

**Executive Master  
in EU Studies**

*Same-sex couples and freedom of  
movement: the case for  
cross-border recognition.*

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# Abstract

This thesis explores how EU law currently protects same-sex married couples who make use of their freedom of movement and residence; which (additional) rights can be derived from this fundamental freedom; and what type of legal and political action is needed to uphold the right to free movement for rainbow couples. The hypothesis discussed is that EU law on freedom of movement (in conjunction with fundamental rights and non-discrimination) creates an obligation for Member States to recognise same-sex marriages concluded in another Member State for all aspects of domestic law, thereby guaranteeing the cross-border recognition of same-sex marriages and the portability of marital status across the EU. The method used to either confirm or nullify this hypothesis is through the analysis of the case law of the CJEU and of the ECtHR on freedom of movement, on the right to family life, on the right to portability of a personal status, and on LGB families. Specific relevance is given to the only two CJEU cases dealing with freedom of movement of rainbow families: *Coman* and *V.M.A.*. This thesis demonstrates that, first, the lack of recognition of same-sex marriages concluded abroad can be interpreted as an obstacle to the freedom of movement of EU citizens; and second, this restriction of a fundamental freedom is hard to justify on the basis of public policy, public interest and/or national identity. Nonetheless, a right to the cross-border recognition of same-sex marriages for all purposes of domestic law is not established yet under EU law. For this to happen, concerted action by the EU institutions, Member States, civil society and human rights groups is needed.

## 1. Introduction

### 1.a. Introduction to the topic

Freedom of movement is a central element of the European Union. Originally one of the four economic freedoms, established since the Treaty of Rome<sup>1</sup> to facilitate economic integration, it then became one of the most important rights of those who can claim the status of European citizens.

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<sup>1</sup> 'Treaty Establishing the European Economic Community' (1957), <http://data.europa.eu/eli/treaty/teec/sign/eng>.

Despite the crucial importance of freedom of movement inside the European Union, certain categories of citizens still do not enjoy this right fully. One of these groups includes LGBTI<sup>2</sup> people. According to a 2020 survey<sup>3</sup>, around 17% of LGBTI respondents who relocated to another EU country stated they were denied (partially or totally) access to services and benefits available to heterosexual couples. Within this group, rainbow families<sup>4</sup> face specific hurdles when moving across borders.

The lack of uniform recognition of LGBTI families across the Union<sup>5</sup> is acknowledged as an obstacle to freedom of movement<sup>6</sup>. The EU Citizenship Report 2020<sup>7</sup> mentions the obstacles that rainbow families are facing when exercising their freedom of movement as one of the challenges to the full enjoyment of EU citizenship rights.<sup>8</sup> But the scope of action of the EU in this area is limited, both because family law is an exclusive competence of Member States and because of the political sensitivity of same-sex marriage and parenthood.

Nonetheless, EU institutions have the task to protect the freedom of movement of all citizens, including LGBTI citizens. The European Court of Justice (CJEU) pronounced itself on this topic for the first time in 2018 with the case *Coman*<sup>9</sup>, followed in 2021 by the case *V.M.A.*<sup>10</sup> (both are analysed in Chapter 4). The *Coman* case showed that EU law on freedom of movement has the potential to underpin the cross-border recognition of rainbow families. In order to guarantee this principle, the Commission promised to review the guidelines on free movement and to propose a horizontal legislative initiative to support the mutual recognition of parenthood between Member States.<sup>11</sup>

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<sup>2</sup> LGBTI stands for Lesbian, Gay, Bisexual, Trans\* and Intersex. It is the acronym generally used by EU institutions, but it exists along with LGBT, LGBTQ and LGBTQI, where Q stands for queer. This acronym aims to represent people who belong to sexual or gender minorities or who fall outside the heterosexual and gender binary spectrum. Though, this thesis focuses on same-sex unions and therefore sometimes the acronym LGB will be used to refer only to sexual minorities.

<sup>3</sup> European Union Agency for Fundamental Rights, 'A Long Way to Go for LGBTI Equality.' (Luxembourg: European Union Agency for Fundamental Rights, 2020), 29.

<sup>4</sup> The term rainbow family will be used as an umbrella term to indicate any family where at least one member is part of the LGBTI community.

<sup>5</sup> The acronym EU and the term Union (capitalised) are used interchangeably to indicate the European Union.

<sup>6</sup> See: Alina Tryfonidou and Robert Wintemute. "Obstacles to the Free Movement of Rainbow Families in the EU." Study Requested by the PETI Committee of the European Parliament - Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 671.505, March 2021.

<sup>7</sup> European Commission - DG Justice and Consumers, 'EU Citizenship Report 2020 - Empowering citizens and protecting their rights', 2020.

<sup>8</sup> European Commission - DG Justice and Consumers, 'EU Citizenship Report 2020 - Empowering citizens and protecting their rights', 2020, 22.

<sup>9</sup> *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16 (CJEU June 5, 2018).

<sup>10</sup> *V.M.A. v Stolichna Obsthina, Rayon 'Pancharevo'*, Case C-490/20 (CJEU December 14, 2021).

<sup>11</sup> European Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' (COM(2020) 698 Final), 11 December 2020, p. 16-17.

As these two initiatives are foreseen for 2022, this year is set to be an important one for rainbow families. Furthermore, at the start of the year, there were dozens of cases involving rainbow families pending in front of the European Court of Human Rights (ECtHR),<sup>12</sup> while the case *Rzecznik Praw Obywatelskich*,<sup>13</sup> currently pending before the CJEU, raises almost identical questions as *V.M.A.*<sup>14</sup> Therefore, these judgements can either reinforce or weaken the protection of rainbow families in the EU.

In this context, this thesis aims to assess how EU law currently protects same-sex married couples who make use of their freedom of movement and residence, which (additional) rights can be derived from this fundamental freedom, and what future legal and political actions are needed to uphold the right to free movement for rainbow couples.

Given the breadth of the topic, this study focuses on only a specific situation: married same-sex couples who move across EU borders and claim protection under the principle of free movement and residence. References to couples with children and to registered partners will be discussed for context and/or by analogy. Even though there is no doubt that the rights of same-sex married couples may be protected also under other principles and instruments of EU law, this thesis will focus on freedom of movement. Moreover, this thesis will not engage in-depth with the existence of a universal human right to marry, or with the argument that LGBTI rights are universal human rights, even though both aspects may reinforce the argument proposed.<sup>15</sup>

## 1.b. Hypothesis

The main hypothesis explored in this text is that EU law on freedom of movement (in conjunction with fundamental rights and non-discrimination) can create an obligation for Member States to recognise same-sex marriages<sup>16</sup> concluded in another Member State for all aspects of domestic law. In the *Coman* and *V.M.A.* judgements, the CJEU clearly stated that the family status of same-sex couples (and their children) should be recognised in all

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<sup>12</sup> European Parliament. Directorate General for Parliamentary Research Services. *Ten Issues to Watch in 2022: In Depth Analysis*. Luxembourg: Publications Office, 2022, p. 18.  
<https://data.europa.eu/doi/10.2861/360923>.

<sup>13</sup> *Rzecznik Praw Obywatelskich*, Case C-2/21.

<sup>14</sup> Opinion of Advocate General Kokott on Case C-490/20, 15 April 2021, para. 4.

<sup>15</sup> See for example: Kees Waaldijk, 'The Right to Marry as a Right to Equality: About Same-Sex Couples, the Phrase "Men and Women", and the Travaux Préparatoires of the Universal Declaration'. In: *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*, edited by Niels M. Blokker, Daniëlla Dam-de Jong, and Vid Prislán, 457–72. Leiden: Brill Nijhoff, 2021.  
[https://doi.org/10.1163/9789004459892\\_024](https://doi.org/10.1163/9789004459892_024).

<sup>16</sup> The term "same-sex marriage", which is commonly used in current language, is adopted throughout this text. It is though important to note that there is no such thing as "same-sex marriage", but rather same-sex couples may be allowed to marry or not.

EU countries solely for the purpose of allowing them to freely move and reside across the Union, (see Chapter 4). However, this study argues that recognising family ties only for the purpose of migration law is still contrary to freedom of movement and to fundamental rights. Therefore, EU law may mandate Member States to recognise same-sex marriages concluded abroad as equivalent to heterosexual marriages, even without legalising same-sex marriage in the domestic order.

## 1.c. Methodology

The method used to either confirm or nullify this hypothesis is through the analysis of case law on freedom of movement, on the right to family life, on the right to portability of a personal status, and on rainbow families. For this reason, this study will rely mainly on the case law of the CJEU and of the ECtHR to argue its hypothesis.

## 1.d. Literature

The rights of same-sex couples under the European regime of freedom of movement is a rather recent research area. Early scholarship reflected primarily on the concept of EU citizenship and the inclusion/exclusion of sexual minorities from it<sup>17</sup>, as well as the opportunities offered by European federalism for strengthening LGBTI rights, especially in Eastern European countries.<sup>18</sup> The question of the rights of rainbow families making use of freedom of movement started to be explored in the early 2000,<sup>19</sup> but gained more relevance after the ratification of the Lisbon Treaty.<sup>20</sup> The 2015 *Oliari* case<sup>21</sup> and the 2018 *Coman*

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<sup>17</sup> Uladzislau Belavusau. 'EU Sexual Citizenship : Sex beyond the Internal Market'. EUI working papers LAW, San Domenico di Fiesole (FI): 2015. <https://cadmus.eui.eu/handle/1814/34960>.

<sup>18</sup> Dimitry Kochenov. "On Options of Citizens and Moral Choices of States: Gays and European Federalism." In: *Fordham International Law Journal* 33, no. 1 (New York: January 1, 2009): 156–205. Uladzislau Belavusau and Dimitry Kochenov. "Federalizing Legal Opportunities for LGBT Movements in the Growing EU." In: *The EU Enlargement and Gay Politics*, edited by Koen Sloopmaeckers, Heleen Touquet, and Peter Vermeersch, 69–96. London: Palgrave Macmillan UK, 2016. [https://doi.org/10.1057/978-1-137-48093-4\\_4](https://doi.org/10.1057/978-1-137-48093-4_4).

<sup>19</sup> Mark Bell. "We Are Family? Same-Sex Partners and EU Migration Law." *Maastricht Journal of European and Comparative Law* 9 (Maastricht: December 1, 2002): 335–55. <https://doi.org/10.1177/1023263X0200900402>.

<sup>20</sup> Jessica Guth. "When Is a Partner Not a Partner? Conceptualisations of 'Family' in EU Free Movement Law." *Journal of Social Welfare and Family Law* 33, no. 2 (London: June 2011): 193–204. <https://doi.org/10.1080/09649069.2011.617078>. Jorrit J. Rijpma, and Nelleke Koffeman. "Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?" In *Same-Sex Couples before National, Supranational and International Jurisdictions*, edited by Daniele Gallo, Luca Paladini, and Pietro Pustorino, 455–91. Berlin, Heidelberg: Springer, 2014. [https://doi.org/10.1007/978-3-642-35434-2\\_20](https://doi.org/10.1007/978-3-642-35434-2_20). Scott Titshaw. "Same-Sex Spouses Lost in Translation? How to Interpret 'Spouse' in the E.U. Family Migration Directives." *Boston University International Law Journal* 34, no. 45 (Boston: April 1, 2016): 47–112.

<sup>21</sup> Sabrina Ragone and Valentina Volpe. "An Emerging Right to a "Gay" Family Life? The Case *Oliari v. Italy* in a Comparative Perspective." *German Law Journal* 17, no. 3 (Cambridge University Press, Cambridge: June 2016): 451–85. <https://doi.org/10.1017/S2071832200019830>.

case<sup>22</sup>, judged respectively by the ECtHR and by the CJEU, sparked important scholarly contributions, while the *V.M.A.* case is too recent to have led to significant peer-reviewed scholarship. While there are many scholars dealing with the rights of sexual minorities in the EU<sup>23</sup>, very few focus on the intersection between freedom of movement and rainbow families<sup>24</sup>.

Considering the high political salience of freedom of movement of rainbow families in 2022 and the relative scarcity of scholarship on the subject, this text aims to contribute to bridge a knowledge gap on a legal question with significant consequences on the everyday life of same-sex couples in Europe.

## 1.e. Structure of the thesis

The study starts with an assessment of the political situation: the recent CJEU judgements on the freedom of movement of rainbow families need to be placed in the context of the tension between the European Commission's and European Parliament's push to guarantee greater protection of LGBTI persons and the backlash happening across Europe, where LGBTI rights are framed by nationalist parties as an imposition which threatens the traditional order of society. Furthermore, this context cannot be ignored when assessing the action (and potential action) of the European Union.

Thereafter, the text analyses the legal context which allows for the protection of rainbow families under the principles of freedom of movement, non-discrimination and fundamental rights. Another relevant aspect to be analysed is the CJEU and ECtHR jurisprudence on the rights of same-sex couples, which evolved considerably in the last decades according to the changing social and political demeanour towards LGBTI individuals.

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<sup>22</sup>Jorrit J. Rijpma, 'You Gotta Let Love Move: CJEU 5 June 2018, Case C-673/16, *Coman*, Hamilton, *Accept v Inspectoratul General Pentru Imigrări*', *European Constitutional Law Review* 15, no. 2 (Cambridge University Press, Cambridge: June 2019): 324–39, <https://doi.org/10.1017/S1574019619000130>. Dimitry Kochenov and Uladzislau Belavusau. "After the Celebration: Marriage Equality in EU Law Post- *Coman* in Eight Questions and Some Further Thoughts." *Maastricht Journal of European and Comparative Law* 27, no. 5 (Maastricht: October 2020): 549–72. <https://doi.org/10.1177/1023263X20962749>.

<sup>23</sup> See for example: Waaldijk. "The Right to Marry as a Right to Equality".

<sup>24</sup> See for example: Alina Tryfonidou. "Law and Sexual Minority Rights in the EU: Navigating a Political Minefield." In *Research Handbook on the Politics of EU Law*, edited by Paul James Cardwell and Marie-Pierre Grainger, 204–23. Edward Elgar, 2020. <https://centaur.reading.ac.uk/92174/>. Alina Tryfonidou and Robert Wintemute. "Obstacles to the Free Movement of Rainbow Families in the EU." Study Requested by the PETI Committee of the European Parliament - Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 671.505, March 2021.

Subsequently, the study looks into the *Coman* and *V.M.A.* cases. These two landmark judgements are scrutinised in-depth, while also underlining their shortcomings and limitations. Similarities, differences and evolutions from the 2018 to the 2021 judgements are also highlighted.

Then, the main hypothesis is discussed, namely that a narrow interpretation of the freedom of movement of rainbow families and a single-purpose recognition of their family ties, uniquely to reside and travel together, is not possible under EU law on freedom of movement, which instead should require the cross-border recognition of rainbow families for all purposes of domestic law.

Finally, this text considers what legal and political actions are necessary to translate into reality the rights that rainbow families should enjoy under EU law.

## **2. The political context**

### **2.a. LGBTI rights in Europe and EU values**

The EU comprises of some of the most progressive countries in the world when it comes to the protection of sexual minorities, side-by-side with EU countries where LGBTI persons cannot count on almost any legal protection.<sup>25</sup>

Looking at the recognition of same-sex couples in the EU, the situation is highly diversified. Thirteen countries have introduced marriage equality<sup>26</sup> (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden), eight provide some forms of legal recognition such as registered partnerships or civil union, but not marriage (Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy and Slovenia), while six do not offer any possibility to legalise a same-sex union (Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia)<sup>27</sup>. With the exception of Poland, the latter group of countries have a constitutional ban on same-sex unions.

EU Member States were pioneers in granting rights to LGBTI individuals. Denmark was the first country in the world to open registered partnerships to same-sex couples in 1989,

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<sup>25</sup> For more details on the state of LGBTI rights in Europe, one can refer to Rainbow Europe map 9 (<https://rainbow-europe.org/>), the legal index of LGBTI equality elaborated by ILGA-Europe, the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association.

<sup>26</sup> This means that the institution of marriage, which is defined by domestic law, is open to both heterosexual and homosexual couples without any distinction

<sup>27</sup> Tryfonidou and Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU', 43.

while the Netherlands holds the record as the first country to introduce marriage equality in 2001.<sup>28</sup> Many of the EU15 countries<sup>29</sup> not only protect LGBTI individuals from discrimination but also grant them civil, social and cultural rights on the same level as heterosexual persons.<sup>30</sup>

In recent years, LGBTI rights have become part of the fundamental rights protected by the EU and a criterion to define the “Europeanness” of Member States.<sup>31</sup> In 2015, the Commission presented the “List of Actions to Advance LGBTI Equality”, the first policy framework specifically combatting discrimination against LGBTI people. The “LGBTIQ Equality Strategy”, published in November 2020, clearly frames LGBTI rights as part of the fundamental rights protected by the Charter.<sup>32</sup> EU citizenship, non-discrimination and fundamental rights have been construed in the last years so as to create a minimum “European” standard of rights for sexual and gender minorities.<sup>33</sup>

On the other hand, anti-LGBTI narratives are often adopted by populist forces to gain political capital. The rights of sexual minorities are framed as an imposition of “Brussels”, in contrast with national tradition and religion, which sees the nuclear and heterosexual family as the foundation of society.<sup>34</sup> The politicisation of the discourse around LGBTI rights led to a backlash, notably but not only in Central and Eastern European (CEE) countries.

## **2.b. Backlash in CEE countries and across Europe**

In recent years, the clash between LGBTI rights promoted by the European Union and the traditional values claimed by certain societies, especially in Central and Eastern Europe, assumed the aspect of a polarised culture war.<sup>35</sup>

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<sup>28</sup> David De Groot. ‘EU Law and the Mutual Recognition of Parenthood between Member States : The Case of V.M.A. v Stolichna Obsthina’. European University Institute, San Domenico di Fiesole (FI): 2021, 11.

<sup>29</sup> EU15 refers to the Member States before the 2004 enlargement, namely: Portugal, Spain, France, UK, Ireland, the Netherlands, Denmark, Belgium, Germany, Austria, Italy, Greece, Sweden, Finland, Luxembourg.

<sup>30</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 11.

<sup>31</sup> Koen Slootmaeckers, Heleen Touquet, and Peter Vermeersch, ‘The Co-Evolution of EU’s Eastern Enlargement and LGBT Politics: An Ever Gayer Union?’, in *The EU Enlargement and Gay Politics*, edited by Koen Slootmaeckers, Heleen Touquet, and Peter Vermeersch (London: Palgrave MacMillan, 2016), 22. [https://doi.org/10.1057/978-1-137-48093-4\\_2](https://doi.org/10.1057/978-1-137-48093-4_2).

