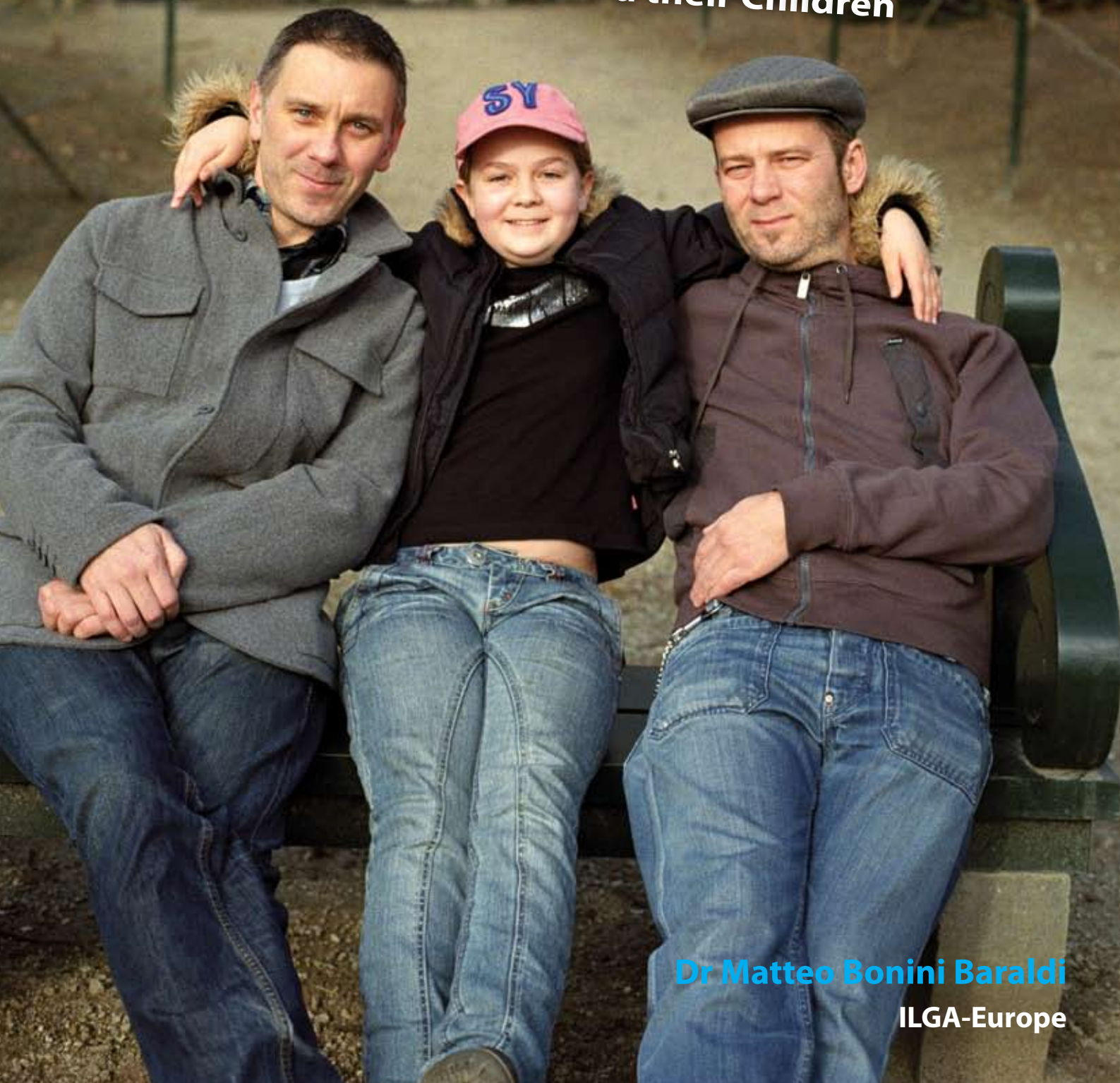


# Different Families, Same Rights?

**Freedom and Justice in the EU:  
Implications of the Hague Programme  
for Lesbian, Gay, Bisexual and Transgender  
Families and their Children**



**Dr Matteo Bonini Baraldi**

**ILGA-Europe**

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Bisexual and Transgender  
Families and their Children

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# Foreword

The recognition of lesbian, gay, bisexual and transgender (LGBT) families is one of the main focuses of ILGA-Europe's work. We work for the elimination of discrimination in law, policies and practices relating to any form of partnership or parenting (including marriage, partnership, reproductive rights, adoption and parental responsibility): in particular, the elimination of restrictions on the rights and responsibilities of parents based on sexual orientation, gender identity and gender expression. Most importantly, the rights of the child are at the core and guide ILGA-Europe's demands for recognition of diverse families.

This publication is the second of a collection of booklets related to different aspects of LGBT families ranging from social and legal issues to more practical consequences of the non-recognition of LGBT families. It focuses on the implications the Hague Programme has for LGBT families in the areas of freedom and justice.

The areas of justice and freedom are not to be considered in isolation from other obligations and policies in the EU. Primarily, the Charter of Fundamental Rights recognises the right to family life and the right to non-discrimination on the grounds of gender and sexual orientation. Other policies are developed at EU level which have an impact on the definition of families, such as the Alliance for Families and the increasing consideration given to the question of demographic changes. The EU is also giving more consideration to children's rights and their basic right to a family.

ILGA-Europe would like to thank Dr Matteo Bonini, the author of this report, for his evaluation of the legislation, proposals and policies in the area of justice, freedom and security as they affect LGBT families. This document is particularly important as it offers ILGA-Europe the opportunity to review the Hague Programme midway through its implementation and to suggest some actions to be taken by the EU institutions and Member States. We are grateful for the amount of work, the support and the enthusiasm shown by the author of the report. The author and ILGA-Europe also would like to thank Dr Kees Waaldijk and Prof. Mark Bell for comments on an earlier draft.

Finally, the production of this document is also the result of team work involving proof reading by Peter Norman and Silvan Agius and production and dissemination by Juris Lavrikovs.

This document is an important contribution to ILGA-Europe's work towards the recognition of diverse forms of families and an end to the current discrimination against LGBT families and their children.

**Christine Loudes**  
**Policy Director**







# 1. Introduction

***'Conscious of its spiritual and moral heritage,  
the Union is founded on the indivisible, universal values  
of human dignity, freedom, equality and solidarity;  
it is based on the principles of democracy and the rule of law.  
It places the individual at the heart of its activities,  
by establishing the citizenship of the Union and  
by creating an area of freedom, security and justice.'***

## **Preamble of the EU Charter of Fundamental Rights**

This sentence of the Preamble of the EU Charter of Fundamental Rights powerfully illustrates the profound relation between individual rights and EU policies dealing with freedom, security and justice. In plain terms, seen from a Community perspective these policies are there to serve people living in the EU and to better protect their rights.

Sexual orientation<sup>1</sup> and gender identity<sup>2</sup> are personal characteristics of the individual, which are protected by anti-discrimination measures at national and European levels. Both the conduct and the identity of lesbian, gay, bisexual and transgender (LGBT) people, are protected by Articles 8 and 14 of the European Convention on Human Rights (respect for private life and non-discrimination).<sup>3</sup> The respect for fundamental rights is a general principle which Community law observes,<sup>4</sup> and these fundamental rights do encompass the right to non-discrimination.<sup>5</sup>

<sup>1</sup>'Sexual orientation' is used to denote a person's sexual and emotional attraction to people of the same and/ or different sex.

<sup>2</sup>'Gender identity' is the individual's gender concept of self, not necessarily dependent on the sex they were assigned at birth. Gender identity concerns every human being and is not only a binary concept of either male or female. See also: European Court of Human Rights, *Case Goodwin v UK*, Application No 28957/95, judgment of 11 July 2002, also: *X, Y and Z v UK* (1997) 24 EHRR 143, and: Court of Justice of the European Communities, *Case P v S and Cornwall County Council*, Case C-13/94, Judgment of the Court of 30 April 1996.

<sup>3</sup> See R. Wintemute, 'Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention', in R. Wintemute, M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships. A Study on National, European, and International Law*, Hart Publishing, Oxford-Portland Oregon, 2001, p. 713; id., 'From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights', in N. Bamforth (ed.), *Sex Rights*, Oxford University Press, Oxford, 2005, p. 186.

<sup>4</sup> See ECJ's Opinion 2/94 on accession by the Community to the ECHR [1996] ECR I-1759.

<sup>5</sup> See ECJ 19 October 1977, Case 117/76, Ruckdeschel [1977] ECR 1753, para 7. See M. Bell, *Anti-Discrimination Law and the European Union*, 2002, p. 20.



A significant European Union commitment to improving the situation of LGBT people was the inclusion in the 1997 Treaty of Amsterdam of a provision inserting a new Article 13 on the EC Treaty, which empowered the Community to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” The new powers enabled the Community to adopt new rules against sexual orientation discrimination in the workplace, namely the Employment Equality Directive of 2000.<sup>6</sup> In the same year the European Union also adopted the European Union Charter of Fundamental Rights, which was signed by a majority of Member States in December 2007, conferring on the Charter the same legally binding character as the EU Treaties themselves. The Charter includes in its non-discrimination clause (Article 21) sexual orientation and gender – including gender identity – as prohibited grounds for discrimination, being the first international human rights charter to do so.

Any State or Union measure must therefore take these developments into account. Of course, LGBT people are not isolated individuals: they do form couples and families, they do move around, they do break up and separate. Issues concerning the legal treatment of LGBT families and their children are a good illustration of the impact that different EU policies can have on individual rights, on the role of the Union in the public sphere and, ultimately, on its legitimacy.

