

**EU DIRECTIVE ON FREE
MOVEMENT AND SAME-SEX
FAMILIES:
GUIDELINES ON THE
IMPLEMENTATION
PROCESS**



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EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS



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Introduction

In 2004, the European Union adopted a new Directive on the right to free movement.¹ It sets out the rules applying to EU citizens and their family members who wish to move to another Member State. This can be for various purposes: to take up a new job, to undertake studies or even for retirement. It will be particularly important for same-sex families who want to exercise their right to free movement.

The Directive enters into force on 30 April 2006. By this date, all 25 Member States must ensure that domestic immigration laws have been revised in order to comply with the Directive. These guidelines provide an introduction to the Directive and an explanation of those provisions most relevant to same-sex families. They are designed to assist organisations in monitoring national law in order to ensure that same-sex families enjoy the fullest protection in accordance with the Directive.

¹Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L229/35. N.B. This Directive was originally published as Directive 2004/38/EC (OJ L158/77), but republished later in a corrected version. The full text is available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_229/l_22920040629en00350048.pdf

1. Background to the Directive

EU law originally limited the right to free movement to those moving for the purposes of work or self-employment. In the early 1990s, free movement rights were extended to other categories: students, retired persons and economically self-sufficient persons. Since then, the Court of Justice has emphasized that free movement is a fundamental right of EU citizens, regardless of the reason why an individual decides to live in another Member State. Consequently, in 2001, the European Commission proposed replacing the various laws covering workers, students, etc. with a single Directive on the free movement rights of all EU citizens.

The Directive took more than two years to negotiate and a central issue was the definition of the 'family' of an EU citizen. The original rules on the free movement of workers primarily limited this to the worker's 'spouse' and their children.² In *Reed v Netherlands*, the unmarried opposite-sex partner of a British man working in the Netherlands argued that she was entitled to a residence permit because she should be treated as his 'spouse'. The Court of Justice rejected this argument, finding that spouse only covered married partners.³ ILGA-Europe, together with national lesbian, gay, bisexual and transgender (LGBT) organisations, campaigned vigorously for an inclusive definition of family within the new EU Citizens Directive. Although this received strong support in the European Parliament, the final text of the Directive is a compromise with the Member States, some of whom resisted the inclusion of same-sex and unmarried couples.

²Art. 10(1), Regulation 1612/68 on freedom of movement for workers within the Community, [1968] OJ Special Edition (II) L257/475.

³Case 59/85 [1986] ECR 1283.

2. The main contents of the Directive

Although not all parts of the Directive have a special relevance to LGB persons, it is useful to have an overview of its contents. The Directive sets out the conditions under which EU citizens can move to another Member State and take up residence there. An EU citizen is any person holding nationality of a Member State. This Directive does not cover families where no-one is an EU citizen. For example, it would not apply to a Brazilian woman working in France who wished to be joined there by her same-sex partner, also of Brazilian nationality. The rules governing family reunification of third country nationals (non-EU nationals) are found in a different Directive.⁴ The EU Citizens Directive does, however, apply to situations where one member of the family possesses nationality of an EU Member State. For example, a Swedish man who wanted to be joined in the UK by his same-sex Brazilian partner would be able to rely on the rules in the EU Citizens Directive. It should be noted that under transitional arrangements some movement restrictions continue to apply to nationals of the EU states that joined on 1 May 2004.

EU citizens and their family members can move within the Union for 3 months without any formalities, other than needing to produce identity documents. EU citizens can stay for longer than 3 months in order to work or study, or if they have sufficient resources to support themselves and their family members. After 5 years, EU citizens and their family members acquire the right of permanent residence in the Member State. EU citizens and their family members can only be expelled from the Member State in narrow circumstances where there are serious reasons relating to public policy or public security.

The most important provisions for same-sex families are Articles 2 and 3, which define the members of the family entitled to accompany an EU citizen to another Member State. These shall now be considered in detail.

⁴Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12. Full text available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_251/l_25120031003en00120018.pdf

3. Married partners

When the EU Citizens Directive was under discussion, ILGA-Europe pressed for a clear indication that same-sex married partners were included. However, the final text of the Directive does not clearly resolve the issue of same-sex married couples. On one hand, Article 2(2) simply states: "'family member" means... the spouse'. On the other hand, the preamble of the Directive includes the following statement: 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as... sexual orientation.'⁵ Although the preamble is not legally binding, it will be used by the Court of Justice to guide interpretation of the Directive.

