movement rights, but it is unlikely that the Court will adopt a different position in situations involving the exercise of free movement under Article 21 TFEU or the other free movement of persons provisions.
[189] Case C-129/18, *SM v. Entry Clearance Officer, UK Visa Section* ECLI:EU:C:2019:248, paras. 50-51.
[190] Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'* (pending); Case C-2/21, *Rzecznik Praw Obywatelskich* (pending).
[191] It has been noted that 'Relatively few thorough studies exist on recognition of adoption decisions issued by another EU Member following intercountry adoptions. One possible reason for this is that it is usually not another EU Member State, but a third country, where individuals go for adoption. Hence, classic cross-border situations within the EU are rare' - Report 'Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU' (November 2019) (prepared by Dr Neža Kogovšek Šalamon), available at https://ec.europa.eu/info/sites/info/files/mapping_of_studies_on_the_difficulties_for_lgbti_people_in_cross-border_situations_in_the_eu.pdf, p. 38. The same is the case, also, for decisions on surrogacy (see p. 39 of the same report).

members of such families when they move to their territory in exercise of EU free movement rights.[192] Hence, **when rainbow families move, the legal ties binding their members are put in jeopardy**, as can be seen from Eleni Maravelia's petition, which is currently pending before the Committee of Petitions of the European Parliament, and which was mentioned in chapter 2 of this study.[193]

Apart from the emotional significance of the continued recognition of a child as legally the child of *both* of his/her parents, it is important from a practical and legal perspective as well, since it is only in this way that parents can have legal obligations towards their child and that the child can claim rights against them as their descendant.[194] For instance, it is only (legal) parents that benefit from administrative privileges in relation to the child (such as the capacity to consent to medical care and open a bank account for the child), travel alone with the child, or provide health insurance for the child. In addition, in systems where an *ius sanguinis* approach is adopted, children can only acquire the nationality of a country from persons who are recognised, in law, as their parents. If the parent who is not legally recognised as their parent dies intestate (without a will), his/her children will not be entitled to inherit his or her property. Moreover, if it is the legal parent that dies, the child becomes an orphan and it is then up to the family of the legally recognised parent or, in the absence of that, the State, to determine whether the non-recognised parent will even be allowed to maintain links with the child or, ideally, be recognised as the child's parent. The child, also, does not have any (legal) ties with the family of origin of the parent who is not legally recognised as a parent. Hence, the failure to legally recognise the parent-child relationship creates uncertainty and, with it, insecurity both for the parents and the child as it, in effect, denies their relationship. It can, also, cause bureaucratic complications and unnecessary delays.[195]

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[192] The recent Regulation (EU) 2016/1191 of the European Parliament and of the Council of the EU of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012 [2016] OJ L 200/1, does not provide much assistance to rainbow families as it merely concerns the authenticity of the document, not the recognition of its content. The same is the case for Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 (Brussels IIA) (2003) OJ L338/29, which provides that where a court order as to parental authority has been made in another EU Member State (other than Denmark) in respect of a child, and the court has jurisdiction in the matter, that court order must be recognised in other EU Member States without any special procedure being required. Rainbow families are unlikely to benefit from this piece of legislation either as, on the one hand, adoption is excluded from the Regulation's scope and, on the other hand, it provides for an exception where recognition would be 'manifestly contrary to the public policy of the Member State in which recognition is sought', which would most probably be relied on by Member States that refuse to legally recognise the parent-child relationship between a child in a rainbow family and one (or both) of his/her parents. In addition, the Regulation expressly excludes establishing or contesting the parent-child relationship. For more on Brusselsl IIA see n. Lowe and G. Douglas, *Bromley's Family Law* (OUP, 2015), pp. 994-1008.

[193] Petition No 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union <https://www.europarl.europa.eu/petitions/en/petition/content/0513%252F2016/html/Petition-No-0513%252F2016-by-Eleni-Maravelia-%2528Greek%2529-on-the-non-recognition-of-LGBT-families-in-the-European-Union>.

[194] A. Koppelman, *SameSex Different States: When Same-SexMarriages Cross State Lines* (Grand Rapids, MI: Sheridan, 2006), pp. 73-74.

[195] For a more detailed analysis of the problems faced by rainbow families as a result of the non-recognition of the parental ties between a child and (usually) his/her non-biological parent see L. Hodson, 'The Rights of Children raised in lesbian, gay, bisexual or transgender families: A European perspective', ILGA-Europe 2008 <https://ilga-europe.org/resources/ilga-europe-reports-and-other-materials/rights-children-raised-lesbian-gay-bisexual-or>. See, also, Report 'Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU' (above n. 22) pp. 37-41.

Empirical research has shown that, **once the parents are admitted to their territory, host Member States tend to facilitate the entry and residence also of the children of a rainbow family**, under the Article 3(2)(a) category of Directive 2004/38, even if their laws do not recognise them as the children of their parents.[196] Hence, in most cases, the **main issue** appears to be not so much whether rainbow families will be able to move to another Member State (i.e. an 'access' issue) in exercise of their EU free movement rights but, rather, *how* they will be able to move: once admitted within the territory of the host State, **will they be recognised as a 'family' for all legal purposes, with the legal ties connecting the parents and their child(ren) remaining intact**?

At the moment, EU law does not provide an answer to these questions.

7.4. The legal recognition of the parent-child relationship under the EConHR

The ECtHR has not had the opportunity to date to rule in a case involving the ***cross-border* legal recognition of the parent-child relationship in a rainbow family**.[197] Accordingly, there is **no ECtHR ruling** which can provide a clear response to the question whether the EConHR requires its signatory states to legally recognise the familial ties between a child and both of his/her *same-sex* parents, as these have been already established *in another country*.

Nonetheless, the **ECtHR** has been called to rule in **cases involving rainbow families, albeit in a single-state context**. Moreover, the ECtHR has already ruled in cases where an EConHR signatory state refused to legally recognise a parent-child relationship which was established in another country, albeit in all these cases the child was a member of a single-parent family or a family created by an opposite-sex couple.

Accordingly, in this section, there will be an examination of the **jurisprudence of the ECtHR** which concerns: a) the **parent-child relationship in a situation involving an LGB (single) parent or a rainbow family**; and b) the **legal recognition of the parent-child relationship in a cross-border context (heterosexual parent or married opposite-sex couple)**.

7.4.1. Cases concerning the parent-child relationship in situations involving LGB (single) parents or same-sex couples

In ***Salgueiro da Silva Mouta* v. *Portugal***,[198] at issue was the compatibility with the EConHR of the judgment of the Lisbon Court of Appeal, which – following the parents' divorce – awarded parental responsibility to the heterosexual mother of the child rather than to the child's gay father. The

[196] Cara-Friend Northern Ireland, 'Handbook on the Rights of Rainbow Families: Rights on the move' (2014), p. 28 <https://www.ilga-europe.org/sites/default/files/rights_on_the_move_-_handbook_on_the_rights_of_rainbow_families_2015.pdf>

[197] Though a number of cases involving this matter have been recently referred to it. See, for instance, *A.D.-Kand Others* v. *Poland* (No. 30806/15) (pending).

[198] *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999.

contested judgment was based mainly on the sexual orientation of the father who, following the dissolution of his marriage, entered into a relationship and lived with another man. The ECtHR held that such a distinction amounted to a breach of Article 14 EConHR read in conjunction with Article 8 EConHR, as it discriminated against the father – on the basis of his sexual orientation – with regard to his right to respect for his family life. In situations such as these, the parent-child relationship already exists and is legally recognised, and the question is whether and how far it should be maintained. Accordingly, this ruling established that, **when a court is deciding a custody case where custody is claimed by the two biological parents of the child, its decision must be free from discrimination on the grounds of sexual orientation** (i.e. the fact that one parent is lesbian or gay must not be treated as a negative factor).[199]

In ***E.B.* v. *France***, on the other hand, the ECtHR was not concerned with an existing parent-child relationship.[200] The applicant was a lesbian who was in a relationship with another woman and wished to apply, alone, to adopt a child. Her application for authorisation to adopt – which was a precondition for adoption – was rejected, and the ECtHR found that the main reason for the rejection was her sexual orientation. Since French law gave the right to single persons to adopt a child, this right could not be refused to a single person on the basis of her sexual orientation, as this would amount to a breach of Article 8 EConHR read in conjunction with Article 14 EConHR.[201] Accordingly, once an EConHR signatory state decides to allow certain categories of persons/couples to become parents, it must do so in a way which is not discriminatory on the ground of sexual orientation. In this case, the ECtHR noted explicitly that the EConHR does not guarantee either the right to adopt or, more broadly, the right to 'found a family' (outside the Article 12 context of a married couple).[202] Therefore, EConHR signatory states are free to choose which categories of persons should be allowed to adopt. Nonetheless, when a signatory state decides who can adopt, its decision must be free from discrimination on any of the prohibited grounds, including sexual orientation. **Accordingly, EConHR signatory states are not required by the EConHR to allow single persons to adopt; however, when they choose to do so, they must do so without discriminating on the ground of sexual orientation.**

This approach was subsequently extended to cases involving same-sex *couples*. In ***X and Others v. Austria***,[203] **Austria allowed second-parent adoption for unmarried/unregistered opposite-sex couples whilst it excluded unmarried/unregistered same-sex couples**. The Court held that there was a difference in treatment between same-sex and opposite-sex unmarried/unregistered couples regarding the right to second-parent adoption. This difference in treatment was based on sexual orientation. Since these two categories of couples were, clearly, similarly situated, the difference in treatment amounted to **discrimination on the ground of sexual orientation contrary to Article 8 ECHR read in conjunction with Article 14 EConHR**.

[199] The same approach was adopted by the IACtHR in *Atala Riffo and Daughers v. Chile* (24 February 2012), Inter-Am. Comm. HR, Case 12.502.
[200] *E.B. v. France*, no. 43546/02, 22 January 2008.
[201] Contrast the Court's prior ruling in *Fretté v. France*, no. 36515/97, 26 February 2002, where it held that the difference in treatment with regard to the right to adopt which was based on the ground of sexual orientation was justified.
[202] *E.B. v. France*, above n. 31, para. 41.
[203] *X and others v. Austria*, no. 19010/07, 19 February 2013.

The ECtHR distinguished this case from the previous case of ***Gas and Dubois v. France***,[204] where the right to second-parent adoption was granted only to married couples at a time when France only allowed opposite-sex couples to marry. The applicants in *Gas and Dubois v. France*, were two women who had entered into a PACS. The ECtHR examined their situation in comparison with that of a married couple and noted that, as EConHR signatory states were not obliged to grant access to marriage to same-sex couples, and having regard to the special status conferred by marriage, the applicants' legal situation was not comparable to that of a married couple. Thus, it was concluded that there had been no difference in treatment based on sexual orientation and, therefore, no violation of Article 14 EConHR taken in conjunction with Article 8. In this 2012 case – unlike the 2016 case of *Taddeucci and McCall v. Italy*,[205] seen in the previous chapter – the ECtHR did not rule that in signatory states that have not opened marriage to same-sex couples, a difference in treatment based on whether a couple is married or not can amount to discrimination based on sexual orientation. Hence, until *Gas & Dubois* is overruled, such signatory **states can reserve the right to be jointly recognised as the parents of a child to married couples**, even if this effectively **excludes all same-sex couples**.[206]

Finally, for existing rainbow families, it is important to note that the **ECtHR** held in ***Gas and Dubois v. France* that a same-sex couple and their child(ren) can together enjoy 'family life'**, within the meaning of Article 8 EConHR.[207] This follows the general approach of the ECtHR, according to which biological ties are not an overriding factor in establishing family life and some evidence of real and constant relationship is normally required before such relationships are afforded the protection of Article 8 ECHR.[208] Accordingly, the ECtHR has made it clear that **the non-biological parent of a child in a rainbow family can be considered a 'parent'** for the purposes of Article 8 EConHR, provided that the relationship between the two resembles what is perceived to be 'the norm' of the nuclear family.[209]

7.4.2. Cases concerning the refusal of an EConHR signatory state to legally recognise a parent-child relationship already established in another country (heterosexual individual or married opposite-sex couple)

In ***Wagner v. Luxembourg***,[210] at issue was the **refusal of the Luxembourg authorities to recognise the Peruvian court decision pronouncing** the full adoption by Ms Wagner – a Luxembourg national – of her child, JMWL, of Peruvian nationality. The refusal was the result of the absence in the Luxembourg legislation of provisions allowing **full adoption of a child by an unmarried person as an individual**. The ECtHR held that this refusal amounted to an unjustified interference with the right to respect for Ms Wagner's and her child's family life and, thus, amounted to a violation of Article 8 EConHR. The Court, in particular, noted that '[b]earing in mind that the best interests of the child are paramount in such a case … the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning

[204] *Gas and Dubois v. France*, no. 25951/07, 31 August 2010.
[205] *Taddeucci and McCall v. Italy*, no. 51361/09, 30 June 2016.
[206] For another case confirming this, see *Boeckel and Gessner-Boeckel v. Germany*, no. 8017/2011, 7 May 2013.
[207] *Gas and Dubois v. France*, above n. 35, para. 37. See, also, *X and Others v. Austria*, above n. 34, paras 95-96; *Boeckel and Gessner-Boeckel v. Germany*, ibid, para. 27.
[208] *J.R.M. v. the Netherlands*, no. 16944/90, 8 February 1993; *Nylund v. Finland*, no. 27110/95, 29 June 1999; *K. and T. v. Finland*, no. 25702/94, 12 July 2001.
[209] C. McGlynn, above n. 6, p. 15.
[210] *Wagner v. Luxembourg*, no. 76240/01, 28 June 2007.

of Article 8 of the Convention.'[211] The case, therefore, demonstrates that **Article 8 EConHR requires the contracting States to pursue the cross-border continuity of family ties**.