<sup>32</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’, 3.

<sup>33</sup> Belavusau and Kochenov, ‘Federalizing Legal Opportunities for LGBT Movements in the Growing EU’, 11.

<sup>34</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 12.

<sup>35</sup> Rijpma, ‘You Gotta Let Love Move’, 326.

In 2019, over 100 regions, counties and municipalities across Poland declared themselves “LGBT-free zones” or adopted “Regional Charters of Family Rights” to impose a restrictive definition of family.<sup>36</sup> In 2020, Hungary (through Article 33 of the Omnibus Bill T/9934) banned legal gender recognition for trans and intersex persons, and approved constitutional amendments further restricting the rights of transgender people and preventing non-married couples (which in Hungary includes same-sex couples) from adopting.<sup>37</sup> In 2021, Hungary passed legislation banning the “portrayal and the promotion of gender identity different from sex at birth, the change of sex and homosexuality” for persons under 18, ostensibly to prevent child abuse.<sup>38</sup> Moving to Romania, in 2020, a bill which prohibits discussion of gender identity in schools was adopted by the national legislator, but was then declared unconstitutional by the Constitutional Court.<sup>39</sup>

These legal changes limiting the rights of LGBTI individuals in CEE countries are happening in a broader context of increased discrimination and state-sponsored homophobia. Only 4% and 6% of the LGBTI population in Poland and Hungary respectively believe that their government effectively combats prejudice and intolerance against LGBTI people.<sup>40</sup> At the same time though, public opinion does not seem to embrace these narratives anymore. Support for LGBTI rights in Hungary is at an all-time high and the population sees the new laws as a political tool.<sup>41</sup> 68% of Romanians support protection for rainbow families and 40% of Bulgarians would support a pro-LGBT political party.<sup>42</sup>

It is important to note that homophobia is not a phenomenon limited to Central and Eastern Europe. The 2021 annual review of ILGA-Europe (the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) indicates a staggering rise in hate speech and homophobic violence in every country of the EU.<sup>43</sup> Germany, for example, saw a 39% increase in hate crimes.<sup>44</sup> Several incidents of rainbow flags being burned or torn down and of rainbow-painted buildings being ravaged were recorded in countries well beyond CEE, such as Ireland, Italy, the Netherlands, Norway,

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<sup>36</sup> European Parliament, ‘Resolution on the Declaration of the EU as an LGBTIQ Freedom Zone’, 2021/2557(RSP) (2021), point C.

<sup>37</sup> ‘Resolution on the Declaration of the EU as an LGBTIQ Freedom Zone’, point C.

<sup>38</sup> ILGA-Europe, ‘Annual Review Of The Human Rights Situation Of Lesbian, Gay, Bisexual, Trans, And Intersex People Covering The Period Of January To December 2021’, Brussels (2022), 9.

[https://www.ilga-europe.org/sites/default/files/2022/full\\_annual\\_review.pdf](https://www.ilga-europe.org/sites/default/files/2022/full_annual_review.pdf). Last accessed on 26/05/2022.

<sup>39</sup> ‘Resolution on the Declaration of the EU as an LGBTIQ Freedom Zone’, point C.

<sup>40</sup> FRA, ‘A Long Way to Go for LGBTI Equality’, 14.

<sup>41</sup> ILGA-Europe, ‘Annual review 2022’, 9.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid., 8.

<sup>44</sup> Ibid.

Finland and Spain.<sup>45</sup> Hate speech by politicians targeting LGBTI people took place also in Greece, Italy (where it was compounded by hate speech from religious leaders), Slovenia, and Spain. Journalists and the media negatively portrayed LGBTI people in Denmark, France, Germany, the Netherlands, Norway, Portugal, and Spain.<sup>46</sup> Overall, social acceptance for LGBTI people seems to be worsening all over the EU. According to a survey of the EU Agency for Fundamental Rights, more LGBTI respondents felt discriminated against in 2019 (43%) than in 2012 (37%).<sup>47</sup> Nonetheless, the extent to which homophobic legislation is being implemented in Hungary, Poland and other CEE countries is particularly worrying.

## 2.c. EU action to protect LGBTI rights

The European Commission has taken different measures in reaction to the backlash against LGBTI rights, such as suspending the disbursement of EU funds to Polish towns which declared themselves “LGBT free”,<sup>48</sup> since the use of EU funds must respect the principle of non-discrimination and fundamental rights.

A strong sign of support for the LGBTI community came from the three infringement procedures against Hungary and Poland launched by the Commission on 15 July 2021.<sup>49</sup> The facts challenged in the case of Hungary were the above mentioned law prohibiting access to content that portrays homosexuality or gender divergence for individuals under 18, and the recent obligation imposed on book publishers to print disclaimers on children’s books which feature rainbow families as containing “behaviour deviating from traditional gender roles”.<sup>50</sup> The procedure against Poland concerns the lack of cooperation on the Commission’s request for detailed information on municipalities and regions declaring themselves “LGBT-free zones”.<sup>51</sup>

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<sup>45</sup> Ibid., 9.

<sup>46</sup> Ibid.

<sup>47</sup> FRA, ‘A Long Way to Go for LGBTI Equality’, 10.

<sup>48</sup> Monika Pronczuk, ‘Polish Towns That Declared Themselves “L.G.B.T. Free” Are Denied E.U. Funds’, *The New York Times*, 30 July 2020, sec. World, <https://www.nytimes.com/2020/07/30/world/europe/LGBT-free-poland-EU-funds.html>. Last accessed on 26/05/2022.

<sup>49</sup> European Commission, ‘Commission Takes Legal Action for Discrimination LGBTIQ’, 15 July 2021, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3668](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668). Last accessed on 26/05/2022.

<sup>50</sup> Ibid.

<sup>51</sup> The European Parliament’s LGBTI Intergroup, ‘Press Release: European Commission Launches 3 Infringement Procedures against Hungary and Poland on LGBTIQ Issues’, <http://lgbti-ep.eu/2021/07/15/press-release-european-commission-launches-3-infringement-procedures-against-hungary-and-poland-on-lgbtiq-issues/>. Last accessed on 26/05/2022.

The European Parliament has also repeatedly taken a stance in favour of LGBTI rights at large. In late 2019, in response to the declaration of “LGBT-free zones” as well as to the general backlash on LGBTI rights in Central and Eastern Europe, it remarked that “LGBTI rights are fundamental rights and that the EU institutions and the Member States [...] have a duty to uphold and protect them in accordance with the Treaties and the Charter”.<sup>52</sup> In March 2021 the European Parliament declared the EU a “LGBTIQ freedom zone”.<sup>53</sup>

## **2.d. EU action to ensure freedom of movement of rainbow families**

Ensuring the freedom of movement of rainbow families across the Union has been on the radar of the EU institutions for a few years already.

Already in 2018 (and before the *Coman* judgement), the European Parliament called on the Commission to ensure that Member States were implementing the Citizen’s Rights Directive in a way that did not discriminate against LGBTI individuals and families.<sup>54</sup> Two years later, the Commission’s “LGBTIQ Equality Strategy”<sup>55</sup> emphasised the necessity to ensure the freedom of movement of rainbow families and same-sex couples. The Strategy was prominently announced during the 2020 State of the Union speech of the European Commission President Ursula von der Leyen, when she proclaimed that “to make sure that we support the whole [LGBTQI] community, the Commission will soon put forward a strategy to strengthen LGBTQI rights. As part of this, I will also push for mutual recognition of family relations in the EU. If you are parent in one country, you are parent in every country”.<sup>56</sup>

With this Strategy, the Commission committed itself to carry out “dedicated dialogues with Member States in relation to the implementation of the *Coman* judgement” and take legal action if necessary;<sup>57</sup> to review the 2009 guidelines on free movement to facilitate the exercise of rights for rainbow families;<sup>58</sup> to explore possible measures to support the mutual recognition of same-sex spouses and registered partners in cross-border situations

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<sup>52</sup> European Parliament, ‘Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones’, (2019/2933(RSP)), point 1.

<sup>53</sup> European Parliament, ‘Resolution on the Declaration of the EU as an LGBTIQ Freedom Zone’.

<sup>54</sup> European Parliament, ‘Resolution of 7 February 2018 on Protection and Non-Discrimination with Regard to Minorities in the EU Member States’, 2017/2937(RSP), (2018), points 20 and 21 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018IP0032>.

<sup>55</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’.

<sup>56</sup> European Commission, ‘State of the Union Address by President von der Leyen at the European Parliament Plenary’, 16 September 2020, available at:

[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655). Last accessed on 26/05/2022.

<sup>57</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’, 16.

<sup>58</sup> *Ibid.*, 17.

and to propose a horizontal legislative initiative to support the mutual recognition of parenthood between Member States.<sup>59</sup> The rights of the children of rainbow families and the importance of recognising their relationship with both parents, also in cross-border situations, was echoed in the EU strategy on the rights of the child.<sup>60</sup> The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the PETI Committee, has already published a report<sup>61</sup> on the topic of rainbow families and freedom of movement, not only to inform the legislator, but first of all in response to several petitions presented by citizens' groups.

At the same time, the European Parliament has continued putting pressure on the Commission to deliver on the promises of the "LGBTIQ Equality Strategy" and on Member States to respect LGBTI rights. In September 2021, it approved a resolution where it insisted that the EU needs to adopt a common approach to the recognition of same-sex marriages and partnerships.<sup>62</sup> It also called on Member States to respect the *Coman* judgement, the right to private and family life and the freedom of movement of rainbow families.<sup>63</sup> Finally, it prompted the Commission to "ensure that all EU Member States respect continuity in law as regards the family ties of members of rainbow families which move to their territory from another Member State",<sup>64</sup> as well as to propose legislation requiring all Member States to recognise for the purposes of national law a birth certificate, a marriage or a registered partnership formed in another Member State.<sup>65</sup>

To conclude, any discussion on same-sex married couples must be framed in the context of a clash between the fundamental values upheld by the European Union (especially the Commission and the European Parliament) and the continuous erosion of the rights of sexual minorities in Central and Eastern Europe. It is evident that the rulings of the CJEU in this area of fundamental rights and freedoms have a strong political significance.

### 3. The legal context

In order to examine the situation of same-sex married couples under EU law on freedom of movement, it is necessary to first understand the rights enjoyed by EU citizens in terms of

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<sup>59</sup> European Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', 17.

<sup>60</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU strategy on the rights of the child', COM/2021/142 final, 24.03.2021.

<sup>61</sup> Tryfonidou and Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU'.

<sup>62</sup> European Parliament, 'Resolution on LGBTIQ Rights in the EU', 2021/2679(RSP), (2021), point 4.

<sup>63</sup> 'Resolution on LGBTIQ Rights in the EU', point 4.

<sup>64</sup> *Ibid.*, point 7.

<sup>65</sup> *Ibid.*, point 10.

freedom of movement and fundamental rights, and the rights enjoyed by LGBTI couples under EU law.

### 3.a. Freedom of movement

Freedom of movement and residence is one of the fundamental freedoms of the European Union. Initially conceived as one of the pillars of the internal market, its scope of application was incrementally broadened. With the introduction of EU citizenship in the Treaty of Maastricht<sup>66</sup> (1992), the rights of movement, residence and equal treatment irrespective of nationality received a stronger legal basis and was expanded to all Union citizens.<sup>67</sup> Until then, only Community nationals who were contributing to the economy of the internal market as workers, employers or service providers were guaranteed free movement rights. Instead, Article 18(1) of the Maastricht Treaty (which became Article 21(1) in the Lisbon Treaty), reads “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 this Treaty and by the measures adopted to give it effect”.

The principle of freedom of movement and residence was further strengthened with the entry into force of the Treaty of Lisbon<sup>68</sup> (2009), which gave the Charter of Fundamental Rights (the Charter) the same legal value as the Treaties (Article 6 of the Treaty on European Union - TEU<sup>69</sup>). Indeed, the right to free movement and residence is expressed also in Article 45 of the Charter. This indicates that the right to move and reside freely is not only a fundamental freedom, but also a fundamental right, and as such it shall not be thwarted by national measures.<sup>70</sup>

As one of the key components of European citizenship, the right to move and reside freely across the Union is directly applicable and enforceable. In 2002, with the landmark ruling of the *Baumbast*<sup>71</sup> case, the CJEU established that Article 21 of the Treaty on the

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<sup>66</sup> ‘Treaty on European Union’, OJ C 191, 29.7.1992, p. 1–112. <http://data.europa.eu/eli/treaty/teu/sign>

<sup>67</sup> Paul Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, Sixth edition (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015), 852.

<sup>68</sup> ‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007’, OJ C 306, 17.12.2007 p. 1–271. <http://data.europa.eu/eli/treaty/lis/sign>

<sup>69</sup> ‘Consolidated version of the Treaty on European Union’, OJ C 326, 26.10.2012, p. 13–390. [http://data.europa.eu/eli/treaty/teu\\_2012/oj](http://data.europa.eu/eli/treaty/teu_2012/oj)

<sup>70</sup> Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Bloomsbury Publishing, Oxford: 2012), 148-149.

<sup>71</sup> *Baumbast and R v Secretary of State for the Home Department*, Case C-413/99 (CJEU 17 September 2002), para. 50.

Functioning of the European Union (TFEU)<sup>72</sup> directly confers on every citizen of the Union an individual right to move and reside across the EU, a right which must be protected by the national courts.<sup>73</sup> The personal scope of this right does not depend on the economic activity of a person, but only on their status as a citizen of the Union.

According to Article 45 TFEU, the right to free movement and residence (for workers) may be restricted on grounds of public policy, public security or public health. Nonetheless, the restricting measures need to satisfy a strict test of necessity and proportionality.<sup>74</sup> Such restrictions could be justified (a) only if based on objective considerations, (b) only if proportionate to the attainment of a legitimate aim, (c) only if necessary for the protection of the interests which they are intended to secure and (d) only in so far as those objectives cannot be attained by less restrictive measures.<sup>75</sup>

Overall, being one of the fundamental Treaty freedoms, the Court has interpreted the right to free movement broadly and its exceptions narrowly.<sup>76</sup> It can be relied on by Union citizens against the host Member State as well as their home Member State, in case the latter deters or prevents its own nationals from moving to another Member State.<sup>77</sup> Furthermore, as maintained in *Singh*<sup>78</sup>, a measure dissuading an EU citizen from returning to a Member State where they are a national constitutes a restriction to free movement.<sup>79</sup>

The introduction of a universally and directly applicable right to free movement and residence in the Treaties (Article 21 TFEU) as part of the rights deriving from EU citizenship (Article 20 TFEU) expanded the array of cases which fall within the scope *ratione materiae* of EU law. Certain situations which may previously have been considered as purely internal may now have a sufficient connection with EU law due to their impact on the rights of EU citizens,<sup>80</sup> for example due to the mere fact that the applicant is exercising the right to move across the Union.<sup>81</sup> This brought within the purview of the CJEU a series of matters falling into the competence of Member States, such as the

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<sup>72</sup> ‘Consolidated version of the Treaty on the Functioning of the European Union’, OJ C 326, 26.10.2012, p. 47–390. [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj)

<sup>73</sup> Robert Schütze, *An Introduction to European Law*, 3rd edn (Oxford University Press, Oxford: 2020), 273.

<sup>74</sup> Craig and De Búrca, *EU Law*, 885.

<sup>75</sup> Case C-353/06, para. 29. *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Case C-208/09 (CJEU 22 December 2010), para. 90

<sup>76</sup> See for example: *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, Case C-200/02 (CJEU 19 October 2004), para. 31.

<sup>77</sup> *Tryfonidou and Wintemute*, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 26.

<sup>78</sup> *The Queen v Immigration Appeal Tribunal and Surinder Singh*, ex parte Secretary of State for Home Department, Case C-370/90 (CJEU 7 July 1992).

<sup>79</sup> Case C-370/90, para. 19.

<sup>80</sup> Craig and De Búrca, *EU Law*, 871.

<sup>81</sup> *Rosas and Armati*, *EU Constitutional Law*, 152.

attribution of a family name in the case *Garcia Avello*<sup>82</sup>. In that judgement, the Court stated that situations involving the exercise of the freedom to move and reside within the Union fall within the scope of EU law, even when the domestic rule in question is a matter of national competence.<sup>83</sup> In those cases, the Member States shall exercise their competence in compliance with EU law<sup>84</sup>. As a result, the introduction of EU citizenship made it possible to grant greater protection against repressive, restrictive or discriminatory national measures.<sup>85</sup>

Article 21 TFEU is implemented by the Directive 2004/38/EC<sup>86</sup>, the so-called Citizens' Rights Directive, which clarifies the conditions under which EU citizens may exercise their freedom of movement and residence. The beneficiaries of this Directive are not only EU citizens, but so are their family members (as defined in Article 2 of the Directive), who also enjoy the right of free movement and residence. Two elements of this Directive are especially relevant for the topic at hand. First, it clearly states that free movement, in order to be exercised "under objective conditions of freedom and dignity" (para. 5), requires EU nationals to have the possibility to be joined by their family members. Additionally, Recital 31 of the Directive affirms that its provisions shall be implemented while respecting fundamental rights and freedoms as recognised by the Charter and without discrimination on the ground of sexual orientation, amongst others. It should also be noted that according to the jurisprudence of the CJEU, in cases which fall outside the scope of Directive 2004/38/EC but are protected directly by the Treaty provisions on freedom of movement, the Directive shall be applied by analogy.<sup>87</sup>

### **3.b. The freedom of movement of rainbow families**

Currently, no explicit or implicit reference is made to rainbow families in any instrument of EU law.<sup>88</sup> When the Citizens' Rights Directive was adopted, only two of the then 15 Member States had opened marriage to same-sex couples. During the legislative process, the European Parliament proposed to explicitly include a same-sex spouse or registered

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<sup>82</sup> *Carlos Garcia Avello v Belgian State*, Case C-148/02 (CJEU 2 October 2003).

<sup>83</sup> *Ibid.*, para. 24.

<sup>84</sup> *Ibid.*, para. 25.

<sup>85</sup> *Craig and De Búrca*, *EU Law*, 888.

<sup>86</sup> '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 (Text with EEA Relevance)', 158 OJ L § (2004).

<sup>87</sup> *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, Case C-456/12 (CJEU 12 March 2014), para. 37.

