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**CROSS-BORDER RECOGNITION OF SAME-SEX
RELATIONSHIPS AND RAINBOW FAMILIES IN THE
EUROPEAN UNION: CURRENT LEGAL SITUATION AND
CHALLENGES**

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ABSTRACT

The focus of this thesis is on the concept of cross-border legal recognition of same-sex couples and rainbow families within the European Union (EU). It aims to assess the current legal situation of cross-border recognition of same-sex couples and rainbow families within the EU by going through the relevant primary and secondary legislation as well as case law and by identifying the challenges these people encounter when exercising their right to free movement. Finally, this thesis proposes how EU could, by amending EU legislation, by ruling in CJEU for these minorities and by enforcing relevant CJEU judgments, solve these challenges and guarantee more equal Union.

Currently, the right to free movement and residence is not necessarily a reality to same-sex couples and rainbow families. Together, the EU's law on free movement and the law on anti-discrimination should ensure an equal right to free movement without discrimination on grounds of sexual orientation. Due to a lack of competence, the EU cannot demand Member States to allow same-sex marriages or registered partnerships, or to guarantee these couples a right to start a family on their territories and therefore legislation on these matters varies considerably. Unfortunately, many Member States base their discriminatory practices on their national legislation, even though in cross-border situations these people exercise a right under EU law. The author wants to assess the current EU legal situation and determine what kind of obstacles same-sex couples and rainbow families encounter when crossing the internal borders of the EU. The obstacles will show that despite the positive developments in last three decades, the EU is still far away from an equal Union and must therefore act in accordance with its competence to ensure that free movement without discrimination works in both theory and in practice.

This thesis follows a qualitative research method and is based on literature related to the topic. The research data is gathered from different books, academic sources, reports, judicial decisions, and relevant legal sources.

Keywords: freedom of movement, European Union, anti-discrimination, same-sex couples, rainbow families, cross-border legal recognition

LIST OF ABBREVIATIONS

Charter	The Charter of Fundamental
CJEU	The Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	The European Union
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union

INTRODUCTION

The aims and values of the EU contain the protection of human rights, combating discrimination as well as ensuring the free movement of EU citizens.¹ According to Article 2 of the Treaty on European Union (TEU) respect for human rights, including the rights of minorities, is one of the values on which the Union is founded, while EU anti-discrimination law prohibits discrimination on grounds of sexual orientation.² When we consider these together with the freedom of movement guaranteed by both primary and secondary EU law,³ we find that in theory every citizen of the Union (in accordance with the Article 20 of the Treaty on the Functioning of the European Union (TFEU)) and, under certain conditions, his/her family members (in accordance with the Directive 2004/38/EC)⁴ should have the right to move and reside freely within the Union, regardless of their sexual orientation.

Although the right to move and reside freely has developed to cover not only economically active persons but all EU citizens,⁵ same-sex couples and rainbow families (families that are composed of LGBT+ parents and their children)⁶ encounter various problems when crossing the internal borders of the EU.⁷ The EU's competence is not enough to require Member States to have common legislation in family and marital matters⁸, and therefore Member States are free to determine whether they allow same-sex couples to enter into marriage or registered partnership,

¹ The European Union. EU:n päämäärät ja arvot. Accessible: https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_fi 25 March 2022

² Craig, P. & De Búrca, G. (2020). *EU Law: Text, Cases and Materials*. 7th ed. Oxford University Press, p. 929

³ Marzocchi, O. (2021) Free movement of persons. Fact Sheets on the European Union. European Parliament. Accessible: <https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons> 25 March 2022

⁴ OJ L 158, 30.4.2004

⁵ Cuyvers, A. (2017) Free Movement of Persons in the EU, In book: Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 361

⁶ Falletti, E. (2014) LGBTI Discrimination and parent-child relationship: Cross border mobility of rainbow families in the European Union. *FAMILY COURT REVIEW*, Vol. 52 No. 1, January 2014 28–45. Association of Family and Conciliation Courts. p. 29

⁷ Kogovšek Šalamon, N. (2019) Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU. Final Report for European Commission. European Union, 2019

⁸ Palazzo, N. (2020) The EU family: Is marital status emerging as a prohibited ground of discrimination? In book: Bernard, E. & Cresp, M. & Ho-Dac, M. (2020) *La famille dans l'ordre juridique de l'Union européenne / Family within the Legal Order of the European Union*. Bruylant, 2020 p. 1-2

and whether they allow these couples to become joint parents in their territory.⁹ As a result, when same-sex couples and rainbow families exercise their right to free movement they may find themselves in a situation where the host Member State does not legally recognize their relationship or family ties, making it difficult to exercise family reunification or to obtain residence permits.¹⁰ Refusal to legally recognize these relationships and families may also lead to the non-recognition for other legal purposes such as pensions, inheritance, property or tax law.¹¹ Rainbow families may also have problems with recognition of children's birth certificates and parental rights, which can lead to a situation where one parent or, in the worst case, neither parent is recognized as the child's legal parent.¹²

This thesis aims to assess the current EU legislation on free movement as well as the anti-discrimination legislation and to determine what are the problems encountered by same-sex couples and rainbow families when they cross the internal borders of the EU. This thesis will also provide possible solutions to these obstacles. To fulfil the aim, it will examine the obstacles in two parts: 1) the obstacles derived from the refusal of legal recognition of same-sex couples and 2) the obstacles derived from refusal of legal recognition of a parent-child relationship. This thesis will go through possible legislative and judicial ways for the EU to secure the right to free movement and combat discrimination against these minorities in accordance with its competence.

The author believes that the topic of this thesis is topical and important as the debate on the rights of sexual and gender minorities increase. Although, the EU has already taken much needed steps to remove these obstacles, much remains to be done. The EU must do its utmost to ensure that those exercising their right under Union law do not face any form of discrimination. In 2020 the Commission adopted its first-ever LGBTIQ Equality Strategy for 2020-2025¹³ to address the inequalities and challenges affecting LGBTIQ people. In 2021 the European Parliament called the Commission, in a resolution on LGBTIQ rights in the EU¹⁴ to propose

⁹ Tryfonidou, A. & Wintemute, R. (2021) Obstacles to the Free Movement of Rainbow Families in the EU, Study Requested by the PETI committee. European Parliament, p. 14

¹⁰ *Ibid.* pp. 15–16

¹¹ Kogovšek Šalamon, N. (2019) *supra nota* 7

¹² Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, pp. 11, 73

¹³ European Commission(2020) Union of Equality: LGBTIQ Equality Strategy 2020-2025 COM(2020) 698 final

¹⁴ Resolution of 14 September 2021 on LGBTIQ rights in the EU (2021/2679(RSP))

legislation, which is now expected in 2022,¹⁵ for mutual recognition of parents mentioned in birth certificate which has been issued in one Member State. The CJEU has also taken an important role in relation to combating discrimination based on sexual orientation in relation to free movement and employment related benefits.¹⁶ However, as seen with the case *Coman*¹⁷, EU Member States do not necessarily comply with CJEU judgments.¹⁸ This thesis will show that there is room for improvement in EU law as well as in enforcement of the CJEU judgments. This thesis follows a qualitative research method, and its data is gathered from different academic and legal sources. It will use European Union primary and secondary legislation, as well as CJEU jurisprudence as primary sources but it will also refer to research reports, academic sources, EU Member States' national legislations and other relevant materials related to the topic.