More recently, the ECtHR was called to rule, again, in a case which involved the **cross-border legal recognition of a parent-child relationship lawfully established abroad, albeit in the more controversial context of a surrogacy arrangement** (***Mennesson v. France***).[212] The ECtHR, following the principles established in *Wagner v. Luxembourg*, found that the contested refusal of France to recognise, as a legal parent, the genetic father of a child born through a surrogacy agreement entered into abroad, amounted to a breach of Article 8 EConHR. However, unlike in *Wagner*, in this case, the ECtHR found that there was a **breach of Article 8 EConHR only as regards the children's right to respect for private life**. In particular, the Court found that, on the facts of the case, the lack of recognition of the parent-child relationship did not disproportionally affect the applicants' ability to enjoy their family life in a practical sense, and, thus, did not amount to a breach of their right to respect for their family life. There was, nonetheless, a breach of **the right to respect for private life of the children, since 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship'**;[213] the 'legal uncertainty' caused as a result of the non-recognition in the host State is liable to have negative repercussions on the children's definition of their personal identity.

Following the above ruling, the question emerged whether the obligation, imposed by Article 8 EConHR, was only with respect to the relationship of the child and his/her intended *biological* parent. That this was not the case, however, was clarified in the **ECtHR's first Advisory Opinion (under Protocol No. 16 to the EConHR) requested by the French Court of Cassation**,[214] and was confirmed more recently in the Court's ruling in ***D v. France***.[215] The ECtHR noted that the right to respect for private life, within the meaning of art 8 EConHR, of a child born abroad through gestational surrogacy requires that domestic law provide a possibility of **recognition of a legal parent-child relationship with the intended *non-biologically related* mother** (the wife of the child's genetic father), designated in the birth certificate legally established abroad as the 'legal mother'. Nonetheless, it is **not required that such recognition take place automatically**. Rather, another means, such as adoption of the child by the intended mother, may be used, provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

Hence, the ECtHR has made it clear in a number of judgments that **Article 8 EConHR is breached where familial ties, which have been legally established in another State, are severed in the country of residence of the family**. In particular, Article 8 EConHR requires signatory states to **recognise the parent-child relationship** – as this has been legally established in another country – between a child and both parent(s), **irrespective of their biological connection with the child**.

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[211] Ibid, para. 133. See, also, *Negrepontis-Giannisis v. Greece*, no. 56759/09, 3 March 2011, which involved the cross-border legal recognition of an adoption lawfully concluded in another country (the US), albeit of an adult.
[212] *Mennesson v. France*, no. 65192/11, 26 June 2014. See, also, *Labassee v. France*, no. 65941/11, 26 June 2014 and *Laborie v. France*, no. 44024/13, 19 January 2017. For a discussion see G. Cano Palomares, 'Right to family life and access to medically assisted procreation in the case law of the European Court of Human Rights' in M. González Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge, 2017), pp. 106-109.
[213] *Mennesson v. France*, above n. 43, para. 96.
[214] ECtHR Advisory Opinion Request No P16-2018-001 (10 April 2019).
[215] *D v. France*, no. 11288/18, 16 July 2020.

7.5. Children of same-sex couples under other international instruments

The **Convention on the Rights of the Child** (CRC) is a human rights treaty adopted by the UN General Assembly in 1989.[216] It entered into force in 1990 and, since then, has received near-universal ratification. It sets out the civil, political, economic, social, health, and cultural rights of children. 'Child' is defined in its Article 1 as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. There is no court which oversees compliance with the Convention, but the Committee on the Rights of the Child, a body of 18 independent experts, monitors and reports on the progress made by states parties.

All EU Member States have signed and ratified the CRC and are, thus, bound by it as a matter of international law. Moreover, although the EU is not a party to it, the CJEU has pointed out that it 'has already recognised that the Convention on the Rights of the Child is binding on each of the Member States, and is one of the international instruments for the protection of fundamental rights of which it takes account in applying the general principles of [Union] law'.[217]

The **CRC provides** some of the rights that children already enjoy under the EConHR or the Charter, such as the **right to non-interference with privacy and family** (Article 16 CRC) and the **best interests of the child** standard (Article 3 CRC).[218] However, it **also includes a number of other rights (or more detailed rights) which can, clearly, bolster the argument of rainbow families who seek cross-border legal recognition when they exercise their EU free movement rights**.

Article 2(2) CRC contains one of the foundational principles of the Convention (**non-discrimination**): 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'. Although the above list of grounds does not include sexual orientation, the Committee on the Rights of the Child has confirmed in one of its **General Comments** that **children are entitled to the enjoyment of their rights 'regardless of the children's or their parents' . . . sexual orientation'**.[219] In another General Comment, the Committee recognised that **children may 'suffer the consequences of discrimination against their parents**, for

[216] For a more detailed analysis of the CRC see T. Buck, *International Child Law* (Palgrave, 2014), chapter 3.
[217] Case C-244/06, *Dynamic Medien* ECLI:EU:C:2007:515, para. 90. For a summary of the role of the CRC in the development of the EU's child policy see EU Agency for Fundamental Rights, 'Handbook on European law relating to the rights of the child', <https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf> pp. 26-28.
[218] The Committee on the Rights of the Child has recently held that CRC State parties must 'adequately take the best interests of the child as a primary consideration when assessing' a child's asylum request based on persecution he faces as a result of his mothers' sexual orientation. The case involved a boy (A. B., now 11) who had fled Russia and moved to Finland together with his mothers after the family faced harassment and threats and the boy was bullied and isolated at school because his parents are of the same sex. The family applied for asylum in Finland and their application was rejected on the ground that the experiences, threats, discrimination and bullying suffered by the family could not be considered to amount to persecution. See Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child in respect of communication No. 51/2018 (4 February 2021).
[219] Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, para. 21.

example if children have been born out of wedlock or **in** other **circumstances that deviate from traditional values**'.[220]

Moreover, **Article 8(1) CRC** provides that 'States Parties undertake to respect the **right of the child to preserve his or her identity**, including nationality, name and family relations as recognised by law without unlawful interference'. Of course, the question here is **whether 'family relations'** do – for the purposes of the CRC – **include relations among the members of a rainbow family**. **The approach of the Committee on the Rights of the Child towards the notion of the 'family' seems to be flexible enough to include rainbow families, despite the fact that this has not been explicitly acknowledged**. When interpreting this provision, the Committee noted that '[t]he basic institution in society for the survival, protection and development of the child is the family. When considering the family environment, the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships. In this regard the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single parent family, common law family and adoptive family'.[221] Reflecting on this, one commentator has noted that the above passage 'does not restrict the definition of "parents" to heterosexual couples. Although there is no reference to people of the same sex, there is also no express exclusion of such relationships ... [T]here is nothing in the final text of article 8 [CRC] which demands that the meaning of "familial relations" be restricted to biological ties'.[222]

Finally, **Article 9(1) CRC** provides that 'States Parties shall ensure that a child **shall not be separated from his or her parents** against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.[223] This provision – especially when read together with Article 2(1) CRC – can help to strengthen the argument of the **children of rainbow families** that they **should not be discriminated against on the ground of the sexual orientation of their parents when the family claims family reunification rights under EU law**.

7.6. What requirements should EU law impose on EU Member States with regard to the cross-border legal recognition of familial ties among members of rainbow families who exercise EU free movement rights?

[220] Committee on the Rights of the Child General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, para. 12.
[221] Committee on the Rights of the Child, Role of the Family in the Promotion of the Rights of the Child, 7th Session, 10 October 1994, CRC/C/24 (1994), para. 2.1. See, also, General comment No. 14 (2013) (n 170), Section V.A.1(c).
[222] J Tobin, 'Recognising Same-Sex Parents: Bringing legitimacy to the law' (2008) 33 *Alternative Law Journal* 36, pp. 37–8.
[223] For an analysis of the meaning of this Article in the context of international migration see Joined General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return, 16 November 2017, paras. 27–38.

The European Parliament has repeatedly made calls to the other EU institutions to create a legal framework at EU level which, whilst it respects the competence of the Member States in the family law field, recognises and protects the rights of rainbow families who make use of EU free movement rights. For instance, back in 1994, the Parliament adopted a Resolution noting, inter alia, that the European Commission should draft a 'Recommendation on equal rights for lesbians and homosexuals' which would, as a minimum, seek to end 'any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children'.[224] Moreover, in its more recent 2017 'Resolution on protection and non-discrimination with regard to minorities in the EU Member States',[225] the Parliament, *inter alia*, recommended the provision of clear and accessible information on the recognition of cross-border rights for LGB persons and their families in the EU,[226] and urged the Commission to ensure that Member States correctly implement Directive 2004/38, consistently respecting, inter alia, the provisions related to family members and prohibiting discrimination on any grounds.[227] In the same Resolution, the Parliament called on the Commission to take action in order to ensure that LGB individuals and their families can exercise their right to free movement in accordance with both Article 21 TFEU and Article 21 of the Charter.[228]

Despite the Parliament's repeated calls for a legal framework which caters for the needs of rainbow families, and which grants them equal protection and equal rights to those enjoyed by the traditional nuclear family, **the EU has to date taken no steps to this direction**. Nonetheless, **things may change soon**, in view of the recent statement of the Commission, in its **LGBTIQ Equality Strategy 2020-2025** announced on 12 November 2020, that it 'will push for **mutual recognition of family relations** in the EU. If one is parent in one country, one is parent in every country. In 2022, the Commission will propose a **horizontal legislative initiative** to support the **mutual recognition of parenthood between Member States**, for instance, the recognition in one Member State of the parenthood validly attributed in another Member State'.[229] Therefore, there is, clearly, scope for optimism that a solution to the problems faced by rainbow families when they exercise their free movement rights will be provided by the EU.

7.6.1. Family reunification rights

Under the current legal framework, **the children of a same-sex couple can derive from EU law the right to move together with their family in the host EU Member State as direct or indirect beneficiaries**. This right derives – depending on the context – from **Directive 2004/38**[230] and from

[224] European Parliament Resolution on equal rights for homosexuals and lesbians in the EC A3-0028/94 (1994) OJ C 61/40.
[225] Resolution on protection and non-discrimination with regard to minorities in the EU Member States 2017/2937(RSP), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018IP0032. This motion was, in fact, the European Parliament's response to the PETI public hearing organised by the Committee on Petitions (PETI) entitled 'Fighting against discrimination of EU citizens in the EU Member States and the protection of minorities' that took place on 4 May 2017, where the Petition submitted by Eleni Maravelia was heard.
[226] Resolution on protection and non-discrimination with regard to minorities in the EU Member States (above n. 56), para. 19.
[227] Ibid, para. 20.
[228] Resolution on protection and non-discrimination with regard to minorities in the EU Member States (above n. 56), para. 21.
[229] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', COM(2020) 698 final.
[230] Above n. 8.

principles established in CJEU case-law and, in particular, in *Zhu and Chen*[231] and in *Baumbast*.[232] Nonetheless, it has **not been explicitly stated that the terms used in Directive 2004/38 and in CJEU case-law are inclusive of rainbow families**: for instance, does the word 'descendant' for the purposes of Directive 2004/38 include the child of a same-sex couple? Does the term 'primary carer' for the purposes of *Zhu and Chen* and *Baumbast*, include the (non-biological) parent who is in a same-sex durable relationship/registered partnership/marriage, with the other parent of the child?[233]

For this purpose, we recommend that the EU institutions provide a clarification that the terms used in Directive 2004/38 when referring to children and their parents, as well as the principles established in *Zhu and Chen* and in *Baumbast*, are inclusive of rainbow families. In this way, rainbow families will enjoy the same family reunification rights under EU law with families founded by opposite-sex couples.

This is required by a number of EU law provisions:

- **Article 21(1) of the Charter**, which provides: 'Any discrimination based on any ground such as […] sexual orientation shall be prohibited'. As explained in chapter 3, situations which involve the exercise of EU free movement rights by an EU citizen always fall within the scope of EU law[234] and, thus, on a broad construction of Article 51 of the Charter, they fall within the scope of the Charter. According to the **hierarchy of EU norms** (as seen in chapter 3 of the study**), all pieces of secondary EU legislation and the principles established through case-law, must be read in a way which complies with the Charter**. Accordingly, the provisions of these instruments must be interpreted in a way which is, inter alia, free from discrimination on the ground of sexual orientation. Accordingly, all EU law provisions must be interpreted in a way which is, inter alia, free from discrimination on the ground of sexual orientation. Therefore, **EU legislation and CJEU rulings must be read in a way which ensures that rainbow families will enjoy the same family reunification rights under EU law with families founded by opposite-sex couples**.

- **Recital 31 of Directive 2004/38**, which applies Article 21 of the Charter in the specific context of Directive 2004/38, and which provides: 'This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as […] sexual orientation'. From this it is clear that all the **provisions of Directive 2004/38**, including Articles 2(2)(c), 2(2)(d) and 3(2)(b), **must be read in a way which does not discriminate on the ground of sexual orientation**.