Arguably, the reference to 'spouse' cannot be restricted to opposite-sex spouses, because this would discriminate on grounds of sexual orientation. Marriage is a status granted by national law; therefore, the EU should not distinguish between legally contracted marriages within the Member States. This is particularly relevant for same-sex couples who got married in one of the three Member States which recognise same-sex marriage, i.e. the Netherlands, Belgium and Spain.⁶

Nevertheless, earlier judgments from the Court of Justice raise some doubts. *In D and Sweden v Council*, the Court stated: 'according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex'.⁷ This decision was based on facts from a period in which no state permitted same-sex marriage. The legal situation has since changed and this may encourage the Court to adopt a different approach when interpreting the EU Citizens Directive.

Ultimately, the national courts and the European Court of Justice will play an important role in determining whether same-sex married partners are included under the definition of spouse.

Guideline: National legislation should not explicitly exclude same-sex married couples from the right to enter and reside. Such provision may be inconsistent with the Directive.



⁵Recital 31.

⁶Four countries currently recognise same-sex marriage: the Netherlands, Belgium, Spain and Canada.

⁷Case C-122/99P and 125/99P *D and Sweden v. Council* [2001] ECR I-4319, para. 34.

4. Registered partners

The Directive recognises a limited right to free movement for registered partners. Article 2(2)(b) extends the definition of 'family member' to include:

'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 national legislation of the host Member State'.

In other words, registered partners can enjoy their right to free movement where:

- (1) They formed their registered partnership in a Member State of the EU;**
- (2) The country to which they want to move treats registered partnerships 'as equivalent' to marriage in its domestic legislation.**

With regard to the first issue, the obvious question that arises is what constitutes a registered partnership? This is important because national laws on same-sex partnerships vary considerably. Registered partnership laws in Denmark, the Netherlands, Sweden, Finland and the UK provide a legal status which is very similar to that of marriage.⁸

There are also laws in Germany, France and Luxembourg that provide many of the rights of marriage, but which also contain important legal differences between partnership and marriage. In other countries, such as Hungary, Slovenia⁹ or Portugal, same-sex couples' legal status is recognised, but with very few rights compared to marriage. It is difficult to predict how the court will approach this issue. The Directive could be read as indicating that registered partnership is a status 'equivalent' to marriage in some cases. However, where a partnership does not fall within the Directive's concept of 'registered partnership', it is very likely that the rules on unmarried partners will apply (described below).

The second question is to which countries are registered partners entitled to move? This depends on which countries the Court views as treating registered partnerships 'as equivalent to marriage'. Given the variations in national law discussed above, we can say with confidence that the Directive entitles registered partners to move between Denmark, the Netherlands, Sweden, Finland, the UK and possibly Germany. It is not clear whether the right to free movement will include countries such as France where the differences between marriage and partnership are wider.

Guideline:

** Where national law already includes registered partnership, national legislation must extend the right to enter and reside to individuals who formed a registered partnership in other EU Member States*

** In countries where registered partnership is under discussion, draft national legislation should include appropriate measures to amend immigration legislation to extend the right to enter and reside to individuals who formed a registered partnership in other EU Member States.*



⁸Also Norway and Iceland.

⁹See ILGA-Europe Newsletter, Vol. 5, Issue 2 (summer 2005), p. 14. Available at:
<http://www.ilga-europe.org/docs/newsletters/index.html>

5. Unmarried partners

The rules applying to unmarried partners are highly relevant to same-sex families. They will cover the following situations:

- * Where a same-sex couple have formed a registered partnership, but wish to move to another state which does not have registered partnership provisions in its domestic law (e.g. a Danish couple in a registered partnership moving to Lithuania);
- * Where a same-sex couple enjoy a legally-recognised status in their home state, but this does not confer sufficient rights to be treated as a 'registered partnership' under the Directive (e.g. a Portuguese couple in a de facto union moving to Poland);
- * Where a couple are neither married, nor registered, but wish to move to any other state in the EU (e.g. an Italian unmarried couple moving to Malta).

The Directive does not confer an absolute right for people in the above situations to bring their partners when exercising free movement rights. Article 3(2) states:

'.. the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: [...]