This thesis consists of four parts. Chapter one will begin with a brief introduction to the competences of the EU related to this thesis. After that it will move on to provide an overview on the general legal framework on the right to free movement by referring to relevant primary and secondary legislation. The second chapter will centralize on the EU anti-discrimination law by again referring to relevant primary and secondary legislation. The third chapter will identify and assess the most common obstacles encountered by same-sex couples and rainbow families in cross-border situations when exercising their right to free movement. The first subchapter will concentrate on refusal to recognize same-sex unions i.e., marriage, registered partnership, and unregistered partnership while the second subchapter will focus on recognition of child-parent relationship and go through obstacles deriving from it. The fourth and final chapter will concentrate on providing possible solutions to these challenges mainly through EU case-law, its enforcement and development of EU legislation.

¹⁵ de Groot, D. (2022) Legislative Train Schedule: A new push for European Democracy, European Parliament, Accessible: <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-recognition-of-parenthood-between-member-states> 25 March 2022

¹⁶ European Union Agency for Fundamental Rights (2020) A long way to go for LGBTI equality. Report, Publications Office of the European Union, 2020. Accessible: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf p. 28

¹⁷ Court decision, 5.6.2018, *Coman & Hamilton*, Case C-673/16, EU:C:2018:385

¹⁸ Resolution (2021/2679(RSP)) *supra nota* 14

1. EUROPEAN UNION LEGAL FRAMEWORK FOR FREEDOM OF MOVEMENT

The deepest roots of the freedom of movement originate from economic rationale and thus at the beginning the free movement of persons concerned only workers, economically active persons and later also their families.¹⁹ The four economic freedoms; goods, workers, services, and capital that were the core objectives of European Economic Community (EEC), established with the Treaty of Rome in 1957,²⁰ are still cornerstone elements for EU's single internal market and the free movement of workers is guaranteed in primary and secondary legislation.²¹ With the Maastricht Treaty (1992) introducing a legal concept of EU citizenship, the freedom of movement and residence has expanded to cover all Union citizen, i.e., every national of any Member State.²² It was followed by an adoption of Free Movement Directive (Directive 2004/38/EC)²³ which brought together most of legislation on the right to free movement and residence.

1.1. Competences of the European Union

In order to examine the types of legal instruments that can be used to achieve the Union's objectives, it is necessary to know where the Union can exercise its competences. According to the principle of conferral, the only competences EU has, are the ones conferred in its Treaties.²⁴ Since the creation of Lisbon Treaty in 2009, EU has had three principal categories of competences: exclusive competence, shared competence, and competence only to take supporting, coordinating or supplementary action.²⁵ Currently, the competences, their scope, and whether they should be exercised or not are defined in articles 2-6 of the Treaty on the Functioning of the European Union (TFEU).²⁶

¹⁹ Cuyvers, A. (2017) *supra nota* 5 p. 354

²⁰ Sokolska, I. (2021) The First Treaties. Fact Sheets on the European Union. European Parliament. Accessible: <https://www.europarl.europa.eu/factsheets/en/sheet/1/the-first-treaties> 1 April 2022

²¹ Craig, P. & De Búrca, G. (2020) *supra nota* 2, p. 781

²² Marzocchi, O. (2021) *supra nota* 3

²³ OJ L 158, 30.4.2004 *supra nota* 4

²⁴ Craig, P. & De Búrca, G. (2020) *supra nota* 2, p. 103

²⁵ *Ibid.* p. 104

²⁶ *Ibid.* pp. 104, 113

In matters related to internal market to which the free movement is closely related, the EU has a shared competence with the Member States in and thus it can legislate and adopt legally binding acts but if it decides not to do so, Member States are free to exercise their own competence.²⁷ EU free movement law is an essential part of EU legislation, and EU can, and it has an obligation to remove any obstacles of the freedom of movement.²⁸ For a long time, EU had no direct competence to actively promote fundamental rights but only to respect and not infringe them.²⁹ It has been, however, slowly moving from passive to active in this field which is clearly indicated in Article 6 TEU which gives the Charter the same legal value with the founding Treaties and declares the fundamental rights guaranteed in the European Convention on Human Rights (ECHR) as general principles of EU law. These fundamental rights include the prohibition of discrimination and thus EU should combat any discrimination occurring in cross-border situations.³⁰ The last essential subject area for this research is family law in which EU has no competence and therefore EU cannot establish common, harmonized legislation in relation to these matters.³¹ However, according to Article 81(3) TFEU in cases involving cross-border implications, EU law applies.

EU law can be divided into primary and secondary legislation from which the former consists of the two founding Treaties, TEU and TFEU, the general principles established by the CJEU and the Charter which, according to the Article 6(1) TEU has the same legal value as the Treaties.³² Secondary legislation consists of legal acts defined in Article 288 TFEU including regulations, directives, decisions, recommendations, and opinions from which the last two are not legally binding. Secondary law also includes other unilateral acts such as resolutions, communications, white and green papers.³³ All EU legislation must be derived from the Treaties and their provisions should be interpreted in the light of the Charter.³⁴ The CJEU role as an interpreter and guardian of the Treaties is an essential part of EU law.³⁵ Its case-law and its general, unwritten

²⁷ *Ibid.* p. 114

²⁸ COM(2020) 698 final, *supra nota* 13

²⁹ Muir, E. (2013) Fundamental Rights: An Unsettling EU Competence, *Human Rights Review* 15(1):25-37, Springer Science+Business Media Dordrecht 2013, p. 26

³⁰ COM(2020) 698 final, *supra nota* 13

³¹ Palazzo, N. (2020) *supra nota* 8, p. 2

³² EUR-Lex, Sources of European Union law. Last updated 13.03.2020. Accessible: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114534> 1 April 2022

³³ *Ibid.*

³⁴ Craig, P. & De Búrca, G. (2020) *supra nota* 2, pp. 141-142

³⁵ *Ibid.* p. 92-93

principles are a supplementary sources of EU law.³⁶ One of these principles is the principle of primacy, according to which in case of a conflict between EU law and national law of a Member State, the former shall prevail.³⁷

1.2. The Treaty of Lisbon

The Lisbon Treaty, also known as ‘Reform Treaty,’ entered into force on 1 December 2009 creating the legal basis for EU today, which now consists of the two already mentioned founding Treaties, the TEU and the TFEU.³⁸ Both Treaties include provisions on the right to free movement which has been part of EU’s (earlier EC) legislation, in form of free movement of workers and freedom of establishment, since the establishment of the European Economic Community in 1957.³⁹ On Treaty level, the free movement of persons (including workers) is now guaranteed by Article 3(2) TEU and by Articles 20-21, 45-48, and 67 TFEU. Both Article 3 (2) TEU and Article 67(1) TFEU ensures for Union citizens an area of freedom, security and justice and thus facilitates the free movement of persons.