At present, the balance between Member States’ interests and the EC vision and mission is a matter of intense debate when it comes to family matters.<sup>7</sup> On closer inspection, nothing in principle prevents cooperation among Member States in the field of the family, as the recent establishment of the Alliance for Families testifies.<sup>8</sup> Contrary to what one might initially think, it appears that there are very intense cooperation efforts being made and very significant calls for Community action in order to support families in Europe.<sup>9</sup> Why is this? According to the governments, “sustainable family policies have a part to play in improving social cohesion and in sound economic development”; thus, European exchanges in this field can make a contribution to “achieving the goals of the renewed Lisbon Strategy for Growth and Jobs and the European Union’s social cohesion objectives.”<sup>10</sup> These statements make it clear that Member States do share the view that there is a close interrelation between family matters and crucial Community action and objectives, and that domestic policies can be compared and shared with others.

These developments highlight a promising approach, as they demonstrate that it is possible and even desirable to align Member States’ and EC activities on the principle of loyal cooperation developed in other areas of Community action. However, it is also clear that some powerful forces are opposing any integration of LGBT issues in this process.

This paper – while providing a thorough overview of older and more recent EU measures which have an impact on LGBT partnerships and families – aims at highlighting patterns of exclusion, and at pointing to possible solutions. It focuses mainly on the developments which followed the adoption of the 2004 Hague Programme, although in its first section it provides a retrospective on previous measures adopted at the EU level, together with an overview of the most important developments at national level. In turn, its second section illustrates in more detail those measures that have a clear impact on LGBT issues, following a thematic division depending on whether they belong to the ‘Freedom’ or the ‘Justice’ strand. Finally, some conclusions and recommendations for action or law reform close the analysis.

<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2.12.2000, L 303/16) see K. Waaldijk, M. Bonini Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, The Hague, 2006; D. Borrillo, ‘La politique antidiscriminatoire de l’Union européenne’, in D Borrillo (éd.), *Lutter contre les discriminations*, La Découverte, Paris, 2003, p. 139.

<sup>7</sup> See the work of the Commission on European Family Law, online at <http://www2.law.uu.nl/priv/cefl/>.

<sup>8</sup> “The Alliance hopes to create impulses for more family-friendly policies through exchanges of ideas and experience in the various Member States and to foster cooperation and fruitful learning from each other in the European Union.” See information on the European Commission’s website [http://ec.europa.eu/employment\\_social/families/european-alliance-for-families\\_en.html](http://ec.europa.eu/employment_social/families/european-alliance-for-families_en.html).

<sup>9</sup> See Recital 6 of the Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the importance of family-friendly policies in Europe and the establishment of an Alliance for Families, OJ 17.7.2007, C 163/1.

<sup>10</sup> Ibid, at 2-3.







# 2. The establishment of the EU area of freedom, security and justice

In this section we will explore how the Hague Programme came about, which are the relevant partnership and adoption laws at the national level, and which are the most relevant EU measures which impact on LGBT families.<sup>11</sup>

<sup>11</sup> According to the 1997 Protocol No. 5 on the position of Denmark – annexed to the Treaty on European Union and to the Treaty establishing the European Community (OJ C 340 of 10.11.1997) – Denmark does not participate in measures under Title IV of the EC Treaty. According to Protocol No. 4 on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these two countries may indicate their wish to take part in the adoption and application of specific measures.



## 2.1. Background

On 4 November 2004 the European Council, convened in the Hague, adopted an ambitious and not uncontested plan aimed at boosting Community activism in many areas, including visas, asylum, immigration, citizenship, and judicial cooperation in civil and criminal matters. Action in these areas was deemed to be crucial for the development of an area of freedom, security and justice, which, by then, had found its way nearly to the top of the political agenda.<sup>12</sup>

Establishing and developing an area of freedom, security and justice has partly become an EC competence with the Treaty of Amsterdam (1997), which introduced a new Title IV in the EC Treaty; police and judicial cooperation in criminal matters still remains a competence of the EU (the third pillar) until proposals to change this – such as the Lisbon Treaty of December 2007 – enter into force. The Hague Programme is the successor to the Tampere Programme, endorsed by the European Council in October 1999, which in turn followed the 1998 Vienna Action Plan.

Despite past achievements through analysis and research dedicated to broader family changes,<sup>13</sup> not much is known about the legal position of unmarried and registered partners who move into or around Europe and about the impact of this phenomenon on the development of a European identity and citizenship. In particular, same-sex couples and LGBT families have long been an ‘invisible entity’ in national cultural, political, and legal discourses, and the same situation is often reflected at the Community level.

<sup>12</sup> See S. Peers, *EU Justice and Home Affairs Law*, 2nd ed., Oxford: OUP, 2006; J. de Zwann & F. Goudappel (eds.), *Freedom, Security and Justice in the European Union. Implementation of the Hague Programme*, the Hague: T. M. C. Asser Press, 2006; P. Stone, *EU Private International Law. Harmonization of Laws*, Cheltenham: Edward Elgar, 2006; D Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge: Cambridge University Press, 2006, 32.

<sup>13</sup> For an overview of EU-funded research projects in the 4th and 5th Framework Programmes, see the Dossier of RTD Info – Magazine on European Research, No. 49, May 2006, online at [http://ec.europa.eu/research/rtdinfo/49/index\\_en.html](http://ec.europa.eu/research/rtdinfo/49/index_en.html).



## 2.2. Brief overview of national laws on marriage, partnerships and adoption

There is little doubt that family law of many Member States has evolved and is continuing to adapt to a changing cultural and social landscape. Given the current institutional arrangement of the EU, it would be a mistake to concentrate only on the European level when considering issues of equal treatment and non-discrimination, since many of the discussions in the Community originated and were inspired by choices previously made at the national level.

Information on domestic laws dealing with new partnership schemes and adoption by same-sex couples is easily available; several research projects have contributed to refining our understanding of both the details of the legal texts and the larger picture of the phenomenon.<sup>14</sup> The box below provides a simplified overview of the current legal situation.

**Box 1.** Simplified overview of national laws concerning same-sex couples in EU Member States<sup>15</sup>

### Civil marriages open to same-sex couples:

- a. Belgium
- b. Netherlands
- c. Spain

### Alternative registration scheme (very) similar to marriage:

- a. Denmark
- b. Finland
- c. Germany
- d. Netherlands
- e. Sweden
- f. United Kingdom

### Alternative registration scheme entailing (considerably) less rights and responsibilities than marriage:

- a. Belgium
- b. France
- c. Czech Republic
- d. Hungary
- e. Luxembourg
- f. Portugal
- g. Slovenia

<sup>14</sup> See for instance *The impact of the increasing numbers of same-sex marriages or legally recognized partnerships on other legal domains, such as property rights and divorce law*, European Parliament Briefing Paper, September 2007. See also K. Waaldijk, *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners. A Comparative Study of Nine European Countries*, Documents de travail n. 125, Institut National d'Études Démographiques, Paris, 2005; M. Bonini Baraldi, *Le nuove convivenze tra discipline straniere e diritto interno*, Milano: IPSOA, 2005; H. Toner, *Partnership Rights, Free Movement, and EU Law*, Oxford-Portland Oregon: Hart Publishing, 2004; K. Boele-Woelki, A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp, Oxford, New York: Intersentia, 2003; Y. Merin, *The Legal Recognition of Gay Partnerships in Europe and the United States*, Chicago: University of Chicago Press, 2002; R. Wintemute, M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships. A Study on National, European, and International Law*, Oxford-Portland Oregon: Hart Publishing, 2001.

<sup>15</sup> For a more detailed overview see ILGA-Europe's website, online at [http://www.ilga-europe.org/europe/issues/marriage\\_and\\_partnership](http://www.ilga-europe.org/europe/issues/marriage_and_partnership).



Among the four Member States of EU -15 without any legal scheme, both in Ireland<sup>16</sup> and Italy<sup>17</sup> there have been official inquiries into the matter and/or government proposals for new legislation. In Austria and Greece the situation appears rather more stagnant, albeit local associations did put forward their proposals.

It is interesting to note that in some Member States contracting a same-sex partnership or marriage may lead to some consequences for adoption, parenthood and/or parental authority. As has been reported,<sup>18</sup> by mid-2007 **joint parental authority** (when the parent who has sole custody of his or her child can exercise parental authority jointly with his or her partner), **second-parent adoption** (when one partner adopts the biological child of the other, e.g. adoption by a lesbian woman of her female partner's child by donor insemination), and **joint adoption** (when a child not biologically related to either partner is jointly adopted by both of them) had become viable options in some European countries.

**Box 2.** Overview of national laws allowing adoption by LGBT couples in EU Member States

**Second-parent adoption:**  
**Belgium, Denmark, Germany, the Netherlands, Spain, Sweden, and the United Kingdom.**

**Joint adoption:**  
**Belgium, the Netherlands, Spain, Sweden, and the United Kingdom.**

At the European level legal rules touching upon free movement of citizens, family reunification of third-country nationals, judicial cooperation, and other areas, do not seem to always adequately address the changing landscape of contemporary families and their needs. This is perhaps because in 2006 a European-wide survey found that only 44% of Europeans in EU-25 were in favour of recognition of same-sex marriages throughout the Union, and even less in favour of adoption by same-sex partners.<sup>19</sup>

<sup>16</sup> For the Labour bill, see [www.labour.it/download/pdf/civil\\_unions\\_bill.pdf](http://www.labour.it/download/pdf/civil_unions_bill.pdf). For the Norris bill see [www.oireachtas.ie/documents/bills28/bills/2004/5404/b5404s.pdf](http://www.oireachtas.ie/documents/bills28/bills/2004/5404/b5404s.pdf). For the study of the Irish Human Rights Commission, see <http://www.ihrc.ie/fileupload/banners/Defactocouples.pdf>. For the report of the Law Reform Commission, see [www.lawreform.ie/Content/Reports/2006/2006Dec201st2006.pdf](http://www.lawreform.ie/Content/Reports/2006/2006Dec201st2006.pdf).