<sup>88</sup> *Tryfonidou and Wintemute*, 'Obstacles to the Free Movement of Rainbow Families in the EU', 89.

partner as a family member of the EU citizen (and therefore a beneficiary of the Directive), but the Council was against this amendment.<sup>89</sup> In the end, as a compromise, the term “spouse” in Article 2(2) of the Directive was not defined as either including or excluding a spouse of the same sex as the EU citizen.<sup>90</sup> Furthermore, under Article 3(2) of the Directive, the Member States shall facilitate entry and residence of “other family members”, who nevertheless do not enjoy a direct right of entry and residence in the same way as the spouse or direct descendant of a EU citizen. This wording by the European legislator left open the possibility to give an interpretation of such articles which would afford protection to LGBTI families under the Directive 2004/38/EC.

### 3.c. Fundamental rights

Even though there are no explicit laws (yet) defending rainbow families, fundamental rights such as the right to dignity and to family life, as well as the principles of equality and non-discrimination, are mainstreamed in EU lawmaking. In *Stauder* (1969)<sup>91</sup>, the CJEU first affirmed that EU law should comply with the fundamental human rights enshrined in the general principles of Union law, and in *Wachauf* (1989)<sup>92</sup> the same Court stated that Member States must respect, when implementing EU law, the same fundamental rights which bind the institutions in their actions. In 1999, the Treaty of Amsterdam<sup>93</sup> introduced a new legal basis giving competence to the EU to prohibit discrimination based on various grounds, including sexual orientation (Article 13 TEC, later Article 19 TFEU). With this, the Amsterdam Treaty became the first international agreement to explicitly make reference to discrimination based on sexual orientation. Article 13 TEC was the legal basis for Directive 2000/78/EC<sup>94</sup>, which prohibits discrimination on various grounds, including sexual orientation, in the workplace. This Directive was the basis for a series of cases on the rights of rainbow families under EU law, further described hereafter (section 3.d.).

Since the Lisbon Treaty, fundamental rights assumed an even more prominent role in the architecture of EU legal norms. Firstly, Article 2 TEU positions the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights at

<sup>89</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 496.

<sup>90</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 39.

<sup>91</sup> *Erich Stauder v City of Ulm - Sozialamt*, Case 29-69 (CJEU 12 November 1969).

<sup>92</sup> *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88 (CJEU 13 July 1989).

<sup>93</sup> ‘Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related act’, OJ C 340, 10.11.1997, p. 1–144.

<http://data.europa.eu/eli/treaty/ams/sign>

<sup>94</sup> ‘Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation’, 303 OJ L § (2000).

the centre of the value system of the Union. Combatting discrimination and social exclusion is also one of the objectives of the EU, as stated in Article 3 TEU.

Secondly, Article 10 TFEU provides that the Union shall aim to combat discrimination based on sexual orientation, amongst other grounds, when defining and implementing its policies and activities. This guarantees that the EU does not only provide reactive protection to LGBTI people once their rights have been violated, but it also ensures that their rights are taken into account in all EU lawmaking.<sup>95</sup>

Thirdly, as already mentioned, since the Lisbon Treaty the Charter has the same legal value of EU primary law. The Charter consolidates and crystallises the EU's existing obligation to respect fundamental rights:<sup>96</sup> it is a distillation of the rights already established as general principles of EU law, derived from international agreements and national constitutions. The Charter provides an additional instrument for the mainstreaming of LGBTI equality in EU lawmaking by prohibiting discrimination on the ground of sexual orientation (Article 21) as well as promoting human dignity (Article 1) and equality before the law (Article 20).

Similarly to the restrictions on fundamental freedoms, any limitations in exercising the fundamental rights enshrined in the Charter must be stipulated by law, must respect the essence of those rights, and must be proportionate, necessary and appropriate to meet the objectives of general interest recognised by the Union (Article 52 of the Charter).

### **3.c.I. Scope of application of fundamental rights**

According to Article 51 of the Charter, its principles are binding only on “institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law”. It is not sufficient for a national measure to come within an area of EU competence or for a national measure to indirectly affect EU law to bring the situation within the scope of the Charter.<sup>97</sup> Instead, EU law shall impose an obligation on the Member State with regard to the subject of the case in order for the Charter to be binding for them.<sup>98</sup> If there is no obligation to act or EU measure to derogate from, the Charter does not apply (see the case *Iida*).<sup>99</sup> When it comes to judicial review, as clarified by the CJEU in *Åkerberg Fransson*<sup>100</sup>, if EU law is applicable to the specific facts of the

<sup>95</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 9.

<sup>96</sup> Craig and De Búrca, *EU Law*, 394-396.

<sup>97</sup> *Ibid.*, 417.

<sup>98</sup> *Ibid.*, *EU Law*, 417.

<sup>99</sup> *Yoshikazu Iida v Stadt Ulm*, Case C-40/11 (CJEU 8 November 2012), para. 78-79

<sup>100</sup> *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10 (CJEU 26 February 2013).

case in respect of which a fundamental rights violation is claimed, then the CJEU shall “provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights” established in the Charter.<sup>101</sup> This means that the CJEU can review a national measure against the standards of fundamental rights of the Charter only if the national measure in question directly affects the application of EU law.

When a national measure restricts a fundamental freedom, the case falls within the scope of EU law and therefore of the Charter.<sup>102</sup> This was established as early as 1991 with the *ERT* case<sup>103</sup>, where the Court maintained that whenever a fundamental freedom is at stake, the fundamental rights protected under EU law shall also be respected. Compliance with fundamental rights is usually examined when assessing the possible justification of the restriction of a fundamental freedom: if the national measure restricting a fundamental freedom is also threatening a fundamental right, the justification of such restriction should pass a stricter proportionality test in order to be accepted. On the other hand, if the restriction of a fundamental freedom is protecting a fundamental right, such consideration will also be relevant when striking a balance between competing (national and European) interests.

### **3.c.II. Right to family life**

Of particular relevance for the topic of this thesis is the right to family life, which is protected by Article 7 of the Charter, and corresponds with Article 8 of the European Convention on Human Rights (ECHR). According to Article 52(3) of the Charter, the meaning and scope of the right to family life must be given the same interpretation under the Charter and under the ECHR. Therefore, the jurisprudence of the ECtHR on the right to family life for same-sex couples is relevant for the application of EU law.

In the case of *Schalk & Kopf* (2010)<sup>104</sup> the ECtHR affirmed for the first time that same sex couples “are in a relevantly similar situation to a different sex couple as regards their need for legal recognition and protection of their relationship”,<sup>105</sup> and that rainbow families enjoy a right to family life as much as heterosexual couples. In the later case *Vallianatos* (2013)<sup>106</sup> this principle was reaffirmed: the ECtHR found that Greece’s decision to limit

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<sup>101</sup> *Ibid.*, para. 19-21.

<sup>102</sup> Rosas and Armati, *EU Constitutional Law*, 164.

<sup>103</sup> *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case C-260/89 (CJEU 18 June 1991).

<sup>104</sup> *Schalk and Kopf v. Austria*, Application no 30141/04 (ECtHR 24 June 2010).

<sup>105</sup> *Ibid.*, para. 99.

<sup>106</sup> *Vallianatos and Others v. Greece*, Application nos 29381/09 and 32684/09 (ECtHR 11 July 2013).

civil partnerships to only heterosexual couples was against the right to family life, since a civil union was the only opportunity for same sex couples to formalise their relationship.<sup>107</sup> This line of jurisprudence of the ECtHR is of great importance, as it moved the ground for the protection of same-sex unions from the right to “private life” to the right to “family life”. The latter is characterised by public and social recognition, thus implying the need for State Parties to take action to protect such unions.<sup>108</sup>

This obligation found a more concrete expression with the landmark judgement *Oliari* (2015)<sup>109</sup>, when the Court ruled that the Italian Government had a positive obligation to create a specific legal framework providing for the recognition and protection of same-sex unions, otherwise the government would be in breach of Article 8 ECHR.<sup>110</sup> With the case *Orlandi* (2017),<sup>111</sup> the Court clarified that such a ‘specific legal framework’ must also be extended to same-sex couples who have married outside of Italy.<sup>112</sup>

Whether these cases create a general obligation for State Parties to legally recognise same-sex couples is debated, as the *Oliari* judgement emphasised the particular legal and social context in Italy, which was found to require the introduction of such a legal framework.<sup>113</sup> In the *Oliari* judgement the ECtHR noted that in Italy both the popular opinion and the judicial courts were in favour of the recognition of homosexual couples, while the Government maintained a more conservative approach. Because of this, the ECtHR found that the Italian Government had 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 same-sex unions.

Though, the jurisprudence of the ECtHR on same-sex unions has evolved since *Oliari*. Of particular importance is the 2021 case *Fedotova*<sup>114</sup>, which involved three same-sex couples who were not able to formally register their relationship in Russia and claimed a violation of Article 8 ECHR. In this case, the ECtHR noted the many obstacles that same-sex couples face because of the lack of legal recognition of their union<sup>115</sup> and observed that such restrictions of their rights is not justified by any overriding public interest, since there

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<sup>107</sup> *Ibid.*, para. 92.

<sup>108</sup> Ragone and Volpe, ‘An Emerging Right to a “Gay” Family Life?’, 482.

<sup>109</sup> *Oliari and Others v Italy*, Applications nos. 18766/11 and 36030/11 (ECtHR 21 October 2015).

<sup>110</sup> *Ibid.*, para. 185.

<sup>111</sup> *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR 14 December 2017)

<sup>112</sup> *Ibid.*, para. 209 and 210.

<sup>113</sup> Tryfonidou, ‘Law and Sexual Minority Rights in the EU’, 10.

<sup>114</sup> *Fedotova and Others v. Russia*, Applications no. 40792/10 (ECtHR 13 July 2021)

<sup>115</sup> *Ibid.*, para. 51.

are not “any risks for traditional marriage which the formal acknowledgment of same-sex unions may involve, since it does not prevent different-sex couples from entering marriage, or enjoying the benefits which the marriage gives.”<sup>116</sup> Furthermore, the Court also contested the observation of the Russian Government, which claimed that the Russian population disapproved of same-sex unions, by stating that “it would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.”<sup>117</sup> In this ruling, the ECtHR went beyond the *Oliari* judgement by recognising the need for legal recognition of same-sex couples also in absence of clear support from the public opinion. *Fedotova* created a stronger case for claiming that State Parties of the Convention have a positive obligation to establish a legal framework to ensure the recognition of same-sex unions.

### **3.c.III. Right to marry**

While rainbow families are protected under the right to family life, they do not (at the moment) enjoy a right to marry. The right to marry is expressed by Article 12 ECHR and Article 9 of the Charter, which both demand respect for “the national laws governing the exercise of this right”. By making reference to national legislation, both articles aim to grant a wide margin of discretion to single governments.<sup>118</sup> On the matter of same-sex marriage, the ECtHR and the CJEU has often relied on the concept of “European consensus”,<sup>119</sup> meaning that the Courts would not force the general introduction of specific rights before a majority of the national legislatures and governments have recognised them.<sup>120</sup> For example, the explanation of the Charter clarifies that the wording of Article 9, by not mentioning “marriage between a man and a woman”, keeps the door open to the extension of such rights to same-sex couples when and if there will be wider legal recognition of same-sex marriages across the Union. But at present, there is “no explicit requirement that domestic laws should facilitate such marriages”.<sup>121</sup>

The same approach is adopted by the ECtHR, which in *Schalk and Kopf* affirmed that, even though the right to marry no longer applies only to persons of the opposite sex, limiting marriage to heterosexual couples does not violate Article 12 ECHR,<sup>122</sup> because the

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<sup>116</sup> Ibid., para. 54.

<sup>117</sup> Ibid., para. 52.

<sup>118</sup> Waaldijk, ‘The Right to Marry as a Right to Equality’, 459.

<sup>119</sup> Ragone and Volpe, ‘An Emerging Right to a “Gay” Family Life?’, 474.

<sup>120</sup> Ibid., 475.

<sup>121</sup> ‘Explanations relating to the Charter of Fundamental Rights’, OJ C 303, 14.12.2007, p. 21.

<sup>122</sup> Application no. 30141/04, para. 62.

latter defines marriage with reference to national legislation.<sup>123</sup> The ECtHR noted the absence of a “European consensus” regarding same-sex marriage,<sup>124</sup> but at the same time did not confirm a “traditional” definition of marriage as a union between a man and a woman.

It cannot be excluded that a universal right to marry may emerge in the near future. Indeed, a 2017 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) affirmed that: “States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples.”<sup>125</sup> Such a new definition of the human right to marry would also influence the jurisprudence of the ECtHR and of the CJEU.

It must be noted though that this thesis does not argue for an obligation to introduce same-sex marriage in the domestic order, but merely to recognise marriages concluded abroad. In this respect, it must be recalled that according to the ECtHR, State Parties have a wide margin of discretion regarding rules on establishing a status. However, when the case is about recognising a status already established, the margins granted to national governments are narrower.<sup>126</sup> This is the case when a rainbow family established in one State moves to another one.

### **3.c.IV. Non-discrimination**

Article 21 of the Charter, corresponding to Article 14 of the ECHR, explicitly prohibits discrimination on the ground of sexual orientation.

To date, the CJEU was called to rule on only one case involving discrimination on the ground of sexual orientation (*Léger*<sup>127</sup>). In this instance, the applicant contested the French lifetime ban on blood donation by men who have had sex with men, claiming that it was against Article 21 of the Charter. The CJEU noted that such general ban may constitute discrimination on the ground of sexual orientation, but the measure could be justified by the aim of ensuring a high level of human health protection. Ultimately, the CJEU left it to

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<sup>123</sup> Waaldijk, ‘The Right to Marry as a Right to Equality’, 466.

<sup>124</sup> Application no. 30141/04, para. 58.

<sup>125</sup> IACtHR, ‘Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion of 24 November 2017’, OC-24/17, point 8.

<sup>126</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 11.

<sup>127</sup> Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang, Case C-528/13 (CJEU 29 April 2015).

the national court to determine whether this ban was proportionate or not.<sup>128</sup> In this way, the CJEU preferred not to pronounce itself on an issue which was politically sensitive, at risk of being criticised for condoning a measure which “was based on deep-seated homophobia and on stereotypical misconceptions about gay and bisexual men”<sup>129</sup>. *Léger* proves that the CJEU is generally reluctant in taking a stance on policy areas (such as public health and sexuality) where Member States’ competence is predominant.<sup>130</sup> This trend is also noticeable in the cases *Coman* and *V.M.A.* (see Chapter 4). Even though this may be discouraging for building an argument for the existence of a right to the universal cross-border recognition of same-sex marriages, the ECtHR jurisprudence on discrimination on the basis of sexual orientation, and in particular *Taddeucci and McCall*<sup>131</sup>, gives some reasons for optimism.

In *Taddeucci and McCall*, the ECtHR was called to rule on the case of an unmarried same-sex couple composed of an Italian and a New Zealand national. The third-country national (Mr McCall) was refused a residence permit on family grounds in Italy because under the relevant Italian law only different-sex spouses could qualify for a residence permit for ‘family members’. At the time, Italy had not introduced same-sex unions in the domestic order yet. The couple claimed a violation of Article 8 ECHR and Article 14 ECHR. In this judgement, the ECtHR noted that discrimination can also arise when “States fail to treat differently persons whose situations are significantly different” and that “in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article”.<sup>132</sup> The ECtHR then observed that the situation of the applicants could not be considered as analogous to that of an unmarried heterosexual couple, since same-sex couples had no access to marriage in Italy and therefore had no way to regularising their situation.<sup>133</sup> Because of this, the ECtHR found a violation of the principle of non-discrimination.

This means that when interpreting Article 21 of the Charter, the CJEU also needs to appreciate that unmarried homosexual and heterosexual couples cannot be considered as being in a comparable situation as long as marriage equality is not achieved.

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<sup>128</sup> *Ibid.*, para. 63-66.

<sup>129</sup> Tryfonidou, ‘Law and Sexual Minority Rights in the EU’, 10.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Taddeucci and McCall v Italy*, Application no. 51362/09 (ECtHR 30 June 2016).

<sup>132</sup> *Ibid.*, para. 81.

<sup>133</sup> *Ibid.*, para. 83.

### 3.d. Same-sex couples in CJEU case law

#### 3.d.I. Early cases: *Grant v South-West Trains*, *D and Kingdom of Sweden*, KB

The increasing protection afforded to LGBTI people under EU law after the ratification of the Lisbon Treaty and the entry into force of Directive 2000/78/EC is reflected through the stark evolution of the CJEU jurisprudence on rainbow families. The first two cases of the CJEU dealing with same-sex couples are *Grant v South-West Trains*<sup>134</sup> of 1998 and *D and Kingdom of Sweden*<sup>135</sup> of 2001. In both cases, the applicants claimed that they suffered discrimination because they were not treated equally to heterosexual couples for the purpose of receiving specific benefits.

In *Grant v South-West Trains* the CJEU referred to the jurisprudence of the ECtHR according to which stable homosexual relationships did not at the time fall within the scope of the right to respect for family life (Article 8 ECHR)<sup>136</sup>, and more favourable treatment of persons of opposite sex living together than of persons of the same sex in a stable relationship was not found to be contrary to the principle of non-discrimination enshrined in Article 14 ECHR<sup>137</sup>. Therefore, the CJEU concluded that “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”.<sup>138</sup> Additionally, in the *D and Kingdom of Sweden* case, the Court held that “according to the definition generally accepted by the Member States, the term marriage means a union between persons of the opposite sex”<sup>139</sup> and that a registered partnership cannot be considered comparable to marriage<sup>140</sup>. In both cases, the CJEU rejected the claims.

Only three years later, the 2004 judgement *KB*<sup>141</sup> was more promising for the rights of LGBTI citizens. The CJEU stated that legislation which, in breach of the ECHR, prevents a couple from fulfilling the marriage requirement which needs to be met to benefit from

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<sup>134</sup> Lisa Jacqueline Grant v South-West Trains Ltd, Case C-249/96 (CJEU 17 February 1998).

<sup>135</sup> D and Kingdom of Sweden v Council of the European Union, Joined cases C-122/99 P and C-125/99 P (CJEU 31 May 2001).

<sup>136</sup> Rees v the United Kingdom, Application no. 9532/81 (ECtHR 17 October 1986), para. 33.

<sup>137</sup> X. and Y. v the United Kingdom, Application No 9369/81, (ECtHR 3 May 1983), *Decisions and Reports* 32, p. 220.

<sup>138</sup> Case C-249/96, para. 35.