Until the establishment of the Maastricht Treaty (1992), the freedom of movement was based on economic rationale and concerned only workers or otherwise economically active persons and their families.⁴⁰ Today, at the Treaty level, the free movement of workers is covered in Articles 45-48 TFEU from which the Article 45 guarantees the freedom of movement for workers within the Union and prohibits discrimination between workers based on their nationality. CJEU has clarified the definition of a ‘worker’ in its case-law in order to respect the objectives of the Treaty and to avoid situations where Member States could have different definitions.⁴¹ Self-employed persons are covered under the right of establishment in Articles 49-55 TFEU. The main legislative act concerning the free movement of workers is the Regulation 492/2011⁴² (repealed the Regulation 1621/68) which do not create any additional rights itself but protects

³⁶ EUR-Lex, last updated 13.03.2020 *supra nota* 33

³⁷ EUR-Lex. Primacy of EU law. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:primacy_of_eu_law 1 April 2022

³⁸ Craig, P. & De Búrca, G. (2020) *supra nota* 2, pp. 20-21

³⁹ Marzocchi, O. (2021) *supra nota* 3

⁴⁰ Kroeze, H. (2018) Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the “Europe-route” for Family Reunification, *European Papers*, Vol. 3, 2018. p. 1210 to Overcome Reverse Discrimination

⁴¹ Craig, P. & De Búrca, G. (2020) *supra nota* 2, p. 785

⁴² OJ L 141, 27.5.2011

and facilitates the exercise of already existing rights conferred by TFEU.⁴³ However, this Regulation refers, unlike TFEU, to workers' families and complements the list of rights that cannot be denied from a worker or his/her family based on nationality.⁴⁴

The Maastricht Treaty (1992) brought a new dimension to free movement of persons by introducing a legal concept of the citizenship of the Union (EU citizenship).⁴⁵ The right to every EU national to move and reside freely is now secured by Articles 20-21 TFEU. According to Article 20 TFEU, a person holding nationality of any Member State is considered automatically a citizen of the Union and thus enjoys a right to move and reside freely within EU. The Article 21 guarantees, again the above mentioned right and in addition regulates what kind of action the Union can take in order to ensure efficient exercise of the right. Correspondingly, as established in CJEU case-law,⁴⁶ EU citizen who exercises the right to free movement to return to Member State he/she is national can rely to Article 21 when claiming family reunification rights. Finally, the Charter guarantees the freedom of movement and residence in its Article 45(1) that must be read in accordance with the Article 52(2) that requires the rights in the Charter to be exercised under the conditions and limitations defined by the Treaties.

1.3. Free Movement Directive

The Directive 2004/38/EC⁴⁷ (Free Movement Directive) defines the right of Union citizens and their family members to move and reside freely within the territory of the Member States. It respects, according to its Recital 31, the fundamental rights and freedoms set out in the Charter.⁴⁸ According to the Article 24 of the Free Movement Directive, EU citizens and their family members who hold a right to residence should not be treated, within the scope mentioned in TFEU, differently from the nationals of the host Member State.⁴⁹ According to Articles 6 and 7, Union citizen and his/her family members may reside in a Member State which they are not nationals for a period of three months only by presenting a passport or identity document, after which they are obligated to seek employment or provide proof that they are not a burden on the

⁴³ Craig, P. & De Búrca, G. (2020) *supra nota 2*, pp. 781, 813

⁴⁴ *Ibid.* p. 813

⁴⁵ Cuyvers, A. (2017) *supra nota 5*, p. 361

⁴⁶ Court decision, 12.3.2014, *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B*, Case C-456/12, EU:C:2014:135, paragraph 54

⁴⁷ OJ L 158, 30.4.2004, *supra nota 4*

⁴⁸ OJ L 158, 30.4.2004, *supra nota 4*, Recital 6

⁴⁹ OJ L 158, 30.4.2004, *supra nota 4*, Article 24

social system of the host Member State.⁵⁰ A permanent resident permit may be issued in accordance with the Article 16 after the Union citizen has resided in the host Member State for five years.⁵¹

Family reunification right, i.e., the right that enables Union citizens who exercise their right to free movement to be accompanied or joined by their family members,⁵² may be granted automatically under Article 2(2) or non-automatically, after an extensive examination by the host Member State, under Article 3(2).⁵³ The nationality of the family member is irrelevant since the right also covers third country nationals.⁵⁴ Family reunification rights cannot be, however, claimed from the Free Movement Directive if the Union citizen has not exercised his/her right to free movement.⁵⁵ The Free Movement Directive applies by analogy situations where a Union citizen has moved to another EU Member State and wishes to return to his/her Member State of nationality, only when the condition of ‘genuine residence’ is fulfilled.⁵⁶ This means, as held in CJEU case-law,⁵⁷ that when a Union citizen returns to his/her Member State of nationality, he/she can claim the right to family reunification under Free Movement Directive only, when the stay in other Member State has lasted over three months and during that time the family life has been either created or strengthened.

Under the Free Movement Directive, for automatic family reunification are entitled, according to Article 2(2): the spouse; the partner with whom the Union citizen has contracted, on the basis of legislation of another Member State, a registered partnership and the host Member State treats registered partnership as an equivalent to marriage; the direct descendants of the Union citizen or his/her spouse or partner if they are under the age 21 or otherwise dependants of the citizen or his/her spouse/partner (children, grandchildren) as well as the Union citizen’s or his/her

⁵⁰ OJ L 158, 30.4.2004, *supra nota* 4, Articles 6, 7

⁵¹ OJ L 158, 30.4.2004, *supra nota* 4, Article 16

⁵² Tryfonidou, A. (2020) The parenting rights of same-sex couples under European law. *Marriage, Families and Spirituality*, 25 (2). pp. 176-194. Peeters Online Journals, Central Archive at the University of Reading. p. 190

⁵³ Tryfonidou, A. (2019) EU free movement law and the children of rainbow families: children of a lesser God? *Yearbook of European Law*, 38. pp. 220-266. Oxford University Press. pp. 10-11

⁵⁴ European Union Agency for Fundamental Rights (2018) Making EU citizens’ rights a reality: national courts enforcing freedom of movement and related rights. Report, p. 21 Accessible:

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-making-rights-a-reality-freedom-of-movement_en.pdf

⁵⁵ Court decision, 5.5.2011, *McCarthy*, Case C-434/09, EU:C:2011:277, paragraph 39

⁵⁶ Tryfonidou, A. (2019) The ECJ recognises the right of same- sex spouses to move freely between EU Member States: the *Coman* ruling. *European Law Review*, 44 (5). pp. 663-679. pp. 3, 15

⁵⁷ Case C-456/12, *O. and B. v. Minister voor Immigratie, Integratie en Asiel*, paragraph 54; Case C-673/16, *Coman & Hamilton*, paragraph 51

spouse's/partner's dependent direct relatives in the ascending line (parents, grandparents).⁵⁸ Other family members may fall under the Article 3(2)(a) which covers persons who, in the country of origin or the country in which they have previously resided, are dependants of the citizen or members of the citizen's household or who require personal care from the citizen for medical reasons.⁵⁹ Article 3(2)(b) on the other hand covers "the partner with whom the Union citizen has a durable relationship, duly attested".⁶⁰ The family members falling into the category under 3(2) do not enjoy automatic family reunification rights and thus their right to be admitted is assessed based on the national legislation of the host Member State.⁶¹ The host Member State is, according to Article 3, obligated to examine the family member's relationship to the Union citizen and other personal circumstances when considering the right to entry and residence as well as to justify any denial of entry and residence.⁶²

As mentioned, the Free Movement Directive applies also to third country nationals if they are family members of the Union citizen who exercises the right to free movement within EU. However, if a third country nationals, who are legally residing in EU Member State, wants to bring their family members to that country they can rely on Directive 2003/86/EC⁶³ (Family Reunification Directive).⁶⁴ If both parties of the relationship or all family members are EU citizens, they all have an individual right to move and reside within the EU guaranteed by Article 21 TFEU.