<sup>17</sup> For the text of the government bill see <http://www.senato.it/service/PDF/PDFServer/BGT/00253559.pdf>. For the private member' bill on Pacs see [www.unpacsavanti.it](http://www.unpacsavanti.it).

<sup>18</sup> See the report online at [http://www.ilga-europe.org/europe/litigation\\_in\\_the\\_european\\_courts/european\\_court\\_of\\_human\\_rights\\_council\\_of\\_europe\\_strasbourg\\_france](http://www.ilga-europe.org/europe/litigation_in_the_european_courts/european_court_of_human_rights_council_of_europe_strasbourg_france) (then click on **E.B. v. France, p. 4**).

<sup>19</sup> For the first report of the 2006 Eurobarometer 66 see [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_highlights\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf).



## 2.3. Overview of EC measures directly or indirectly relevant for LGBT families

Notwithstanding the lively picture at the national level, unmarried partners, same-sex couples and LGBT families run the risk of remaining caught between legal rules, old and new, that were not designed to include them at the EU level. From a legal point of view, in the EU there is still only a vague understanding as to a number of issues relevant to LGBT people, which are not always adequately taken into account in the formulation of EU policies. The list below exemplifies the broad areas concerned.

### 2.3.1. First phase instruments

Following the Vienna and the Tampere Programme, numerous measures concerning freedom, security and justice were proposed and/ or adopted. For the sake of clarity and completeness, this paragraph provides a brief overview of those acts – having a potential impact on LGBT issues – which had already been adopted before the Hague Programme came into existence (the so called ‘first phase instruments’). The measures listed below are directly or indirectly relevant for LGBT issues primarily because of the definition of ‘family member’ they contain. But first, it should be emphasised that most of them also incorporate the invitation to Member States to refrain from discrimination when implementing their binding rules, sometimes also taking the EU Charter of Fundamental Rights as the benchmark. This is the case for the important free movement Directive:

**This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.<sup>20</sup>**

As far as measures coming under the ‘Freedom’ strand are concerned, the list comprises several Directives and Regulations, covering temporary protection,<sup>21</sup> minimum standards for the reception of asylum seekers,<sup>22</sup> asylum applications,<sup>23</sup> family reunification,<sup>24</sup> long-term residents,<sup>25</sup> freedom of movement of Union citizens,<sup>26</sup> and refugees.<sup>27</sup> A discussion of the main legal issues raised by these measures will follow in section 2.

With respect to the ‘Justice’ strand, in 2000 the Council adopted a Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.<sup>28</sup>

<sup>20</sup> Recital 31, 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.

<sup>21</sup> Council Directive 2001/55/EC of 20 July 2001.

<sup>22</sup> Council Directive 2003/9/EC of 27 January 2003.

<sup>23</sup> Council Regulation (EC) No. 343/2003 of 18 February 2003.

<sup>24</sup> Council Directive 2003/86/EC of 22 September 2003.

<sup>25</sup> Council Directive 2003/109/EC of 25 November 2003.

<sup>26</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. See ILGA-Europe’s guidelines on this Directive online at [http://www.ilga-europe.org/europe/publications/non\\_periodical](http://www.ilga-europe.org/europe/publications/non_periodical).

<sup>27</sup> Council Directive 2004/83/EC of 29 April 2004. See ILGA-Europe’s guidelines on this Directive online at [http://www.ilga-europe.org/europe/publications/non\\_periodical](http://www.ilga-europe.org/europe/publications/non_periodical).

<sup>28</sup> Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 15.1.2001, C 12/1.

The programme indicated which new areas would be addressed in order to strengthen the area of justice within the EU. Among the measures adopted in the implementation of this programme, two are directly relevant for LGBT issues because they address family law matters or matters which otherwise impact on cohabitation arrangements: Council Regulation (EC) No 2201/2003 of 27 November 2003<sup>29</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000; and Council Regulation (EC) No 44/2001 of 22 December 2000<sup>30</sup> on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Both measures are designed to ensure that judgments of one Member State can easily and inexpensively be recognised and enforced in all other Member States (excluding those that do not participate in the area of freedom, security and justice). They can impact on LGBT families if and when judgments on same-sex marriages, registered partnerships, divorces, and maintenance are involved.

## 2.3.2. The Hague Programme and second phase instruments

As far as family matters are concerned, the Hague Programme<sup>31</sup> is rather unclear as to what family policies the Union will put in place. The Programme deals with family matters rather incidentally, for instance when it plans for measures dealing with immigration or private international law. More in particular, there is no indication whatsoever concerning the consideration of sexual orientation or gender identity. As described below, there are several 'orientations' that deserve closer attention, but no explicit reference to LGBT families and their children.

The 'general orientations' of the Hague Programme start out by recalling that the EU Charter of Fundamental Rights will, once entered into force, place the Union "under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted".<sup>32</sup> In general terms, the Hague Programme does make reference to fundamental rights. In addition to the right to non-discrimination (Article 21), the most important ones for LGBT people are the right to respect for private and family life (Article 7 of the EU Charter of Fundamental Rights) and the right to marry and to found a family (Article 9), which draw inspiration from parallel provisions of the European Convention on Human Rights. In addition, as far as the 'Justice' strand is concerned, mutual recognition of decisions in civil matters is seen as strictly functional to the aim of protecting citizens' rights; this claim would seem to reflect a promising approach. However, any Community intervention in this field is not intended to formulate new policies, but only to ensure mutual recognition of judgments. For the time being, this mainly implies that court decisions of any one Member State are recognised in other Member States. It can be noted that the only explicit comment by the European Council is directed at preserving Member States' prerogatives over what constitutes a family or a marriage, and at preventing any attempt to harmonise substantive family law: "*such [second phase] instruments should cover matters of private international law and should not be based on harmonised concepts of "family", "marriage", or other*".<sup>33</sup> As discussed below, this option might have repercussions in contradiction with EU fundamental rights standards. This paper attempts to assess EU measures against Treaty rights and the EU Charter of Fundamental Rights.

<sup>29</sup> OJ 23.12.2003, L 338/1.

<sup>30</sup> OJ 16.1.2001, L 12/1.

<sup>31</sup> The version of the Hague Programme used here is the one published as Annex I of the Presidency Conclusions, 4/5 November 2004, Council doc. No. 14292/04.

<sup>32</sup> Presidency Conclusions, 4/5 November 2004, the Hague Programme, p. 14.

<sup>33</sup> *Ibid.*, p. 40.



The 2005 Council and Commission Action Plan<sup>34</sup> conceived to implement the Hague Programme indicates which actions would become part of the second phase of construction of the area of freedom, security and justice. What follows is an indication of those 'second phase instruments' that will most direct impact on LGBT issues.

The Hague Programme lays down some **general orientations** formulated by the European Council. Actions planned by the Commission in order to implement the general orientations set out by the Hague European Council comprise the following:

- **adopting a framework Programme on Fundamental Rights and Justice, in particular the specific Programme on 'Citizenship and Fundamental Rights'**
- **starting informal discussions on accession of the EU to the ECHR**
- **extending the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Fundamental Rights Agency.**

Furthermore, the bundle of initiatives drawn together in order to strengthen **Freedom** encompasses:

- **control of transposition, compliance and correct application of Directive 2004/38/EC on free movement and residence (2006)**
- **a report on application of Directive 2004/38/EC on free movement and residence and, if appropriate, proposals for the amendment of the Directive (2008)**
- **adoption of the Asylum Procedures Directive (2005)**
- **monitoring the transposition and implementation of first phase instruments (2005-2007)**
- **a proposal on long-term resident status for refugees (2005).**

Finally, in order to improve mutual recognition and effective access to **Justice** in civil matters, the most relevant actions planned are:

- **a specific Programme on 'Judicial Cooperation in Civil and Commercial Matters'**
- **a Green Paper on succession**
- **a Green Paper on conflicts of laws and jurisdiction on divorce matters**
- **proposals on maintenance obligations**
- **a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition**
- **a report on the functioning of the Brussels I Regulation in 2007 and a proposal for amendment, if appropriate, by 2009 at the latest.**

<sup>34</sup> Based on a Communication from the Commission (COM(2005) 184 final), the Council and the Commission have adopted an Action Plan translating the Hague Programme into specific measures (Council Document 9778/2/05 of 10 June 2005).

<sup>35</sup> Accession of the Community to the Hague Conference on Private International Law was completed with the Council Decision of 5 October 2006, OJ 26.10.2006, L 297/1. Accession took place on 3 April 2007.

Most of these prospective instruments will be analysed in more detail in the next section. It is interesting to note that the Commission Communication originally envisaged for 2008, a Green Paper on mutual recognition in matters related to civil status. The version of the Action Plan adopted by the Council has deleted any reference to action in the field of civil status, a choice which testifies to the ongoing difficulties in shaping coordinated and coherent policies on conditions for marriage and related issues. Finally, the Commission indicated that it would pursue accession of the Community to the Hague Conference on Private International Law in 2006.<sup>35</sup>





# 3. Potential Impacts of the Hague Programme on LGBT families

From the overview sketched above it appears that various EU measures and policies, most of which are brought together under the Hague Programme, have a clear impact on individual rights and on LGBT families. However, a number of shortcomings have also been anticipated, which limit this impact and cause uncertainty or continuing exclusion. This section will examine where the weak points of EU legislation are, why they are there, and what avenues for progress can be identified.

# 3.1. Institutional views, domestic (good) practices and ‘portability’ of personal status

In past years the Commission has held rather clearly that its proposals do not seek to impose any particular choice on Member States when it comes to regulating family matters. The Council was more cryptic but took very similar views, holding that cross-country recognition ‘could pose problems’. The implications of these viewpoints will be examined below. In the meantime, some Member States have already dealt with issues of recognition and have in fact witnessed significant difficulties.