<sup>139</sup> Joined cases C-122/99 P and C-125/99 P, para. 11.

<sup>140</sup> *Ibid.*, para. 51.

<sup>141</sup> KB v National Health Service Pensions Agency and Secretary of State for Health, Case C-117/01 (CJEU 7 January 2004).

certain rights, must be considered incompatible with the Treaties.<sup>142</sup> This case did not involve a same-sex couple, but a heterosexual couple that did not have access to marriage because the national law did not recognise the gender reassignment of one partner. As a result, the surviving partner did not have access to a widower's pension. Since this case involved a transsexual person and a matter of inequality of treatment in the granting of a pension, the CJEU could rely on Article 157 TFEU, which ensures the principle of equal pay regardless of gender. Therefore, even though the right to marry is a question of national law, the case was brought within the scope of EU law. Nonetheless, Article 157 TFEU cannot be invoked to protect a same-sex couple.

### **3.d.II. Towards a greater recognition of the rights of same-sex couples: Maruko, Römer, Hay and Parris**

Later cases such as *Maruko* (2008)<sup>143</sup>, *Römer* (2011)<sup>144</sup> and *Hay* (2013)<sup>145</sup>, whose matters were the compatibility of national measures with Directive 2000/78/EC, saw more favourable outcomes for same-sex couples.

In these cases, the CJEU ruled that in situations where a Member State has not opened marriage to same-sex couples but national legislation treats for a certain purpose registered partnerships as equivalent to marriage, employers must extend the treatment they afford to married couples to registered same-sex partners. The EU Court underlined that even though legislation on civil and marital status falls within the competence of Member States, the latter shall exercise such competence in compliance with EU law, and in particular with the provisions on non-discrimination as expressed by Directive 2000/78/EC and Article 10 TFEU.<sup>146</sup>

According to Directive 2000/78/EC, direct discrimination occurs when one person is treated less favourably than another person who is in a comparable situation.<sup>147</sup> The Court clarified that such situations do not need to be identical but only comparable and that the assessment of that comparability shall be carried out in a specific and concrete manner in respect to the benefits concerned.<sup>148</sup> While in the cases *Maruko* and *Römer* the CJEU left it

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<sup>142</sup> *Ibid.*, para. 34.

<sup>143</sup> *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Case C-267/06 (CJEU 1 April 2008).

<sup>144</sup> *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C-147/08 (CJEU 10 May 2011).

<sup>145</sup> *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, Case C-267/12 (CJEU 12 December 2013).

<sup>146</sup> Case C-267/06, para. 59. Case C-147/08, para. 38.

<sup>147</sup> 'Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation', 303 OJ L § (2000), Article 2(2a).

<sup>148</sup> Case C-147/08, para. 42.

to the national court to evaluate whether spouses and life partners are in a comparable situation in regards to the benefit at hand<sup>149</sup>, in the later case *Hay* the CJEU affirmed that “the different treatment based on the employee’s marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”<sup>150</sup> These cases made it clear that, whenever EU law is applied, the principle of non-discrimination on the basis of sexual orientation shall also be respected.

On the other hand, the 2016 case *Parris*<sup>151</sup> represented a setback. The applicants contested an Irish pension scheme that required a couple to enter into marriage or registered partnership before the pension scheme’s member turned 60, in order to be able to designate a spouse or registered partner as the person entitled to receive a survivor’s pension in the event of death. Ireland however only allowed same-sex couples to enter into a registered partnership from 1 January 2011, and on that date the applicant was already 65 years old. Nonetheless, the CJEU dismissed the claim of discrimination on the basis of sexual orientation and age. To support its argument, the Court noted that Directive 2000/78/EC is without prejudice to national laws on marital status and the benefits dependent thereon, which are still within the area of competence of the Member States.<sup>152</sup>

These earlier cases provide some elements for the interpretation of the rights enjoyed by rainbow families under EU law, but a question regarding the freedom of movement of a same-sex couple was brought to the attention of the CJEU only with the *Coman* case.

## **4. Freedom of movement of rainbow families: Coman and V.M.A.**

### **4.a. Coman**

#### **4.a.I. Facts of the case**

Mr Coman is a Romanian and American citizen, who met Mr Hamilton, an American citizen, in New York and lived with him for four years in the United States. In 2009, Mr Coman moved to Belgium to work at the European Parliament and married Mr Hamilton in

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<sup>149</sup> Case C-267/06, para. 73. Case C-147/08, para. 52

<sup>150</sup> Case C-267/12, para. 44.

<sup>151</sup> *David L Parris v Trinity College Dublin and Others*, Case C-443/15 (CJEU 24 November 2016).

<sup>152</sup> *Ibid.*, para. 57-58.

Brussels in 2010. When Mr Coman ceased to work for the Parliament, the couple contacted the Romanian immigration inspectorate to receive information on the conditions under which Mr Hamilton could obtain a residence permit in Romania as the spouse of an EU citizen. In fact, according to Directive 2004/38/EC, third-country nationals who are family members of a EU citizen who is exercising their right to free movement enjoy a derived right of residence in the host Member State (Article 7(2)). Though, the inspectorate informed the couple that Mr Hamilton could not claim a right of residence under Romanian law, because the Civil Code defines marriage as the union of a man and a woman (Article 259/1 of the Civil Code) and expressly prohibits same-sex marriage, as well as the recognition in Romania of same-sex unions contracted abroad (Articles 227/1 and 227/2 of the Civil Code).

Coman, supported by the LGBTI rights organisation Accept<sup>153</sup>, brought an action before the national court, which referred the matter to the Constitutional Court. The latter decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling. The Romanian Constitutional Court sought clarification regarding the interpretation of the term “spouse” in Directive 2004/38/EC and, as a consequence, the rights that can be claimed by a same-sex spouse of an EU citizen.

In its judgement, the CJEU noted that Directive 2004/38 does not apply to the case at hand, since it only concerns citizens who move to or reside in a Member State other than that of which they are nationals.<sup>154</sup> Nonetheless, Mr Coman could derive a right to free movement and residence, which he can claim also against his own country, by virtue of Article 21 TFEU.<sup>155</sup> In such a case, Directive 2004/38 is applied by analogy, meaning that the conditions under which a right of residence can be derived must not be stricter than those laid down by said Directive.<sup>156</sup> The Court continued by stating that the rights which EU nationals enjoy in virtue of Article 21 TFEU include “the right to lead a normal family life, together with their family members”.<sup>157</sup> According to the Court it is also undisputed that during the “genuine residence” of Mr Coman in Belgium the couple “created or strengthened a family life”.<sup>158</sup> In reference to the question of the Constitutional Court, the CJEU clarified that the term “spouse” used in Directive 2004/38/EC is gender neutral<sup>159</sup>

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<sup>153</sup> <https://www.acceptromania.ro/>

<sup>154</sup> Case C-673/16, para. 19-20.

<sup>155</sup> *Ibid.*, para. 23-24.

<sup>156</sup> *Ibid.*, para. 25.

<sup>157</sup> *Ibid.*, para. 32.

<sup>158</sup> *Ibid.*, para. 28.

<sup>159</sup> *Ibid.*, para. 35.

and applies to any person joined to another person by the bonds of marriage in accordance with the law of the state where the marriage is concluded.<sup>160</sup> As a result “a Member State cannot rely on its national law as justification for refusing to recognise in its territory [...] a marriage concluded [...] in another Member State”.<sup>161</sup> However, the Court stressed that the marriage in question needs to be recognised “for the sole purpose of granting a derived right of residence to a third-country national”.<sup>162</sup> The Court concluded by considering the possible justifications of such a restriction to the freedom of movement, and affirmed that recognising a same-sex marriage concluded abroad for the sole purpose of granting a derived right of residence to a third-country national cannot undermine the institution of marriage as defined in the host Member State<sup>163</sup> and therefore cannot be justified on the grounds of national identity or public policy. Furthermore, the Court also observed that any justification of a restriction of a fundamental freedom shall respect the fundamental rights of EU citizens, including the right to family life.

#### **4.a.II. Analysis of the case**

The conclusion reached by the CJEU is not surprising, given the significant line of jurisprudence on the respect for family life of EU citizens who make use of their freedom of movement (see section 5.b.), as well as the obligation to interpret secondary law in accordance with the principle of non-discrimination on the ground of sexual orientation (see section 3.c.). If this case was straightforward from a legal point of view, it was nonetheless a very complex ruling from a political standpoint.

##### ***4.a.II.A. Fundamental freedoms, not fundamental rights, in the spotlight***

The Court was aware of the political sensitivity of the subject, and chose its strategy accordingly: it situated the case squarely within the framework of the internal market freedoms, instead of referring to an argument based on fundamental rights.<sup>164</sup> This is not uncommon, since other judgments which reinforced the right to family life, such as *Carpenter*<sup>165</sup> and *Baumbast*<sup>166</sup>, were also argued from an economic rationale.<sup>167</sup> Strikingly, the term “discrimination” is absent from the judgement, even though Romania certainly

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<sup>160</sup> Ibid., para. 33-34.

<sup>161</sup> Ibid., para. 36.

<sup>162</sup> Ibid., para. 36.

<sup>163</sup> Ibid., para. 45.

<sup>164</sup> Rijkma, ‘You Gotta Let Love Move’, 330.

<sup>165</sup> *Mary Carpenter v Secretary of State for the Home Department*, Case C-60/00 (CJEU 11 July 2002).

<sup>166</sup> Case C-413/99.

<sup>167</sup> Rijkma, ‘You Gotta Let Love Move’, 330.

recognises opposite-sex marriages concluded abroad. However, an argument based on equality was certainly possible, as outlined by Advocate General Wathelet<sup>168</sup>, who observed that if Directive 2004/38/EC was to be interpreted as covering only opposite-sex married couples, such a difference would not be acceptable because it would amount to direct discrimination based on sexual orientation “since no Member State prohibits heterosexual marriage”.<sup>169</sup> On top of that, the CJEU also failed to mention that, according to the case law of the ECtHR, creating distinctions based on sexual orientation could be justified only for “particularly convincing and weighty reasons”, while “differences based solely on considerations of sexual orientation are unacceptable”.<sup>170</sup>

Furthermore, the Court makes only cursory reference to fundamental rights and only when looking at possible justifications for the restriction of an internal market freedom, instead of basing a separate line of argument for finding a breach of EU law in a violation of the Charter.<sup>171</sup> Interestingly the CJEU does not even cite one of the most important cases of the Strasbourg Court on the right to family life of rainbow families, i.e. *Oliari*, arguably to avoid suggesting that the obligation to create a legal framework for same-sex unions, which the ECtHR imposed on Italy, would also apply to Romania.<sup>172</sup> This strategy of the CJEU, aimed at appeasing the Member States most strongly opposed to same-sex marriage, may be criticised as excessively cautious.<sup>173</sup>

#### **4.a.II.B. The meaning of “spouse” in EU law**

One innovative element of the *Coman* case is the gender-neutral interpretation of the term “spouse”, used in Directive 2004/38/EC. The Court defined as spouses two persons who got married “in a Member State in accordance with the law of that State”.<sup>174</sup> The CJEU, therefore, refers to the legislation of the Member State where the marriage was concluded. This approach seems at odds with the jurisprudence of *Metock*<sup>175</sup>, where it was stated that a derived right of residence for a third-country national married to an EU citizen can be relied upon “irrespective of when and where the marriage took place”.<sup>176</sup> Differently from the ruling of the Court, Advocate General (AG) Wathelet supports an autonomous and

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<sup>168</sup> Opinion of Advocate General Wathelet on Case C-673/16 delivered on 11 January 2018.

<sup>169</sup> *Ibid.*, para. 67.

<sup>170</sup> Application No 51362/09, para. 89.

<sup>171</sup> Tryfonidou, ‘Law and Sexual Minority Rights in the EU’, 5.

<sup>172</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 41.

<sup>173</sup> Rippma, ‘You Gotta Let Love Move’, 336.

<sup>174</sup> Case C-673/16, para. 56.

<sup>175</sup> *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, Case C-127/08 (CJEU 25 July 2008).

<sup>176</sup> *Ibid.*, para. 81.

univocal interpretation of the term “spouse”, independent from national legislation, because of the need for uniform application of EU law, for the respect of equality and for the necessity to interpret the law in the light of present-day circumstances.<sup>177</sup> In his words, same-sex marriage “is now recognised in all continents. It is not something associated with a specific culture or history; on the contrary, it corresponds to a universal recognition of the diversity of families”.<sup>178</sup> This approach was also supported by the European Commission and the government of the Netherlands. On the other hand, the Court does not engage with the social acceptance and legitimacy of same-sex unions, limiting itself to note that the existence of a family in the case of Mr Coman and Mr Hamilton is not disputed.

#### ***4.a.II.C. The limitations of the judgement***

Under *Coman*, the rights enjoyed by same-sex couples when moving across the Union are fraught with restrictions. First, the CJEU stressed that in order to be able to claim a derived right of residence for the spouse of an EU citizen, family life must be created or strengthened in the course of “genuine residence” of the EU citizen in another Member State.<sup>179</sup> This seems to appease those Member States where same-sex marriage is illegal. Even though this criterion is in-line also with the jurisprudence concerning opposite-sex couples,<sup>180</sup> it leaves same-sex couples residing in these States without any possibility of having their union recognised in their country.<sup>181</sup> This criterion also does not offer protection to same-sex couples visiting another Member State temporarily and in need of demonstrating their family ties.<sup>182</sup>

Second, the requirement of “creating or strengthening family life” is more restrictive than in the general case law of the CJEU. For example, in the case of *Singh*, a couple composed of a UK citizen and a third-country national moved back to the UK to divorce (exactly the opposite of creating or strengthening family life) and were still exempted from immigration controls due to the rights they enjoyed in the internal market.<sup>183</sup>

The third, and somehow inevitable limit of the *Coman* judgement, is that it does not offer any protection to same-sex couples who did not make use of their right to free movement, and therefore cannot claim that their case falls within the scope of EU law.

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<sup>177</sup> Opinion of Advocate General Wathelet on Case C-673/16, para. 34.

<sup>178</sup> *Ibid.*, para. 58.

<sup>179</sup> Tryfonidou, ‘Law and Sexual Minority Rights in the EU’, 15.

<sup>180</sup> Case C-456/12, para. 51.

<sup>181</sup> Kochenov and Belavusau, ‘After the Celebration’, 566.

<sup>182</sup> Alina Tryfonidou, ‘The Right of Same-Sex Spouses under EU Law to Move Freely between EU Member States’, Research report (NELFA, January 2019), 15.

<sup>183</sup> Kochenov and Belavusau, ‘After the Celebration’, 567.

Finally, an additional limitation of *Coman* lies in the difficulty to enforce such a judgement. Indeed, despite the CJEU ruling, the General Inspectorate for Immigration continues to deny a residence permit to Mr Hamilton and other people in a similar situation. As a result, Mr Coman and Mr Hamilton in 2020 brought their case to the ECtHR, where the ruling is pending.<sup>184</sup> As it will be seen in Chapter 6, it is the duty of the European Commission to bring infringement proceedings against those Member States who do not comply with the *Coman* judgement.

#### ***4.a.II.D. A single purpose recognition of same-sex marriages.***

The most substantial limit of the judgement is that the CJEU required Romania to recognise a same-sex marriage concluded abroad “for the sole purpose of granting a derived right of residence to a third-country national”.<sup>185</sup> This means that the Romanian state does not need to recognise Mr Coman and Mr Hamilton as spouses for any other purpose, for example in relation to taxation, social security, pensions, inheritance, citizenship, and medical law, (e.g. hospital visitation and consultation). Since the civil status of a person determines their access to a broad range of rights and entitlements, it should be expected that a marriage concluded abroad would need to be recognised in the domestic legal system also in areas outside of the scope of the internal market.<sup>186</sup> It would be paradoxical if a government department were to recognise the marriage with Mr Coman to grant Mr Hamilton a residence permit, but the same administration would refuse a tax advantage or a benefit available only to married couples.<sup>187</sup> Interestingly, this point was raised by the Polish Government in its written observations, where it argued that recognition of same-sex marriage for purposes of immigration law could have unforeseen consequences for other domestic matters beyond mere entry and residence, but this concern was not addressed by the CJEU.<sup>188</sup>

A single purpose recognition of same-sex marriage seems at odds with EU law itself. Article 24 of Directive 2004/38/EC states 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”. Furthermore, as already seen, Recital 31 of the Directive requires Member States to implement it with no

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<sup>184</sup> Application no. 2663/21 against Romania, lodged on 23 December 2020, communicated on 9 February 2021.

<sup>185</sup> Case C-673/16, para. 36.

<sup>186</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 483.

<sup>187</sup> Tryfonidou, ‘Law and Sexual Minority Rights in the EU’, 13.

<sup>188</sup> Rijpma, ‘You Gotta Let Love Move’, 335.

discrimination on grounds of sexual orientation. If the Directive applies by analogy also to the case of *Coman*, it is difficult to justify a difference in treatment in comparison with heterosexual spouses.<sup>189</sup>

The reticence of the Court to require full recognition of a same-sex marriage concluded abroad for all matters of domestic law is clearly motivated by the intention to appease Member States where same-sex marriage is banned, sometimes by the national constitution. Nonetheless, as it will be argued in Chapter 5, the Court may need to extend the recognition of same-sex married couples if confronted with a case where the right of residence of one of the spouses is not at stake.

## **4.b. V.M.A.**

### **4.b.I. Facts of the case**

Three years after *Coman*, the CJEU was confronted with another case concerning the freedom of movement of rainbow families. This new case involved a same-sex couple (V.M.A., a Bulgarian citizen, and K.D.K., a British citizen) who married in Spain in 2018 and conceived a daughter (S.D.K.A.) in 2019. Both mothers are indicated in the birth certificate issued by the Spanish authorities. V.M.A. applied to the Sofia municipality for a birth certificate for her daughter, which is necessary for the issuance of a Bulgarian identity document. The Sofia municipality requested V.M.A. to provide evidence of the identity of the biological mother of S.D.K.A. and informed V.M.A. that only the name of one mother could appear on the Bulgarian birth certificate.<sup>190</sup> V.M.A. refused to disclose the identity of the biological mother and therefore the Sofia municipality turned down V.M.A.'s application for a birth certificate. V.M.A. brought action against that decision to the Administrative Court of the City of Sofia, which referred the case to the CJEU, asking whether Article 20 and 21 TFEU oblige the national authorities to issue a Bulgarian birth certificate to S.D.K.A., or whether a wider margin of discretion may be accorded as regards to the rules for establishing parentage, as an expression of national identity. It must be noted that the referring court recognises that S.D.K.A. is a Bulgarian national by virtue of the fact that one of the parents is a Bulgarian citizen. Furthermore, it must be recalled that Article 4(3) of Directive 2004/38/EC requires Member States to issue an identity card or passport to their own nationals, for the purpose of exercising their right to free movement and residence. Therefore, it is not disputed that the refusal to issue a birth

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<sup>189</sup> Rijpma, 'You Gotta Let Love Move', 335.