⁵⁸ OJ L 158, 30.4.2004, *supra nota* 4, Article 2

⁵⁹ *Ibid.* Article 3

⁶⁰ *Ibid.*

⁶¹ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 50

⁶² OJ L 158, 30.4.2004, *supra nota* 4, Article 3

⁶³ OJ L 251, 3.10.2003

⁶⁴ Bazylińska-Nagler, J. (2018) Free-movement rights of third country nationals in the EU Internal Market. Vol. 8:1. *Wroclaw Review of Law, Administration & Economics*. pp. 34-35

2. EUROPEAN UNION ANTI-DISCRIMINATION LAW

Such as the free movement, EU anti-discrimination legislation was originally based on economic grounds, such as equal pay without discrimination based on sex (now Article 157 TFEU).⁶⁵ Soft law measures governing LGBT+ rights and prohibition of discrimination has been visible in EU level since 1980s and in Roth Report (1994), the Commission was requested to draft a council directive on combating discrimination on grounds of sexual orientation.⁶⁶ At the same time also CJEU dealt with first cases involving LGBT+ persons.⁶⁷ In judgement regarding case *Stauder*⁶⁸ in 1969, the CJEU held, for the first time, that fundamental human rights are part of general principles of EU law and their respect is ensured by the Court.⁶⁹

The constitutional framework for EU anti-discrimination law has developed significantly in the last three decades and with the establishment of the Amsterdam Treaty in 1999, EU law introduced a general provision (now Article 19 TFEU) on the possibility for EU to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁷⁰ The Article is not directly effective since it do not contain a direct prohibition of discrimination.⁷¹ However, it has been the basis for two legislative acts called the Equality Directives that extended the prohibited grounds of discrimination from nationality and sex to cover also race and ethnicity, religion, age, disability and sexual orientation.⁷² These two directives, the Directive 2000/43/EC⁷³ also known as Race Directive and the Directive 2000/78/EC⁷⁴ also known as Framework Employment Directive have different scopes of

⁶⁵ Belavusau, U. & Kochenov, D. (2016) On the 'Entry Options' for the 'Right to Love': Federalizing Legal Opportunities for LGBT Movements in the EU, EUI Working Paper, LAW 2016/09 Department of Law. European University Institute. p. 7

⁶⁶ Belavusau, U. (2020) Legislative and Judicial Politics of LGBT Rights in the European Union. Don Haider-Markel (ed). The Oxford Encyclopaedia of LGBT Politics and Rights, Oxford University Press. p. 4

⁶⁷ *Ibid.* p. 4

⁶⁸ Court decision, 12.11.1969, *Stauder v. City of Ulm*, Case 29-69, EU:C:1969:57

⁶⁹ Douglas-Scott, S. (2011) The European Union and Human Rights after the Lisbon Treaty Human Rights Law Review 11:4 Published by Oxford University Press. p. 669

⁷⁰ Craig, P. & De Búrca, G. (2020) *supra nota* 2, p. 929

⁷¹ Belavusau, U. (2020) *supra nota* 66 p. 4

⁷² Belavusau, U. & Henrard, K. (2019) A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives German Law Journal (2019), 20, pp. 614–636 Cambridge University Press. p. 615

⁷³ OJ L 180, 19.7.2000

⁷⁴ OJ L 303, 2.12.2000

protection as the latter applies only to employment and vocational training while the former covers, in addition to these, also areas such as social security, housing and education.⁷⁵ They also differ in what exceptions may be justified.⁷⁶ A proposal to extend the scope of Directive 2000/78 to cover the same areas as the Race Directive was recommended in 2008 but has been held up due to different views among the Member States.⁷⁷

Currently, the general provisions on Union's respect for equality and human rights and the obligation to combat discrimination are laid down in Articles 2 and 3 TEU from which the latter creates an obligation for the Union to combat social exclusion and discrimination. The Article 10 TFEU complements the abovementioned Directives and requires EU to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation when defining and implementing its policies and activities. The Article 6(1) TEU recognizes the binding effect of the Charter which is one of the three formal sources of EU human rights law listed in Article 6 TEU.⁷⁸ Although, the Charter has same legal value as the two founding Treaties, its scope, according to its Article 51(1) is limited and thus its Article 21 that prohibits any discrimination based on, among other things, sexual orientation is limited to addressing discrimination by the Member States only when they are implementing EU law.

Other two formal sources of EU human rights law are the general principles of EU law developed by CJEU and the ECHR, which is not an EU instrument, but has special position in the EU legal order.⁷⁹ It must be noted however, that even though ECHR enjoys a special significance status in CJEU, it is not treated as formally binding.⁸⁰ In this way, the EU ensures that, rather than limiting Union law, the ECHR creates part of the basis for its human rights law.⁸¹ The consistency between the ECHR and the Charter is guaranteed by Article 52(3) of the latter which holds, that in so far as the rights in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is the same as in ECHR. The Article 14 of ECHR (prohibition of discrimination) do not explicitly prohibit discrimination based on sexual

⁷⁵ Howard, E. (2018) EU anti-discrimination law: has the CJEU stopped moving forward? *International Journal of Discrimination and the Law*, 18 (2-3), pp. 60-81. Middlesex University Research p. 3

⁷⁶ *Ibid.* p. 3

⁷⁷ *Ibid.* p. 4

⁷⁸ Craig, P. & De Búrca, G. (2020) *supra nota* 2, pp. 414, 416

⁷⁹ *Ibid.* p. 414

⁸⁰ *Ibid.* p. 419

⁸¹ *Ibid.* pp. 419-420

orientation, but in its case law, the European Court of Human Rights (ECtHR) has repeatedly included sexual orientation among the prohibition of discrimination based on “other status”.⁸²

⁸² Scherpe, J.M. (2013) The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights, *The Equal Rights Review*, Vol. Ten (2013) p. 87

3. OBSTACLES IN CROSS-BORDER RECOGNITION

Now, when we know the general legal framework, we may proceed to the most common obstacles encountered by same-sex couples and rainbow families when they exercise the right to free movement within the EU. There is, however, no need to differentiate between free movement for economic purposes or based on citizenship of the Union, but rather to focus on the fact that sexual and gender minorities should have an equal right to free movement.⁸³

Globally, EU seems like a good place for LGBT+ people due to its wide anti-discrimination legislation.⁸⁴ The reality however, is very different and LGBT+ people experience discrimination, for instance, in many areas covered in the Race Equality Directive and yet still EU has not been able to provide new directive that would extend the prohibition of discrimination based on sexual orientation beyond existing limits of the Employment Equality Directive.⁸⁵ As the CJEU case-law has expressed, family law and marital matters are not a competence of EU but of each Member State.⁸⁶ This lack of EU competence leads to a considerably diverse set of national legislations regarding same-sex couples and rainbow families.⁸⁷ EU law, which requires equal treatment regardless of civil status and sexual orientation, becomes relevant in cross-border cases.⁸⁸ EU rules include facilitation of recognition of legal documents such birth certificates, divorce papers, or documents related to parental responsibilities and rights, succession, maintenance and property in context of marriage or registered partnership.⁸⁹ Therefore, even if EU cannot force Member States to allow same-sex unions it can, and it has the legal obligation to combat discrimination that occurs when Union citizens and their family members exercises the right to free movement guaranteed by EU law. The ECtHR has also ruled in its case-law that ECHR signatory states are not obligated to allow

⁸³ COM(2020) 698 final, *supra nota* 13

⁸⁴ de Groot, D. (2021) The rights of LGBTI people in the European Union. Updated version of a briefing originally drafted by Piotr Bakowski. European Parliamentary Research Service. Accessible: https://www.researchgate.net/publication/352029887_The_rights_of_LGBTI_people_in_the_European_Union p. 2