- **The free movement of persons provisions of the TFEU** (Arts. 21, 45, 49, 56 TFEU): In situations where a child is a Union citizen and (s)he is not allowed to be accompanied or joined by both of

[231] Above n. 6.
[232] Above n. 7.
[233] According to Clare McGlynn, this should be the case: 'the emphasis placed by modern family law on the child's best interests requires consideration of non-biological and non-marital relationships which may be central to ensuring the child's welfare and interests. For this reason, the social reality of parenting becomes more important than the civil status of the parents. A recognition of these changes is necessary to ensure that families which do not conform to the married nuclear norm do not suffer, either with fathers being excluded from parental rights, or children being prejudiced as a result of their parents' status, or lack of status.' – C. McGlynn, above n. 6, p. 108.
[234] A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart, 2016), pp. 86-88.

her (same-sex) parents in the host Member State – because the legal links between the members of the family, as legally established elsewhere, are not recognised in the host State – the child's EU right to move and reside in the territory of another EU Member State will be breached. Similarly, in situations where, for the same reason, a Union citizen cannot be accompanied or joined by his/her (same-sex) spouse/partner and/or the children of the couple, (s)he will be deterred from exercising free movement rights.[235] Accordingly, **when the host Member State refuses family reunification rights to rainbow families, this amounts to a breach of the free movement provisions in the TFEU**. After all, as the CJEU noted in *Metock,*[236] 'if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed. This, according to another commentator, 'adds considerable weight to the suggestion that non-portability of partnerships, marriages and parental ties, particularly but not necessarily confined to entry and residence of such third country national family members is both something that the EU has competence to address, and even that Member States can and should be called upon to justify with compelling reasons of public interest'.[237] **Obstacles emerging in this context cannot be justified** by the Treaty derogations or the objective justifications, since (as will be seen below), they are in violation of fundamental (human) rights that are protected under EU law, and they involve a *blanket* refusal to admit the members of a rainbow family, which means they are not based on the personal conduct of the individual(s) concerned, as required by Article 27(2) of Directive 2004/38.

7.6.2. Other benefits and entitlements that the family may wish to claim once admitted into the territory of the host Member State

Once a rainbow family is admitted within the territory of an EU Member State that does not legally recognise the familial ties between a child and both (same-sex) parents, it will be confronted with a host of practical and procedural difficulties. For instance, if one parent is not legally recognised as the parent of the child in its territory, that person will not be able to travel alone with the child, consent to medical treatment for the child, or register the child at school. **Currently, EU law comes up empty-handed for rainbow families who exercise their free movement rights and, once within the host Member State, wish to be treated like every other family and be recognised as a family under the law: no explicit or implicit provision or reference is made to rainbow families in any EU law provision or instrument.**

Accordingly, we recommend that the EU institutions make it clear that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families at least in all the circumstances that this is required under the EConHR.

<u>This is required by a number of EU law provisions:</u>

- **The free movement of persons provisions of the TFEU** (Arts. 21, 45, 49, 56 TFEU): If the host Member State **does not legally recognise the familial ties between the members of the family for other legal purposes** (e.g. tax law, property law, inheritance law, nationality law,

[235] For an analysis of this argument see A. Tryfonidou, above n. 1, pp. 243-248.
[236] Case C-127/08, *Metock* ECLI:EU:C:2008:449, para. 62.
[237] H. Toner, above n. 12, p. 308.

pensions, and so on), this will cause **great inconvenience** to the members of the family which, in its turn, will **impede the exercise of their free movement rights**. The basis for this argument is the reasoning in the CJEU's rulings in *Garcia Avello*[238] and *Grunkin Paul*,[239] where the Court noted that the denial of the host State to recognise the surnames of Union citizens registered in another Member State, and the resultant discrepancy in surnames *in different Member States*, led to serious inconvenience for the persons concerned which, in turn, was likely to deter them from exercising their free movement rights. Hence, in the context of rainbow families, the denial of the host State to legally recognise the familial ties between the members of the family – as these are legally recognised in one of the EU Member States – once the family is within its territory, and the resultant discrepancy in the legal ties among the members of the family in different EU Member States, can constitute an obstacle to free movement, contrary to the free movement of persons provisions in the TFEU. **Obstacles emerging in this context cannot be justified** by the Treaty derogations or the objective justifications, since (as will be seen below) they are in violation of fundamental human rights that are protected under EU law, and they involve a *blanket* refusal to admit the members of a rainbow family and are, thus, not based on the personal conduct of the individual concerned, as required by Article 27(2) of Directive 2004/38.

- **Article 7 of the Charter and the right to respect for private and family life as a general principle of EU law:** As noted earlier, the ECtHR held in ***Gas and Dubois v. France***[240] that a **same-sex couple and their child(ren) can together enjoy 'family life'**, within the meaning of Article 8 EConHR. Obviously, the **same interpretation** must be followed for the purposes of **Article 7 of the Charter**.[241] Accordingly, in situations where the child in a rainbow family has established de facto 'family ties' with both parents, it is undisputed that family life exists between the members of the family; *a fortiori*, this is the case when those family ties have, already, been legally recognised somewhere. According to ***Wagner v. Luxembourg,***[242] ***Mennesson v. France,***[243] **and** ***D v. France***,[244] **Article 8 EConHR** is breached where there is ***de facto* family life**, and **familial ties legally established in another country are severed** in the country of residence of the family. This means that the right to respect for private and family life requires **signatory states to recognise the parent-child relationship – as this has been legally established in another country – between a child and his/her parents.** Although the relevant EConHR cases did not involve rainbow families, nor did they involve movement between EU Member States, **similar legal argumentation can be pursued in situations involving the cross-border legal recognition of the legal status attached to the members of a rainbow family which moves between EU Member States**. Hence, the failure of the host EU Member State to legally recognise the familial ties between a child and one or both of his/her same-sex parents, as these have been

[238] Case C-148/02, *Garcia Avello* ECLI:EU:C:2003:539.
[239] Case C-353/06, *Grunkin Paul* ECLI:EU:C:2008:559.
[240] Above n. 35.
[241] Article 52(3) EUCFR. See, also, 'Explanation on Article 7 – Respect for private and family life' from the 'Explanations relating to the Charter of Fundamental Rights' [2007] OJ C 303/02. For an analysis of the influence that ECtHR rulings on the notion of 'family life' for the purposes of Article 8 ECHR have had on CJEU jurisprudence regarding the notion of 'family life' for the purposes of Article 7 EUCFR (and, previously, the general principles of EU law) see S. Iglesias Sánchez and K. Carr, 'The right to family life in the EU Charter of Fundamental Rights' in M. González Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge, 2017), pp. 43-45.
[242] Above n. 41.
[243] Above n. 43.
[244] Above n. 46.

legally established elsewhere, can amount to an interference with the family's right to respect for their family life and the child's right to respect for his/her private life, protected as a general principle of EU law and under Article 7 of the Charter. This is the case especially if the right to respect for private and family life is read in the light of Article 33 of the Charter, which provides that '[t]he family shall enjoy legal, economic and social protection'. From the moment that a rainbow family is recognised as enjoying 'family life' and is, thus, 'a family', then it also attracts 'legal protection' under EU law. Accordingly, **when the legal links between a child and one or both (same-sex) parents dissolve in the host EU Member State, this amounts to a breach of the right to respect for family life of the child and the parents, and of the right to respect for private life of the child, contrary to Article 7 of the Charter, and the right to respect for private and family life which is protected as a general principle of EU law**.

- **Article 21 of the Charter which prohibits discrimination on the ground of sexual orientation:** EU Member States which do not allow a same-sex couple to legally establish a family in their territory, and which do not allow a rainbow family lawfully established elsewhere to be recognised as such, do so for the simple reason that the couple that is founding the family is comprised of two persons of the same sex. If the parents of the child were an opposite-sex couple, in the vast majority of cases they would both be legally recognised as the parents of the child, even if the child was adopted or was conceived via assisted procreation methods. Accordingly, the children of same-sex couples are clearly treated worse than the children of opposite-sex couples and, thus, there is discrimination directly based on the fact that the parents of those children are a same-sex couple: **the children face discrimination on the ground of sexual orientation by association with their LGB parents**. [245] Similarly, the **(same-sex) parents** are, also, **discriminated against on the ground of their sexual orientation**, when they are compared with opposite-sex couples who are similarly situated with them. This can, clearly, amount to a **violation of Article 21 of the Charter**. Of course, when rainbow families experience discrimination when compared to families founded by opposite-sex couples, Article 21 TFEU can also be read in conjunction with other provisions of the Charter (e.g. Article 7 of the Charter) to establish a violation. Accordingly, **when the legal links between a child and one or both (same-sex) parents dissolve in the host EU Member State, this amounts to a breach of the right of the child (by association) and the parents not to be discriminated against on the ground of sexual orientation, contrary to Article 21 of the Charter**.

[245] In Case C-303/06, *Coleman* ECLI:EU:C:2008:415, the CJEU established that discrimination by association is also prohibited by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; there is no reason why this could not be the case, also, for Article 21 EUCFR.

7.7. Recommendations

7.7.1. Family reunification rights

- The Commission should issue a **Communication** clarifying that the **terms used in Directive 2004/38** when referring to **children** and their **parents**, **as well as the principles established judicially** in *Zhu and Chen*[246] and in *Baumbast*,[247] are **inclusive of rainbow families**. In this way, rainbow families will enjoy the same **family reunification rights** under EU law as families founded by opposite-sex couples when they exercise their EU free movement rights. The Commission should **monitor national implementation** of Directive 2004/38.[248]
- In the same vain, if the **CJEU** is given the **opportunity to rule on the interpretation of the terms used in Directive 2004/38** when referring to children and their parents, **as well as the principles established judicially** in *Zhu and Chen* and in *Baumbast*, these terms and principles should be interpreted in a way that is **inclusive of rainbow families**. In this way, rainbow families will enjoy the same **family reunification rights** under EU law as families founded by opposite-sex couples when they exercise their EU free movement rights.
- In line with its LGBTIQ Equality Strategy 2020-2025, **the Commission should make a proposal for a Directive which will harmonise cross-border recognition of birth certificates**, thereby ensuring that when a rainbow family moves, the familial ties among the members of the family – as legally established and reflected in a birth certificate issued by another country – will automatically be recognised in the host Member State for family reunification purposes. As will be explained in the next chapter of the study, the **legal bases for this Directive should be Articles 18, 21(2), 46, 50(1), and 59(1) TFEU**, as its main aim will be to ensure that rainbow families comprised of at least one Union citizen can exercise their free movement rights.
- In addition, when delivering its preliminary rulings in **Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'*** (pending) and **Case C-2/21, *Rzecznik Praw Obywatelskich*** (pending), the **CJEU** should hold that EU law requires that the **familial ties among the members of a rainbow family** – as these have been legally established and reflected in a birth certificate issued by another EU Member State – **will automatically be recognised in the host Member State for family reunification purposes**.

7.7.2. Other benefits and entitlements that the family may wish to claim once admitted into the territory of the host Member State

- The Commission should issue a **Communication** clarifying that all EU Member States must **ensure the continuity – in law – of the familial ties of the members of rainbow families** that move to their territory from another EU Member State, **at least in all the circumstances that this is required under the EConHR**.
- In the same vein, if the **CJEU** is given the opportunity to rule in a case involving a **rainbow family claiming benefits or entitlements in the host Member State**, it should rule that all **EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families that move to their territory from another EU Member State, at least in all the circumstances that this is required under the EConHR**.

[246] Above n. 6.
[247] Above n. 7.
[248] Above n. 8.

- In line with its LGBTIQ Equality Strategy 2020-2025, the Commission should make a **proposal for a Directive which will harmonise cross-border recognition of birth certificates**, thereby ensuring that **when a rainbow family moves, the familial ties among the members of the family – as legally established and reflected in a birth certificate issued by another country – will automatically be recognised** in the host Member State for all legal purposes. As will be explained in the next chapter of the study, the **legal bases for this Directive should be Articles 18, 21(2), 46, 50(1), and 59(1) TFEU**, as its main aim will be to ensure that rainbow families comprised of at least one Union citizen can exercise their **free movement rights**.
- In addition, when delivering its preliminary ruling in **Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'*** (pending) and **Case C-2/21, *Rzecznik Praw Obywatelskich*** (pending), the **CJEU** should hold that EU law requires that the **familial ties among the members of a rainbow family** – as these have been legally established and reflected in a birth certificate issued by another EU Member State – will **automatically be recognised** in the host Member State **for all legal purposes**.
- The proposed **Equality Directive**[249] must remain a **top priority** and the EU legislature must ensure that the proposal becomes law, as this will ensure that there is legislation in all EU Member States that **prohibits discrimination on the ground of sexual orientation in relation to matters outside employment**.

[249] 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)0426.

8. WHAT THE EUROPEAN UNION COULD DO TO REMOVE THE OBSTACLES FACED BY RAINBOW FAMILIES

8.1. Introduction

This chapter will consider what (taking into account the social and legal problems identified in chapters 2 to 7) the European Union could do to remove the obstacles to the free movement of rainbow families.

8.2. Competence

When considering potential measures to remove obstacles to the free movement of rainbow families, **EU** institutions must bear in mind that they have competence over **freedom of movement** of EU citizens within the territory of the Member States, whereas the **Member States** have competence over **family law and the civil status** of their nationals or residents. This distinction is reflected in the different legal bases for potential measures in the TFEU.

Article **81(3) TFEU** provides that 'measures concerning **family law with cross-border implications** shall be established by the Council, acting in accordance with a special legislative procedure. The **Council** shall act **unanimously** after consulting the European Parliament.'