<sup>190</sup> Case C-490/20, para. 21.

certificate represents an obstacle to the freedom of movement of S.D.K.A., but the referring court notes that “it is necessary to strike a balance between [...] the constitutional and national identity of the Republic of Bulgaria and [...] the interests of the child, and in particular the child’s right to a private life and to free movement”.<sup>191</sup>

## **4.b.II. Analysis of the case**

### ***4.b.II.A. Balancing fundamental freedoms and national identity***

This was a much more complex case than *Coman*, because, as noted by the Advocate General Kokott in her Opinion, “it is not possible to draw up a birth certificate solely for the purposes of free movement”,<sup>192</sup> since the birth certificate reflects parentage within the meaning of family law.

According to the referring court, the birth certificate requested was against the concept of the traditional family laid down in Article 46(1) of the Constitution of Bulgaria, according to which “matrimony shall be a free union between a man and a woman”, and was therefore liable of having an adverse effect on the Bulgarian national identity. However, according to the CJEU, national identity cannot justify the refusal to recognise the family relationship established on the Spanish birth certificate for the sole purpose of exercising the rights derived by EU law on freedom of movement.<sup>193</sup> In particular, S.D.K.A. as an EU national is a beneficiary of Directive 2004/38/EC, and therefore must be issued an identity card or passport.<sup>194</sup> In response to the claim that recognising parentage by two women was against the national identity of Bulgaria, the CJEU simply replied that a Member State “cannot rely on its national law as justification for refusing to draw up such an identity card or passport”.<sup>195</sup> Therefore, the Bulgarian authorities were obliged to issue travel documents “regardless of whether a new birth certificate is drawn up for that child”.<sup>196</sup> Furthermore, such a document (alone or accompanied by other documents issued by the host Member State) shall enable S.D.K.A. to travel and be accompanied by each of the two mothers. According to the CJEU, complying with this ruling would not undermine the national identity of the Member State, since it would not oblige Bulgaria to open up

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<sup>191</sup> Case C-490/20, para. 29.

<sup>192</sup> Opinion of Advocate General Kokott on Case C-490/20 delivered on 15 April 2021, para. 104.

<sup>193</sup> *Ibid.*, para. 134.

<sup>194</sup> Case C-490/20, para. 43.

<sup>195</sup> *Ibid.*, para. 45.

<sup>196</sup> *Ibid.*, para. 45.

marriage and parenthood to same-sex couples, and would not determine any rights, entitlements or benefits other than those derived from EU law.<sup>197</sup>

Also in this case, the one-purpose recognition of family relationships was used to strike a balance between national identity and rights conferred by EU law.

#### ***4.b.II.B. The portability of family ties***

In the *V.M.A.* case, the CJEU affirmed that, for the purpose of EU law, all Member States must recognise the relationships between all three family members.<sup>198</sup> Not recognising one of the two mothers would be against the right to lead a normal family life,<sup>199</sup> and therefore constitute a restriction to freedom of movement. In this way, the Court established the principle of mutual recognition of family ties across the Union, but regrettably only within the scope of EU law. If a rainbow family is able to legalise their status in the course of their genuine residence in one Member State, all other Member States need to recognise such family ties for the purpose of respecting EU law.

#### ***4.b.II.C. Fundamental rights in the spotlight***

Contrary to the *Coman* judgement, in *V.M.A.* the Court examined at length the protection accorded to rainbow families by the Charter. Firstly, it is maintained that “the relationship between the child concerned and each of the two persons with whom she leads a genuine family life in the host Member State and who are mentioned as being her parents on the birth certificate drawn up by that Member State’s authorities is protected under Article 7 of the Charter”,<sup>200</sup> hence the obligation to allow S.D.K.A. to travel and reside with both mothers. Then, the Court examined the principles expressed in the UN Convention on the Rights of the Child (ratified by all Member States), which is integrated in EU law via Article 24 of the Charter. Article 7 of this Convention established the right to be registered immediately after birth and the right to acquire a nationality without discrimination, including discrimination on the basis of characteristics of the parents. These considerations reinforced the argument of the CJEU regarding the right of S.D.K.A. to be recognised as the daughter of both her mothers.

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<sup>197</sup> *Ibid.*, para. 57.

<sup>198</sup> *Ibid.*, para. 67.

<sup>199</sup> Opinion of Advocate general Kokott on Case C-490/20, 15 April 2021, para. 144-145.

<sup>200</sup> Case C-490/20, para. 62.

#### ***4.b.II.D. The definition of “direct descendant” under EU law***

Finally, the Court also clarified that the term “direct descendant” in Article 2(2)(a) and (c) of Directive 2004/38/EC includes the child of a same-sex couple, as established on the birth certificate issued by the competent authorities of a Member State.<sup>201</sup> This is extremely relevant since some countries do not recognise a parent-child relationship in the absence of a biological link (or of an adoption procedure).<sup>202</sup> Though, similar to the definition of “spouse” in the *Coman* case, this formulation may exclude the child of a Union citizen born outside of the EU.

#### ***4.b.II.E. Comparison with Coman***

The *V.M.A.* judgement presents elements of continuity but also steps forward in comparison with the line of jurisprudence established by *Coman*. The Court anchors its argumentation in the principle that the rainbow family of *V.M.A.* has the right to lead a normal family life when exercising the right to free movement,<sup>203</sup> and dedicates more space to the assessment of Member States’ respect of fundamental rights when restricting a fundamental freedom. Therefore, the Court clearly indicates that rainbow families are granted the same level of protection as other families and that rainbow families are in a comparable situation to families based on heterosexual marriage.

On the other hand, *V.M.A.* follows the tradition of *Coman* in recognising rainbow families only for the purpose of freedom of movement and only within the scope of EU law. In the next chapter, it will be discussed whether such single-purpose recognition of family ties is tenable according to EU law.

## **5. The case for an all-purpose recognition of rainbow families moving across borders**

Can EU law protect same-sex couples beyond the single purpose recognition presented in cases such as *Coman* and *V.M.A.*? In other words: are Member States that have not yet opened up marriage to same-sex couples obliged under EU law to recognise same-sex

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<sup>201</sup> Ibid., para. 68.

<sup>202</sup> Alina Tryfonidou, ‘EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?’, *Yearbook of European Law* 38 (Oxford: 1 January 2019): 227, <https://doi.org/10.1093/yel/yez001>.

<sup>203</sup> Case C-490/20 para. 47.

marriages concluded abroad as equivalent to marriages in the domestic order? This chapter will argue so.

Let's consider the case of a same-sex couple who got married in Belgium, where they were both residing and working. Let's now imagine that the family wants to move to Poland for professional purposes. Both spouses have an autonomous right of residence in Poland as EU citizens, but their union cannot find any form of legal recognition. Let's now imagine that this couple seeks the registration of their marriage in Poland and this is refused by the national administration. This is not a hypothetical case: there are currently at least two cases pending in front of the ECtHR that involve Polish same-sex couples who have been refused the registration of their marriage concluded abroad because it was found against the Polish legal order (*Marta Agnieszka Handzlik-Rosul and Anna Katarzyna Rosul against Poland*<sup>204</sup>; and *Katarzyna Formela and Sylwia Formela against Poland*<sup>205</sup>). In both cases, the applicants claim that Poland is in breach of Article 8 of the ECHR. Nonetheless, these two cases do not fall within the scope of EU law because the two couples did not establish "genuine residence" abroad and therefore their case is not protected by the principles of freedom of movement (see section 4.a.II.C.).

However, in a hypothetical case where the applicants have actually lived, worked and established a family in another Member State and are now returning to (or moving to) Poland, their situation would fall within the scope of EU law, notably Directive 2004/38/EC and Article 21 TFEU. Therefore, in this case, the national court may refer questions to the CJEU according to Article 267 TFEU on preliminary rulings. Let's then assume that the national court refers this question to the CJEU: does EU law on freedom of movement preclude Member States from refusing to register, for all purposes of domestic law, a marriage concluded in another Member State?

## **5.a. The scope of EU law**

As already discussed, family law does not fall within the field of application of EU law. Therefore, the decision of a Member State to open up marriage or civil unions to same-sex couples is purely an internal matter. Nonetheless, this case would fall within the remit of EU law since it concerns two EU nationals who have benefitted from the rights derived from Directive 2004/38/EC to move and reside in a Member State different from that of

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<sup>204</sup> Marta Agnieszka Handzlik-Rosul and Anna Katarzyna Rosul against Poland, Application no 45301/19 (ECtHR, lodged on 16 August 2019, pending).

<sup>205</sup> Katarzyna Formela and Sylwia Formela against Poland and 3 other applications, Application no 58828/12 (ECtHR, Communicated on 20 June 2020, Published on 6 July 2020, pending).

origin. According to the doctrine of supremacy of EU law (affirmed as early as *Costa v ENEL*)<sup>206</sup> in combination with the principle of sincere cooperation (enshrined in Article 4(3) TFEU), Member States have a duty to comply with EU law even when exercising powers that have not been transferred to the EU. Therefore, whenever a fundamental freedom is at stake, Member States need to exercise their competences while complying with European legislation (see also *ERT* and *Garcia Avello*).

## **5.b. CJEU case law on the right to lead a normal family life in the host Member State**

The importance of respect for family life for the effectiveness of freedom of movement has been established through a long tradition of jurisprudence on the right of EU nationals to be accompanied by their third-country national spouse and children when moving across the Union.

First, in the 1992 case *Singh* the CJEU stated that a national of a Member State would be deterred from leaving their country of origin if, when returning to their home country, their spouse and children would not be permitted to enter and reside in the territory of their Member State of origin under conditions at least equivalent to those granted them by EU law in the territory of another Member State.<sup>207</sup> This judgement, which precedes both the introduction of EU citizenship and of the Charter, underlines the importance of protecting family life across borders in order to enable freedom of movement.

The later case *Eind*<sup>208</sup> makes it even more explicit that an obstacle to freedom of movement would ensue if an EU citizen would face the prospect, upon return to his Member State of origin, “of not being able [...] to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage.”<sup>209</sup> The wording in *Eind* arguably suggests that not only being separated from your spouse, but also not being legally and socially recognised as such, can harm the freedom of movement of EU citizens.

In *Baumbast*, the Court affirmed that the principle of freedom of movement “requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the

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<sup>206</sup> *Flaminio Costa v ENEL*, Case 6-64 (CJEU 15 July 1964).

<sup>207</sup> Case C-370/90, para. 20.

<sup>208</sup> *Minister voor Vreemdelingenzaken en Integratie v R N G Eind*, Case C-291/05 (CJEU 11 December 2007).

<sup>209</sup> *Ibid.*, para. 36.

best possible conditions for the integration of the Community worker's family in the society of the host Member State".<sup>210</sup> Arguably, not having access to any form of legal recognition as a family would harm the integration of a same-sex couple moving to a new country.

In *Carpenter*, the Court stressed "the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty".<sup>211</sup> Again in *Metock* it was underlined that "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."<sup>212</sup> This principle was also confirmed in *Lounes*<sup>213</sup>, where the Court stated that "the rights which nationals of Member States enjoy under article 21(1) TFEU include the right to lead a normal family life, together with their family members, in the host Member State".<sup>214</sup>

It is therefore well established in case-law that EU citizens have the right, when exercising their freedom of movement, to continue enjoying a normal family life.

## 5.c. Beyond family reunification

All the cases considered above concern the right of residence of a third-country national or a right to family reunification. In other words, the applicants were contesting a national measure which would force them to be separated from the rest of their family. This would not be the case in the situation where two EU citizens are seeking the recognition of their marriage concluded abroad. Can the latter case also be considered a restriction of freedom of movement? It can be argued so, for a series of reasons expressed below.

First, as observed by the CJEU in *Bosman*<sup>215</sup>, "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 [...] constitute an obstacle to that freedom".<sup>216</sup> It is not difficult to imagine that the non-recognition of a same-sex marriage in the host state could deter an

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<sup>210</sup> Case C-413/99, para. 50.

<sup>211</sup> Case C-60/00, para. 38.

<sup>212</sup> Case C-127/08, para. 62.

<sup>213</sup> Toufik Lounes v Secretary of State for the Home Department, Case C-165/16 (CJEU 14 November 2017).

<sup>214</sup> *Ibid.*, para. 52.

<sup>215</sup> Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, Case C-415/93 (CJEU 15 December 1995)..

<sup>216</sup> *Ibid.*, para. 96.

EU citizen from leaving his country of origin.<sup>217</sup> This argument is also embraced by Advocate General Kokott in her Opinion<sup>218</sup> on the *V.M.A.* case. There, the AG observed that “the status of family members forms the basis of numerous rights and obligations arising from both EU and national law. [...] There is no doubt that the failure to recognise the family relationships established in Spain could deter the applicant in the main proceedings [V.M.A.] from returning to her Member State of origin”,<sup>219</sup> and this would constitute a restriction of her freedom to move and reside in the Union territory. It is important to note that in this scenario V.M.A. would not be separated from her child and her wife, but according to Advocate General Kokott the lack of recognition of their family ties is liable to “prevent the applicant in the main proceedings, if she were to return to Bulgaria, from continuing the family life she has led in Spain”.<sup>220</sup> In conclusion, according to the Opinion of AG Kokott, the right to lead a normal family life when moving from one Member State to another is infringed when family ties are not recognised across borders.

Second, the wording used in the cases related to family reunification and the right of residence of third country nationals is broad enough to argue that the protection of family life of EU citizens could be invoked in case of refusal to grant any kind of legal and social recognition to a family formed abroad. For example, in the *Metock* case, the Court affirmed that “freedom of movement for Union citizens must [...] be interpreted as the right to leave any Member State [...] in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.”<sup>221</sup> This broad interpretation of freedom of movement given in *Metock* reinforces the assumption that severing a marital bond constitutes an obstacle to the freedom of movement.<sup>222</sup>

Third, in *Runevič-Vardyn and Wardyn*<sup>223</sup>, the Court clarified that a restriction on the freedom of movement and residence arises whenever a national measure “is liable to cause serious inconvenience to those concerned at administrative, professional and private levels”.<sup>224</sup> This can be the case in the instance of a failure to register a marriage concluded abroad. For example, looking again at the case of *Formela and Formela v Poland*, pending

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<sup>217</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 45.

<sup>218</sup> Opinion of Advocate general Kokott on Case C-490/20, 15 April 2021.

<sup>219</sup> *Ibid.*, para. 62.

<sup>220</sup> *Ibid.*, para. 64.

<sup>221</sup> Case C-127/08, para. 68.

<sup>222</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 68.

<sup>223</sup> *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Case C-391/09 (CJEU 12 May 2011).

<sup>224</sup> *Ibid.*, para. 76.

in front of the ECtHR, the applicants claim to have been discriminated against in the course of several proceedings because of the impossibility to conclude a marriage. These include: being excluded from tax-free donations (which are reserved for family members), the impossibility to file a joint tax return declaration, the lack of access to leave from work and social security contributions for caring for a sick partner, and the impossibility to extend health insurance coverage to their partner.<sup>225</sup>

Fourth, the Court has affirmed in several cases the importance of being able to demonstrate the existence of family links for the purpose of freedom of movement. In the case *Runevič-Vardyn and Wardyn* the CJEU stated that “many daily actions, both in the public and in the private domains, require a person to provide evidence [...] of the nature of the links between different family members. A couple who are both citizens of the Union [...] residing and working in a Member State other than their Member States of origin, must be in a position to prove the relationship which exists between them”.<sup>226</sup> The same principle was also reasserted in the case of *Bogendorff von Wolffersdorff*.<sup>227</sup> This also reinforces the argument that marital status needs to be recognised across borders.

Finally, it can be argued, through analogy to similar cases involving legal persons, that the portability of civil status is a condition for the genuine enjoyment of freedom of movement. In fact, the CJEU ruled in cases such as *Centros*<sup>228</sup> and *Überseering*<sup>229</sup> that the failure to recognise the legal personality of a company set up under the laws of another Member State could amount to a violation of the freedom of companies to move their business elsewhere within the EU. Since legal personality is a construct of domestic law as much as marriage, it can be argued that the non-portability of marriage ties constitutes a restriction to the freedom of movement and an obstacle to the correct functioning of the internal market.<sup>230</sup> Indeed, it should be possible to guarantee the continuity and permanence of EU citizens’ civil status when crossing borders, in order to eliminate hindrances to free movement.<sup>231</sup>

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<sup>225</sup> Katarzyna Formela and Sylwia Formela against Poland, Application no. 58828/12, Statement of facts, (ECtHR 6 July 2020).

<sup>226</sup> Case C-391/09, para. 73.

<sup>227</sup> Nabil Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, Case C-438/14 (CJEU 2 June 2016), para. 43.

<sup>228</sup> Centros Ltd v Erhvervs- og Selskabsstyrelsen, Case C-212/97 (CJEU 9 March 1999).

<sup>229</sup> Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00 (CJEU 5 November 2002).

<sup>230</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 477.

<sup>231</sup> Ibid., 488.

In conclusion, EU citizens who intend to benefit from their freedom of movement and residence, but need to confine themselves to the territory of those Member States that recognise their already existing marriage with a same-sex partner, are effectively deprived of the enjoyment of the rights and entitlements expressed in Article 21 TFEU.<sup>232</sup>

Though, the Court may still find that there is no obstacle to the enjoyment of the freedom of movement of the two spouses since indeed they are both allowed to enter and reside in the host Member State by virtue of their status as EU citizens. Such a restrictive interpretation of freedom of movement would be at odds with the case law analysed in the previous paragraphs, but is still possible considering that there is no clear judicial precedent under EU law.