**Box 3** - Negative example of non-recognition<sup>36</sup>

**In 2005 an Italian court had to decide whether two male Italian citizens could register in Italy the marriage they had contracted in The Hague. After moving back to Italy, the two men had chosen to request the registrar of the city where they lived to record them as ‘married’ in the national registry of births, marriages, and deaths. Upon the refusal of the registrar, who was also supported by an opinion of the Ministry of the Interior that he had requested, the couple sued the State. The local court rejected the claim, and so did the Rome Court of Appeal: the marriage was considered non-existent under Italian law and contrary to Italian public policy. The Court based its reasoning on the notion of ‘family’ which can be found in the 1948 Italian Constitution, thereby putting the debate on highly contentious grounds such as constitutional values and principles. It concluded that the Italian Constitution refers only to the traditional marital relationship between people of different sex, and that this conception finds its justification “in the sentiment, the culture, and the history of our national community” which come before the law books.**

A similar conclusion can be found in a judgment of 14 December 2006 by the Irish High Court. The case concerned a Canadian marriage contracted between two Irish women, and thus is not relevant for EC free movement purposes. However, the reasoning of the Court does illustrate where the main problem lies. The Court refused to agree with the arguments presented by a couple of two women that their Canadian marriage should be recognised in Ireland. It emphasised that under the 1937 Irish Constitution marriage is reserved for opposite-sex couples. It also concluded that this situation cannot be held to be incompatible with the European Convention on Human Rights. The decision was appealed to the Supreme Court on 23 February 2007.

This scenario is far from reassuring. Views taken by national courts or governments tend to exacerbate the arguable presence of (legal) obstacles that may adversely affect the possibility of moving around Europe with a partner, either married or unmarried, either of the same or of a different

<sup>36</sup> See the decisions published and commented, in Italian, in *Famiglia e Diritto* 4 (2005), 411; and in *Famiglia e Diritto* 2 (2007), 166.



sex, either citizen of the EU or not, and with children born and/or raised within such unions. This shows that Member States are reacting very cautiously to changes happening in other Member States. In this context, it is unclear what the European Union would be prepared to do in order not only to safeguard individual rights, but also to remedy an existing fragmentation based on national 'good old values'.

Fortunately, there are some examples of good practices which remind us all that better integration can and should be achieved. For instance, when implementing the free movement Directive, Ireland has chosen to grant LGBT couples limited immigration rights.<sup>37</sup> The Directive only requires Member States to facilitate entry and residence of the unmarried partner, and Ireland has decided to take this obligation seriously. In more cryptic terms, the obligation to facilitate entry and residence can be found at least in Austria<sup>38</sup> and in Italy.<sup>39</sup>

**Box 4** - Examples of good practices in same-sex marriage recognition

**In Italy there is also an unreported good practice based on Regulation 44/2001 (Article 19(2)(a)) and on the Employment Equality Directive. A public sector employee had been seconded indefinitely to the Brussels permanent mission of his employer. When he got married to a Belgian citizen in Belgium, he requested his employer to grant him honeymoon leave. After a long confrontation, the employer agreed with his submission that his Belgian marriage should have been recognised for the purposes of employment benefits. In this case, which made national headlines, the Italian citizen was able to reconcile his personal life (his Belgian marriage) with his job for an Italian employer. From a political point of view, it is interesting to note how the debate on 'what is family' was influenced more by a European dimension than by a closed circuit of purely local values. Legally speaking, the worker was able to make 'portable' his personal status of being married. His Belgian same-sex marriage had some legal consequences in Italy as far as employment benefits were concerned.**

**A same-sex marriage contracted in Belgium between a Belgian national and a third-country national also had some consequences in Luxembourg. Initially it had some negative consequences: the Minister of Foreign Affairs and Immigration of Luxembourg held that the third-country national could not obtain a permit to stay in the country. The Minister claimed that he could not obtain the benefits deriving from the Act of 9 July 2004 (on legal consequences of certain partnerships) because he was already married. In his decision, the Minister implicitly affirmed the validity of the Belgian marriage. The decision was appealed to the Administrative Court of the Grand Duchy which, in its decision of 3 October 2005, held that the Ministry did not enjoy absolute discretion but was bound by Article 8 of the ECHR and had to take into account the right to respect for private and family life. The Court concluded that the State would contradict itself if, after having enacted a law permitting same-sex partners to 'declare' their partnership, it refused residence to a spouse ('conjoint') of a Belgian national.**

<sup>37</sup> Statutory Instrument No. 226 of 2006, European Communities (Free Movement of Persons) Regulations 2006. See ILGA-Europe's Euro-letter, May 2006, n. 131, p. 8.

<sup>38</sup> See

Fremdenrechtspaket 2005, arts. 47 and 52.

<sup>39</sup> Legislative Decree 6 February 2007, No. 30, arts. 3, 9(5), 9(6) and 9(7). It is worth

highlighting that a ministerial circular of 18 July 2007 on the application of decree

No 30 requires the foreign couple to prove the existence of the relationship

through evidence of its registration. This requirement is clearly too restrictive, because it excludes, contrary to the Directive, all those couples that could not,

or preferred not to formally register their relationship.



There could be several other examples of domestic practices related to inter-country recognition or non-recognition of foreign statuses, but it appears extremely difficult to acquire precise information about them. For this reason, a European-wide database of cases and administrative decisions would be extremely helpful.<sup>40</sup>

The favourable outcome of the Luxembourg case demonstrates that the legal effects of a same-sex marriage should not be limited to a single Member State when this impacts on fundamental rights of the individual. In this context ensuring portability of personal status can be a viable solution. In general, using the formula 'portability of personal status' is preferable to 'mutual recognition of civil status' because it reflects more adequately the importance of the matter for the individual. Also, the chosen formula does not prescribe one method: mutual recognition could well be one of the avenues for ensuring portability of personal status. However, other methods could also be considered, such as complete unification of family law in Europe, and/or other actors could be involved (such as the Hague Conference on Private International Law).

More generally, why is portability of personal status such a central issue at this time? It is because there are few justifications for allowing the mutual recognition of separation, divorce, annulments, arrangements concerning property division or maintenance obligations, or even wills, if it is not possible to clear up some preliminary questions: who is to be considered tied to whom? since when and according to which legal scheme? with what legal consequences? In a way, determining an individual's personal status is the first question to be considered because it generates most of the situations that flow from being married or not, from being in a registered partnership or not, from being the parent/child of someone or not. The recognition of these legal links makes a real difference in people's lives and has a clear impact on fundamental rights of the individual. In concrete terms, it allows partners and family members to access partner benefits in employment, survivor's pensions, inheritance, or the right to entry and residence in another Member State.

<sup>40</sup> A general database does already exist (CERSGOSIG) but it needs further development; see S. Fabeni, 'CERSGOSIG: Perspectives and Objectives to Challenge Discrimination. A Network on Global Scale', *Journal of Homosexuality*, 48 (2005), 3/4, 3-7.



## 3.2 Strengthening freedom: opportunities and pitfalls

All relevant measures conceived for strengthening freedom, except the proposal for long-term resident status of refugees and the Asylum Procedures Directive (neither of which innovates in terms of definitions), were adopted during the first phase of implementation of the Tampere programme. Some of them have already been examined from an LGBT perspective, and thus need less in-depth analysis.<sup>41</sup> All of these measures have a potential impact on LGBT families for one main reason: they contain a definition of the 'family member' who is granted a particular status under EC law. All first-phase measures have been adopted following a special decision-making procedure, whereby Member States shared the power of initiative with the Commission, the Council decided unanimously, and Parliament was only to be consulted. Many measures have been criticised on human rights grounds, or because minimum standards have been set at a low or very low level.<sup>42</sup>

### 3.2.1. Family members and temporary protection

One of the first measures which defined who could qualify as a 'family member' is Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof.<sup>43</sup> Although this Directive has never been applied in practice and it remains a rather abstract law, its Article 15(1) sets out an important principle that would be followed almost to the letter in most subsequent legislation:

For the purpose of this Article...the following persons shall be considered to be part of a family:

(a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens.

<sup>41</sup> See M. Bell, 'We are Family? Same-sex Partners and EU Migration Law', in *Maastricht Journal of European and Comparative Law*, 9(4), 2002, p. 335.

<sup>42</sup> See Peers, *EU Justice and Home Affairs Law*, 352.

<sup>43</sup> OJ 7.8.2001, L 212/12.

<sup>44</sup> Case 59/85, [1986] ECR 1283.

It appears immediately evident that the principle affirmed is not radically new. It is, rather simply, designed to comply with the ruling of the ECJ in *Reed*.<sup>44</sup> With that decision the ECJ had stated that "article 10(1) of regulation no 1612/68 cannot be interpreted as meaning that the companion, in a stable relationship, of a worker who is a national of a Member State and is employed in the territory of another Member State must in certain circumstances be treated as his 'spouse' for the purposes of that provision" (point 16). However, the ECJ considered "the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him" as a social advantage (Article 7(2) of Reg. 1612/68), which should be afforded without discrimination on grounds of nationality: the unmarried



partner of a migrant worker should be allowed entry and residence in the host State if unmarried partners of nationals of that State enjoy that benefit.

This principle seems to be the main guideline followed by the Commission and the Council, even decades after the decision. This circumstance points to the conclusion that, since *Reed*, there has been very little advance in the Community's approach vis à vis unmarried partners. Clearly, both *Grant*<sup>45</sup> and *D and Sweden*<sup>46</sup> have contributed to consolidating the reluctance of the Commission and the Council to incorporate definitions of family members not limited to the traditional nuclear family. By contrast, one can observe fewer difficulties when Member States are not involved, as the example of the Staff Regulations illustrates.