But another legal basis, not requiring unanimity in the Council, is available and has been used before. In 2001, when the Commission proposed what became **Directive 2004/38** on free movement of EU citizens and their family members, the Explanatory Memorandum relied on several Treaty Articles as the legal basis for the Proposal:

> 'This proposal for a Directive is based on Articles 12, 18(2), 40, 44, and 52 [TEC]. Since Article 18(2) of the Treaty [now Article 21(2) TFEU] is a sort of back-up legal basis that can be used only for people not working, the specific legal bases of Articles 40, 44 and 52, which cover people engaged in gainful activity [employment and self-employment] in the host Member State, need to be used, so that a single instrument can be adopted, applying a single procedure covering all the procedures laid down in the above provisions.'[250]

The equivalent Articles of the TFEU today are Articles 18 (freedom from nationality discrimination), 21(2) (the right to move and reside freely within the territory of the Member States), 46 (freedom of movement for workers), 50(1) (freedom of establishment for self-employed persons), and 59(1) (freedom to provide and receive services). These Articles all provide for the **ordinary legislative procedure**, outlined in **Article 294**, which generally means that a **qualified majority** in the **Council**, as defined in Article 238(3), is sufficient for a measure to be adopted.

[250] 'Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM(2001) 257 final (23 May 2001), https://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-257-EN-F1-1.Pdf, para. 3.1.

As in the case of Directive 2004/38, measures to remove obstacles to the free movement of rainbow families (which include an EU citizen moving with family members to another Member State or returning to their own Member State after exercising free movement rights) could be adopted with Articles 18, 21(2), 46, 50(1), and 59(1) TFEU as their legal bases, on the understanding that these measures would **apply to EU citizens and their family members who are in a situation of free movement**, and **would not affect national family law or civil status legislation applying to a citizen or resident of a Member State, and the citizen or resident's family members, who are in an 'internal situation'**.

8.3. Litigation

The European **Commission** should take action to enforce, or should support civil-society action to enforce or develop, existing EU law or the existing case law of the ECtHR, and the **CJEU** should clarify EU law, as follows:

(1) The Commission should take **enforcement action against Romania** under Article 258 TFEU, because of Romania's ongoing failure to comply with the judgment of the CJEU in ***Coman & Hamilton*** in relation to the recognition of a same-sex spouse under Article 2(2)(a) of Directive 2004/38 (see 4.2.2 above).[251] The Commission should also **examine whether the other 26 Member States comply** with *Coman & Hamilton* and take enforcement action against any that do not comply.

(2) In view of the patchwork of recognition of same-sex registered partners discussed in 5.2.2 above, the Commission should bring judicial review proceedings under Article 263 TFEU against the European Parliament and the Council, **seeking the annulment** of the condition 'if the legislation of the host Member State treats **registered partnerships as equivalent to marriage**' in Article 2(2)(b) of Directive 2004/38, as contrary to Article 21 of the Charter (as explained in 5.2.4 above).

(3) The Commission should **support strategic litigation** initiated by civil-society organisations seeking to extend the CJEU's *Coman & Hamilton* judgment from a residence permit to **other rights or benefits** enjoyed by spouses in a particular Member State, the denial of which causes 'serious inconvenience' (see 4.2.4 and 5.2.3 above), and to extend the ECtHR's *Oliari & Others* and *Taddeucci & McCall* judgments from Italy to other EU member states (those without a 'specific legal framework' for same-sex couples or without a procedure for same-sex partner immigration under national law; see 4.2.1 above).[252]

(4) If the **CJEU** is given the opportunity to rule on the interpretation of the term '**partner'**, in Article 3(2)(b) of Directive 2004/38 and for the purposes of the principle established in the *Reed* judgment, it should make it clear that the term must be read as including both the opposite-sex and the **same-sex partner** of the Union citizen.

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[251] See Communication from the Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', COM/2020/698 final (12 November 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0698, 3.1: "The Commission will continue to ensure the correct application of free movement law … This includes dedicated dialogues with Member States in relation to the implementation of the Coman judgment … If necessary, the Commission will take legal action.'

[252] For example, *Buhuceanu & Ciobotaru* v. *Romania*, No. 20081/19, http://hudoc.echr.coe.int/eng?i=001-200952; *Przybyszewska* v. *Poland*, No. 11454/17, http://hudoc.echr.coe.int/eng?i=001-203744.

(5) If the CJEU is given the opportunity to rule on the requirements imposed on EU Member States, regarding the **examination** of the personal circumstances of the couple that must be undertaken for the purposes of '**facilitating'** the admission of the unregistered partner of the Union citizen into their territory according to Article 3(2)(b) of Directive 2004/38, it should require that this assessment must be **free from discrimination on the ground of sexual orientation**.

(6) If the CJEU is given the opportunity to rule on the interpretation of Directive 2000/78 in cases involving same-sex **unregistered partners**, the Directive should be interpreted as requiring EU Member States' legislation to **prohibit any discrimination** against same-sex unregistered partners with regard to matters that fall within the area of **employment**.

(7) If the CJEU is given the opportunity to rule in cases involving same-sex unregistered partners who have moved within the EU and who are claiming **non-employment-related benefits and entitlements**, it should rule that the host EU Member State should at least – as a minimum – comply with the obligations imposed by the EConHR, when determining which benefits/entitlements it should grant to unregistered same-sex couples who moved to its territory from another EU Member State.

(8) If the CJEU is given the opportunity to rule on the interpretation of the terms used in Directive 2004/38 when referring to **children** and their **parents**, as well as the principles established in *Zhu and Chen* and in *Baumbast*, these terms and principles should be interpreted in a way that is **inclusive of rainbow families**. In this way, rainbow families will enjoy the same family reunification rights under EU law as families founded by opposite-sex couples when they exercise their EU free movement rights.

(9) If the CJEU is given the opportunity to rule in a case involving a rainbow family claiming **benefits or entitlements** in the host Member State, it should rule that all EU Member States must ensure the **continuity – in law – of the familial ties of the members of rainbow families** that move to their territory from another EU Member State, at least in all the circumstances that this is required under the EConHR.

(10) When delivering its preliminary ruling in Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'* (pending), the CJEU should hold that EU law requires that the **familial ties** among the **members of a rainbow family** – as these have been legally established and reflected in a **birth certificate** issued by another EU Member State – will **automatically be recognised** in the host Member State for **all legal purposes** (including family reunification under Directive 2004/38 and under principles established through CJEU case-law).

8.4. Legislation

The **Commission** should insist on the adoption of its existing proposal for legislation, and make a new proposal for legislation:

(1) The Commission should put as much **pressure** as possible on the **Council** to approve the Commission's 'Proposal for a Council Directive on implementing the principle of **equal treatment** between persons irrespective of religion or belief, disability, age or sexual orientation', which was

published over twelve years ago on 2 July 2008.[253] The Proposal would fill a gap in existing EU anti-discrimination law by bringing the material scope of protection against discrimination based on religion or belief, disability, age, or sexual orientation into line with the material scope of protection against discrimination based on racial or ethnic origin or (in most cases) sex. Article 3(1) of the proposed Directive would add to existing protection in the areas of employment and vocational training: '(a) Social protection, including social security and healthcare; (b) Social advantages; (c) Education; (d) Access to and supply of goods and other services which are available to the public, including housing.'

It is a disgrace that EU law permits people who are lesbian or gay or bisexual, who are Muslim or members of other religious minorities, or who have a disability (including people who use wheelchairs) to be refused service by a hotel or restaurant in Member States with no national legislation prohibiting discrimination on these grounds in these areas. A rainbow family exercising its free movement rights under the CJEU's *Coman & Hamilton* judgment could be told after arriving in another Member State that 'there is no room in the inn': a hotel renting rooms, or a landlord renting apartments, could legally (under national law and in the absence of EU legislation) refuse to provide accommodation to a same-sex couple (travelling with or without children). In Italy in 2017, a same-sex couple were told by the owner of a guesthouse that the owner did not accept 'gays and animals' ('Non accettiamo gay e animali').[254]

(2) With a view to removing the obstacles to freedom of movement that non-recognition of a same-sex marriage or a registered partnership can create (see 4.2.4 and 5.2.3 above), and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should propose **legislation**, **on the legal basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU, requiring all Member States to recognise**, for the purposes of national law, a **marriage or registered partnership formed in another Member State**, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the ECtHR.[255] The reference to the case law of the ECtHR, with which all Member States must comply, would provide a workable limit on the free movement situations in which EU law would require equal treatment of same-sex spouses or registered partners.

(3) With a view to removing the obstacles to freedom of movement that non-recognition of a birth certificate can create (see 7.6.2 above), and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should propose legislation, on the legal bases of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU, **requiring all Member States to recognise**, for all purposes of national law (including family reunification under Directive 2004/38), the **adults mentioned in a birth certificate issued in another Member State as the legal parents of the child** mentioned in that birth certificate, **regardless of the sexes or the marital status of the adults**.[256] This will ensure

[253] COM(2008) 426 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426.
[254] See https://www.repubblica.it/cronaca/2017/07/23/news/calabria_coppia_omosessuale_respinta_da_struttura_nei_pressi_di_tropea_qui_niente_gay_e_animali_-171467234/. Compare the enforcement of national legislation in a similar situation by the United Kingdom Supreme Court in *Bull* v. *Hall*, [2013] UKSC 73, https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.
[255] See Communication, above n. 2, 3.2: '[The Commission] will explore possible measures to support the mutual recognition of same-gender spouses and registered partners' legal status in cross border situations.'

[256] See Communication, note 2 above, 3.2: 'The Commission will push for mutual recognition of family relations in the EU. If one is parent in one country, one is parent in every country. In 2022, the Commission will propose a

that when a rainbow family moves, the **familial ties** among the members of the family – as legally established and reflected in a birth certificate issued by another Member State – will **automatically be recognised** in the host Member State for all purposes of national law (including family reunification under Directive 2004/38).

8.5. European Commission: Non-binding ('soft law') measures

The **Commission** should adopt non-binding **'soft law' measures** that would facilitate the free movement of rainbow families in the EU:

(1) The Commission should issue a **Communication** clarifying that the term '**partner**', as used in Article 3(2)(b) of Directive 2004/38 and in the CJEU's *Reed* judgment, must be read as including both the opposite-sex and the **same-sex partner** of the Union citizen.

(2) The Commission should issue a **Communication** clarifying that when EU Member States undertake an examination of the personal circumstances of the couple for the purpose of 'facilitating' the admission of the unregistered cohabiting partner of the Union citizen into their territory, under Article 3(2)(b) of Directive 2004/38, their assessment must be **free from discrimination** on the ground of sexual orientation.

(3) The Commission should issue a **Communication** clarifying that **Directive 2000/78** must be read, in the light of the Maruko, Römer, and Hay judgments of the CJEU and the Taddeucci & McCall judgment of the ECtHR, as requiring Member States to **prohibit any discrimination in employment, vocational training, or any other area within the material scope of the Directive**, against **same-sex spouses** compared with opposite-sex spouses (if same-sex couples have access to marriage), against **same-sex registered partners** compared with opposite-sex spouses or registered partners (if same-sex couples have access to registered partnership), or **same-sex unregistered cohabiting partners** compared with opposite-sex spouses, registered partners, or unregistered cohabiting partners (if same-sex couples do not have access to marriage or registered partnership).

(4) The Commission should issue a **Communication** clarifying that all references in **Directive 2004/38** to a **'parent', a 'child', a 'direct descendant', or a 'direct relative in the ascending line'**, as well as the principles established in the CJEU's Zhu and Chen and Baumbast judgments, are **inclusive of rainbow families**, to ensure that, when they exercise their EU free movement rights, they enjoy the same family reunification rights under EU law as families founded by opposite-sex couples.

(5) The Commission should issue a **Communication** clarifying that all EU Member States must ensure the **continuity – in law – of the familial ties of the members of rainbow families that move** to their territory from another EU Member State, at least in all the circumstances that this is required under the EConHR.

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horizontal legislative initiative to support the mutual recognition of parenthood between Member States, for instance, the recognition in one Member State of the parenthood validly attributed in another Member State.'

8.6. European Parliament: Non-binding ('soft law') measures

The European Parliament should **adopt a resolution similar to the 10 October 2018 resolution of the PACE on 'Private and family life: achieving equality regardless of sexual orientation'**,[257] stressing legislation that the European Commission should propose (see 8.4 above).

[257] See http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en.

9. CONCLUSIONS AND RECOMMENDATIONS

Rainbow families still face major obstacles to their freedom of movement in the EU in 2021. But, by exercising the EU's competence in relation to free movement of EU citizens and their family members, there are many ways in which the EU institutions could act to remove these obstacles. We recommend that the EU institutions take the following actions or adopt the following measures:

(1) The Commission should take enforcement action against Romania under Article 258 TFEU, because of Romania's ongoing failure to comply with the judgment of the CJEU in Coman & Hamilton in relation to the recognition of a same-sex spouse under Article 2(2)(a) of Directive 2004/38 (see 4.2.2 above).[1] The Commission should also examine whether the other 26 Member States comply with Coman & Hamilton and take enforcement action against any that do not comply.

(2) In view of the patchwork of recognition of same-sex registered partners discussed in 5.2.2 above, the Commission should bring judicial review proceedings under Article 263 TFEU against the European Parliament and the Council, seeking the annulment of the condition 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' in Article 2(2)(b) of Directive 2004/38, as contrary to Article 21 of the Charter (as explained in 5.2.4 above).