## **5.d. Justification of the restriction of a fundamental freedom**

### **5.d.I. Public policy**

If the CJEU finds that a national measure constitutes a restriction to the freedom of movement, it will then consider if the measure can be justified on legitimate grounds. The non recognition of same-sex marriages concluded abroad may be justified by the Member States on the grounds of public policy or public interest (on the basis of Article 45 TFEU), invoking the defence of the institution of marriage and of traditional family values, and the protection of the moral and religious order of society. It can also be argued that the obligation to recognise same-sex unions concluded abroad goes against CJEU case law (notably *Omega*<sup>233</sup>), according to which the concept of public policy may vary from one State to another and national governments shall be given a margin of appreciation.<sup>234</sup> In other words, EU law does not oblige a Member State to adopt the public policy of another Member State.<sup>235</sup>

Nonetheless, the scope of a derogation based on public policy cannot be determined unilaterally by the Member States.<sup>236</sup> Furthermore, public policy as a justification of a restriction of freedom of movement “may be relied on only if there is a genuine and

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<sup>232</sup> *Ibid.*, 478.

<sup>233</sup> *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02 (CJEU 14 October 2004).

<sup>234</sup> *Ibid.*, para. 37.

<sup>235</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 479.

<sup>236</sup> Barbara Guastaferrro, ‘Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’, *Yearbook of European Law* 31, no. 1 (Oxford: 1 January 2012): 43, <https://doi.org/10.1093/yel/yes022>.

sufficiently serious threat to a fundamental interest of society”.<sup>237</sup> Moreover, any restriction to the freedom of movement should also pass a proportionality test: it should be suitable for the attainment of the objective pursued and shall be the least restrictive means to achieve those goals.<sup>238</sup> The non-recognition of same-sex unions already registered abroad would not pass this test, since registering those marriages in the domestic order would not alter the nature of and rules governing marriage in that country.<sup>239</sup>

It shall be recalled that a measure restricting one of the fundamental freedoms must respect the fundamental rights enshrined in the Charter. The rights that can be invoked in this instance are not only those connected to the right to family life (Article 7 of the Charter). Indeed, it can be argued that stripping someone of their marital status is a breach of human dignity (Article 1 of the Charter), even though the Court has not engaged yet with this argument.<sup>240</sup>

Finally, not recognising a same-sex marriage concluded abroad would also be against the principle of non-discrimination (Article 10 TFEU and Article 21 of the Charter). If two EU citizens of the same gender get married according to the law of their home Member State and those same persons were to be treated differently from opposite-sex couples of EU citizens when exercising their right to free movement, this would constitute direct discrimination on the ground of sexual orientation.<sup>241</sup> As observed in the Opinion of Advocate General Jääskinen in *Römer* “the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation”.<sup>242</sup>

On the other hand, equating within the domestic system same-sex and opposite-sex marriages concluded abroad may be seen as putting pressure on Member States to open up marriage to same-sex couples, since otherwise the national government would be discriminating against their own citizens. This would affect the freedom of the Member States to decide on matters of marital status. Therefore, the CJEU may conclude that such a restriction of the freedom of movement and residence is justified by public policy concerns.

Moreover, the CJEU may not consider the situation of a same-sex married couple as comparable to that of a heterosexual married couple. Indeed, the principle of

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<sup>237</sup> Case C-208/09, para. 86.

<sup>238</sup> *Ibid.*, para. 90.

<sup>239</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 480.

<sup>240</sup> *Ibid.*, 337-338

<sup>241</sup> *Ibid.*, 465.

<sup>242</sup> Opinion of Mr Advocate General Jääskinen on Case C-147/08, delivered on 15 July 2010, para. 175.

non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Even though the CJEU considers same-sex couples as worthy of protection under the right to family life and even though in the AG Opinion on *Coman* the definition of marriage as a union between people of two different genders was overruled,<sup>243</sup> same-sex couples still do not enjoy a right to marry. In cases such as *Römer*, *Maruko* and *Hay*, the CJEU maintained that civil unions are comparable to marriage for the purpose of the benefits disputed in the case at hand. The evaluation may be different in the case of a host state where civil unions for same-sex couples do not exist. If the CJEU would not recognise same-sex marriage as comparable to heterosexual marriage, the Court may be more sympathetic towards the non-recognising Member State when striking a balance between the different interests at stake.

## **5.d.II. National identity**

Member States which define marriage as a union between a man and a woman may also argue that recognising a same-sex marriage concluded in another EU country is against their national identity. National identity is protected by Article 4(2) TEU, which reads “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional”. In order to understand how the protection of national identity may justify a violation of a fundamental freedom, it is important to consider, first, the meaning of Article 4(2) TEU in the EU constitutional system; second, what constitutes national identity according to the case-law of the CJEU; third, what type of proportionality test applies to a derogation based on national identity.

### ***5.d.II.A. Article 4(2) in the constitutional architecture of the Lisbon Treaty***

Article 4(2) TEU has a particular significance in the architecture of the Lisbon Treaty, since it aims at regulating the constitutional relationship between the European Union and the Member States. The Article has been interpreted as giving the power to national (constitutional) courts to derogate from the principle of primacy of EU law in case of exceptional conflicts between the EU legal order and domestic constitutions and when

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<sup>243</sup> Opinion of Advocate General Wathelet on Case C-673/16, para. 57.

national (constitutional) identity is at stake<sup>244</sup>, thus endorsing a relative rather than absolute interpretation of the primacy of EU law<sup>245</sup>.

Another function of this Article is to better define the division of competences between Member States and the European Union, and of protecting core areas of national sovereignty in the absence of a catalogue of exclusive national competences in the Treaties.<sup>246</sup> By bolstering an interpretation of EU law which is more favourable to the respect of the Member States' discretion, regulatory autonomy, constitutional and cultural diversity<sup>247</sup>, the Article aims to protect some sensitive policy areas from the “competence creep” of the EU<sup>248</sup>.

Considering the power of Article 4(2) TEU to justify derogations from EU law, the recent trend in Central European States to introduce a definition of heterosexual marriage in the constitution appears even more worrying. These constitutional amendments are arguably a strategy to circumvent (present and future) EU law.

#### ***5.d.II.B. Definition of national identity and scope of the Article***

It is primarily the Member States and their constitutional courts who are entitled to define what forms part of their national identity.<sup>249</sup> Yet, the CJEU under Article 19(1) TEU<sup>250</sup> shall still determine the rules according to which a claim based on national identity can be made.<sup>251</sup> For this reason, it is relevant to consider what could constitute national identity within the scope of Article 4(2) TEU.

From the wording of the Article, it seems that national identity in this context relates mainly to the core content of domestic constitutions rather than to cultural, historical or linguistic elements.<sup>252</sup> Even though the main emphasis lies in the political and constitutional aspects of national identity, cultural elements may also find their place in this definition.<sup>253</sup> Most importantly though, not all provisions of national constitutional law are

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<sup>244</sup> Armin von Bogdandy and Stephan W. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’, *Common Market Law Review* 48, no. 5 (United Kingdom: 1 October 2011), 1419. Leonard F. M. Besselink, ‘National and Constitutional Identity before and after Lisbon’, *Utrecht Law Review* 6, no. 3 (Utrecht: 18 November 2010): 48, <https://doi.org/10.18352/ulr.139>.

<sup>245</sup> Guastafarro, ‘Beyond the Exceptionalism of Constitutional Conflicts’, 10.

<sup>246</sup> *Ibid.*, 13 and 27.

<sup>247</sup> *Ibid.*, 67.

<sup>248</sup> *Ibid.*, 57.

<sup>249</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1429.

<sup>250</sup> “The European Court of Justice [...] shall ensure that in the interpretation and application of the Treaties the law is observed.”

<sup>251</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1448.

<sup>252</sup> *Ibid.*, 1427.

<sup>253</sup> Besselink, ‘National and Constitutional Identity before and after Lisbon’, 44.

protected under the identity clause, but rather only the basic constitutional features<sup>254</sup> that are linked to “fundamental political and constitutional structures”. Only incredibly important aspects of constitutional law can justify a derogation from EU law.<sup>255</sup> For example, in the case *Michaniki*,<sup>256</sup> the CJEU found that provisions introduced into the Greek Constitution to prevent power concentration by media tycoons could not be invoked as a justification of a restriction to fundamental freedoms. This case showed that provisions of constitutional law which do not form part of the core constitutional identity of the Member States do not fall within the scope of Article 4(2) TEU.<sup>257</sup> As expressed in the Opinion on the case: “respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules”.<sup>258</sup>

Clearly, national identity cannot be invoked unilaterally to protect any manifestation of national law, since this would be against the principle of uniform application of EU law.<sup>259</sup> A derogation from EU law can happen only in limited circumstances and in respect of the principle of sincere cooperation contained in Article 4(3) TEU.<sup>260</sup> As expressed by the Advocate General in the *Coman* opinion, the obligation to respect national identity “cannot be construed independently of the obligation of sincere cooperation”, which requires the Member States to ensure the fulfilment of the obligations arising from the Treaties.<sup>261</sup> Indeed, Article 4(2) TEU and Article 4(3) TEU need to be read together as defining the framework for interaction between the CJEU and the domestic constitutional courts.<sup>262</sup> Furthermore, it must be noted that national courts need to construe their national identity in light of their EU membership.<sup>263</sup>

Moreover, a derogation from EU law based on the argument of national identity should still be subject to a proportionality test, thereby the CJEU shall consider whether the measure serves the aim to protect the legitimate interest in question and whether less

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<sup>254</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1431.

<sup>255</sup> Besselink, ‘National and Constitutional Identity before and after Lisbon’, 48. Mary Dobbs, ‘Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?’ *Yearbook of European Law* 33, no. 1 (Oxford: 2014): 328. <https://doi.org/10.1093/yel/yeu024>.

<sup>256</sup> *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, Case C-213/07 (CJEU 16 December 2008).

<sup>257</sup> Besselink, ‘National and Constitutional Identity before and after Lisbon’, 49.

<sup>258</sup> Opinion of Mr Advocate General Poiares Maduro on Case C-213/07, delivered on 8 October 2008, para. 33.

<sup>259</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1420.

<sup>260</sup> *Ibid.*, 1419.

<sup>261</sup> Opinion of Advocate General Wathelet on Case C-673/16, para. 40.

<sup>262</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1419.

<sup>263</sup> Dobbs, ‘Sovereignty, Article 4(2) TEU and the Respect of National Identities’, 323.

restrictive measures are available.<sup>264</sup> For example, in the case *Commission v Luxembourg*,<sup>265</sup> the Court recognised that the preservation of national identity “is a legitimate aim respected by the Community legal order”, but ruled that the contested national measure was disproportionate since the interests in question could be effectively safeguarded by less restrictive means.<sup>266</sup>

To conclude, the fact that a national rule constitutes part of national identity does not automatically allow for a derogation from EU law. Rather, the national and European courts shall strike a balance between the uniform application of EU law and the national identity at stake.<sup>267</sup> In particular, the protection of national identity should not endanger the project of European integration as a whole<sup>268</sup> and shall not go against the fundamental values enshrined in Article 2 TEU<sup>269</sup>.

### **5.d.II.C. The CJEU case law**

The CJEU has already adjudicated a number of cases where Article 4(2) TEU was used to justify restrictions to fundamental freedoms. Through this line of jurisprudence, the CJEU went beyond the famous judgement in *Internationale Handelsgesellschaft*,<sup>270</sup> which emphasised EU law supremacy over national constitutions and affirmed that not even particular constitutional arrangements in the Member States can justify an exception to EU law or a restriction of fundamental freedoms.<sup>271</sup> At the same time, these cases demonstrate that the concept of national identity cannot be used as a trump card against EU law, but instead shall be interpreted restrictively and shall be subject to a proportionality test.<sup>272</sup>

In the early case *Groener*<sup>273</sup> the Court ruled that a restriction to free movement can be justified by the objective to promote and preserve the Irish language as an expression of national identity. It is important to observe that the Court construed national identity as a legitimate aim which can justify a derogation from the free movement, but also that it

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<sup>264</sup> *Ibid.*, 322.

<sup>265</sup> *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-473/93 (CJEU 2 July 1996).

<sup>266</sup> Dobbs, ‘Sovereignty, Article 4(2) TEU and the Respect of National Identities’, 318. Guastaferrero, ‘Beyond the Exceptionalism of Constitutional Conflicts’, 36.

<sup>267</sup> Bogdandy and Schill, ‘Overcoming Absolute Primacy’, 1441.

<sup>268</sup> *Ibid.*, 1448.

<sup>269</sup> *Ibid.*, 1430.

<sup>270</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70 (CJEU 17 December 1970).

<sup>271</sup> Besselink, ‘National and Constitutional Identity before and after Lisbon’, 45.

<sup>272</sup> Rijpma and Koffeman, ‘Free Movement Rights for Same-Sex Couples Under EU Law’, 482.

<sup>273</sup> *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, Case C-379/87 (CJEU 28 November 1989).

submitted this justification to a proportionality test, stating that national provisions shall not “be disproportionate in relation to the aim pursued”.<sup>274</sup>

In *Omega*, the CJEU maintained that a constitutional principle may justify a restriction of a fundamental freedom. The case involved the prohibition of a laser game where participants played at killing other competitors. The Court noted that “according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany”.<sup>275</sup> On this basis, the Court considered it proportionate to limit the fundamental freedom to provide services by banning the exploitation of such games. It is important to note that the national court defined the content of the constitutional rights involved, while the CJEU decided on the consequences of such interpretation under EU law.<sup>276</sup> It is also relevant to observe that, as stated by the CJEU, “the objective of protecting human dignity is compatible with Community law”.<sup>277</sup>

The Court also accepted national identity as a justification to a restriction of freedom of movement in two cases involving the abolition of tokens of nobility in surnames (*Sayn-Wittgenstein* and *Bogendorff von Wolfersdorff*). This national measure was framed by the referring courts as a reflection of the constitutional status of a State as a Republic and as a tool to achieve the equality of all citizens. In both cases the competing interests which needed to be balanced were the right of the applicants to respect for their private and family life and the principle of equality of all citizens in a Republic. Therefore, differently from *Groener* and *Omega*, the CJEU was called to weigh national identity against a fundamental right of EU citizens. It is worth noting though that the principle of equality before the law, enshrined in the Austrian and German constitutions, is a legitimate objective recognised by EU law.<sup>278</sup> In both cases, the CJEU accepted that the restrictions on freedom of movement imposed by those national laws may be justified on the ground of national identity.<sup>279</sup> Nonetheless, the national measures were still subject to a proportionality test, even though less strict than in other cases.<sup>280</sup>

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<sup>274</sup> *Ibid.*, para. 19.

<sup>275</sup> Case C-36/02, para. 39.

<sup>276</sup> Besselink, ‘National and Constitutional Identity before and after Lisbon’, 46.

<sup>277</sup> Case C-36/02, para. 34.

<sup>278</sup> Dobbs, ‘Sovereignty, Article 4(2) TEU and the Respect of National Identities’, 320.

<sup>279</sup> Case C-208/09, para. 25 and 90. Case C-438/14, para. 64, 65 and 74.

<sup>280</sup> Guastafarro, ‘Beyond the Exceptionalism of Constitutional Conflicts’, 46.

In *Runevič-Vardyn and Wardyn*, the Court admitted that denying a uniform spelling of surnames could constitute a restriction of freedom of movement, but such a restriction could be justified in light of the protection of national language as an expression of national identity. Also in this instance, the CJEU was called to strike a balance between national identity (the legitimate protection of the official language) and a fundamental right (respect of private life).<sup>281</sup> The Court recognised that the aim pursued constituted a legitimate objective capable of justifying a restriction to the freedom of movement, but left it to the national judge to determine how to balance this objective against the right to free movement. It must be noted that respect for linguistic diversity is also an objective of EU law, as stated in Article 3(3) TEU, according to which the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced”.

Referring to national identity does not lead to an automatic disapplication of EU law. Indeed, in another case concerning national rules relating to the acquisition of surnames, *Grunkin and Paul*,<sup>282</sup> the Court concluded that the protection of national identity, despite being a legitimate objective, cannot warrant having such importance attached to it to justify a restriction to the right to free movement.<sup>283</sup>

#### ***5.d.II.D. Application to same-sex marriage***

National identity can therefore be used to justify a restriction to a fundamental freedom. When national identity is at stake, the CJEU has generally granted a higher margin of appreciation to the national authorities and has submitted the national measures to a less stringent proportionality test.<sup>284</sup> Though, it must be underlined that in all cases when the CJEU conceded that national identity could justify a restriction of a fundamental freedom, such elements of national identity were also in line with objectives of EU law (such as the respect for cultural and linguistic diversity, the principle of equality, the principle of respect for human dignity). This would not be the case if national identity was used to justify a measure which discriminates citizens on the basis of their sexual orientation.

Many governments which submitted observations in the *Coman* case invoked the protection of national identity as a ground to refuse the recognition of same-sex marriages concluded abroad, claiming the need to protect “the fundamental nature of the institution of

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<sup>281</sup> Guastafarro, ‘Beyond the Exceptionalism of Constitutional Conflicts’, 61.

<sup>282</sup> Stefan Grunkin and Dorothee Regina Paul, Case C-353/06 (CJEU 14 October 2008).

<sup>283</sup> *Ibid.*, para. 31.

<sup>284</sup> Guastafarro, ‘Beyond the Exceptionalism of Constitutional Conflicts’, 45.

marriage”<sup>285</sup>. The Court dismissed this claim because recognising a marriage concluded abroad for the purpose of granting residence rights “does not undermine the institution of marriage”<sup>286</sup>, since it would not require the Member State to open marriage to same-sex couples in the domestic order. Therefore, the Court did not assess whether the recognition of a same-sex marriage concluded abroad for the purpose of domestic legislation would actually threaten national identity.

On the other hand, though, the Opinion of Advocate General Kokott on *V.M.A.* affirms that the recognition of a birth certificate indicating two mothers for the purpose of domestic law would go against the national identity of Bulgaria and therefore could not be imposed by the CJEU. This interpretation of Article 4(2) TEU would exclude any possibility that same-sex marriages concluded abroad may produce effects in areas of domestic law. Nonetheless, the arguments proposed by AG Kokott differ from the general jurisprudence of the CJEU on national identity.

In her Opinion, Advocate General Kokott stated that “the obligation to recognise parentage for the purpose of drawing up a birth certificate affects the fundamental expression of the national identity of the Republic of Bulgaria”<sup>287</sup> and is therefore protected by Article 4(2) TEU. Because of this, in her views, even though the case falls within the scope of EU law, the Court shall not make an assessment of the relevant domestic provisions of family law, since “this would mean that all national family law [...] would have to conform to a uniform vision of family policy which the Court would draw from its interpretation of those provisions”<sup>288</sup>.