⁸⁵ *Ibid.* pp. 2, 5, 6

⁸⁶ Case C-673/16, *Coman & Hamilton*, paragraph 37

⁸⁷ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 14

⁸⁸ COM(2020) 698 final, *supra nota* 13

⁸⁹ *Ibid.*

same-sex couples to marry on their territories.⁹⁰ Given the sensitivity of the issue and the different approaches of the Member States, the ECtHR has tried to find a balance between securing the rights of minorities and respecting the signatory states views on these issues when ruling on same-sex couples.⁹¹

3.1. Refusal of legal recognition of same-sex couples

Legislation on same-sex couples differs considerably in the EU Member States, at least in part due to the public attitudes towards LGBT+ people. Some of the Member States recognizes same-sex marriages and thus provides them the rights attached to being married. Some recognize solely registered partnerships, while others offer possibility for same-sex couples to enter marriage or/and registered partnership. Some do not legally recognize same-sex marriage or registered partnership but have given some rights for same-sex cohabiting partners. It has been typical that before a Member State legally recognizes same sex marriage, legal recognition for registered partnerships has been already available and most countries have provided some rights to cohabiting same-sex couples already before providing formal recognition (marriage or registered partnership).⁹²

Today, 13 Member States out of 27 recognize same-sex marriage from which seven (Denmark, Ireland, Finland, Germany, Portugal, Spain, and Sweden) recognize solely marriage and six (the Netherlands, Belgium, France, Luxemburg, Malta, Austria) recognize both marriage and registered partnerships. Eight Member States (Cyprus, Czech, Greece, Italy, Slovenia, Estonia, Hungary, and Croatia) allow only registered partnerships between same-sex partners, and six (Slovakia, Bulgaria, Poland, Lithuania, Latvia, and Romania) do not provide legal recognition for either marriage or registered partnership of same-sex couples. Germany, which currently recognizes solely same-sex marriage, have kept their previous law concerning registered partnerships applicable to partnerships concluded before 2017 or abroad.⁹³

⁹⁰ Shahid, M. (2017) The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights, *Erasmus Law Review*, Eleven international publishing, p. 193

⁹¹ *Ibid.* p. 198

⁹² Waaldijk, K. (2020) What First, What Later? Patterns in the Legal Recognition of Same-Sex Partners in European Countries, In book: Digoix, M. (Ed) (2020) Same-Sex Families and Legal Recognition in Europe. Vol. 24, Springer International Publishing, European Studies of Population pp. 15-16

⁹³ Lukáčik, A. (2018) Same-Sex Couples on the Move: Family Life Guaranties & Challenges. *Days of Law 2018: Part I. Marriage for All?* Pavol Jozef Šafárik University in Košice, Slovakia pp. 113-117

Cross-border related obstacles may arise when one Member State refuses to legally recognize a same-sex marriage or registered partnership that has been legally obtained and recognized in another Member State.⁹⁴ Obstacles occurs also when same-sex couples travel to one Member State in order to get a recognition for their relationship and then come back to their home Member State in which this recognition is refused.⁹⁵ These refusals interfere with EU law if they prevent granting family reunification rights and residence permits.⁹⁶

3.1.1 Family Reunification Right

As found out in the first chapter, family reunification rights i.e., the right that guarantees a person to bring his/her family members to the EU country of residence, can be derived from primary or secondary EU legislation depending on the status of the person. Third country, non-EU nationals residing lawfully in territory of Member State can claim family reunification through Family Reunification Directive (Directive 2003/86/EC)⁹⁷, while EU citizens and their family members can use the Free Movement Directive (Directive 2004/38/EC)⁹⁸ for the same purpose. The latter, according to CJEU case-law⁹⁹, does not cover situations where EU citizen exercises the right to free movement for returning to Member State that he/she is a national. CJEU has clarified that these Union citizens can rely to the Article 21 TFEU.¹⁰⁰

In relation to same sex couples, the refusal to be admitted and to be granted a right to family reunification is usually a consequence of Member State not recognizing the civil status of the parties.¹⁰¹ The non-recognition can occur to same-sex couples regardless of the type of their relationship i.e., whether they are married, in registered partnership, or in unregistered partnership, but it is necessary, for the purpose of this research, to distinguish the three as the provisions and case-law varies for each situation.

In 2018, with the case *Coman*¹⁰², the CJEU was given an opportunity to develop EU free movement law. Relu Coman, a Romanian and US national had requested information about the

⁹⁴ Kogovšek Šalamon, N. (2019) *supra nota* 7

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ OJ L 251, 3.10.2003 *supra nota* 63

⁹⁸ OJ L 158, 30.4.2004 *supra nota* 4

⁹⁹ Case C-456/12, *O. and B. v. Minister voor Immigratie, Integratie en Asiel*, paragraph 50

¹⁰⁰ *Ibid.*

¹⁰¹ Kogovšek Šalamon, N. (2019) *supra nota* 7

¹⁰² Case C-673/16, *Coman & Hamilton*

procedure and conditions under which Robert Hamilton, Mr. Coman's husband and thus a family member could obtain right to reside more than three months in Romania.¹⁰³ A few weeks later, the couple got a reply in which the extension of Mr. Hamilton's residence permit on grounds of family reunification was found to be impossible since Romania do not recognize same-sex marriage.¹⁰⁴

In the judgement, the CJEU ruled that when granting the right to residence, a same-sex spouse who is married to a Union citizen and the marriage has been recognized in another Member State, should be recognized as a 'spouse' for the purpose of granting family reunification rights under EU law.¹⁰⁵ With 'spouse' the CJEU referred to Article 2(2)(a) of Directive 2004/38/EC and thus clarified the Directive's definition to include same-sex spouse of a Union citizen. It held that although the legislation of marital matters is a competence of Member States, they must still comply with EU law, in this case with the free movement provisions, when exercising this competence.¹⁰⁶ CJEU also referred to Charter when it stressed that "a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter".¹⁰⁷ The right to private and family life is guaranteed by Article 7 of the Charter and according to its Article 52(3), all rights in the Charter have the same scope and meaning as those in ECHR, which Article 8 "right to respect for private and family life" can be, according to ECtHR case-law,¹⁰⁸ enjoyed by same-sex couples. The Coman judgment can be seen as a landmark ruling which surprised LGBT+ community and same-sex married couples pleasantly.¹⁰⁹ However, it must be noted that although the judgement proves that for purposes of EU free movement law, married same-sex couples are in the same position as opposite-sex counterparts, it only refers to the spouse of a Union citizens and thus do not provide same rights for a spouse of third-country nationals whose family reunification rights are derived from Directive 2003/86/EC.¹¹⁰

Due to the Coman judgment, all Member States should now recognize same-sex marriage contracted in another Member State for purposes of family reunification and residence permit.