... the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

There are three main elements to this provision. First, the state has a duty to *facilitate* the entry and residence of unmarried partners. This implies that states cannot have a total ban on the admission of unmarried partners. Secondly, this duty applies in respect of partners with a 'durable' and 'attested' relationship. Partners will need to demonstrate that their relationship has existed for some time. For example, a couple that has been living together for several years and has shared family responsibilities (e.g. children) would appear to satisfy this test. Alternatively, a couple might not be living together, but they could supply other evidence (such as letters, photos, etc.) to demonstrate that they have a durable relationship. Finally, the state receiving the couple's application is obliged to undertake an 'extensive examination' and to provide justification for any refusal. Consequently, states must have a mechanism in domestic law that allows unmarried partners to request admission. In order to ensure consistency and fairness, states should identify which criteria they will take into account when exercising their discretion on such applications. The Directive requires clear reasons explaining a refusal.

As mentioned earlier, Recital 31 of the preamble prohibits sexual orientation discrimination in the implementation of the Directive. In relation to unmarried partners, this means that a state could not have a policy of preferring to admit unmarried opposite-sex partners, whilst excluding unmarried same-sex partners.

Guideline:

** National legislation must provide a mechanism through which unmarried partners can request admission. National legislation must also include provisions to ensure that any refusal of entry or residence is duly justified.*

** It is important to ensure that states define transparent and non-discriminatory criteria:*

- 1) to determine what evidence is required to demonstrate the existence of a 'durable relationship';*
- 2) to evaluate the basis on which states will make decisions to grant or deny admission to a country.*

6. Children and other family members

The Directive provides a right to be joined in another Member State by:

'the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner...'¹⁰

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.

In the context of the Directive, an individual will be entitled to be joined by his or her children where this is based on a legally-recognised parental relationship. Difficulties may arise where the children only have a legally-recognised relationship to the person's partner. As discussed above, registered partners are only partially included within the right to free movement. Where registered partners are not covered, or where the partners are unmarried and unregistered, then the partner's children will have to seek admission on the basis of Article 3(2):

'... the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, ... who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'.

As mentioned previously in the case of unmarried partners, Article 3(2) does not recognise a right to enter and reside for "other family members", but it does include a duty for Member States to facilitate entry and residence. The Member State is likewise required to undertake an extensive examination of such requests for admission and to justify any refusal.

For example, consider the case of a Slovak woman seeking to move to Ireland together with her Russian same-sex partner and their daughter. Even if the daughter only has a legally-recognised relationship with her Russian mother, Ireland would still be under an obligation

to facilitate her admission as a member of the household of her Slovak mother. In this regard, it is important to note that the preamble of the Directive makes reference to respect for the EU Charter of Fundamental Rights which includes the following principle: 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.¹¹

The duty to facilitate entry and residence will also apply in relation to any other family members who are dependent upon or were members of the household of the person moving to another Member State.

Guideline:

- * 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.*
- * Where there is a legally-recognised relationship between the child and the EU citizen, Member States must grant admission.*
- * The consideration of requests for admission should be based on transparent, non-discriminatory criteria.*
- * National legislation should be based on the principle of the best interests of the child.*

¹⁰Art. 2(2)(c).

¹¹Art. 24(2). Full text available at:

http://www.europarl.eu.int/charter/pdf/text_en.pdf

7. Transgender persons and their families

The discussion above has focused on the situation of same-sex couples. What are the implications of the Directive for transgender persons and their family members? Following the decision of the European Court of Human Rights in *Goodwin v UK* (Application No 28957/95, 11 July 2002) there should not be legal restrictions in the Member States on transgender persons marrying a person of the opposite-sex. The judgment also implies that there are no grounds for other EU states to refuse to recognize such marriages. There are, however, situations where transgender persons cannot marry their partners. This is clearly the case for transgender persons with a gay or lesbian sexual orientation. Another situation is where gender identity is not yet fully recognized within national law. For example, some states make gender recognition conditional on undergoing gender reassignment surgery. Where transgender persons consequently find themselves within unmarried partnerships, then the rules on unmarried partners will apply (described above).

8. Equal treatment within the host state

Where all family members are EU citizens, the obstacles to movement are reduced in practice. Even if the couple's partnership is not recognised, they both possess autonomous rights to enter and reside in any other EU state. The principal barriers to entry and residence are likely to be experienced by multinational families, where at least one family member holds nationality of a non-EU state.