AG Kokott also affirmed that the CJEU cannot submit to a proportionality test a justification based on national identity.<sup>289</sup> In her assessment, “national identity [...] was conceived to limit the impact of EU law in areas considered essential for the Member States and not only as a value of the European Union which must be weighed against other interests of the same ranking”,<sup>290</sup> and therefore the Court must constrain itself to a review of the limits of the reliance on that principle. AG Kokott interpreted the provision of Article 4(2) TEU as an important element in the definition of the division of competences between the EU and the Member States and as a remedy against the risk of “competence creep” of the Union.

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<sup>285</sup> Case C-673/16, para. 42.

<sup>286</sup> *Ibid.*, para. 45.

<sup>287</sup> Opinion of Advocate general Kokott on Case C-490/20, para. 106.

<sup>288</sup> *Ibid.*, para. 99.

<sup>289</sup> *Ibid.*, para. 107.

<sup>290</sup> *Ibid.*, para. 86.

Nonetheless, as discussed in the previous paragraphs, national identity cannot justify a blanket derogation from EU primary law. From the cases discussed in section 5.d.II.C., it is evident that the CJEU performed an assessment of the national measures at hand and applied a test of proportionality to the protection of national identity invoked by the domestic court. Therefore, the analysis of AG Kokott is not in line with the jurisprudence of the CJEU.

Arguably, the recognition of a personal status acquired abroad, even when this would produce effects in the domestic order in regards to specific families, would not force a change in national law itself. Therefore, it is difficult to claim that the recognition of a foreign birth or marriage certificate for the purpose of domestic law would have such a detrimental effect on national identity to warrant a restriction to the right to free movement and residence, a violation of the fundamental right to family life and a breach of the principle of non-discrimination.

Therefore, even though the Opinion of AG Kokott in *V.M.A.* may be discouraging for the protection of rainbow families under EU law, previous jurisprudence on national identity and freedom of movement warrants more optimism. Furthermore, nothing in the judgement of the CJEU on the case *V.M.A.* indicates that the Court agrees with the assessment of AG Kokott.

### **5.d.III. Striking a balance between freedom of movement and national identity: downgrading marriage to civil union.**

If the CJEU would affirm that Member States whose constitutions define marriage as a union between a man and a woman cannot be requested to recognise a same-sex marriage concluded abroad for the purpose of domestic law, since this would be against public policy and/or national identity, it may still ask those Member States to recognise such marriages as civil unions or registered partnerships. In fact, once the Court finds an obstacle to the enjoyment of freedom of movement, it shall strike a balance between the concurring interests of protecting the rights of EU citizens and protecting the national autonomy of the Member State in defining its family law in accordance with its Constitution.

The recent case of the ECtHR *Fedotova* seems to indicate that State Parties have a general obligation, independently from the specific circumstances of their public opinion or public policy, to afford the possibility for same-sex couples to have their union legally formalised. Even though the CJEU does not enforce the jurisprudence of the ECtHR on Member

States, nonetheless it shall take account of the case law of the Strasbourg Court on the right to family life when interpreting Article 7 of the Charter. Considering that a restriction to a fundamental freedom can be justified only if it complies with the Charter, anything less than affording to married couples the possibility to have their relationship recognised as a civil union in the host country would be against EU law. At the same time, it would be very hard to claim that allowing same-sex couples to be recognised as registered partners would threaten the constitutional definition of marriage.

To conclude, it can be claimed that a fair balancing of competing interests would require the CJEU to state that a married couple who enters a country where marriage is constitutionally defined as a union between a man and a woman should be afforded access to civil unions or a comparable legal recognition of their partnership. This solution is not without complications, given that certain countries may not have introduced civil unions or registered partnerships (for heterosexual couples), and given that specific rights (especially connected to adoption and automatic recognition of the parent-child relationship) are available only to married couples. Nonetheless, such legal recognition would still afford adequate protection in respect to many social, economic and cultural rights.

## **6. Possibilities for future action**

Chapter 5 has sought to demonstrate that EU law mandates the cross-border recognition of rainbow families: if a couple gets married in one country, their marriage should be recognised across the EU for all purposes of domestic law, the opposite would constitute a breach of their freedom of movement. Even though there are solid grounds to argue in favour of such interpretation of EU law, ultimately the concretisation of such a right depends on the willingness of the CJEU, the European Commission, the European Parliament and Member States, and on the pressure exerted by civil society and human rights groups.

As already seen in Chapter 2, in recent years the EU has defined European citizenship and fundamental rights so as to also include the rights of LGBTI persons.<sup>291</sup> In parallel, human rights groups are framing their demands for equality as a matter of “being European” and as a responsibility linked to belonging to the European family of States.<sup>292</sup> What remains to be seen is whether EU law can have a harmonising impact in bringing all Member States in

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<sup>291</sup> Belavusau and Kochenov, ‘Federalizing Legal Opportunities for LGBT Movements in the Growing EU’, 11.

<sup>292</sup> Belavusau, ‘EU Sexual Citizenship’, 7.

line with a common standards of equality and non-discrimination.<sup>293</sup> This chapter will explore how the right of freedom of movement of same-sex couples can be reinforced and protected in the EU.

In terms of political action, the European Commission may propose legislation directly protecting rainbow families that exercise the right to free movement. In this scenario, the European Parliament could be a crucial ally by asking for and supporting such a proposal. In fact, as it was seen in section 2.d, the European Parliament has already been asking for such a legislative proposal and for other actions in support of the freedom of movement of rainbow families. The European Council may also play an important role by activating the general passerelle clause to break a possible deadlock in the Council of the EU during the legislative process (see section 6.a.I).

When it comes to legal action, the European Commission may start an infringement procedure against the Member States which are not complying with the *Coman* and *V.M.A.* judgements and therefore failing to implement EU law. Furthermore, human rights groups and civil society can use strategic litigation to prompt national and European courts to recognise further rights for rainbow families.

## **6.a. Proposing EU legislation to protect rainbow families**

### **6.a.I. On the basis of Article 19 TFEU or Article 81(3) TFEU**

The EU is empowered, under Article 19 TFEU, to “take appropriate action to combat discrimination based on sexual orientation”. Nonetheless, under this same Article, the EU operates through a special legislative procedure, meaning that the legislative process to turn a proposal into a legislative act differs from the “standard” ordinary legislative procedure, where the European Parliament and the Council are co-legislators. The special legislative procedure applies in the specific cases provided for by the Treaties and takes the form of a legislative act adopted by the Council with the participation of the European Parliament (or vice versa).<sup>294</sup> Article 19 TFEU describes what special legislative procedure is requested: the Council shall act unanimously and the Parliament is only requested to consent. This means that a Commission’s proposal based on Article 19 TFEU, in other words a legislative proposal to combat discrimination, would need to obtain unanimity in the Council in order to become a legislative act.

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<sup>293</sup> *Ibid.*, 7.

<sup>294</sup> Craig and De Búrca, *EU Law*, 133.

The same goes for legislation based on Article 81(3) TFEU, which forms the legal basis for measures concerning family law with cross-border implications. In this case, the special legislative procedure requires the Council to act unanimously after consulting the European Parliament. Based on the “LGBTIQ Equality Strategy”, it would seem that the Commission is planning to legislate on the protection of rainbow families on the basis of Article 81(3) TFEU. Indeed, the strategy reads “substantive family law falls under the competence of Member States. EU legislation on family law applies in cross-border cases or in cases with cross border implications and it covers LGBTIQ people”.<sup>295</sup> On this basis, the Commission aims to present in 2022 a proposal for a horizontal initiative on mutual recognition of parenthood in the EU.

Obtaining unanimity in the Council on a Commission’s proposal related to marriage equality would be extremely challenging, considering that six Member States have a (constitutional) ban on same-sex marriages. Indeed, because of the nature of policymaking in the EU, which is vastly based on consensus building and vote trading, even EU Member States that have been pioneers in advancing the rights of sexual minorities in their countries may not push for progressive legislation at EU level.<sup>296</sup>

A way to solve this obstacle would be for the European Council to activate the general passerelle clause, as provided by Article 48(7) TEU, according to which, in derogation to the Treaties, the Council may act by qualified majority instead of by unanimity or adopt the ordinary legislative procedure instead of the special legislative procedure. The activation of the passerelle clause requires a unanimous decision by the European Council after having obtained the consent of the European Parliament. Moreover, the decision takes effect only if there is no opposition by national parliaments.<sup>297</sup> Therefore, if the European Commission proposes legislation based on Article 19 TFEU or Article 81(3) TFEU, but unanimity in the Council is impossible to reach, and at the same time there is the political will to pass such legislation, the European Council may decide to activate the general passerelle clause and waive the requirement of unanimity. In case the ordinary legislative procedure is followed thanks to the activation of the passerelle clause, the legislative process would grant a stronger role to the European Parliament, the most pro-LGBTI actor among the EU institutions.<sup>298</sup>

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<sup>295</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’, 17.

<sup>296</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 14.

<sup>297</sup> Craig and De Búrca, *EU Law*, 133.

<sup>298</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 13.

If the passerelle clause is not triggered, any legislative proposal on the rights of rainbow families based on Article 19 or Article 81(3) would probably have the same destiny as the Horizontal Non-Discrimination Directive<sup>299</sup>, which was proposed in 2008 but never approved by the Council because of the opposition of two Member States, despite the support of the European Commission, the European Parliament and the majority of other Member States<sup>300</sup>. Arguably, though, the Commission and the European Parliament should also put more pressure on the Council to make progress on this file,<sup>301</sup> as demanded also by the LGBTI Intergroup of the European Parliament<sup>302</sup>.

## **6.a.II. On the basis of the Treaty articles on fundamental freedoms**

A solution to the challenge of obtaining unanimity in the Council would be to rely on the internal market, rather than on non-discrimination or family law, as a legal basis. According to Article 4(2) TFEU, the internal market is an area of shared competence: therefore, the EU can make provisions to remove obstacles to free movement provided that it respects the principle of subsidiarity, according to which “the Union shall act 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” (Article 5(3) TEU). In the case discussed, the obstacles to freedom of movement arise from the diversity in national laws regarding the legal recognition of same-sex relationships: therefore, this is an area where only harmonising action at the EU level would actually be effective, in compliance with the principle of subsidiarity. The European Commission could put forward a legislative proposal based on Article 21 TFEU to remove obstacles to the freedom of movement of rainbow families, for example by requiring the cross-border recognition of marriages and civil unions for all purposes of domestic law (thereby going beyond what the CJEU has already established in *Coman* and *V.M.A.*). The proposal would then follow the ordinary legislative procedure.

It can also be argued that the obstacles to freedom of movement of rainbow families do not only contravene the rights derived from EU citizenship but have an adverse impact on the

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<sup>299</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, COM/2008/0426 final - CNS 2008/0140.

<sup>300</sup> Equinet, ‘Time to Adopt the Equal Treatment Directive’, <https://equineteurope.org/time-to-adopt-the-equal-treatment-directive/>. Last accessed on 26/05/2022.

<sup>301</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 96.

<sup>302</sup> The European Parliament’s LGBTI Intergroup ‘Press Release: The Horizontal Anti-Discrimination Directive Cannot Wait Another Decade’, <https://lgbti-ep.eu/2020/05/08/the-horizontal-anti-discrimination-directive-cannot-wait-another-decade/>. Last accessed on 26/05/2022.

internal market per se, as they exclude large parts of the population from providing and receiving services, consuming goods and fostering economic growth across the Union.<sup>303</sup> Therefore, the lack of cross-border recognition of rainbow families is against the market rationale which the EU originated from. Following this line of thought, EU legislation could be made on the basis of Article 46 TFEU (free movement of workers), Article 50 TFEU (freedom of establishment) and Article 59 TFEU (on the liberalisation of services), which require the ordinary legislative procedure.

In the area of fundamental freedoms, the Commission plans for now to only act by soft law instruments, namely by reviewing the 2009 guidelines on free movement with regards to implementing Directive 2004/38/EC so as to reflect the reality of LGBTI families.<sup>304</sup> This measure is expected in 2022 and was announced also in the 2020 Citizenship Report, according to which the review should “improve legal certainty for EU citizens exercising their free movement rights, and [...] ensure a more effective and uniform application of the free movement legislation across the EU”.<sup>305</sup> Though, the guidelines would not be binding on Member States, but merely provide guidance and information for all interested parties, among which EU citizens, public administrations and national courts. Though, the guidelines could also act as an important stepping stone if they would include ambitious recommendations, for example in favour of a legislative proposal on the basis of Article 21 TFEU guaranteeing the cross-border recognition of rainbow families for all purposes of domestic law.

## 6.b. Infringement actions

According to a recent report commissioned by the European Parliament, it is unclear whether six Member States (Bulgaria, Latvia, Lithuania, Romania, Slovakia and Poland) are actually willing to implement the *Coman* ruling.<sup>306</sup> Against this background, the Commission can and should start infringement procedures before the CJEU, according to Article 258 TFEU, against Member States which are not respecting the *Coman*

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<sup>303</sup> Belavusau and Kochenov, ‘Federalizing Legal Opportunities for LGBT Movements in the Growing EU’, 8.

<sup>304</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’, 17.

<sup>305</sup> European Commission, ‘EU Citizenship Report 2020’, 23.

<sup>306</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 44.

judgement.<sup>307</sup> This is demanded by human rights groups<sup>308</sup> as well as by the European Parliament, as seen in section 2.d.

In response to these calls for action, in the “LGBTIQ Equality Strategy” the Commission promised to carry out “dedicated dialogues with Member States in relation to the implementation of the *Coman* judgement”<sup>309</sup> and to take legal action if necessary<sup>310</sup>.

## 6.c. Strategic litigation

Strategic litigation could be an effective tool to compel Member States to respect the *Coman* and *V.M.A.* judgements, since individuals can bring an enforcement action before a national court, by relying on direct effect.<sup>311</sup>

Strategic litigation, though, can also serve to expand the rights of rainbow families under EU law. As seen in Chapter 5, if a case was brought before the CJEU whereby a same-sex married couple was not recognised by one Member State for the purposes of domestic law, despite the fact that both spouses had an independent right of residence, the ruling of the CJEU could contain an obligation to ensure the portability of marital status across EU borders.

In fact, strategic litigation at EU level is a concrete possibility. Even though organisations and individuals have a very limited standing in front of the CJEU, it is still possible for human rights groups to bring to a national court a legal action which could trigger a reference to the EU Court. The *Coman* case itself is an example of strategic litigation,<sup>312</sup> as *Coman* and *Hamilton* were supported by the Romanian NGO *Accept*, and received pro-bono legal advice from the law firm *White & Case*<sup>313</sup>.

*Accept* was not new to EU strategic litigation, since they had already brought a successful case to the CJEU in 2013. The case concerned a Romanian football club which was found guilty of not distancing themselves from the homophobic statements of one of their

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<sup>307</sup> *Ibid.*, 48.

<sup>308</sup> Dan Van Raemdonck, Elena Crespi, Elise Petitpas, Camille Gervais, Krzysztof Śmiszek, Eliza Rutynowska. ‘All downhill from here: the rapid degradation of the rule of law in Poland: what it means for women’s sexual and reproductive rights, and LGBT+ persons’ rights.’ FIDH. November 2018 / N° 726a, p. 78.

<sup>309</sup> European Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’, 16.

<sup>310</sup> *Ibid.*, 17.

<sup>311</sup> De Groot, ‘EU Law and the Mutual Recognition of Parenthood between Member States’, 16.

<sup>312</sup> Rijpma, ‘You Gotta Let Love Move’, 330.

<sup>313</sup> ‘White & Case Wins Landmark EU Court of Justice Ruling on Free Movement Rights for Same-Sex Spouses’, accessed 29 April 2022,

<https://www.whitecase.com/publications/story/white-case-wins-landmark-eu-court-justice-ruling-free-movement-rights-same-sex>. Last accessed on 26/05/2022.

patrons.<sup>314</sup> In this instance, the Court found that organisations that have a legitimate interest in the correct implementation of Directive 2000/78/EC can engage on behalf of a complainant in a judicial procedure for the enforcement of obligations under the Directive.<sup>315</sup> Though, this was possible because national law transposing Directive 2000/78/EC allowed for such representation of general interests by civil society. Nonetheless, such case provides hopes for non-discrimination lawsuits where no individual plaintiffs are available.<sup>316</sup>

In 2020, a similar case was brought to the CJEU by the Italian “Associazione Avvocatura per i diritti LGBTI - Rete Lenford” (lawyers’ association for LGBTI rights - Lenford network) for infringement of Directive 2000/78/EC. Also in this case, the *locus standi* of the association in front of the Court was determined by national law, according to which “trade unions, associations and organisations representing the rights or interests affected [...] shall have standing to bring proceedings [...] in the name and on behalf of, or in support of, the person subject to the discrimination”.<sup>317</sup> Such strategic litigation initiated by civil society could also be supported by the Commission.<sup>318</sup>

Ultimately, to bring about real change and ensure that rainbow families can enjoy the freedom of movement they are entitled to on the basis of EU citizenship and EU law, many concurring actions are necessary. New legal instruments adopted by the EU can afford specific protection to rainbow families. Strategic litigation, in front of the CJEU and the ECtHR, can increase the protection that LGBTI families enjoy under the law. But this alone will not be sufficient: the Commission should oversee the correct implementation of EU law by Member States and take measures in case of non-compliance. The role of civil society and human rights groups in raising awareness regarding such violation of the rights enjoyed by LGBTI individuals under EU law is also relevant, and therefore EU support for LGBTI groups in specific countries is equally needed. Member States which support marriage equality also play a role in exercising political pressure on Member States where same-sex unions are not allowed, by supporting the cause of LGBTI equality in the Council and in bilateral relations.

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<sup>314</sup> *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, Case C-81/12 (CJEU 25 April 2013).

<sup>315</sup> *Ibid.*, para. 39.

<sup>316</sup> Belavusau and Kochenov, ‘Federalizing Legal Opportunities for LGBT Movements in the Growing EU’, 13.

<sup>317</sup> *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, Case C-507/18 (CJEU 23 April 2020), para. 15.

<sup>318</sup> Tryfonidou and Wintemute, ‘Obstacles to the Free Movement of Rainbow Families in the EU’, 95.

## 7. Conclusion

Freedom of movement and residence is one of the pillars of the EU. Not only it underpins the correct functioning of the internal market by protecting the free movement of workers, service providers and clients, but first and foremost it gives concrete substance to the concept of European citizenship. The freedom to move across borders and choose any place of residence across the Union, facing very little practical burdens when moving to a new country, is one of the few manifestations of European citizenship that everyone can understand, appreciate and enjoy. Furthermore, free movement of Europeans is also crucial to foster mutual cultural learning and create a sense of community and “unity in diversity”. For all these reasons, freedom of movement should not be thwarted.