¹⁰³ Tryfonidou, A. (2019) *supra nota* 56 pp. 1-2

¹⁰⁴ *Ibid.*

¹⁰⁵ Case C-673/16, *Coman & Hamilton*, paragraphs 35, 51

¹⁰⁶ *Ibid.* paragraphs 37, 38

¹⁰⁷ *Ibid.* paragraph 47

¹⁰⁸ Court decision, 24.6.2010, *Schalk and Kopf v Austria*, no. 30141/04, paragraph 90

¹⁰⁹ Tryfonidou, A. (2019) *supra nota* 56, pp. 1, 10

¹¹⁰ *Ibid.* pp. 14-15

Romania, against which the case was brought, has failed to implement the judgement and at least in 2021 Mr. Hamilton was still waiting for his residence permit.¹¹¹ It is also uncertain whether the judgment is enforced in other Member States.¹¹²

Although, now same-sex spouse of a Union citizen must be legally recognized for the purposes of family reunification, the situation for couples in same-sex registered partnerships is not that simple. The Article 2(2)(b) of the Directive 2004/38/EC¹¹³ grants automatic right of entry and residence to partner of Union citizen in registered partnership only if this partnership is contracted in other Member State and most importantly if the legislation of the host Member State treats registered partnerships as equivalent to marriage. This condition means that Member States which do not treat registered partnerships same way as marriages are not obligated to grant an automatic right to entry and residence to partner of Union citizen in registered partnership.¹¹⁴

Currently, there are great differences in granting family reunification rights and residence permits to same-sex couples in registered partnership.¹¹⁵ From the six Member States (Slovakia, Bulgaria, Poland, Lithuania, Latvia, and Romania) that recognizes neither registered partnership nor marriage for same-sex couples, at least two (Latvia, Lithuania) guarantees free movement rights for same-sex registered partnerships. However, Latvia seems, through paragraph 4.2. of Regulation No. 675 (2011), to downgrade registered partnership to the category of ‘other family members’ under Article 3(2) of the Directive 2004/38/EC and do not provide recognition for these relationships but only safeguards the right of entry and residence.¹¹⁶ Lithuania on the other hand issues, temporary residence permit to same-sex partner in registered partnership with Union citizen, for the purpose of family reunification, in accordance with the Article 43(1)(5) of the Law on the Legal Status of Aliens (2004).¹¹⁷ The possibility of granting a temporary residence permit for non-EU citizen who joins his/her same-sex spouse or partner of registered partnership in Lithuania is also affirmed by the Constitutional Court of the Republic of Lithuania

¹¹¹ ILGA-Europe (2021) European Court will consider lack of implementation of EU law to enable freedom of movement for same-sex spouses. Media Release. Accessible: <https://www.ilga-europe.org/resources/news/latest-news/european-court-will-consider-lack-implementation-eu-law-enable-freedom> 15 April 2022

¹¹² Kogovšek Šalamon, N. (2019) *supra nota* 7

¹¹³ OJ L 158, 30.4.2004 *supra nota* 4

¹¹⁴ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 50

¹¹⁵ *Ibid.* pp. 51–53

¹¹⁶ Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā 30.8.2011, Ministru kabineta noteikumi Nr.675

¹¹⁷ LIETUVOS RESPUBLIKOS Į S T A T Y M A S DĖL UŽSIENIEČIŲ TEISINĖS PADĖTIES 2004 m. balandžio 29 d. Nr. IX-2206 Vilnius

in 2019.¹¹⁸ In general, it appears that just over half of the Member States treats a registered partnership as equivalent to marriage and thus automatically grant the right to entry and residence.¹¹⁹ As regards the case-law, the CJEU has not had an opportunity to rule on the recognition of same-sex registered partnerships for the purposes of family reunification since the only request for preliminary ruling (case *Cocaj*¹²⁰) was withdrawn by the national court.¹²¹

It is evident that the condition in Article 2(2)(b) in Directive 2004/38/EC can create an obstacle for same-sex couples in registered partnerships, at least in countries where this partnership is not treated as equivalent to marriage. These Member States are although required to facilitate entry and residence of “the partner with whom the Union citizen has a durable relationship, duly attested” according to Article 3(2)(b) of the same Directive.¹²² They are required to carry out an extensive examination of personal circumstances and justify any denial of right to entry and residence.¹²³ The assessment of what is considered to be ‘durable relationship’ has been left for Member States.¹²⁴ It seems that most Member States treat opposite-sex and same-sex unregistered partnerships equally in terms of this facilitation for family reunification purposes.¹²⁵ However, the legal status or designations of these couples (e.g., whether they are called ‘cohabitants’ or ‘registered cohabitants’ etc.) varies between Member States.¹²⁶ There have not been cases in CJEU in relation to clarification of the term ‘partner’ in Article 3(2)(b) and there is currently no explicit understanding on whether the term ‘partner’ includes also partners of same-sex relationships.¹²⁷ ECtHR has ruled in case *Pajić*¹²⁸ that if a state grants family reunification right for unregistered opposite-sex partner it is obligated to do the same for unregistered same-sex partner. In Case *Taddeucci and McCall*¹²⁹ ECtHR ruled that treating unregistered same-sex couples the same way as opposite-sex counterparts might amount to discrimination on grounds of sexual orientation if in that specific state the opposite-sex unregistered partners have the legal ability to get married and for same-sex couples this is not possible. In other words, a state may

¹¹⁸ Court decision 11.1.2019, no KT3-N1/2019, Case no 16/2016

¹¹⁹ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 50-53

¹²⁰ Order (case closed), 16.7.2015, *Cocaj*, C-459/14, EU:C:2015:546

¹²¹ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 110

¹²² OJ L 158, 30.4.2004 *supra nota* 4, Article 3

¹²³ *Ibid.*

¹²⁴ Prof. Dr. Spaventa, E. & Dr. Rennuy, N. & Prof. Dr. Minderhoud, P. (2021) *The legal status and rights of the family members of EU mobile workers*. Research Report. Publications Office of the European Union. p. 8

¹²⁵ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 57

¹²⁶ *Ibid.* p. 58

¹²⁷ *Ibid.* p. 60

¹²⁸ Court decision, 23.2.2016, *Pajić v. Croatia*, no. 68453/13

¹²⁹ Court decision, 30.6.2016, *Taddeucci and McCall v. Italy*, no. 51362/09

not deny residence permit on ground of family reunification from unregistered same-sex partners if these residence permits are reserved in that state for married couples and same-sex couples do not have the legal possibility to get married.

3.1.2. Unequal treatment for other legal purposes

In addition to not always legally recognizing same-sex relationships, Member States may also treat these couples differently after granting them a right to entry and reside which may in itself prevent them from exercising their right to free movement.¹³⁰ Same-sex couples, whether in marriage, registered partnership or unregistered partnerships might not be recognized for other legal purposes than family reunification and residence permit such as pensions, taxation, inheritance, health related matters and tenancies.¹³¹ Overall, it seems like during “bad times” (in times of death, illness, accident, violence etc.) the recognition of same-sex couples for these purposes appears to be the highest while at the same time, for example, in matters related to having children or changing one's last name, recognition becomes reluctant.¹³² Article 3 of Regulation 883/2004¹³³ determines that workers and their families are entitled to social security and social benefits in the host Member State under the same conditions as nationals of that Member State. Directive 2004/38/EC on the other hand does not guarantee equal treatment for non-economically active EU citizens for the first three months, and then according to CJEU case law, it must be shown that the person is not a burden to public finances and is closely linked to the labor market or otherwise strongly integrated into the society.¹³⁴ Most Member States grant most of the rights for foreign, or surviving same-sex partners already when in registered partnerships and thus marriage is not necessary in regards of these rights.¹³⁵ However, some Member States still reserve more rights for married couples and thus same-sex couples in registered partnerships might not be entitled to them.¹³⁶

Regarding employment related survivor's benefits, the CJEU has ruled in case *Maruko*¹³⁷ that such unequal treatment is contrary to EU law in a situation where same-sex couples do not have