(3) The Commission should support strategic litigation initiated by civil-society organisations seeking to extend the CJEU's Coman & Hamilton judgment from a residence permit to other rights or benefits enjoyed by spouses in a particular Member State, the denial of which causes 'serious inconvenience' (see 4.2.4 and 5.2.3 above), and to extend the ECtHR's Oliari & Others and Taddeucci & McCall judgments from Italy to other EU member states (those without a 'specific legal framework' for same-sex couples or without a procedure for same-sex partner immigration under national law; see 4.2.1 above).[2]

(4) If the CJEU is given the opportunity to rule on the interpretation of the term 'partner', in Article 3(2)(b) of Directive 2004/38 and for the purposes of the principle established in the Reed judgment, it should make it clear that the term must be read as including both the opposite-sex and the same-sex partner of the Union citizen.

(5) If the CJEU is given the opportunity to rule on the requirements imposed on EU Member States, regarding the examination of the personal circumstances of the couple that must be undertaken for the purposes of 'facilitating' the admission of the unregistered partner of the Union citizen into their territory according to Article 3(2)(b) of Directive 2004/38, it should require that this assessment must be free from discrimination on the ground of sexual orientation.

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[1] See Communication from the Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', COM/2020/698 final (12 November 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0698, 3.1: "The Commission will continue to ensure the correct application of free movement law … This includes dedicated dialogues with Member States in relation to the implementation of the Coman judgment … If necessary, the Commission will take legal action.'

[2] For example, *Buhuceanu & Ciobotaru* v. *Romania*, No. 20081/19, http://hudoc.echr.coe.int/eng?i=001-200952; *Przybyszewska* v. *Poland*, No. 11454/17, http://hudoc.echr.coe.int/eng?i=001-203744

(6) If the CJEU is given the opportunity to rule on the interpretation of Directive 2000/78 in cases involving same-sex unregistered partners, the Directive should be interpreted as requiring EU Member States' legislation to prohibit any discrimination against same-sex unregistered partners with regard to matters that fall within the area of employment.

(7) If the CJEU is given the opportunity to rule in cases involving same-sex unregistered partners who have moved within the EU and who are claiming non-employment-related benefits and entitlements, it should rule that the host EU Member State should at least – as a minimum – comply with the obligations imposed by the EConHR, when determining which benefits/entitlements it should grant to unregistered same-sex couples who moved to its territory from another EU Member State.

(8) If the CJEU is given the opportunity to rule on the interpretation of the terms used in Directive 2004/38 when referring to children and their parents, as well as the principles established in Zhu and Chen and in Baumbast, these terms and principles should be interpreted in a way that is inclusive of rainbow families. In this way, rainbow families will enjoy the same family reunification rights under EU law as families founded by opposite-sex couples when they exercise their EU free movement rights.

(9) If the CJEU is given the opportunity to rule in a case involving a rainbow family claiming benefits or entitlements in the host Member State, it should rule that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families that move to their territory from another EU Member State, at least in all the circumstances that this is required under the EConHR.

(10) When delivering its preliminary ruling in Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'* (pending), the CJEU should hold that EU law requires that the familial ties among the members of a rainbow family – as these have been legally established and reflected in a birth certificate issued by another EU Member State – will automatically be recognised in the host Member State for all legal purposes (including family reunification under Directive 2004/38 and under principles established through CJEU case-law).

(11) The Commission should put as much pressure as possible on the Council to approve the Commission's 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation', which was published over twelve years ago on 2 July 2008.[3] The Proposal would fill a gap in existing EU anti-discrimination law by bringing the material scope of protection against discrimination based on religion or belief, disability, age, or sexual orientation into line with the material scope of protection against discrimination based on racial or ethnic origin or (in most cases) sex. Article 3(1) of the proposed Directive would add to existing protection in the areas of employment and vocational training: '(a) Social protection, including social security and healthcare; (b) Social advantages; (c) Education; (d) Access to and supply of goods and other services which are available to the public, including housing.' It is a disgrace that EU law permits people who are lesbian or gay or bisexual, who are Muslim or members of other religious minorities, or who have a disability (including people who use wheelchairs) to be refused service by a hotel or restaurant in Member States with no national legislation prohibiting discrimination on these grounds in these areas (see 8.4 above).

[3] COM(2008) 426 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426.

(12) With a view to removing the obstacles to freedom of movement that non-recognition of a same-sex marriage or a registered partnership can create (see 4.2.4 and 5.2.3 above), and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should propose legislation, on the legal basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU, requiring all Member States to recognise, for the purposes of national law, a marriage or registered partnership formed in another Member State, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the ECtHR.[4] The reference to the case law of the ECtHR, with which all Member States must comply, would provide a workable limit on the free movement situations in which EU law would require equal treatment of same-sex spouses or registered partners.

(13) With a view to removing the obstacles to freedom of movement that non-recognition of a birth certificate can create (see 7.6.2 above), and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should propose legislation, on the legal basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU, requiring all Member States to recognise, for all purposes of national law (including family reunification under Directive 2004/38), the adults mentioned in a birth certificate issued in another Member State as the legal parents of the child mentioned in that birth certificate, regardless of the sexes or the marital status of the adults.[5] This will ensure that when a rainbow family moves, the familial ties among the members of the family – as legally established and reflected in a birth certificate issued by another Member State – will automatically be recognised in the host Member State for all purposes of national law (including family reunification under Directive 2004/38).[6]

(14) The Commission should issue a Communication clarifying that the term 'partner', as used in Article 3(2)(b) of Directive 2004/38 and in the CJEU's Reed judgment, must be read as including both the opposite-sex and the same-sex partner of the Union citizen.

(15) The Commission should issue a Communication clarifying that when EU Member States undertake an examination of the personal circumstances of the couple for the purpose of 'facilitating' the admission of the unregistered cohabiting partner of the Union citizen into their territory, under Article 3(2)(b) of Directive 2004/38, their assessment must be free from discrimination on the ground of sexual orientation.

(16) The Commission should issue a Communication clarifying that Directive 2000/78 must be read, in the light of the Maruko, Römer, and Hay judgments of the CJEU and the Taddeucci & McCall judgment of the ECtHR, as requiring Member States to prohibit any discrimination in employment, vocational training, or any other area within the material scope of the Directive, against same-sex spouses compared with opposite-sex spouses (if same-sex couples have access to marriage), against same-sex registered partners compared with opposite-sex spouses or registered partners (if same-sex couples have access to registered partnership), or same-sex unregistered cohabiting partners compared with

[4] See Communication, note 2 above, 3.2: '[The Commission] will explore possible measures to support the mutual recognition of same-gender spouses and registered partners' legal status in cross border situations.'
[5] See Communication, note 2 above, 3.2: 'The Commission will push for mutual recognition of family relations in the EU. If one is parent in one country, one is parent in every country. In 2022, the Commission will propose a horizontal legislative initiative to support the mutual recognition of parenthood between Member States, for instance, the recognition in one Member State of the parenthood validly attributed in another Member State.
[6] Case C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'* (pending).

opposite-sex spouses, registered partners, or unregistered cohabiting partners (if same-sex couples do not have access to marriage or registered partnership).

(17) The Commission should issue a Communication clarifying that all references in Directive 2004/38 to a 'parent', a 'child', a 'direct descendant', or a 'direct relative in the ascending line', as well as the principles established in the CJEU's *Zhu and Chen* and *Baumbast* judgments, are inclusive of rainbow families, to ensure that, when they exercise their EU free movement rights, they enjoy the same family reunification rights under EU law as families founded by opposite-sex couples.

(18) The Commission should issue a Communication clarifying that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families that move to their territory from another EU Member State, at least in all the circumstances that this is required under the EConHR.

(19) The European Parliament should adopt a resolution similar to the 10 October 2018 resolution of the PACE on 'Private and family life: achieving equality regardless of sexual orientation',[7] stressing legislation that the European Commission should propose (see 8.4 above).

[7] See http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en.

ANNEX 1 - A SELECTION OF REAL CASES ILLUSTRATING THE OBSTACLES FACED BY RAINBOW FAMILIES

Petition No. 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union (open)

Petition Summary: 'The petitioner believes that LGBT families do not have the same rights across the European Union. She explains that she is married to a British lady and gave birth to a daughter in Spain in 2014. The Spanish birth certificate of her daughter indicates both her and her partner as mothers. Yet, outside of Spain they are not considered as family, as their daughter has only one parent. In the UK, where they applied for a British passport they were told that under UK family law, the petitioner's married partner is not recognised as the mother and consequently, if they ever decided to move to the UK, the petitioner's married partner would have to adopt her own daughter. In Greece they were also told that only the birth mother is recognised as the parent, since there are no provisions in the Greek law for similar families. For the above reasons, for a long time the petitioner's daughter did not have a passport and the family was unable to travel. The petitioner believes that families like hers are being refused their right to free movement and their children are vulnerable, since their parents are not equally recognised across the EU. The petitioner urges that the EP and the Commission work towards making official civil status documents, such as birth certificates, to be accepted de facto across the Member States. She believes that the children of parents in similar situation deserve the same rights as all the children, with both their parents recognised.'

Petition No. 1493/2016 by Javier Diez (Spanish) on surrogacy and the relevant legal framework (declared inadmissible)

Petition Summary: 'The petitioner explains that surrogate pregnancy is still unregulated in most Member States and that parents returning to the EU with their children are unable to have their newborns recorded in civil registers. These irregularities are in flagrant breach of Article 7(1) of the UN Convention on the Rights of the Child. The petitioner calls on the European Union to take urgent steps to address the issue at hand, and to require Member States to recognise and register all children born through surrogacy abroad, ensuring that their legal relationships are upheld and without forcing them to change their name and family when crossing from one country into another, and to grant parents all the maternity and/or paternity rights and benefits to which they are entitled (irrespective of civil status, gender or sexual orientation) in a bid to ensure optimum care for minors and improve work-life balance.'

Petition No. 0973/2018 by Adolfo Pablo Lapi (Italian) on discrimination against homosexual and LGBTI couples in Europe (closed)

Petition Summary: 'The petitioner complains about the discrimination suffered by homosexual and LGBTI couples in certain European countries, in particular those with predominantly Catholic and Orthodox populations. He refers to a gap between northern Europe, which is rich and respects human rights, and southern Europe, which is poor and sometimes homophobic. According to the petitioner, the failure to respect sexual minorities makes societies selfish and devoids them of love and respect. The petitioner trusts in the legislator's goodwill.'

Petition No. 0402/2020 by Frank Bartz (German) on the fundamental rights of LGBT-EU citizens and their different treatment in different Member States (open)

Petition Summary: 'The petitioner points out that homosexual couples are still being treated differently in different Member States and remain at a disadvantage compared with heterosexual couples, notwithstanding the guarantees of equality embodied in the Treaties and the Charter of Fundamental Rights of the European Union. Despite the protection afforded to marriages and families, same-sex bi-national couples find it harder, for example, to obtain recognition of marriage certificates in another

Member State. Member States are also adopting laws effectively invalidating the fundamental rights enshrined in the European Convention on Human Rights. The petitioner indicates that the German authorities are refusing to recognise his marriage to a Dutch national, which took place in 2011, issue his partner with a passport or grant him the right to vote, unless he renounces certain rights, effectively leaving him stateless. Moreover, unlike a heterosexual man, he is not entitled to seek redress before the courts. The petitioner is accordingly seeking the adoption of a European law containing uniform definitions of concepts such as gender and marriage, coupled with the recognition of LGTB minority rights.'

Petition 0657/2020 by Catalina Pallàs Picó (Spanish), on behalf of the Association of LGBTI Families of Catalonia, on the right of free movement for LGBTI families in the EU (open)
Petition Summary: 'The petitioner believes that LGBT families do not have the right to free movement within the EU. She considers that Spanish LGBT families, whose family ties are established in law, would not be recognised as such if they were to move to another EU Member State without national laws recognising LGBT persons and their children. The refusal of a host Member State to legally recognise the family ties of an LGBT family could restrict freedom of movement in two ways: denial of family reunification rights and denial of a series of rights (such as social and tax benefits), to which the family would have been entitled if the legal ties between its members had been recognised. She calls for LGBT families to be ensured fair treatment and for their rights to be guaranteed even in Member States that do not have national laws in place covering LGBT families.'

Petition 0712/2020 by R.A.P. (Spanish) on the fundamental rights of rainbow families and free movement within the EU (open)
Petition Summary: 'The petitioner deplores that LGBT families do not have the same rights across the European Union. The petitioner is married to a Polish same-sex partner and they have two children, born by surrogacy in the US in 2016 and 2018. The Spanish birth certificates of their children indicate both partners as parents. Yet, in other Member States, they are not considered as a family, and their children can only have one parent. In Poland, they cannot apply for Polish passports for their children because, under Polish family law, the petitioner's married partner is not recognized as the other parent and, consequently, if they ever decided to move to Poland, their family would not be recognized. The petitioner claims that families in this situation are being denied their right to free movement and that their children are vulnerable, since their parents are not equally recognised across the EU. The petitioner urges the EP and the Commission to work towards the de facto recognition of official civil status documents, such as birth certificates, across all Member States. The petitioner believes that the children of parents in similar situations deserve the same rights as all other children, with both of their parents being recognized.'

Petition 1038/2020 by Björn Sieverding (German), on behalf of the Network of European LGBTIQ* Families Associations, signed by one other person, on the mutual recognition of legal guardians in LGBTIQ families in the EU (open)
Petition Summary: 'The petitioner, together with another representative of an LGBT organisation, has taken up the case of a Danish mother of a five-year-old child. The petitioner states that the Danish woman married the biological mother, a Bulgarian woman, in Denmark, but has since divorced. The boy has Danish and Bulgarian nationality and both have custody under Danish law. The biological mother took the boy with her to Bulgaria, where the Bulgarian courts ruled out 'joint motherhood' on the grounds that there was no provision for such an arrangement in law. The Danish mother was neither invited to nor represented at those proceedings. Her right to custody of the child was not recognised and she was not granted visiting rights. The Danish courts have also declared that they do not have jurisdiction because it is a cross-border matter. The petitioner regards this case as an infringement of the free movement of persons and a flagrant violation of fundamental rights'.