Today, many same-sex couples who move from one EU country to another cannot find any legal recognition of their marriage in the domestic order of the host country. This lack of recognition of their status has concrete practical repercussions on their lives, for example when it comes to pensions, the award of joint health and accident insurance cover, and succession to tenancies<sup>319</sup>. Family status, indeed, is crucial for the determination of many benefits and entitlements. Furthermore, being unable to find recognition of a marital bond when moving to a new country can be considered *per se* an obstacle to freedom of movement, and a violation of the right to family life.

Though, the CJEU up to now has been hesitant to establish a right to the cross-border recognition of family status, thereby a marriage concluded in one EU country shall be recognised as such by all other Member States for all purposes of domestic law. Instead, it, limited itself to laying down an obligation to recognise family ties for the sole purpose of enabling free movement across borders. This cautious attitude is due to the fact that family law is a sensitive policy area, where Member States remain sovereign, and to the wide diversity in attitudes towards same-sex unions across the EU. In this thesis, it has been argued that even though Member States shall determine their policies in the area of family law, a narrower margin of appreciation shall apply in the case of the recognition of a status established abroad, especially when doing otherwise would constitute an obstacle to the freedom of movement of EU citizens. Moreover, this type of restriction of the right to free movement and residence shall not be justified on the grounds of public policy, public interest and/or national identity, also considering that Member States are bound to respect fundamental rights and non-discrimination in cases with implications for the freedom of

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<sup>319</sup> *Ibid.*, 17.

movement of citizens. Therefore, this thesis sought to demonstrate that a right to the cross-border recognition of same-sex couples can be derived from EU law on freedom of movement.

Nonetheless, this right is not yet established by the case law of the CJEU or by EU legislation and therefore cannot be relied upon yet. In order for this to happen, a concerted effort by the EU institutions, civil society and human rights groups is necessary. EU legislation protecting the rights of rainbow families would be an important step forward, provided that the European Commission and Parliament closely supervise the transposition and implementation of such instruments. Another way, or a complementary way, to establish the rights of rainbow families in the EU is through CJEU case law. In this sense, strategic litigation by human rights groups, supported by the Commission, is crucial. Finally, political pressure by the European Parliament, civil society and the general public can have a positive impact on both the Commission and single Member States.

Furthermore, the academia also has a role to play: more scholarship on the universal right to marry, on the rights of rainbow families in the EU, and on freedom of movement for same-sex couples can inform the legislator at national and European level. This area of law and of jurisprudence is one that quickly changes and evolves, and for this reason legal research should pay particular attention to it.

In 2021, the European Parliament declared the EU a “LGBTIQ Freedom Zone”<sup>320</sup>. Nonetheless, much work is needed to make this title a concrete reality for LGBTI persons and rainbow families. Starting from guaranteeing the right to free movement would be an important first step, as it would demonstrate that EU citizenship is granted to everyone on an equal footing, without discriminating on the ground of sexual orientation.

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<sup>320</sup> European Parliament Newsroom. ‘Parliament Declares the European Union an “LGBTIQ Freedom Zone”’ | News’, 3 November 2021, <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone>. Last accessed on 26/05/2022.

# List of references

- Belavusau**, Uladzislau. 'EU Sexual Citizenship : Sex beyond the Internal Market'. *EUI working papers LAW* (San Domenico di Fiesole (FI): 2015) <https://cadmus.eui.eu/handle/1814/34960>.
- Belavusau**, Uladzislau, and Dimitry Kochenov. 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU'. *EUI working papers LAW* (San Domenico di Fiesole (FI): 2016). [https://doi.org/10.1057/978-1-137-48093-4\\_4](https://doi.org/10.1057/978-1-137-48093-4_4).
- Bell**, Mark. 'We Are Family? Same-Sex Partners and EU Migration Law.' *Maastricht Journal of European and Comparative Law* 9 (Maastricht: December 1, 2002): 335–55. <https://doi.org/10.1177/1023263X0200900402>.
- Besselink**, Leonard F. M. 'National and Constitutional Identity before and after Lisbon'. *Utrecht Law Review* 6, no. 3 (Utrecht: 18 November 2010): 36–49. <https://doi.org/10.18352/ulr.139>.
- Bogdandy**, Armin von, and Stephan W. Schill. 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty'. *Common Market Law Review* 48, no. 5 (United Kingdom: 1 October 2011).
- Craig**, Paul, and G. De Búrca. *EU Law: Text, Cases, and Materials*. Sixth edition. Oxford, United Kingdom ; New York, NY: Oxford University Press: 2015.
- De Groot**, David. 'EU Law and the Mutual Recognition of Parenthood between Member States : The Case of V.M.A. v Stolichna Obsthina'. *European University Institute* (San Domenico di Fiesole (FI): 2021). <https://cadmus.eui.eu/handle/1814/69731>.
- Dobbs**, Mary. 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' *Yearbook of European Law* 33, no. 1 (Oxford: 2014): 298–334. <https://doi.org/10.1093/yel/yeu024>.
- Equinet**, 'Time to Adopt the Equal Treatment Directive', <https://equineteurope.org/time-to-adopt-the-equal-treatment-directive/>. Last accessed on 26/05/2022.
- European Commission** - DG Justice and Consumers, 'EU Citizenship Report 2020 - Empowering citizens and protecting their rights', 2020
- European Commission**, 'State of the Union Address by President von der Leyen at the European Parliament Plenary', 16 September 2020, available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655). Last accessed on 26/05/2022.
- European Commission**, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' (COM(2020) 698 Final), 11 December 2020.

**European Commission**, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU strategy on the rights of the child’, COM/2021/142 final, 24.03.2021.

**European Commission**. ‘Commission Takes Legal Action for Discrimination LGBTIQ’, 15 July 2021, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3668](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668). Last accessed on 26/05/2022.

**European Parliament**. ‘Resolution of 7 February 2018 on Protection and Non-Discrimination with Regard to Minorities in the EU Member States’, 2017/2937(RSP), (2018).

**European Parliament**. ‘Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones’, (2019/2933(RSP)) (2019).

**European Parliament**, ‘Resolution on the Declaration of the EU as an LGBTIQ Freedom Zone’, 2021/2557(RSP) (2021).

**European Parliament**. ‘Resolution on LGBTIQ Rights in the EU’, 2021/2679(RSP), (2021).

**European Parliament**. Directorate General for Parliamentary Research Services. ‘Ten Issues to Watch in 2022: In Depth Analysis’. Luxembourg: Publications Office, 2022.

**European Parliament Newsroom**. ‘Parliament Declares the European Union an “LGBTIQ Freedom Zone” | News’, 3 November 2021, <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone>. Last accessed on 26/05/2022.

**European Union Agency for Fundamental Rights**, ‘A Long Way to Go for LGBTI Equality.’ (Luxembourg: European Union Agency for Fundamental Rights, 2020).

**Guastafarro**, Barbara. ‘Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’. *Yearbook of European Law* 31, no. 1 (Oxford: 1 January 2012): 263–318. <https://doi.org/10.1093/yel/yes022>.

**Guth**, Jessica. “When Is a Partner Not a Partner? Conceptualisations of ‘Family’ in EU Free Movement Law.” *Journal of Social Welfare and Family Law* 33, no. 2 (London: June 2011): 193–204. <https://doi.org/10.1080/09649069.2011.617078>.

**ILGA-Europe**, ‘Annual Review Of The Human Rights Situation Of Lesbian, Gay, Bisexual, Trans, And Intersex People Covering The Period Of January To December 2021’, Brussels (2022). [https://www.ilga-europe.org/sites/default/files/2022/full\\_annual\\_review.pdf](https://www.ilga-europe.org/sites/default/files/2022/full_annual_review.pdf). Last accessed on 26/05/2022.

**Kochenov**, Dimitry. “On Options of Citizens and Moral Choices of States: Gays and European Federalism.” In: *Fordham International Law Journal* 33, no. 1 (New York: January 1, 2009): 156–205.

**Kochenov**, Dimitry Vladimirovich, and Uladzislau Belavusau. ‘After the Celebration: Marriage Equality in EU Law Post- Coman in Eight Questions and Some Further Thoughts’. *Maastricht Journal of European and Comparative Law* 27, no. 5 (Maastricht: October 2020): 549–72. <https://doi.org/10.1177/1023263X20962749>.

**Prończuk**, Monika. ‘Same-Sex Couple Cannot Register in Poland as Parents of UK-Born Child, Rules Top Court’. Notes From Poland (blog), 3 December 2019. <https://notesfrompoland.com/2019/12/03/same-sex-couple-cannot-register-as-parents-of-uk-born-child-rules-top-polish-court/>. Last accessed on 26/05/2022.

**Ragone**, Sabrina, and Valentina Volpe. ‘An Emerging Right to a “Gay” Family Life? The Case Oliari v. Italy in a Comparative Perspective’. *German Law Journal* 17, no. 3 (Cambridge University Press, Cambridge: June 2016): 451–85. <https://doi.org/10.1017/S2071832200019830>.

**Rijpma**, Jorrit, and Nelleke Koffeman. ‘Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?’ In *Same-Sex Couples before National, Supranational and International Jurisdictions*, edited by Daniele Gallo, Luca Paladini, and Pietro Pustorino, 455–91. Berlin, Heidelberg: Springer, 2014. [https://doi.org/10.1007/978-3-642-35434-2\\_20](https://doi.org/10.1007/978-3-642-35434-2_20).

**Rijpma**, Jorrit J. ‘You Gotta Let Love Move: ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General Pentru Imigrări’. *European Constitutional Law Review* 15, no. 2 (Cambridge University Press, Cambridge: June 2019): 324–39. <https://doi.org/10.1017/S1574019619000130>.

**Rosas**, Allan, and Lorna Armati. *EU Constitutional Law: An Introduction*. Bloomsbury Publishing, Oxford: 2012.

**Schütze**, Robert. *An Introduction to European Law*. 3rd edn. Oxford University Press, Oxford: 2020.

**Slootmaeckers**, Koen, Heleen Touquet, and Peter Vermeersch. ‘The Co-Evolution of EU’s Eastern Enlargement and LGBT Politics: An Ever Gayner Union?’ In *The EU Enlargement and Gay Politics*, edited by Koen Slootmaeckers, Heleen Touquet, and Peter Vermeersch. London: Palgrave MacMillan, 2016. [https://doi.org/10.1057/978-1-137-48093-4\\_2](https://doi.org/10.1057/978-1-137-48093-4_2).

**Titshaw**, Scott. “Same-Sex Spouses Lost in Translation? How to Interpret ‘Spouse’ in the E.U. Family Migration Directives.” *Boston University International Law Journal* 34, no. 45 (Boston: April 1, 2016): 47–112.

**Tryfonidou**, Alina. ‘The Right of Same-Sex Spouses under EU Law to Move Freely between EU Member States’, Research report (NELFA, January 2019).

**Tryfonidou**, Alina. ‘EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?’ *Yearbook of European Law* 38 (Oxford: 1 January 2019): 220–66. <https://doi.org/10.1093/yel/yez001>.

**Tryfonidou**, Alina. ‘Law and Sexual Minority Rights in the EU: Navigating a Political Minefield’. In *Research Handbook on the Politics of EU Law*, edited by Paul James Cardwell and Marie-Pierre Grainger, 204–23. Edward Elgar, 2020.

**Tryfonidou**, Alina and Robert Wintemute. “Obstacles to the Free Movement of Rainbow Families in the EU.” Study Requested by the PETI Committee of the European Parliament - Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies PE 671.505, March 2021.

**The European Parliament’s LGBTI Intergroup**. ‘Press Release: The Horizontal Anti-Discrimination Directive Cannot Wait Another Decade’, accessed 17 May 2022, <https://lgbti-ep.eu/2020/05/08/the-horizontal-anti-discrimination-directive-cannot-wait-another-decade/>. Last accessed on 26/05/2022.

**Van Raemdonck**, Dan, Elena Crespi, Elise Petitpas, Camille Gervais, Krzysztof Śmiszek, Eliza Rutynowska. ‘All downhill from here: the rapid degradation of the rule of law in Poland: what it means for women’s sexual and reproductive rights, and LGBT+ persons’ rights.’ FIDH. November 2018 / N° 726a

**Waldijk**, Kees. ‘The Right to Marry as a Right to Equality: About Same-Sex Couples, the Phrase “Men and Women”, and the Travaux Préparatoires of the Universal Declaration’. In: *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development*, edited by Niels M. Blokker, Daniëlla Dam-de Jong, and Vid Prislan, 457–72. Leiden: Brill Nijhoff, 2021. [https://doi.org/10.1163/9789004459892\\_024](https://doi.org/10.1163/9789004459892_024).

## **CJEU case law - chronological order**

Flaminio **Costa v ENEL**, Case 6-64 (CJEU 15 July 1964).

Erich **Stauder v City of Ulm - Sozialamt**, Case 29-69 (CJEU 12 November 1969).

**Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel**, Case 11-70 (CJEU 17 December 1970).

Anita **Groener v Minister for Education and the City of Dublin Vocational Educational Committee**, Case C-379/87 (CJEU 28 November 1989).

Hubert **Wachauf v Bundesamt für Ernährung und Forstwirtschaft**, Case 5/88 (CJEU 13 July 1989).

Elliniki **Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Piroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others**, Case C-260/89 (CJEU 18 June 1991).

The Queen v Immigration Appeal Tribunal and Surinder **Singh**, ex parte Secretary of State for Home Department, Case C-370/90 (CJEU 7 July 1992).

Union royale belge des sociétés de football association ASBL v Jean-Marc **Bosman**, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, Case C-415/93 (CJEU 15 December 1995).

**Commission** of the European Communities v Grand Duchy of **Luxembourg**, Case C-473/93 (CJEU 2 July 1996).

Lisa Jacqueline **Grant** v **South-West Trains** Ltd, Case C-249/96 (CJEU 17 February 1998).

**Centros** Ltd v Erhvervs- og Selskabsstyrelsen, Case C-212/97 (CJEU 9 March 1999).

**D and Kingdom of Sweden** v Council of the European Union, No. Joined cases C-122/99 P and C-125/99 P (CJEU 31 May 2001).

**Baumbast** and R v Secretary of State for the Home Department, Case C-413/99 (CJEU 17 September 2002).

Mary **Carpenter** v Secretary of State for the Home Department, Case C-60/00 (CJEU 11 July 2002).

**Überseering** BV v Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00 (CJEU 5 November 2002).

Carlos **Garcia Avello** v Belgian State, Case C-148/02 (CJEU 2 October 2003).

**KB** v National Health Service Pensions Agency and Secretary of State for Health, Case C-117/01 (CJEU 7 January 2004).

Kunqian Catherine **Zhu** and Man Lavette **Chen** v Secretary of State for the Home Department, Case C-200/02 (CJEU 19 October 2004).

**Omega** Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02 (CJEU 14 October 2004).

Minister voor Vreemdelingenzaken en Integratie v R N G **Eind**, Case C-291/05 (CJEU 11 December 2007).

Blaise Baheten **Metock** and Others v Minister for Justice, Equality and Law Reform, Case C-127/08 (CJEU 25 July 2008).

**Michaniki** AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias, Case C-213/07 (CJEU 16 December 2008).

Opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008, Case C-213/07

Stefan **Grunkin** and Dorothee Regina **Paul**, Case C-353/06 (CJEU 14 October 2008).

Tadao **Maruko** v Versorgungsanstalt der deutschen Bühnen, Case C-267/06 (CJEU 1 April 2008).

Ilonka **Sayn-Wittgenstein** v Landeshauptmann von Wien, Case C-208/09 (CJEU 22 December 2010).

Jürgen **Römer** v Freie und Hansestadt Hamburg, Case C-147/08 (CJEU 10 May 2011).

Opinion of Mr Advocate General Jääskinen delivered on 15 July 2010, Case C-147/08

Malgożata **Runevič-Vardyn and Łukasz Paweł Wardyn** v Vilniaus miesto savivaldybės administracija and Others, Case C-391/09 (CJEU 12 May 2011).

Yoshikazu **Iida** v Stadt Ulm, Case C-40/11 (CJEU 8 November 2012).

Åklagaren v Hans **Åkerberg Fransson**, Case C-617/10 (CJEU 26 February 2013).

Asociația **Accept** v Consiliul Național pentru Combaterea Discriminării, Case C-81/12 (CJEU 25 April 2013).

Frédéric **Hay** v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Case C-267/12 (CJEU 12 December 2013).

**O** v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v **B**, Case C-456/12 (CJEU 12 March 2014).

Geoffrey **Léger** v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang, Case C-528/13 (CJEU 29 April 2015).

David L **Parris** v Trinity College Dublin and Others, Case C-443/15 (CJEU 24 November 2016).

Nabiel Peter **Bogendorff von Wolffersdorff** v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, Case C-438/14 (CJEU 2 June 2016).

Toufik **Lounes** v Secretary of State for the Home Department, Case C-165/16 (CJEU 14 November 2017).

Relu Adrian **Coman** and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, Case C-673/16 (CJEU 5 June 2018).

Opinion of Advocate General Wathelet on Case C-673/16 delivered on 11 January 2018.

**NH** v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Case C-507/18 (CJEU 23 April 2020).

**V.M.A.** v Stolichna Obsthina, Rayon ‘Pancharevo’, Case C-490/20 (CJEU 14 December 2021).

Opinion of Advocate General Kokott on Case C-490/20 delivered on 15 April 2021.

## **ECtHR case law - chronological order**

**X. and Y.** v the United Kingdom, Application no. 9369/81, (ECtHR 3 May 1983).

**Rees v the United Kingdom**, Application no. 9532/81 (ECtHR 17 October 1986).

**Schalk and Kopf v. Austria**, Application no. 30141/04 (ECtHR 24 June 2010).

**Vallianatos and Others v. Greece**, Application nos 29381/09 and 32684/09 (ECtHR 11 July 2013).

**Oliari and Others v Italy**, Applications nos. 18766/11 and 36030/11 (ECtHR 21 October 2015).

**Taddeucci and McCall v Italy**, Application no. 51362/09 (ECtHR 30 June 2016).

**Orlandi and Others v. Italy**, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR 14 December 2017).

**Fedotova and Others v. Russia**, Applications no. 40792/10 (ECtHR 13 July 2021).