**Box 4.** Reform of the Community's Staff Regulations

**The Commission's proposals for reforming the Staff Regulations claimed that the old text no longer reflected the changed social and legal attitudes towards family relationships. As of 1 May 2004, new Article 1d (formerly Article 1a) now provides that "For the purposes of these Staff Regulations, non-marital partnerships shall be treated as marriage provided that all the conditions listed in Article 1(2)(c) of Annex VII are fulfilled." The new Article 1(2) of Annex VII grants family allowances to a married official (point (a)) and to 'an official who is registered as a stable non-marital partner', provided that a few conditions are met (point (c)). After this reform, benefits provided for by the Regulations (household allowance, pension and sickness insurance, access to canteens and language courses) apply to a registered partnership between persons who are not allowed to marry "in a Member State". In addition, the reform provides a "reduced social package" for unmarried officials who live in a de facto (unregistered) relationship, if it can be proved by a legal document.**

### 3.2.2. Asylum seekers and refugees

The limited approach taken vis à vis the definition of 'family member' seen above finds confirmation in measures establishing the common asylum system. Council Directive 2003/9/EC of 27 January 2003<sup>47</sup> laying down minimum standards for the reception of asylum seekers sets out rights and duties of asylum seekers during the processing of their application. According to Article 3, the Directive applies to third-country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State, "as well as to family members, if they are covered by such application for asylum according to the national law." Article 2(d) defines as family member "the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens."

In addition, Council Regulation (EC) No 343/2003 of 18 February 2003<sup>48</sup> establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national reiterate the same principle affirmed

<sup>45</sup> Case C-249/96, [1998] ECR I-621.

<sup>46</sup> Joined Cases C-122/99 P and C-125/99 P, [2001] ECR I-4319.

<sup>47</sup> OJ 6.2.2003, L 31/18.

<sup>48</sup> OJ 25.2.2003, L 50/1.



in *Reed*,<sup>49</sup> and so does Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.<sup>50</sup> With respect to the latter, it must be emphasised that the Directive contains not only an important recognition of sexual orientation and gender identity as factors susceptible of triggering international protection on grounds of membership of a particular social group,<sup>51</sup> but also the enunciation that family unity should be maintained (but only whenever possible and subject to some conditions).<sup>52</sup>

The Asylum Procedures Directive does not give any definition of 'family member', nor does the proposal to extend long-term resident status to refugees.

### 3.2.3. Family reunification of third-country nationals

Reunification of third-country nationals with their family members can be regarded as a particular application of the right to respect for family life, a human right protected by most international and regional instruments. In EC law, this right is afforded to a narrowly defined set of people, even narrower than seen above. In the case of family reunification for third-country nationals, in fact, the *Reed* principle, albeit limited, is further diluted: even if Member States treat unmarried couples in a way comparable to married couples, they still retain the option of choosing whether the unmarried partner will qualify for entry or not. Recital 10 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification summarises this position:

It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor.<sup>53</sup>

More disturbingly, each Member State is not bound by eventual generous choices made by other Member States<sup>54</sup> and enjoys an almost unlimited discretion as to which members of the family - apart from the spouse and minor children - could be reunited with a landed immigrant. In fact, even the formal juxtaposition of the spouse and the unmarried partner - accepted in the temporary protection directive - was here found to be an insurmountable problem.<sup>55</sup>

<sup>49</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Art 2(i)

<sup>50</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Art 2(h).

<sup>51</sup> *Ibid.*, Article 10(d).

<sup>52</sup> *Ibid.*, Article 23(1) and 23(2).

<sup>53</sup> OJ 3.10.2003, L 251/12.

<sup>54</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Rec. 10

<sup>55</sup> *Ibid.*, Article 4(1)(a), Article 4(3), and Article 5(2)

### 3.2.4. Free movement of EU citizens

The measures seen so far have little or no direct significance for EU citizens. They apply exclusively to third-country nationals who are long-term economic migrants, or to asylum seekers and refugees. By contrast, the new Directive on freedom of movement certainly impacts more directly on EU citizens, without excluding third-country nationals who can qualify as their family members.<sup>56</sup> Notwithstanding the fact that the opportunity of moving and residing freely within the territory of the Member States is a right granted to EU citizens by Article 18 of the Treaty, there is but a small variation in the definition of the family member.

One peculiarity of Directive 38 is that it does contain a distinction between registered partnerships and informal cohabitation. The only other – at least explicit – example of this is in the Family Reunification Directive. The chosen formula is arguably slightly more permissive because, when registered partnerships are treated as 'equivalent' to marriage by the host State, the *Reed* principle applies and Member States must recognise the registered partner of the EU citizen:

"Family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.<sup>57</sup>

The situation is rather more dubious for the unmarried (and unregistered) partner because, according to Article 3(2), Member States have only a duty to 'facilitate' entry and residence of "the partner with whom the Union citizen has a durable relationship, duly attested." ILGA-Europe guidelines on the transposition of the Directive have stressed that the Directive must be implemented without discrimination on grounds of sexual orientation and that "States must have a mechanism in domestic law that allows unmarried partners to request admission."<sup>58</sup>

### 3.2.5. Children and other family members

In harmony with international standards in the field, the EU did not turn a blind eye to children and other members of the family. The EU should conform to Article 24 of the Charter of Fundamental Rights and to the 1989 UN Convention on the Rights of the Child, including its anti-discrimination provisions.<sup>59</sup> Clearly, while the situations in which parental responsibility is established, exercised, or taken away (and supplemented or substituted by guardianship, fostering or public care) are determined by each Member State individually, the rights and benefits deriving from being the child of a migrant citizen or third-country national are increasingly dealt with by the common European rules seen above, at least for entry and residence purposes.

<sup>56</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.

<sup>57</sup> *Ibid.*, Article 2(2).

<sup>58</sup> EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process, ILGA-Europe, October 2005, p. 8.

<sup>59</sup> See *Families, Partners, Children and the European Union*, ILGA-Europe, 2003, p. 20.



**Box 5.** *Children and other family members dependent on EU citizens*

**Directive 2004/38 stipulates that direct descendants who are under the age of 21 and direct relatives in the ascending line are considered to be family members and enjoy entry and residence rights on condition that they are dependants of the migrant EU citizen (Article 2(2)(c)). As it has been written, “although there is no definition in the Directive of ‘descendant’, it is reasonable to assume that this includes: children where there is a biological link with the parent; adopted children; and any other children for which the person is a legal guardian. However, the situation is less clear in relation to social parenting. For example, where a same-sex couple raise a child, the non-biological parent might not acquire legal recognition if this is not permitted by domestic family law” (EU Directive on free Movement and same-sex Families: Guidelines on the Implementation Process, ILGA-Europe, October 2005, p. 10). Thus, when children only have a legally-recognised relationship to the person’s partner, the partner’s children will have to seek admission on the basis of Article 3(2). According to Article 3(2) of the Directive, Member States are under a duty to ‘facilitate’ entry and residence for other dependent family members or ‘members of the household’. It has been suggested, therefore, that “based on the duty to facilitate admission, national legislation must provide a mechanism through which requests for the admission of children (and other family members) will be considered” (Ibid., p. 11).**

In general, EU law remains solidly anchored to the choices made at the domestic level. Sometimes it makes it clear that children of unmarried couples and adopted children do qualify as family members. Directives on refugee status, asylum seekers and asylum procedures consider as family members “the minor children of the couple...or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law.”

**Box 6.** *Family reunification of unmarried third-country nationals with their children*

**The Family Reunification Directive gives full discretion to Member States as regards entry and residence of children, including adopted ones, of unmarried and registered partners (Article 4(3)). As has been highlighted, “in this case, there is a wide gap between the situation faced by children with married parents and that confronted by those with unmarried parents. The former have a legal right to join their parents inside the Union, whereas the latter find themselves at the discretion of each individual Member State. This does not accord with the explicit recognition in the Charter of the right of every child ‘to maintain on a regular basis a personal relationship and direct contact with both his or her parents’” (see further *Families, Partners, Children and the European Union*, ILGA-Europe, 2003, p. 24).**

In sum, it can be noted that no EU provision attempts to define in an autonomous manner when a parent-child relation exists or should exist. Whilst this deference to domestic law can be defended in certain circumstances, it is difficult to uphold any differential treatment of children based on the legal ties between their parents. EU measures should, thus, ensure that the child’s well-being and best interest are guaranteed regardless of the legal tie with his or her parents, and their gender or sexual orientation.



## 3.3. Towards more inclusive definitions of the family

All of the definitions seen above are distinctly dissatisfying. First, the distinction between marriage and registered partnership is arbitrary. At least in those cases when no significant difference exists between the two, such distinction is directly based on sexual orientation and is highly likely to conflict with fundamental rights. Second, the choice of the law of the host State in order to determine whether unmarried partners will qualify entirely rejects the principle of mutual recognition (at least when Member States are involved). As the Commission itself has explained,

“the provision on unmarried partners is applicable only in Member States where unmarried couples are treated for legal purposes in the same way as married couples. This provision generates no actual harmonisation of national rules on the recognition of unmarried couples; it merely allows the principle of equal treatment to operate.”<sup>60</sup>

Furthermore, it should be added that when a third-country national – for instance a Canadian or a Russian citizen – is allowed entry into a given Member State – for example Sweden – as family member of a Union citizen, on the grounds that Swedish legislation treats registered partnerships as ‘equivalent to marriage’, the Directive will still allow differential treatment as compared to the registered partner who has Union citizenship. This will have an effect both on administrative formalities and on the consequences of termination of the relationship. In sum, leaving LGBT couples and families without rights affects not only the individuals concerned, but also an entire system of relations among Member States. The solution adopted in the Free Movement Directive does little to reinforce mutual trust. It does not foresee much cooperation on the issue and it undermines the process of mutual recognition started in the field of judicial decisions under the ‘justice’ heading. More generally, it leaves national prejudices completely unaddressed.