¹³⁰ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, pp. 45-46, 53-54, 69

¹³¹ Kogovšek Šalamon, N. (2019) *supra nota* 7

¹³² Waaldijk, K. (2020) *supra nota* 92, pp. 23, 24

¹³³ OJ L 166, 30.4.2004

¹³⁴ European Union Agency for Fundamental Rights (2018) *supra nota* 54, p. 40

¹³⁵ Waaldijk, K. (2020) *supra nota* 92, p. 29

¹³⁶ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, p. 17

¹³⁷ Court decision, 1.4.2008, *Maruko*, C-267/06, EU:C:2008:179

an equal legal opportunity to marry.¹³⁸ Similar rulings were given in cases *Römer*¹³⁹ and *Hay*¹⁴⁰ when CJEU held that unequal treatment of same-sex couples in registered partnerships, in Member States where marriage is not available for them, amounts to direct discrimination on the grounds of sexual orientation. ECtHR has held in case *P.B. v. J.S v Austria*¹⁴¹ that unregistered same-sex couples must be treated in the same as opposite-sex counterparts in relation to joint health and accident insurance since an unequal treatment amounts to discrimination based on sexual orientation under Article 14 ECHR in conjunction with Article 8 ECHR. Similar violation occurs, according to the judgment of the case *Karner v. Austria*¹⁴², if same-sex unregistered couples are treated differently than opposite-sex counterparts in relation to succession of tenancies. We see from ECtHR case law that same-sex couples should be treated in the same way as opposite-sex couples, not only in terms of employment but also in terms of other rights. We also know that the rights laid down in the Charter enjoy same scope and meaning as the corresponding rights in ECHR and thus the CJEU should, if given the opportunity to do so, rule for recognition of same-sex couples in unregistered partnerships also for other legal purposes than family reunification and residence permits.

3.2. Refusal of legal recognition of child-parent relationship

As we saw in the previous subchapter, the legal recognition of same-sex couples, whether in marriage, registered partnership, or unregistered partnership varies between EU Member States and thus same-sex couples may encounter discriminatory treatment and obstacles in relation with family reunification and residence permits but also with other things such as pensions, taxation, inheritance, health insurances and tenancies while and after exercising their right to free movement. Another important, even more controversial field among Member States is the legal recognition of same-sex family life including the recognition of child-parent relationship and parental rights.¹⁴³ Again, EU's competences do not give it the power to regulate whether Member States should allow, under their national law, same-sex couples to become joint parents in their territory.¹⁴⁴ Member States must however act in accordance with EU law when

¹³⁸ C-267/06, *Maruko*; Court decision, 10.5.2011, *Römer*, C-147/08, EU:C:2011:286; Court decision, 12.12.2013, *Hay*, C-267/12, EU:C:2013:823

¹³⁹ C-147/08, *Römer*

¹⁴⁰ C-267/12, *Hay*

¹⁴¹ Court decision, 22.7.2010, *P.B. and J.S. v. Austria*, no. 18984/02

¹⁴² Court decision, 24.7.2003, *Karner v. Austria*, no. 40016/98

¹⁴³ Tryfonidou, A. (2019) *supra nota* 53, p. 7

¹⁴⁴ Tryfonidou, A. (2020) *supra nota* 52, p. 189

regulating these matters.¹⁴⁵ Due to lack of EU competence, also parental rights of same-sex couples vary considerably between Member States.¹⁴⁶ Not only does the non-recognition of family links cause uncertainty and insecurity, it also gives rise to practical and legal problems in relation to, for instance, medical care, health insurance and inheritance.¹⁴⁷ In the case of adoption, non-recognition may result in the parents having to go through several steps in order to be held responsible for the child and to have the right to decide on matters relating to the child.¹⁴⁸ If a child has only one legally recognized parent and that parent dies, the child may, in the worst case, be orphaned due to lack of legal connection to the non-recognized parent.¹⁴⁹ The non-recognition of child-parent relationship may also constitute an obstacle to the recognition of birth certificates and other documents relating to parenthood.¹⁵⁰ In terms of meaningful family reunification, the recognition of child-parent relationship for all legal purposes is essential in order for the family to be integrated in the society.¹⁵¹

Same-sex couples may become parents through adoption, surrogacy, or medical reproductive procedures such as ART/IVF treatments.¹⁵² There are three possible forms of adoption available for them: joint adoption where both parties of the couple adopts jointly and acquires parental right; individual adoption where one person adopts alone and the partner of this person do not acquire any parental rights as well as second-parent or step-parent adoption through which one partner adopt the other one's biological or adopted child and thus acquires parental rights without removing the first parents legal rights.¹⁵³ Currently from 27 Member States, 13 allows joint adoption and 14 allows second-parent adoption for same-sex couples.¹⁵⁴ In Italy the courts makes decisions on these issues case-by-case basis.¹⁵⁵ In Croatia registered and unregistered life partners are entitled to become partner-guardians of the child of their partner while in Greece same-sex couples are only entitled to foster, but not adopt a child.¹⁵⁶ There is currently no legal protection at EU level for recognition of adoptions and thus no guarantee that an adoption carried

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Tryfonidou, A. (2019) *supra nota* 53, p. 8

¹⁴⁸ Evas, T. (2016) Cross-border recognition of adoptions. Study. European Parliamentary Research Service, p. 31

¹⁴⁹ Tryfonidou, A. (2019) *supra nota* 53, p. 8

¹⁵⁰ Kogovšek Šalamon, N. (2019) *supra nota* 7

¹⁵¹ Tryfonidou, A. (2019) *supra nota* 53, p. 10

¹⁵² Kogovšek Šalamon, N. (2019) *supra nota* 7

¹⁵³ Valleala, A. (2014) Legal recognition of same-sex family life in the jurisprudence of the European Court of Human Rights. Master's Thesis in Constitutional Law. University of Helsinki pp. 45-46

¹⁵⁴ ILGA-Europe (2021) The 2021 Rainbow Europe Map. Accessible: <https://www.rainbow-europe.org/#1/8682/8687> (assessed on 25.4.2022)

¹⁵⁵ de Groot, D. (2021) *supra nota* 84, p. 7

¹⁵⁶ *Ibid.*

out in one Member State will be legally recognized in another.¹⁵⁷ This causes according to European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions, uncertainty and creates a lot of problems for families exercising their right to free movement.¹⁵⁸ In some situations the parents have to even re-adopt the child because the adoption carried out in one Member State was not legally recognized in another.¹⁵⁹ Within EU, medically assisted insemination (ART/IVF) is available for same-sex couples in 12 Member States¹⁶⁰ while surrogacy is widely prohibited and many countries refuse to recognize child-parent relationship if the child has been born via surrogacy.¹⁶¹ Due to diversity of means to access into parenthood, it is not rare in rainbow families that one or neither of the parents are biologically related to the child.¹⁶² Consequently, while exercising their right to free movement, these families may face situation where only one parent or in the worst case scenario neither of the parents are recognized as parent in other Member State.¹⁶³ While EU's competence is not enough to demand the recognition of rainbow families in Member States' national legislation, it must be active in securing the rights under free movement law and combating all forms of discrimination.¹⁶⁴ ECtHR has also taken a general line of not obligating ECHR signatory states to allow joint parenthood for same-sex couples but, the restrictions to this cannot be justified on the basis of sexual orientation which is prohibited ground of discrimination under Article 14 ECHR.¹⁶⁵

3.2.1 Family Reunification Right

The CJEU has confirmed in its case law¹⁶⁶ that the Union citizen's right to free movement cannot be dependent on age and thus a child, who is a Union citizen, enjoys independent right to free movement under EU law. Under Article 2(2)(c) of the Free Movement Directive¹⁶⁷, a child may benefit from automatic family reunification right even if he/she is not a Union citizen, if the