Petition 1179/2020 by Dan Sobovitz (Hungarian) bearing 2 signatures, on the protection of the right of rainbow families to free movement within the EU (open)

Petition Summary: 'The petitioner and his partner, who currently reside in Germany, are the fathers of two children. They deplore that same-sex parented families do not have the same rights across the European Union. In their opinion, the lack of common rules across the EU violates their rights to move and reside freely within the territory of the EU Member States, to respect for private and family life, to be protected from discrimination on the ground of sexual orientation as well as their children's right to be protected from discrimination on the ground of sexual orientation by association with their gay parents. The petitioners, therefore, call on the European Parliament and the European Commission to put forward proposals for EU legislation aimed at providing concrete solutions for rainbow families and at avoiding that same-sex parents and their children live the current legal void'.

ANNEX 2 - CASE LAW OF THE CJEU AND THE ECTHR RELEVANT TO RAINBOW FAMILIES

1. Court of Justice of the European Union (CJEU)

Case 59/85 State of the Netherlands v Ann Florence Reed [1986] ECLI:EU:C:1986:157
Ann Florence Reed was a British national who had moved to the Netherlands with her unmarried partner who was also British and who was a 'worker' covered by Article 48 EEC (now Article 45 TFEU) in the Netherlands. She applied for a residence permit as the family member of a 'worker', but the Dutch Secretary of State refused this, on the ground that she could not qualify as a 'family member' of a 'worker' as she did not fall within any of the categories laid down in Article 10 of Regulation 1612/68. As a result, she brought an action against the Dutch authorities claiming that the refusal to grant her a residence permit was contrary to EU law. The national court hearing the case on appeal stayed the proceedings and made a reference for a preliminary ruling, asking a) whether EU law required Member States to treat a person who had a stable relationship with a 'worker' as the 'spouse' of that 'worker' for the purposes of Article 10 of Regulation 1612/68, and b) whether the fact that a Member State treated the unmarried partner of one of its nationals as a 'spouse', whereas it refused to do so under the same circumstances for the unmarried partner of a national of another Member State who was a 'worker' in its territory, amounted to discrimination on the ground of nationality contrary to EU law. In its response, the CJEU clarified that 'the term "spouse" in Article 10 of the Regulation refers to a marital relationship only'. However, it also held that the right of a 'worker' to be joined in the host Member State by his/her partner falls within the concept of a 'social advantage' for the purposes of Article 7(2) of Regulation 1612/68 (which provided that 'workers' who held the nationality of other Member States should enjoy the same social and tax advantages as national workers). Thus, Member States which granted such an advantage to their own nationals could not refuse to grant it to 'workers' who were nationals of other Member States, as such a refusal would be contrary to Articles 7 and 48 EEC (now Articles 18 and 45 TFEU).

Case C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd [1998] ECLI:EU:C:1998:63
The case involved the refusal of South-West Trains to grant travel concessions (free rail travel) to Ms Grant, one of its employees, for her female partner, with whom she had a stable relationship for over two years. Travel concessions had been granted to Ms Grant's male predecessor in the post for his female partner (to whom he was not married). According to the regulations of South-West Trains, travel concessions were granted to employees for their spouse or their opposite-sex partner, provided that the couple were in a stable relationship for at least two years. The only reason that the travel concessions were refused to Ms Grant was, therefore, that her partner was of the same sex as her. The matter was taken to an English employment tribunal, which made a reference for a preliminary ruling to the CJEU: the question was whether the refusal of South-West Trains to grant the travel concessions amounted to a breach of EU law and, in particular, to discrimination based on sex in relation to pay, contrary to Article 119 EEC (now Article 157 TFEU) and Directive 75/117 (repealed and replaced by Directive 2006/54). The CJEU held that the contested refusal did not amount to discrimination based on sex, because the travel concessions would also be refused to a male worker who was in a stable relationship with a man: men (who had a partner of the same sex) were treated just as badly as women (who had a partner of the same sex). The Court also held that, 'in the present state of the law within the Community', stable relationships between two persons of the same sex were not equivalent to marriages or stable relationships outside marriage between two persons of the opposite sex, and that discrimination based on sexual orientation did not constitute discrimination based on sex. The outcome on the facts of *Grant* would be different under Directive 2000/78, which expressly prohibits discrimination based on sexual orientation.

Case T-264/96 D v Council of the European Union [1999] ECLI:EU:T:1999:13
D was an official working at the Council of the EU who had entered into a registered partnership with his male partner in Sweden. He applied for a household allowance claiming that his registered partnership was equivalent to a marriage, given that the version of the EU Staff Regulations at the time provided that the household allowance shall be granted to, inter alia, married officials. The question was whether an EU official who had contracted a same-sex registered partnership in an EU Member State could be considered a 'married official' under the Staff Regulations. The Council of the EU refused to award D the household allowance on the ground that the Staff Regulations could not be construed as allowing a 'registered partnership' to be treated as being equivalent to a marriage. D, supported by the Kingdom of Sweden, took the case before the Court of First Instance, which dismissed the application by D for annulment of the Council's refusal. The Court of First Instance held that the Council was under no obligation to regard as equivalent to marriage for the purposes of the Staff Regulations the situation of a person who had a stable relationship with a partner of the same sex, even if that relationship had been officially registered in a Member State. Same-sex relationships were not covered by the right to respect for family life protected under Article 8 ECHR. The relevant provisions of the Staff Regulations applied equally to men and women (the registered partnership between two women would, equally, not be recognised as equivalent to marriage for the purposes of Regulations). Thus, there was no discrimination based on sex.

Joined Cases C-122/99 P and C-125/99 P – D and Kingdom of Sweden v Council of the European Union [2001] ECLI:EU:C:2001:304
This was an appeal against the judgment of the Court of First Instance in Case T-264/96 *D v Council of the European Union*. The CJEU dismissed the appeal noting that the term 'marriage' meant a union between two persons of the opposite sex and that 'arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage'. Therefore, the Court could not interpret the Staff Regulations in such a way that legal situations distinct from marriage should be treated in the same way as marriage. The CJEU also upheld the reasoning of the CFI with regards to the existence of discrimination, noting that the Staff Regulations – which restricted the household allowance to married officials – were not discriminatory on the ground of sex as they applied equally to men and women who had entered into a same-sex registered partnership (i.e. both sexes were treated equally badly). The difference in treatment was based on the legal nature of the ties between the official and the partner and not on the sex of the partner. The situation of an official who had contracted a registered partnership was not comparable, for the purposes of the Staff Regulations, to that of a married official. In 2004, the Council amended the Staff Regulations to provide for benefits for the non-marital partners of EU officials. [1]

Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] ECLI:EU:C:2008:179
Mr Maruko entered into a (German) registered life partnership with another man in 2001. Mr Maruko's life partner died in 2005. As a designer of theatrical costumes, Mr Maruko's deceased life partner had been a member of the compulsory pension scheme for theatrical professionals managed by VddB, until his death. Mr Maruko applied to the VddB for a widower's pension. VddB rejected his application on the ground that its regulations did not provide for such an entitlement for surviving life partners: only surviving spouses were entitled to a widower's pension (at the time, marriage was not open to same-sex couples in Germany). Mr Maruko brought an action before a German court, challenging the legality of the refusal on the basis that it amounted to a breach of EU anti-discrimination law. The German court

[1] See Staff Regulations of officials of the European Communities, Article 1d(1); Annex VII, Article 1(2)(c); Annex VIII, Art. 17, as amended by Council Regulation 723/2004/EC (22 March 2004), OJ L124/1; Decision No. 2005/684/EC of the European Parliament, Art. 17(9), (28 September 2005), OJ L262/6 ('[p]artners from relationships recognised in the Member States shall be treated as equivalent to spouses').

stayed the proceedings and made a reference for a preliminary ruling to the CJEU. The CJEU noted that a survivor's pension under an occupational pension scheme amounts to 'pay' and, thus, falls within the material scope of Directive 2000/78, which prohibits discrimination based on, inter alia, sexual orientation in the area of employment. The CJEU then concluded that, if the referring court decides that surviving spouses and surviving life partners are in a comparable situation, so far as concerns the survivor's benefit that is claimed, the regulations that led to the contested refusal must be considered to constitute direct discrimination on the ground of sexual orientation, contrary to Directive 2000/78.

Case F-86/09 W v European Commission [2010] ECLI:EU:F:2010:125

W, a dual Belgian and Moroccan national, was a European Commission official. He and his same-sex partner had made a 'declaration of legal cohabitation' in Belgium. W then applied to the European Commission to receive a household allowance, claiming that, although he and his partner were not married, they qualified under the EU Staff Regulations applicable at the time. The Staff Regulations provided that the household allowance could be granted to an official who is registered as a stable non-marital partner, provided that 'the couple has no access to legal marriage in a Member State'. The European Commission rejected the application on the ground that the couple had access to legal marriage in Belgium. However, W argued that, 'because homosexual acts are a criminal offence under Moroccan legislation, his Moroccan nationality and the legal and emotional ties he had with Morocco "make it impossible [for him] to marry" a person of the same sex'. W successfully applied to the Civil Service Tribunal for annulment of the decision of the European Commission. The Tribunal noted that the Staff Regulations extending entitlement to the household allowance to officials registered as stable partners must be interpreted in such a way as to make those rules as effective as possible. Accordingly, the notion of 'access to legal marriage in a Member State' must not be construed in a purely formal sense, without any verification of whether the couple's access to marriage is practical and effective. For this reason, when examining whether a same-sex couple has access to legal marriage, the provisions of the law of another State with which the situation in question is closely connected, because of the nationality of the persons concerned, cannot be disregarded, especially when that law 'criminalises homosexual acts without making any distinction according to the place where the homosexual act is committed'.

Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg [2011] ECLI:EU:C:2011:286

Until he ceased work on grounds of incapacity, Mr Römer worked for the City of Hamburg and was a member of the retirement pension scheme for employees of the City of Hamburg (HmbZVG). Mr Römer entered into a (German) registered life partnership with another man in 2001; at the time, marriage was not open to same-sex couples in Germany. Mr Römer informed his employer and requested that the amount of his supplementary retirement pension be recalculated, on the basis of the more favourable deduction made under the different tax category, applicable, inter alia, to married employees. His employer refused to amend the calculation of the said pension, on the ground that, under the pension scheme regulations, only married persons (i.e not registered life partners) could fall within the more favourable tax category. Mr Römer brought an action before a German court, challenging the legality of the refusal on the basis that it amounted to a breach of EU anti-discrimination law. The German court stayed the proceedings and made a reference for a preliminary ruling to the CJEU. The CJEU noted that supplementary retirement pensions such as those paid under the scheme of which Mr Römer had been a member amount to 'pay' and, thus, fall within the material scope of Directive 2000/78. It then recalled its ruling in Case C-267/06 *Maruko* and noted that, when the referring court is comparing married couples with registered life partners, it is not required that the situations are identical but only that they are comparable, and that the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned (on the facts, supplementary retirement pensions). The CJEU then held that the contested regulations of the pension scheme – and the resultant difference in treatment between married couples and registered life partners – could amount to a violation of Directive 2000/78 if: (a) in the Member State concerned, marriage is reserved to persons of a different sex and exists alongside a registered life partnership

which is reserved to persons of the same sex; and (b) there is direct discrimination on the ground of sexual orientation because, under national law, registered life partners are in a legal and factual situation comparable to that of married persons as regards the benefit claimed (i.e. the supplementary retirement pension).

Case C-267/12 Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres [2013] ECLI:EU:C:2013:823

Mr Hay brought proceedings against his employer (Crédit agricole) concerning the latter's refusal to award him days of special leave and a bonus granted to staff who marry, following the conclusion by Mr Hay of a (French) civil solidarity pact (PACS). At the time, marriage was only open to opposite-sex couples in France, whereas the PACS was available to both opposite-sex and same-sex couples. Mr Hay brought an action before a labour tribunal seeking to obtain payment of the marriage bonus and compensation for the days of special leave he had been refused. His action was dismissed. The court hearing his second appeal stayed the proceedings and made a reference for a preliminary ruling to the CJEU, asking, whether the contested refusal amounted to discrimination on the ground of sexual orientation in the area of employment in breach of Directive 2000/78. It was clear that the situation fell within the material scope of Directive 2000/78, as it concerned rules relating to employment and working conditions including pay conditions. The CJEU recalled its judgments in Case C-147/08 *Römer* and Case C-267/06 *Maruko*, noting that, in order for there to be discrimination, the situation of married employees and those who have entered into a PACS should be comparable, for the purposes of the bonus and the days of special leave, and that the comparability assessment must be carried out in a specific and concrete manner in the light of the benefit concerned. Unlike in those cases, however, it did not leave it to the referring court to conduct the comparability assessment, but proceeded to conduct the assessment itself. The CJEU concluded that married employees and employees who had entered into a PACS were in a comparable situation for the purposes of the bonus and the days of special leave. Accordingly, the CJEU found that the difference in treatment at issue amounted to direct discrimination based on sexual orientation, contrary to Directive 2000/78, given that marriage was legally possible in France – at the time – only between persons of different sexes.