In order to justify timid action, the Commission has also presented the argument of ‘national diversity’, which was also put forward by the ECJ in *D and Sweden* to uphold differential treatment between registered partnerships and marriage. Whilst one can more or less understand that the ECJ was unwilling to push the boundaries in that particular case, the argument of national diversity is naïve when put forward by the lawmaking institutions. It is frankly difficult to imagine a dossier on the table of Community lawmakers that does not proceed from national diversity. Arguably, the very existence of the EC and of its institutions finds its roots in the desire, and the need, to go beyond countless instances of national diversity in any given field. Since 1957 this exercise has been performed thousands of times and the reasons for excluding family matters are unclear from a legal point of view.

On the adoption of the Free Movement Directive the Council – which rejected the EP’s amendments albeit no unanimity was necessary – argued that “with regard to marriage, the Council has been reluctant to opt for a definition of the term “spouse” which makes a specific reference to spouses of the same sex.”<sup>61</sup> The Council justified this position by making reference to the fact that a

<sup>60</sup> COM (2000)303 final, Article 13.

<sup>61</sup> Common Position of 10 November 2003, Council document 13263/03, p. 8.



tiny minority of Member States have legal provisions for marriages between partners of the same sex. With regard to partnerships, the Council equated registered partnerships with informal cohabitation, and stated that,

Whether they are registered partners or unmarried partners, the Council is of the opinion that recognition of such situations must be based exclusively on the legislation of the host Member State. Recognition for purposes of residence of non-married couples in accordance with the legislation of other Member States could pose problems for the host Member State if its family law does not recognise this possibility. To confer rights which are not recognised for its own nationals on couples from other Member States could in fact create reverse discrimination, which must be avoided.<sup>62</sup>

These arguments might temporarily seem convincing on political grounds, but have shaky legal foundations. On closer inspection, reverse discrimination is a false problem, as is that of Community competences. According to the Treaty, free movement of people can be limited only in exceptional cases which fall within the ambit of public policy, health and security. Any unjustified obstacle to free movement must be addressed, even when it falls outside areas of direct EC competence. By way of comparison, as regards the attribution of citizenship (*Micheletti*<sup>63</sup>; *Chen*<sup>64</sup>) and surnames (*Garcia Avello*<sup>65</sup>), the ECJ has ruled that Member States must respect the choices made by other Member States. The granting of nationality and of surnames embodies crucial State interests; these are matters which fall outside the powers of the Community, but no feeling of imposition was reported in either instance. Simply put, there are no reasons why the Community lawmaker should depart from this principle as far as family status is concerned, even if no explicit case law on the matter has been produced.

In conclusion, there are at least three underlying assumptions that, regrettably, still need to be accepted in EU law:

- First, that spouses can be of the same sex; this eliminates direct discrimination based solely on grounds of sexual orientation.
- Second, that spouses and registered partners are to be treated equally, irrespective of gender and sexual orientation, so as to ensure 'portability' of the status acquired elsewhere.
- Third, that children of unmarried, registered and married same-sex couples must be treated just like any other children, and should not suffer pejorative treatment due to their parents' gender, sexual orientation or legal tie.

<sup>62</sup> Ibid.

<sup>63</sup> ECJ 7 July 1992, Case C-369/90, Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria [1992] ECR I-4239.

<sup>64</sup> ECJ 19 October 2004, Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] ECR I-9925 (paras. 37-39).

<sup>65</sup> ECJ 2 October 2003, Case C-148/02, Carlos Garcia Avello v Belgium [2003] ECR I-11613.



## 3.4. Strengthening justice, a goal for all?

Measures adopted under the 'freedom' strand do not normally have 'the family' as their central concern. Even when these measures need to define who qualifies as a family member, family law matters are addressed only incidentally. For instance, in the case of the Family Reunification Directive, the matter being regulated is immigration, not family. In the definitions seen above the main Community constraint binding Member States is that of avoiding nationality discrimination, not sexual orientation discrimination.

Conversely, most measures adopted or proposed under the 'justice' heading address typical family law matters: separation and divorce, maintenance, property regimes, wills and succession. As it stands, Community law dealing with 'justice' incidentally addresses LGBT issues only in two ways. First, Regulation 2201/2003 applies to matters of parental responsibility regarding children of unmarried couples. Second, maintenance obligations between unmarried couples or parents and children appear to be covered by Regulation 44/2001.

The following paragraphs will examine the (proposed) measures published so far. Pursuant to Article 67(5) of the Treaty, all measures in the field of family law must be decided by unanimous vote in the Council. Whilst Parliament must be consulted, its opinion is not binding. The only uncertainty as to whether qualified-majority voting will apply concerns the proposal on maintenance obligations.

### 3.4.1. Separation, divorce and parental responsibility

On 17 June 2006 the Commission published its proposal for a Council Regulation on applicable law in matrimonial matters.<sup>66</sup> With this proposal it seeks to pursue two objectives:

- to amend Regulation 2201/2003<sup>67</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
- to introduce new rules on applicable law.

Regulation 2201 applies to the dissolution of marriages only. Registered partnerships are not mentioned and there is no indication that 'international' or bi-national registered partners wishing to terminate their relationship can benefit from the facilitated regime provided for by the Regulation. The recent proposal does nothing to change this situation. This state of things raises two questions, one dealing with same-sex marriages, and the other with registered partnerships.

On the first point, it is unclear whether the Regulation and the draft Regulation could apply to same-sex marriages. For instance, a Cypriot same-sex couple, married in the Netherlands but resident in Latvia, may wish to divorce before a Latvian court, which has jurisdiction according to Article 3(a), first indent. A plain reading of the text and of the *travaux préparatoires* would suggest that same-sex

<sup>66</sup> COM(2006) 399 final.  
<sup>67</sup> OJ 23.12.2003, L 338/1.



marriages have not been deliberately excluded by Regulation 2201 and are, thus, comprised within the scope of the Regulation. However, this has never been tested in the courts.

The prevailing view in the Council is that Member States retain the right to “respect for [their] laws and traditions...in the area of family law.”<sup>68</sup> In the example above, the Latvian court would be able to claim that a Dutch same-sex marriage amounts to a legal nullity under Latvian law and, thus, no divorce would be granted. The Council maintains that “the definition of marriage and the conditions of the validity of a marriage are matters of substantive law and are therefore left to national law.”<sup>69</sup> This contention is perfectly acceptable in this case; the question is: to which national law? Letting the Member State which has jurisdiction on divorce or separation assess the existence of a marriage according to its own law seems the preferred option at the political level. However, it does not follow automatically, as the Council seems to imply, that it should be the law of the Member State which has jurisdiction as regards divorce, or only its substantive law. It could well be the law of the place where the marriage was contracted.

The result of the prevailing trend is that same-sex married couples become hostage to a system that does not grant them the same facilities granted to opposite-sex spouses and that places considerable hardship on them. If the couple manages to obtain divorce in the Netherlands and wishes to have that decision enforced in Latvia, Latvian courts could still deny recognition of the Dutch divorce on public policy grounds pursuant to Article 22(a) of the Regulation. Under the present state of things, unpredictability and unfairness seem to prosper. Until all Member States open up marriage to same-sex couples and agree that this is a perfectly acceptable legal scheme, the most adequate connecting factor for assessing if an individual is indeed married is that of the law of the Member State where the marriage was celebrated, clearly only when the parties themselves did not make any express choice.

On the second point, the problems tackled by Regulation 2201 and by the draft Regulation remain wholly unaddressed as far as registered partnerships are concerned. The only rational explanation for this choice is that in EC law registered partners are usually treated similarly to unmarried couples. This means that they would have no divorce or annulment claim to pursue. However, it must be remembered that Regulation 2201 applies to children of both married and unmarried couples. Registered or unmarried partners who jointly adopted a child according to the relevant law and wish to obtain a court decision regarding custody could therefore benefit from the regime provided for by the Regulation. However, some Member States could argue that there should be greater respect for national diversity and national sensitivities in matters pertaining to children and parenthood. Thus, it is still possible that a court decision adjudicating a custody dispute between registered or unmarried same-sex partners will not be recognised and enforced in other Member States on grounds of public policy pursuant to Article 23(a).

In conclusion, in order to bring the instruments more in line with the needs of LGBT families, they would have to be amended as follows:

**(a)** clarify that Regulation 2201 applies to same-sex marriages, and that the validity of marriages and the conditions for marriage are determined by the law chosen by the parties or the law of the place where the marriage was celebrated;

<sup>68</sup> Council document 8364/07, Justice and Home Affairs meeting of 19-20 April 2007, at p. 11 holds that “the proposal does not determine the law applicable to a marriage. The definition of marriage and the conditions of the validity of a marriage are matters of substantive law and are therefore left to national law. Consequently, the court of a Member State which has jurisdiction as regards divorce or legal separation may assess the existence of a marriage according to its own law.”  
<sup>69</sup> Ibid.



- (b) clarify explicitly that no public policy concern emerges solely on the grounds that the spouses are of the same sex;
- (c) ensure the application of Regulation 2201 to registered partnerships and possibly to other forms of legal cohabitation, and expressly exclude that any public policy claim can be made solely on the grounds that the decision concerns one of such schemes;
- (d) make it clear that no public policy claim may be made by any one Member State as regards court decisions concerning parental responsibility over children of same-sex couples.

### 3.4.2. Maintenance obligations

Maintenance obligations are those obligations to provide financial support to a family member in need.<sup>70</sup> In some respects they are now covered by Community law, notably by Regulation 44/2001,<sup>71</sup> one of the first Community instruments designed to implement judicial cooperation in civil matters, as provided for by Article 65 of the EC Treaty. Its aim consists in overcoming certain differences between national rules governing jurisdiction and recognition of judgments, which hamper the operation of the internal market. Regulation 44 is designed to simplify the determination of the court and of the Member State which has jurisdiction. It also aims at simplifying recognition and enforcement of judgments in other Member States. Regulation 44 replaces the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>72</sup> The Regulation, unlike the Convention, is immediately binding and directly applicable. Maintenance claims are also included in the scope of Regulation 805/2004, creating a European enforcement order for uncontested claims. This Regulation is conceived as an alternative mechanism for enforcement of uncontested claims.