Nevertheless, problems can still be encountered after entry and residence is granted. For example, two married men from Spain decide to move to Greece. They both find jobs there and exercise their *individual* rights to free movement. Having established themselves in Greece, what is the status of their marriage? If they find, for instance, that married couples receive preferential taxation treatment to unmarried couples, can they insist that Greece treats them as married? These are complex legal questions that partially depend on national rules about the recognition of partnerships legally contracted in other countries.

The principle established by the Directive is *equal treatment* of EU citizens (and their family members) with nationals of the host state (Article 24 (1))¹². Therefore, it could be argued that benefits for married couples in domestic legislation should be extended to all married couples from other EU states. An important application of this equal treatment principle is in relation to immigration rights. Domestic law might go further than the requirements of the Directive. For example, it might permit domestic nationals to be joined in the state by an unmarried partner of different nationality. If such rights are extended to domestic nationals, then they must also be available on the same basis to EU citizens.

Guideline: *The principle of equal treatment of EU citizens and their family members in relation to nationals of the state should be included in national legislation.*

¹²Article 24 (1). "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."



IMPLEMENTATION PROCESS - THE NEXT STEPS

By 30 April 2006, Member States must ensure that their domestic legislation complies with the Directive on the Right to Free Movement. To assist organisations in monitoring implementation of and full compliance of national legislation with the Directive, you will find below a list of steps to take in the coming months.

- 1/ Does the national legislation comply with the Directive?**
- 2/ What if national legislation does not meet this checklist?**

1/ Does the national legislation comply with the Directive?

* Using these guidelines, national legislation or proposed national legislation should be checked for compliance. Administrative practices should also be reviewed to ensure that they do not contravene the provisions of the Directive.

COMPLIANCE CHECKLIST - By 30 April 2006, national legislation should:

- * NOT exclude same-sex married couples
- * Include registered partners, where national law permits registered partnership
- * Include a procedure for unmarried partners and their families to request the right to enter and reside in the state, and provisions to ensure that refusal of admission is justified
- * Include children who have a legally-recognised relationship with an EU citizen
- * Ensure that the Directive is implemented without discrimination on grounds of sexual orientation
- * Ensure that decisions relating to the admission of children are based on the best interests' principle and without discrimination



2/ What if national legislation does not meet this checklist?

- * Identify strategies to initiate a change in national legislation where it is necessary (e.g. lobby parliamentarians, rally support from other NGOs and other civil society organisations, launch a public-awareness campaign, etc.)**
- * Publicise any individual cases where families are negatively affected by the non-compliance and seek legal advice on possible remedies with reference to the Directive**
- * Bring non-compliance to the attention of the Ministry responsible for immigration**
- * Make specific reference to the Directive in any document, public statement and letter to government and elected officials you send regarding the issue of freedom of movement**
- * Raise the issue with other NGOs working on immigration law issues**
- * Bring your concerns to the attention of the Commission (The relevant office is the Citizenship and Fundamental Rights Unit, Directorate C 'Civil Justice, Rights and Citizenship', DG Justice, Freedom and Security, European Commission)**
- * Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions**

Further information is available:

ILGA-Europe - an overview of partnership laws in Europe:

<http://www.ilga-europe.org/> (click on 'Same-sex marriage and partnerships in Europe')

Directorate-General for Justice and Home Affairs - overview of the free movement laws:

http://europa.eu.int/comm/justice_home/fsj/citizenship/movement/fsj_citizenship_movement_en.htm

'Your Europe - Citizens' - practical guidance on exercising free movement rights:

<http://europa.eu.int/youreurope/nav/en/citizens/home.html>



In 2004, the European Union adopted a new Directive on Free Movement Rights which has relevance for same-sex families who want to exercise their right to free movement. The Directive sets out the rules applying to EU citizens and their family members who wish to move to and reside in another EU member state. While falling short of respecting the right to free movement for all families, the Directive opens the door for some recognition of same-sex families.

The goal of these guidelines is twofold. First, the guidelines are meant to assist organisations in monitoring national law in order to ensure that same-sex families enjoy the fullest protection in accordance with the Directive. Second, this document discusses how the provisions of the Directive can and should be applied to further advance the free movement rights of same-sex families.