Case C-459/14 Fadil Cocaj v Bevándorlási és Állampolgársági Hivatal [case not decided]

In this case, a Hungarian court referred a number of questions to the CJEU for a preliminary ruling. The questions concerned the interpretation of the term 'registered partnership' in Article 2(2)(b) of Directive 2004/38, the formal and substantive criteria that must be satisfied for a registered partnership to fall within the scope of the Directive, and whether the term included both opposite-sex and same-sex registered partnerships. However, the case was removed from the register one year after it was referred. Thus, the CJEU did not have the opportunity to provide an answer to those questions.

Case C-443/15 David L Parris v Trinity College Dublin and Others [2016] ECLI:EU:C:2016:897

In 2011, Ireland introduced same-sex registered partnerships and began to recognise same-sex registered partnerships contracted elsewhere. In 2015, it opened marriage to same-sex couples. Dr Parris (born in 1946) was an academic at Trinity College Dublin and a member of the occupational benefit scheme operated by his employer. He entered into a civil partnership with his same-sex partner in the UK in 2009 (when he was 63), which was recognised in Ireland only in 2011. Dr Parris asked his employer to grant his civil partner, on Dr Parris's death, the survivor's pension provided for by the occupational benefit scheme of which Dr Parris was a member. His employer refused on the ground that Dr Parris did not satisfy the condition that he must have entered into a registered partnership or marriage prior to turning 60 (even though Irish law did not permit him to do so until he was almost 65). Dr Parris brought proceedings before a labour court in Ireland, which referred questions for a preliminary ruling to the CJEU. The questions asked whether a rule of an occupational pension scheme, which specifies an age by which a member of the scheme must marry or enter into a civil partnership for his spouse or civil partner to be entitled to a survivor's pension, amounts to discrimination based on sexual orientation and/or age contrary to Directive 2000/78. The CJEU first noted that a survivor's

pension falls within the material scope of Directive 2000/78 as it is considered 'pay'. It then pointed out that the contested rule did not amount to direct discrimination based on sexual orientation as it applied equally to LGB employees and to heterosexual employees and excluded their partners without distinction from receiving a survivor's pension, if the marriage or civil partnership had not been entered into before the employee reached the age of 60. The CJEU also found that the rule did not amount to indirect discrimination based on sexual orientation either: the fact that some employees (those in a same-sex registered partnership who were born before 1951) are unable to satisfy the contested rule is a consequence of the state of the law in Ireland at the time of their 60th birthday (i.e. the lack of recognition of any form of civil partnership or marriage) and of the absence of transitional provisions for the same-sex registered partnerships of employees born before 1951 (after the judgment, Ireland amended its legislation to provide for employees like Dr Parris).[2] In addition, it was noted that Member States are free to decide whether to provide marriage for persons of the same sex, or an alternative form of legal recognition, and to set the date from which such a marriage or alternative form of legal recognition is to have effect. The CJEU also found that the contested rule was not discriminatory on the ground of age, nor was it capable of creating discrimination as a result of the combined effect of sexual orientation and age.

Case C-673/16 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne [2018] ECLI:EU:C:2018:385

This case concerned the refusal of Romania to recognise a same-sex marriage contracted between an EU citizen, Mr Coman (a Romanian national), and a third-country national (Mr Hamilton) in another EU Member State (Belgium), for the purpose of granting family reunification rights under EU free movement law. The main question that arose was whether the term 'spouse' in Article 2(2)(a) of Directive 2004/38 should be interpreted as including the same-sex spouse of an EU citizen. Directive 2004/38 includes an exhaustive list of family members that can (automatically) accompany or join EU citizens when they move between Member States, without needing to satisfy the immigration requirements of the Member State to which the EU citizen moves. The CJEU held that the term 'spouse' in Directive 2004/38 should be interpreted as including the same-sex spouse of an EU citizen who exercises free movement rights. This means that when an EU citizen moves to another Member State, (s)he is entitled to rely on EU law (i.e. the free movement of persons provisions and/or Directive 2004/38) in order to require the Member State to which (s)he moves to accept within its territory his/her same-sex spouse and grant him/her a right of residence; this is so irrespective of whether that Member State has opened marriage to same-sex couples in its territory. However, if the EU citizen is exercising free movement rights to return to their Member State of nationality from another Member State (as in this case), (s)he must have spent a period of at least three months in the territory of the host Member State(i.e. a period of 'genuine residence' in the host State), during which time family life must have been created or strengthened in the host State, before returning to his/her Member State of nationality where family reunification rights would be claimed.

Case C-490/20 VMA v Stolichna Obsthina, Rayon 'Pancharevo' (hearing on 9 February 2021; Advocate General's Opinion expected on 15 April 2021)

This is a reference for a preliminary ruling made by the Administrative Court of the City of Sofia, Bulgaria as a result of proceedings before it, initiated by an action brought by VMA (a woman who is a Bulgarian national) against the refusal of the Sofia municipality ('Pancharevo' district) to issue a birth certificate for the girl, SDKA, born in 2019 in Spain, whose birth was attested by a Spanish birth certificate which names VMA and KDK (a UK national), who are a married same-sex couple, as the girl's mothers. The grounds for the refusal were a) the lack of sufficient information regarding the child's parentage with respect to her biological mother, and b) that the registration of two female parents on a child's birth

[2] Social Welfare, Pensions and Civil Registration Act 2018, s. 27.

certificate is inadmissible, as same-sex marriages are currently not permitted in Bulgaria and such registration is contrary to public policy.
The questions referred to the CJEU are the following:
1. Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?
2. Must Article 4(2) TEU and Article 9 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:
- Must Art. 4(2) TEU be interpreted as allowing Member States to request information on the biological parentage of the child?
- Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?
3. Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as sa result, may impede the unlimited exercise of her rights as an EU citizen?
4. If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law?

Case C-2/21, Rzecznik Praw Obywatelskich (pending)
Information is currently not available as the date of the lodging of the application initiating proceedings (04/01/2021) is very recent.

2. European Court of Human Rights (ECtHR)

(a) Same-sex couples: Access to the rights of unmarried opposite-sex couples

- *Karner* v. *Austria* (24 July 2003) (violation of Article 14 together with Article 8, home; only unmarried opposite-sex but not same-sex partners could succeed to a tenancy after the death of the official tenant): '41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a

homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion. 42. … [T]he Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of … the … Act that prevented a [same-sex] surviving partner from relying on [it].'

- *Schalk & Kopf* v. *Austria* (24 June 2010) (no violation; exclusion of same-sex couple from marriage): '94. ... [T]he relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.'

- *Vallianatos & Others* v. *Greece* (7 November 2013, Grand Chamber) (violation of Article 14 together with Article 8, private and family life; a new institution of civil union was created for unmarried opposite-sex couples only): '81. … [T]he civil partnerships provided for by Law no. 3719/2008 as an officially recognised alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce. … [S]ame-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. … 85. … [I]t is … for the Greek Government to show … that it was necessary, in pursuit of the legitimate aims which they invoked, to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008 … 92. … [T]he Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. …'

- *Pajić* v. *Croatia* (23 February 2016) (violation of Article 14 together with Article 8, private and family life; family-member residence permit available to an unmarried opposite-sex partner but not to a same-sex partner): ' 74. … [T]he relevant provisions of the Aliens Act expressly reserved the possibility of applying for a residence permit for family reunification to different-sex couples, married or living in an extramarital relationship … [B]y tacitly excluding same-sex couples from its scope, the Aliens Act … introduced a difference in treatment based on the sexual orientation of the persons concerned … 83. … [T]he Government [did not] adduce any particularly convincing and weighty reasons to justify the difference in treatment between same-sex and different-sex couples in obtaining the family reunification. …'

(b) Same-sex couples: Access to specific rights of married opposite-sex couples

- *Taddeucci & McCall* v. *Italy* (30 June 2016) (violation of Article 14 together with Article 8, private and family life; family-member residence permit available to an opposite-sex spouse but not to an unmarried partner, opposite-sex or same-sex): '82. ... [I]t does not appear that the applicants, an unmarried homosexual couple, were treated differently from an unmarried heterosexual couple. ... 83. That said, the applicants' situation cannot ... be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. ... [O]nly homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons. Nor could they obtain a form of legal recognition other than marriage, ... [such as] a registered partnership ... 85. ... [W]ith regard to eligibility for a residence permit for family reasons, the applicants – a homosexual couple – were treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularise their situation. ... 90. ... [W]ith regard to the burden of proof ... under Article 14 ... once the applicant has shown the existence of comparable treatment in significantly different situations it is for the Government to show that such an approach was justified ... 93. .... [Protection of the traditional family] cannot amount to a "particularly convincing and weighty" reason capable of justifying ...

discrimination on grounds of sexual orientation ... 94. Without any objective and reasonable justification the Italian State failed to treat heterosexual couples differently and take account of their ability to obtain legal recognition of their relationship ..., an option that was not available to the applicants (see *Thlimmenos* [v. *Greece*, 2000], ... [44]). ... 98. … [B]y deciding to treat [unmarried] homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as [unmarried] heterosexual couples who had not regularised their situation the State infringed the applicants' right not to be discriminated against on grounds of sexual orientation ….'

(c) Same-sex couples: Access to marriage

- *Schalk & Kopf* v. *Austria* (24 June 2010) (no violation; exclusion of same-sex couple from marriage): '61. Regard being had to Article 9 of the [EU] Charter [of Fundamental Rights, which does not refer to 'men and women'], ... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. … However, as matters stand [6 of 47 Council of Europe member states allowed same-sex couples to marry], the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.'

- *Oliari & Others* v. *Italy* (21 July 2015) (exclusion from marriage not a violation; same conclusion as *Schalk & Kopf* with 11 of 47 CoE member states allowing same-sex couples to marry)

(d) Same-sex couples: Access to 'a specific legal framework'

- *Schalk & Kopf* v. *Austria* (24 June 2010) (absence of legal recognition of same-sex couples did not violate Article 14 together with Article 8, family life): Three dissenting judges would have found a violation because Austria failed to introduce a registered partnership law before 1 January 2010. The four judges in the majority found no obligation on Austria to introduce such a law earlier than 1 January 2010, but stressed: '103. ... Given that at present it is open to the applicants to enter into a registered partnership [in Austria], the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples [in another country] would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.'

- *Oliari & Others* v. *Italy* (21 July 2015) (absence of an alternative for same-sex couples who attempted to marry in Italy breached a positive obligation under Article 8, respect for family life, to provide a 'specific legal framework'; 7-0, but concurring opinion of 3 judges employs different reasoning which applies only to Italy): '55. … [T]o date twenty-four countries out of the forty-seven [Council of Europe] member States have already enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership. … 167. … [T]he applicants … have been unable to have access to a specific legal framework … capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship. … 172. … [T]he current available protection … not only … fails to provide for the core needs relevant to a couple in a stable committed relationship, but is also not sufficiently stable – it is dependent on … the judicial (or sometimes administrative) attitude in the context of a country that is not bound by a system of judicial precedent … 173. … [A]n obligation to provide for the recognition and protection of same-sex unions … would not amount to any particular burden on the Italian State be it legislative, administrative or other. Moreover, such legislation would serve an important social need … 174. … [I]n the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. … 177. … [T]he instant case is not concerned with certain specific "supplementary" (as

opposed to core) rights … which may be subject to fierce controversy in the light of their sensitive dimension [adoption or assisted reproduction?] … [T]he instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. … 185. … [I]n the absence of a prevailing community interest …, against which to balance the applicants' momentous interests as identified above, … the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.'

- *Chapin & Charpentier* v. *France* (9 June 2016) (no violation; France's 'specific legal framework', the *pacte civil de solidarité* from 1999 until 2013, did not have to be identical to marriage; but, under *Taddeucci & McCall*, it must include certain minimum 'core rights', eg, a residence permit)

- *Aldeguer Tomás* v. *Spain* (14 June 2016) (no violation; the 'specific legal framework' does not have to be retroactive; same-sex partner died in 2002, before 2005 marriage law)

- *Orlandi & Others* v. *Italy* (14 December 2017) (violation of Article 8, as in *Oliari*; 5-2, a 'specific legal framework' must also be provided to same-sex couples who married outside of Italy)

(e) LGB individuals: Custody of a genetic child

- *Salgueiro da Silva Mouta* v. *Portugal* (21 December 1999) (violation of Article 14 together with Article 8, family life; gay father's sexual orientation treated as a negative factor in decision to award custody of his daughter to her heterosexual mother, his former wife): '34. … The Court of Appeal … took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family" and that "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations" … 35. It is the Court's view that the above passages …, far from being merely clumsy or unfortunate …, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife" … 36. … [T]he Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, the *Hoffmann* [v. *Austria*] judgment cited above, … § 36 [Jehovah's Witness mother]).'

(f) LGB individuals: Adoption of an unrelated child as an individual

- *E.B.* v. *France* (22 January 2008, Grand Chamber) (violation of Article 14 combined with Article 8, private or family life, by 10 votes to 7 on the facts, 14 to 3 on the principle; openly lesbian woman denied preliminary approval as a potential adoptive parent): '96. … [I]n rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention (see *Salgueiro da Silva Mouta*, cited above, § 36).' In his dissenting opinion, Judge Costa (joined by 3 other judges) added: '... [T]he message sent by our Court ... is clear: a person seeking to adopt [as an individual] cannot be prevented from doing so merely on the ground of his or her homosexuality. ... [O]ur Court [the majority of 10] considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds (*Salgueiro da Silva Mouta*). I agree.'