An important question with respect to maintenance is whether registered partnerships and other non-marital legal schemes are covered by Regulation 44 and can benefit from the simplified system it sets up. Some scholars have argued that, since according to national law registered partnerships are very similar to marriage, they should be excluded from the scope of Regulation 44 just as married couples are.<sup>73</sup> On 15 December 2005 the Commission published a draft Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,<sup>74</sup> which does include registered partnerships. According to Article 1 of the proposal, “this Regulation shall apply to maintenance obligations arising from family relationships or relationships deemed by the law applicable to such relationships as having comparable effects.” It is rather clear, thus, that the Commission’s proposal does not exclude from its scope those registered partnerships that can be compared to marriage as to their legal consequences, according to the applicable law.

By contrast, Article 12 of the proposal (titled ‘No effect on the existence of family relationships’) stipulates that “the provisions of this Chapter shall determine only the law applicable to maintenance obligations and shall not prejudice the law applicable to any of the relationships referred to in Article 1.” What this means is that, as made clear by recital 13 of the proposal, “the rules on conflict of laws should apply only to maintenance obligations and should not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based.” Rather clearly, this crucial assessment will continue to be carried out according to the (private international)

<sup>70</sup> See also the Glossary at the end of this report.

<sup>71</sup> OJ 16.1.2001, L 12/1.

<sup>72</sup> OJ 31.12.1972, L 299/32.

<sup>73</sup> M Lupoi, *Rapporti patrimoniali tra conviventi e provvedimenti riconoscibili*, online at [www.judicium.it](http://www.judicium.it).

<sup>74</sup> COM(2005) 649 final. See also the Green Paper on maintenance obligations, COM(2004) 254 final.



law of each Member State, with the consequence of leaving untouched the fundamental question of the validity of legal schemes, different from marriage, outside the Member State where they were set up.

More practically, according to Article 14(b)(iii), the creditor and the debtor may – “in the case of a maintenance obligation between two persons who are or were married or *in a relation which has similar effects under the law applicable to it*” (emphasis added) – designate the law applicable to their property relations at the time of designation. The central statement clearly points to registered partnerships or other marriage-like schemes; this is a very welcome development, albeit the formulation of Article 12 seen above is, regrettably, likely to undermine the real novelty of such an approach.

The broader meaning which emerges from this proposal is that it may be less problematic for the Commission to encompass registered partnerships within the system of mutual recognition of judgements when proposed legislation is perceived to be removed from family law matters and a useful tool to ease the pressure of needy people on the public purse. In fact, if Community law makes it easier for someone in financial need to obtain support from a partner or a family member, there are fewer chances that the State will have to intervene with its social security schemes. To be clear, the Commission has called on the Council to provide for measures relating to maintenance obligations to be adopted with the codecision procedure, which involves the necessary agreement of the European Parliament,<sup>75</sup> arguing that no family law matter is involved. It remains to be seen whether the Council will accept this contention.

Article 20 explicitly excludes that the application of a provision of the law of a Member State designated by the Regulation can be refused by another Member State on the ground of public policy. This useful provision means that disputes between registered partners decided in one Member State cannot be disregarded on the grounds that they conflict with the public policy of another Member State.

### 3.4.3. Matrimonial property regimes

With regard to conflict of laws in matters concerning matrimonial property regimes, the Commission published a Green Paper on 17 July 2006,<sup>76</sup> based on a study commissioned in 2003.<sup>77</sup> The consultation launched with the Green Paper closed on 30 November 2006; the Commission is now assessing whether to put forward a proposal. The Green Paper made a number of assumptions and sought feedback on various issues. One of these was whether the instrument should apply to property regimes of registered partnerships and of ‘de facto unions’.

As a matter of fact, the study from which the Green Paper originates had highlighted that, seen from a private international law perspective, the situation of non-marital couples was rather critical. Especially in those countries that do not allow any form of partnership registration, the study claimed that “legal certainty is almost nonexistent.”<sup>78</sup>

A very positive development is that the Green Paper did tackle registered partnerships and lighter regimes such as the French Pacs, in order to “ensure that all property aspects of family law are examined.”<sup>79</sup> The Commission noted that “in all the Member States, more and more couples are formed

<sup>75</sup> See COM(2006) 648 final.

<sup>76</sup> COM(2006) 400 final.

<sup>77</sup> Étude sur les régimes matrimoniaux des couples mariés et sur le patrimoine des couples non mariés dans le droit international privé et le droit interne des États membres de l’Union européenne. Analyse comparative des rapports nationaux et propositions d’harmonisation, Rapport final établi à l’intention exclusive de la Commission européenne, The Hague-Louvain-la-Neuve, 2003, online at [http://www.europa.eu.int/comm/justice\\_home/doc\\_centre/civil/studies/doc/regimes/report\\_regimes\\_030703\\_fr.pdf](http://www.europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/regimes/report_regimes_030703_fr.pdf).

<sup>78</sup> Étude sur les régimes matrimoniaux des couples mariés, cit., p. 218.

<sup>79</sup> COM(2006) 400 final, p. 3.



without a marriage bond. To reflect this new social reality, the Mutual Recognition Programme states that the question of the property consequences of the separation of unmarried couples must also be addressed. The area of justice must meet the citizen's practical needs.<sup>80</sup> This is an important and quite remarkable statement, because it contains an explicit acceptance that 'other forms of unions' do enjoy family life. One downside remains in the fact that only property matters are addressed.

The Green Paper raised a number of issues specific to registered partnerships and unmarried couples, among them the question whether the future instrument should lay down specific conflict rules for the property consequences of registered partnerships and/or informal cohabitation and whether there should be rules of international jurisdiction. As further initiatives by the Commission become public, it will be possible to assess whether the Green Paper's blueprint will continue to be followed and how. There is an opportunity for stakeholders to monitor any further initiative by the Commission in the area of property regimes.

### 3.4.4. Succession and Wills

Issues of applicable law, jurisdiction and recognition of judgments related to succession and wills have been addressed by a Green Paper of March 2005.<sup>81</sup> It attempted to justify Community action on such grounds as increased mobility of people, increasing frequency of unions between people with different nationalities or living in a Member State different from their Member State of origin, where they may have acquired property.

From an LGBT perspective, a particularly sensitive issue is the possible raising of preliminary questions on the validity of marriage or partnerships, or on the establishment of parenthood.

**For instance, should a same-sex couple married in Spain acquire substantial property in Bulgaria, and should the succession be opened there, Bulgarian authorities might want or be asked to determine the nature of the relationship between the deceased and his or her 'spouse'. An assessment of the legal tie between the deceased and the claimant may be needed in order to decide upon the succession. Not all Member States recognise the validity of same-sex marriages or partnerships and some of them might not recognise adoption links established according to the law of another Member State.**

**In the case of a German-Italian couple who contracted a Lebenspartnerschaft in Germany but settled in Italy, if the German partner dies, the Italian judge will apply German law (because Italian rules of private international law privilege nationality over domicile). According to German law, the Italian registered partner is a legitimate heir and will take part in the succession as if he or she was a spouse. But if the Italian partner dies, then Italian succession law will be applicable, where there is no room for heirs other than the spouse. This creates an imbalance of rights within the couple, because the Italian partner will inherit from his or her German companion but not the contrary.**

<sup>80</sup> Ibid.

<sup>81</sup> COM(2005) 65 final.



The Commission seems aware of the problem, as the Green Paper explicitly focuses on the issue. It is to be hoped that the future proposal will encompass conflict rules capable of ensuring the broadest validity of same-sex unions and adoption links. Given the present state of things, it appears that the Commission's attempt to enable partners to choose the applicable law should be supported and even extended to preliminary questions on the establishment of the legal tie. In fact, the Commission seems to support the option of allowing the 'future deceased', or perhaps even the heirs after the succession has opened, to choose the law applicable to the succession. In a case like the one sketched above, a good option would be to allow the partner making a will or another specific deed to choose the law applicable to his or her future succession. In the absence of choice, a prospective Community instrument should put aside the traditional connecting factors (i.e. nationality, or last domicile of the deceased) and refer only to the law of the State where the partnership was legally celebrated/registered or the adoption link was established (*lex loci actus*). This solution would ensure that, in the example given, German law is always applicable, whether the deceased is Italian or German, and no matter where the deceased's last domicile was.



## 3.5. The position of transgender people

The Hague Programme does not address specifically the position of transgender people and their families. The main point is that EC law has not anticipated the issues that may arise when gender recognition takes place in a cross-border context, for example where medical procedures for gender reassignment are completed in one State and the individual later seeks recognition in another State. This situation might be exacerbated should transgender people encounter other obstacles in relation to free movement. In practice, they may not be able to marry nor to adopt children abroad nor to have their domestic marriage recognised abroad.

Heterogeneity in domestic transgender laws – which do address questions such as change of legal documents, medical treatment or marriage – carries with it the problem of mutual recognition. For instance, in the UK a change of birth certificate can be granted if the individual has lived for two years in the ‘chosen gender’ and signed a sworn declaration that he or she intends to do so for the rest of his/ her life. Most other Member States, however, have laws on fundamental rights based on the completion of medical treatment and could, thus, refuse to recognise this more liberal procedure.

In the past, all cases brought before the ECJ by transgender people were connected to employment and concerned dismissal, survivor’s pensions or retirement age. Starting from the case *P v S*,<sup>82</sup> it is established case law that discrimination against transgender people is covered by EC sex discrimination law. All petitions have been successful. This remarkable case law could have interesting socio-political explanations.

From the legal point of view it should be remarked that the ECJ and the European Court of Human Rights make a good tandem on these issues: the ECtHR has already recognised in *X, Y, and Z*<sup>83</sup> that a transgender person, his or her partner and their child do enjoy the right to respect for family life. In *Goodwin*,<sup>84</sup> the ECtHR has even ruled that transgender persons should be free to marry the person they choose, even when this leads to a marriage between two people of the same biological sex.