(g) Same-sex couples: Access to second-parent adoption (partner's child)

- *X & Others* v. *Austria* (19 February 2013, Grand Chamber) (violation of Article 14 together with Article 8, family life; second-parent adoption legally impossible for a same-sex couple; possible for an unmarried opposite-sex couple): '112. … [T]he applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to [an unmarried] different-sex couple in which one partner wished to adopt the other partner's child. 113. The Court will now turn to the question whether there was a difference in treatment based on the first and third applicants' sexual orientation. 114. Austrian law allows second-parent adoption by an unmarried different-sex couple. … [S]econd-parent adoption in a same-sex couple is legally impossible. … 116. … This would be so even if the biological father of the second applicant were dead or unknown or if there were grounds for overriding his refusal to consent to the adoption. It would even be impossible if the second applicant's father were ready to give his consent to the adoption. … 139. … [G]iven that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life … 141. … [T]he Court notes that the burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples. 142. … The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that, in personal terms, same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children. … Nonetheless, they stressed that the legislature had wished to avoid a situation in which a child had two mothers or two fathers for legal purposes. … 144. The Court would add that the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent … The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers … 145. The Court finds force in the applicants' argument that *de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. … 146. … Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child … 151. The Court is aware that striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests … However, … the Court finds that the Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention.'

- *Gas & Dubois* v. *France* (15 March 2012) (no violation; 6-1, with 3 other judges urging France to review its legislation; no discrimination where second-parent adoption restricted to married opposite-sex couples, and same-sex couples treated in the same way as unmarried opposite-sex couples): '43. … [T]he applicants … maintained that there was a difference in treatment under the law depending on whether a couple raising children was made up of two women cohabiting or in a civil partnership or of a woman and a man in the same situation [the man could recognise a child born to his female partner through donor inseminaton and become the child's legal father without a second-parent adoption]. …

63. … [A[nonymous donor insemination in France is confined to infertile heterosexual couples [married or unmarried], a situation which is not comparable to that of the applicants. … [They] cannot be said to be the victims of a difference in treatment arising out of the French legislation in this regard. … 68. … [F]or the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple. 69. Next, … the Court must examine their situation compared with that of an unmarried heterosexual couple. The latter may, like the applicants, have entered into a civil partnership or may be cohabiting. … [A]ny couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have their application for a simple-adoption order refused … It does not therefore observe any difference in treatment based on the applicants' sexual orientation.'

(h) Same-sex couples: Access to joint adoption (unrelated child)

- no case law yet; *X & Others v. Austria* should apply if unmarried opposite-sex couples have access

(i) Same-sex couples: Access to donor insemination

- *X & Others* v. *Austria* should apply, if unmarried opposite-sex couples already have access (as in France and Italy)
- this argument was made in *Charron & Merle-Montet* v. *France* (8 February 2018) (inadmissible for failure to exhaust a theoretical domestic remedy: enforcement of the EConHR by French courts)

- *Boeckel & Gessner-Boeckel* v. *Germany* (7 May 2013) (no violation of Article 8, taken alone or combined with Article 14; after donor insemination, a birth mother could have the name of her husband entered on the child's birth certificate, even though he was not the child's genetic father, but not the name of her female registered partner; by the time of the Court's decision, the birth mother's female registered partner had become a legal parent through second-parent adoption)

(j) Same-sex couples: Children born to a surrogate mother

- *Mennesson* v. *France* (26 June 2014) (violation of rights of children under Article 8, private life; refusal to recognise the genetic link between two children born to a surrogate mother in California and their genetic father, who is French)

- the principle of *Mennesson* applies whether the genetic father is heterosexual and has a female partner (as in *Mennesson*), or is gay or bisexual and has a male partner, as in *Foulon & Bouvet* v. *France* (21 July 2016)

- *Advisory Opinion requested by the French Court of Cassation* (10 April 2019, Grand Chamber): The children in *Mennesson* have a right under Article 8 (respect for private life) to a legal relationship with the wife of their genetic father, who is socially their mother. This could be through second-parent adoption rather than recognition of the California birth certificate listing the wife as a parent.

- *Advisory Opinion* and *Taddeucci & McCall* cited in third-party intervention requesting reconsideration of *Gas & Dubois* in the pending case of *A.D.-K & Others* v. *Poland* (No. 30806/15): British-Polish lesbian couple with child born through donor insemination in UK; refusal to recognise UK birth certificate listing Polish non-genetic mother as a parent, combined with absence of second-parent adoption for same-sex couples in Poland; see https://www.ilga-europe.org/sites/default/files/AD-K%20v%20Poland%202019-07-25%20FINAL.pdf

ANNEX 3 – MARRIAGE AND REGISTERED PARTNERSHIP LAWS OPEN TO SAME-SEX COUPLES IN THE EU

Austria - Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009

Constitutional Court (*Verfassungsgerichtshof*), *Erkenntnis* G 258-259/2017-9, 4 December 2017:
1. The phrase 'of different sex' in section 44 of the General Civil Code, Collection of Laws 946/1811, and the phrases 'of same-sex couples' in section 1, 'of the same sex' in section 2 and section 5 (1) item 1 of the Federal Act on Registered Partnership, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, are repealed as unconstitutional.
2. The repeal shall take effect as per the close of December 31, 2018.

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale*, *Moniteur belge*, 12 Jan. 1999, p. 786 ('*cohabitants légaux*'; 'statutory cohabitants'); *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, in force on 1 June 2003

Croatia - *Zakon o životnom partnerstvu osoba istog spola*, NN 92/14, 98/19, https://www.zakon.hr/z/732/Zakon-o-%C5%BEivotnom-partnerstvu-osoba-istog-spola

Cyprus - *ΝΟΜΟΣ ΠΟΥ ΠΡΟΝΟΕΙ ΓΙΑ ΤΗ ΣΥΝΑΨΗ ΠΟΛΙΤΙΚΗΣ ΣΥΜΒΙΩΣΗΣ*, N. 184(I)/2015 (9 December 2015), http://www.cylaw.org/nomoi/indexes/2015_1_184.html

Czechia - *Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů* (Act no. 115/2006 Coll. on Registered Partnership and on the Change of Certain Related Acts)

Denmark - Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ('*registrerede partnere*'; 'registered partners'); replaced by *Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab*, Law nr. 532 of 12 June 2012 (in force 15 June 2012; 'spouses')

Estonia – Registered Partnership Act (9 October 2014), https://www.riigiteataja.ee/en/eli/527112014001/consolide

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ('*parisuhteen osapuolet*'; 'registered partners'); *Laki avioliittolain muuttamisesta*, 156/2015, https://www.finlex.fi/fi/laki/alkup/2015/20150156 (marriage)

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, ('*partenaires*'; 'partners'); *Loi no. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe* ('*époux*'; 'spouses')

Germany - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ('*Lebenspartner*'; 'life partners'); *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* (20 July 2017), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2787.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s2787.pdf%27%5D__1599502513922

Greece - ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4443 (9 December 2016), https://0076.syzefxis.gov.gr/wp-content/uploads/2019/08/11aNomos_N4443-1.pdf

Hungary – Act on Registered Partnership, Law 29 of 2009 ('registered partners')

Ireland - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24 of 2010 ('civil partners'); Marriage Act 2015, https://www.oireachtas.ie/en/bills/bill/2015/78/

Italy - *LEGGE 20 maggio 2016, n. 76. Regolamentazione delle unioni civili tra persone dello stesso sesso* …, https://www.gazzettaufficiale.it/eli/gu/2016/05/21/118/sg/pdf.

Luxembourg - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial* A, nr. 143, 6 August 2004 ('*partenaires*'; 'partners'); *Loi du 4 juillet 2014*, http://legilux.public.lu/eli/etat/leg/loi/2014/07/04/n1/jo (marriage)

Malta - Marriage Act and other Laws (Amendment) Act, 2017, https://parlament.mt/media/90386/act-xxiii-marriage-act-and-other-laws-amendment-act.pdf

Netherlands - Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ('*geregistreerde partners*'; 'registered partners'); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9 ('*echtgenoten*'; 'spouses')

Portugal – *Lei no. 9/2010 de 31 de Maio*, *Permite o casamento* [marriage] *civil entre pessoas do mesmo sexo* ('spouses')

Slovenia - *Zakon o partnerski zvezi* (Civil Union Act, ZPZ), Ur. l. RS, 33/16 (9 May 2016), https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2016-01-1426?sop=2016-01-1426

Spain – *Ley 13/2005, de 1 de julio, por la que se modifica el Codígo Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634

Sweden – Law on Registered Partnership (*Lag om registrerat partnerskap*), 23 June 1994, SFS 1994:1117 ('*registrerade partner*'; 'registered partners'); replaced by SFS 1987:230 as amended by SFS 2009:253 ('spouses')

ANNEX 4 – QUESTIONNAIRE SENT TO THE EUROPEAN CENTRE FOR PARLIAMENTARY RESEARCH AND DOCUMENTATION (ECPRD)

Aim of the questionnaire

The European Parliament Policy Department on Citizens' Rights and Constitutional Affairs is carrying out a research requested by the Committee on Petitions on "Obstacles to the free movement of rainbow families in the EU". Within this framework, we submit to your attention the following questionnaire, which aims at gathering updated and detailed information on the situation of rainbow families moving across the EU and their status when exercising the fundamental right to free movement. The aim of the research is to provide the European Parliament with information useful for drafting reports or resolutions by its competent committees, notably the Committee on Petitions or the Committee on Civil Liberties, Justice and Home Affairs.

We would be grateful to receive a reply from you as soon as possible, and in any case before Monday the 6th of July.

QUESTIONNAIRE on RAINBOW FAMILIES

Could you please reply to the following questions (and, where appropriate, include a legal reference: a specific provision of a constitution, law, regulation, or administrative policy, or a court decision):

A. SAME-SEX COUPLES MOVING TO ANOTHER EU MEMBER STATE (CROSS-BORDER SITUATIONS)

(1) When a *same-sex married couple* moves to your country, does your country recognise their marriage:
(a) for free movement purposes (family reunification), by automatically granting entry and residence also to the third-country national spouse of the EU citizen exercising free movement rights, as required by the 2018 *Coman & Hamilton* judgment of the CJEU?
(b) for other purposes of national law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation)?

(2) Are married same-sex couples who move to your country recognised as 'married'?
(3) If not, is their marriage assimilated to some other national law status?
(4) What rights and duties are connected to the type of recognition your country grants?

(5) Is there any difference between the way same-sex and different-sex married couples are treated when they move from another EU Member State to your country?

(6) Are there any requirements as regards the jurisdiction where the same-sex marriage was contracted (e.g. that the marriage must have been contracted in another EU Member State)?

(7) When a *same-sex couple in a registered partnership* (which might have another name such as civil partnership or civil union) moves to your country, does your country recognise their registered partnership:
(a) for free movement purposes (family reunification), by automatically granting entry and residence also to the third-country national in a registered partnership with the EU citizen exercising free movement rights?
(b) for other purposes of national law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation)?

(8) If so, is their relationship recognised as a registered partnership?
(9) If not, is their registered partnership assimilated to some other national law status?
(10) What rights and duties are connected to the type of recognition your country grants?

(11) Is there any difference between the way same-sex and different-sex couples in a registered partnership are treated when they move from another EU Member State to your country?

(12) Are there any requirements as regards the jurisdiction where the same-sex registered partnership was contracted (e.g. that it must have been contracted in another EU Member State)?

(13) When a *same-sex couple in a durable relationship* (an unregistered or de facto or cohabiting couple) moves to your country, does your country recognise their durable relationship:
(a) for free movement purposes (family reunification), by facilitating the entry and residence of the third-country national in a durable relationship with the EU citizen exercising free movement rights?
(b) for other purposes of national law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation)?

(14) If so, is the couple recognised as an unregistered or de facto or cohabiting couple?
(15) If not, do you assimilate it to some other national law status?
(16) What rights and duties are connected to the type of recognition your country grants?

(17) Is there any difference between the way same-sex and different-sex couples in a durable relationship are treated when they move from another EU Member State to your country?

B. CHILDREN OF SAME-SEX COUPLES MOVING TO ANOTHER EU MEMBER STATE (CROSS-BORDER SITUATIONS)

(18) Do the children of same-sex couples, who have been recognised in another country as having two legal parents of the same sex (the two members of the same-sex couple), continue to be recognised as the children of *both parents* when the family moves to your country in the exercise of EU free movement rights?
(a) If so, are they recognised as such for free movement purposes (family reunification)?
(b) If so, are they recognised as such for other purposes of national law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation)?

(19) Does it matter whether the child of a same-sex couple was adopted (jointly or by one member of the couple), or was conceived through assisted reproduction?

(20) Does it matter which type of assisted reproduction was used: (a) insemination involving an anonymous donor or a known donor; (b) insemination at a fertility clinic or at home; (c) insemination at a fertility in your country or in another country; and (d) insemination of a woman who gives birth and intends to raise the child, or implantation of an embryo into a surrogate mother who does not intend to raise the child (and is not a legal parent in the country of birth)?

(21) Does it make a difference if the parents are married, in a registered partnership, or unregistered, de facto or cohabiting partners?

(22) Are the children of same-sex couples who move from another EU Member State to your country treated in the same way as the children of different-sex couples who move from another EU Member State to your country?

(23) Are there any differences in their treatment under national law? If yes, what are these differences?

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, examines: (i) the obstacles that rainbow families (same-sex couples, with or without children) face when they attempt to exercise their free movement rights within the EU, including examples in petitions presented to the PETI committee; (ii) how EU Member States treat same-sex married couples, registered partners, unregistered partners, and their children in cross-border situations; and (iii) action that EU institutions could take to remove these obstacles.

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