Favourable case law in Strasbourg has assisted the ECJ in reaching a favourable decision in *K.B.*<sup>85</sup> The case concerned the right of a female-to-male transsexual to benefit from the pension of his female partner should she pre-decease him. The pension scheme of K.B.’s employer only allowed the payment of survivors’ pensions to the legally married ‘spouse’. K.B., the worker, claimed before the Court that the refusal to pay the survivor’s pension to her partner violated article 141 EC and Directive 75/117/EC on equal pay between men and women. The Court ruled that even when inequality of treatment concerns not the right protected by Community law, but one of the conditions (the capacity to marry) for granting that right, the Treaty is in principle violated. Furthermore, the Court has recently ruled that the refusal to allow a male-to-female transgender person to retire at age 60, instead of 65 (the retirement age for men in the UK), is a violation of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.<sup>86</sup>

<sup>82</sup> ECJ 30 April 1996, Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143.

<sup>83</sup> ECtHR 22 April 1997, *X, Y and Z v UK*, appl. 21830/93, Reports 1997-II.

<sup>84</sup> ECtHR 11 July 2002, *Christine Goodwin v UK*, appl. 28957/95.

<sup>85</sup> ECJ 7 January 2004, Case C-117/01, *K.B. v National Health Service Pensions Agency* [2004] ECR I-541.

<sup>86</sup> ECJ 27 April 2007, Case C-423/04, *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.







# 4. Conclusion

The fact that an exponential number of countries are acquiring same-sex partnership or marriage outside a shared European vision or project has led to significant differences in the rights and responsibilities these unions entail. Not only has substantial law historically evolved in a scattered and fragmented way, but only a handful of Member States have conflict rules governing the recognition of foreign (same-sex) partnership regimes and these rules differ considerably. Other countries that have no regime of their own are at a loss about how to deal with new foreign partnerships. Uncertainty and protection of national sovereignty over family matters seem to be the most common feelings in several European capitals, in contrast with an increasing circulation of people, lifestyles, family structures, work arrangements and legal models.



Thus, the EU has a vital role to play if fundamental rights are not to be seen only as market-unifier tools, but as specific instances of the important values that underpin a community of citizens. European institutions should find a way to guarantee freedom and justice for all individuals living in that community and for the family arrangements that matter to them. Some of the Green Papers or proposed measures under the Hague Programme do encompass promising approaches (for example more party choice, inclusion of registered partnerships and de facto unions for some purposes). However, legislation has only very timidly embraced the contention that excluding same-sex marriages and registered partnerships – often the only option available to same-sex couples – means excluding LGBT people from exercising treaty rights, or making the exercise of universal human rights unduly cumbersome.

The brief analysis given in this paper allows some conclusions to be articulated. It appears rather clear that what is lacking is – let alone complete unification of substantive law – a common perspective based on two contentions:

1. that all citizens should be able to:
  - validly acquire a personal status of their choice elsewhere in the Union (especially if it is not possible in their own State);
  - have a portable status wherever they go (including returning to their home State); and
  - circulate freely with an unmarried and unregistered partner.
  
2. that respect for fundamental rights of LGBT families must be ensured each time that rights and benefits are attached to family members for any given purpose.

Under the present fragmentation, the division of competences within the EU, with its emphasis on national sovereignty over family matters, could even provide a favourable competitive environment. Neither Member States nor the European Union should feel uncomfortable with a system where EU citizens are allowed to make use of the law that best recognises their rights and to make these rights portable. Suffice it to recall that, in the economic domain, the Community has been able to develop several important principles, such as the prohibition of double regulation, home State control on production and marketing of goods, subjecting the service provider only to the requirements of the Member State where he or she is established. To sum up, it is increasingly difficult to explain to the ordinary citizen why the EU should favour the circulation of goods and economic globalisation and not that of individual rights and aspirations.





# 5. Recommendations


## 5.1. To Member States

- Member States should launch a 'Freedom and Justice 2010' programme so as to ensure that:
  1. Any discrimination on grounds of sexual orientation or gender identity is removed from family law and all other legal measures or administrative practices dealing with family matters.
  2. In particular, any remaining unequal treatment of LGBT people in relation to marriage, partnership and parenting is removed, for instance allowing citizens to live and circulate freely and legally with their same-sex unmarried partner of third-country citizenship.
  3. Transgender people do not face any obstacle to marrying or remaining married to a person of their choice.
- Member States with progressive legislation should more vigorously negotiate in the Council a principle that the status acquired by EU citizens thanks to their domestic laws should be recognised by other Member States, including the State of which the interested parties are citizens.

## 5.2. To the European Union

### 5.2.1. General recommendations

- Table a discussion within the Hague Conference on Private International Law on a prospective Convention on jurisdiction and law applicable to registered partnerships and other forms of registered cohabitation arrangements.
- Drawing on existing data and studies published by DG Employment and Social Affairs, on studies by the Fundamental Rights Agency, and on new studies if necessary, publish a Communication on fundamental rights of LGBT people and their families.
- Organise an International Conference on fundamental rights of LGBT people and their families, in conjunction with the Council of Europe, Member States and relevant NGOs.
- Start or reinvigorate formal and informal contacts with relevant stakeholders with a view to drafting and proposing an international (regional or universal) Convention on human rights of LGBT people.

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- Set up a database (or restructure existing ones) in order to collect legislation, civil, administrative and criminal case law, as well as practices on recognition of LGBT couples and adoption in Member States and in the EU.

## 5.2.2. Recommendations on the rights of partners

- Ensure that anyone married or registered in any Member State is granted full portability of his or her personal status across the Union.
- Adopt the necessary amendments to ensure that any definition of ‘family member’ includes and applies to the same-sex spouse of a migrant EU citizen, and that he or she is granted the right to enter, reside, work and enjoy social security in the host Member State.
- Modify existing measures affecting the right to entry and to family reunification of immigrants, refugees, and asylum seekers so as to encompass the (unmarried) same-sex partner of such persons.
- Make sure that rights conferred by EU law always encompass the registered same-sex partner on an equal footing with the spouse.
- Launch a study on the mutual recognition of civil status and open a consultation process on the issue, based on the principles mentioned above.
- Make sure that any current or future measures on private international law apply the principle of mutual recognition to court decisions or other arrangements involving same-sex couples.
- To this end, clarify that:
  - Regulation 2201/2003 applies to same-sex marriages, and that the validity of marriages and the conditions for marriage are determined by the law of the place where the marriage was celebrated;
  - clarify explicitly that no public policy concern emerges solely on the grounds that the spouses are of the same sex;
  - ensure the application of Regulation 2201 to registered partnerships and possibly to other forms of legal cohabitation, and expressly exclude that any public policy claim can be made solely on the grounds that the decision concerns one of such schemes;
- Include same-sex couples in the instruments designed to eliminate all obstacles which still today prevent the recovery of maintenance throughout the Union and in the future proposal on property relations.
- Carefully craft any future proposal on succession and wills so as to ensure that the (married, unmarried or registered) same-sex partner of the deceased will be considered an heir, and will be entitled to the administration and distribution of the estate.



### 5.2.3. Recommendations on the rights of children and other family members

- Children should be treated equally, without distinction based on the sexual orientation or the gender identity of their parents.
- No distinction should exist based on the legal tie between the parents, or between children and their parents.
- Any right conferred by EU law should cover the (biological or adopted) children of same-sex and transgender couples.
- In particular, the right to free movement within the EU and the right to family reunification for third country nationals should encompass:
  - any children for whom the migrant shares parental responsibility
  - any children of the migrant's spouse, registered partner or unmarried partner
  - any other dependent of the migrant or their spouse, registered partner or unmarried partner.
- In any measure of private international law, it should be made clear that no public policy claim may be made by any one Member State as regards court decisions concerning parental responsibility over children of same-sex couples.





# 6. Glossary

**Hague Programme:** The Hague Programme is a five-year programme – adopted by the European Council on 4 November 2004 – for closer cooperation in justice and home affairs at EU level from 2005 to 2010. The Programme aims at creating an area of freedom, security and justice in Europe. The main areas which will be subject to common policies and laws among the 27 Member States are fundamental rights, terrorism, migration management, borders, visas, asylum, privacy and security, civil and criminal justice (see further [http://ec.europa.eu/justice\\_home/news/information\\_dossiers/the\\_hague\\_priorities/index\\_en.htm](http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm)).

**Conflict of laws/private international law:** differently defined in common law and civil law systems, it can be simply explained as that branch of (national) law that regulates controversies involving a ‘foreign’ element, or that deals with the determination of which national law is applicable to situations crossing over the borders of one particular State (see further [http://en.wikipedia.org/wiki/Conflict\\_of\\_laws](http://en.wikipedia.org/wiki/Conflict_of_laws)).

**Maintenance:** in family and child law this refers to the obligation of a former spouse or of a parent to provide financial support to the other or to the child upon termination of a relationship or marriage (see further [http://en.wikipedia.org/wiki/Child\\_support](http://en.wikipedia.org/wiki/Child_support)).

**Mutual recognition:** the principle that governs the validity and the effectiveness of Member States’ decisions and deeds, according to which judicial decisions should be recognised and enforced in another Member State without any additional intermediate step (see further [http://ec.europa.eu/justice\\_home/fsj/civil/recognition/fsj\\_civil\\_recognition\\_general\\_en.htm#](http://ec.europa.eu/justice_home/fsj/civil/recognition/fsj_civil_recognition_general_en.htm#)).

**Property regimes:** by this over-arching formula one normally refers to the rules which govern either the accumulation of (common) property during marriage or registered partnership, and/or to the rules governing the division of property of married or registered couples when they separate or when one of them dies.