¹⁵⁷ Shreeves, R. (2022) Legislative Train Schedule: Cross Border Aspects of Adoptions, European Parliament, Accessible: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-cross-border-aspects-of-adoptions> 25 April 2022

¹⁵⁸ European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions (2015/2086(INL))

¹⁵⁹ *Ibid.*

¹⁶⁰ ILGA-Europe (2021) *supra nota* 154

¹⁶¹ Tryfonidou, A. (2019) *supra nota* 53 p. 6

¹⁶² Tryfonidou, A. (2020) *supra nota* 52 p. 177

¹⁶³ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9 p. 16

¹⁶⁴ Tryfonidou, A. (2019) *supra nota* 53, p. 21

¹⁶⁵ Tryfonidou, A. (2020) *supra nota* 52, p. 186

¹⁶⁶ Court decision, 19.10.2004, *Zhu and Chen*, Case C-200/02, EU:C:2004:639, paragraph 20

¹⁶⁷ OJ L 158, 30.4.2004, *supra nota* 4, Article 2

child is a direct descendant under the age 21 of a Union citizen or is dependant of his/her parent(s). The right to automatic family reunification can also be obtained through Article 2(2)(d), if the child acts as a ‘sponsor’ for his/her dependent direct relatives in ascending line who are not EU citizens and therefore cannot themselves benefit from the right to free movement.¹⁶⁸ According to CJEU case law, when evaluating whether family member is dependent on the Union citizen or not, the dependance must be proved with documents and is characterized by material support by the Union citizen for the family member and emotional dependence cannot be considered.¹⁶⁹ According to the CJEU case-law¹⁷⁰, a child who is a Union citizen, may claim the right to be joined/companied with ‘primary carer’ when exercising his/her right to move and reside freely within the EU. This is derived from the Article 21 TFEU but the family, however, must be financially self-sufficient.¹⁷¹

Finally, a child who does not fall within the above Articles may acquire the right to enter and reside in accordance with Article 3(2)(a) of the Free Movement Directive. In that case the child must be a dependant of the Union citizen or a member of his/her household or medically dependent on the personal care provided by the Union citizen.¹⁷² A child can act as a ‘sponsor’ if the people who come with him/her can prove they are members of the child’s household.¹⁷³ As we know, the rights under Article 3 are non-automatic and thus Member States are only required to facilitate the entry and residence and justify any denial. The general principle, also affirmed by ECtHR case-law,¹⁷⁴ is that Member States, when implementing the Directive, must act in the best interests of the child, in accordance with the United Nations Convention on the Rights of the Child (1989).¹⁷⁵

3.2.2 Case V.M.A. v Stolichna

For a long time, rainbow families have been in a precarious position when exercising their right to free movement, and different levels of recognition between Member States have even led to

¹⁶⁸ Tryfonidou, A. (2019) *supra nota* 53, p. 12

¹⁶⁹ Case C-200/02, *Zhu and Chen*, paragraphs 42, 43

¹⁷⁰ Case C-200/02, *Zhu and Chen*, paragraphs 45, 46, 47

¹⁷¹ Case C-200/02, *Zhu and Chen*, paragraph 47

¹⁷² OJ L 158, 30.4.2004, *supra nota* 4, Article 3

¹⁷³ Tryfonidou, A. (2019) *supra nota* 53, p. 13

¹⁷⁴ Court decision, 22.4.1997, X, Y and Z v. the United Kingdom, no. 21830/93, paragraph 47

¹⁷⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for better transposition and application of Directive 2004/38/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 COM(2009) 313 final

the breakdown of the families at the internal borders of the EU.¹⁷⁶ The CJEU has made it clear in case *MS*¹⁷⁷ that a biological link between a child and the Union citizen exercising right to free movement is not necessary under EU law, because the child-parent relationship must be interpreted broadly so that it covers both, biological and legal relationship. It has also established that the category of “direct descendant” in Article 2(2)(c) of the Free Movement Directive includes both, biological and adopted child of Union citizen.¹⁷⁸ However, the CJEU has only addressed these aspects through a traditional family consisting of a couple of the opposite sex and their child, and it has therefore been unclear whether these also apply to rainbow families.¹⁷⁹

In November 2021, the CJEU gave a landmark judgement for case *V.M.A v. Stolichna*¹⁸⁰ which was the first-ever case about parenting by same-sex couples referred to CJEU. In this case, a Bulgarian-born woman and her Gibraltar-born same-sex spouse were refused to be marked as parents in their child's birth certificate in Bulgaria. The child was born in Spain with both parents being recognised in the Spanish birth certificate. The Bulgarian-born mother approached Bulgarian authorities and applied for Bulgarian birth certificate that was obligatory in issuing Bulgarian identity document. The request was rejected because, according to Bulgarian authorities, a child cannot have two mothers and the authorities did not have the information on who was the biological mother of the child. The child was left without passport or any other personal documents and therefore was unable to leave Spain.¹⁸¹

In its judgement, CJEU first noted that by being born for a Bulgarian citizen, the child automatically holds a Bulgarian nationality and EU citizenship which, according to Directive 2004/38/EC, requires Bulgarian authorities to issue her a passport or other identity document.¹⁸² Then the Court ruled that Member States must recognise the right of the parents, who are the primary carers of a minor Union citizen who exercises her right to free movement, to accompany that citizen.¹⁸³ The Court also ruled that the non-recognition of parent-child relationship and refusal to issue a passport or other identity document could not be justified on ground of public

¹⁷⁶ Tryfonidou, A. (2019) *supra nota* 53, p. 14

¹⁷⁷ Court decision, 26.3.2019, *SM v. Entry Clearance Officer*, Case C-129/18EU:C:2019:248, paragraph 54

¹⁷⁸ *Ibid.*

¹⁷⁹ Tryfonidou, A. & Wintemute, R. (2021) *supra nota* 9, pp. 78-79

¹⁸⁰ Court decision, 14.12.2021, *V.M.A v. Stolichna*, Case C-490/20, EU:C:2021:1008

¹⁸¹ European Law Blog, Tryfonidou, A. (2021, December 21) Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ's *V.M.A.* ruling. Retrieved from: <https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/> 2 May 2022

¹⁸² Case C-490/20, *V.M.A v. Stolichna*, paragraphs 39, 40, 44

¹⁸³ *Ibid.* paragraph 48

policy since these do not require Member States to allow, in national legislation, parenthood for same-sex couples.¹⁸⁴ The Court also held, by referring to the Charter and its Articles 7 (respect for private and family life) and 24 (the rights of the child) in conjunction with the Convention on Rights of the Child (1989) and especially its Article 2 (prohibition of discrimination), that if Member State denies child the relationship with one parent while exercising her right to move and reside freely within the Union or makes the exercise of that right impossible or extremely difficult in practice on the ground that she has same-sex parents, that Member State acts in contrary to these articles.¹⁸⁵

As a result of this judgment, Member States are now obligated to recognize, for the purpose of the free movement, a birth certificate of a child with same-sex parents issued in another Member State and thus the right of this child to be accompanied by both of his/her same-sex parents.¹⁸⁶ The judgement also indicates that non-recognition of child-parent relationship for the purposes of free movement, might amount to a breach of the Charter and the Convention on Rights of the Child.¹⁸⁷ Even though the judgment clarifies terms ‘‘primary carer’, ‘parent’, and ‘direct descendant’ to include rainbow families and was an essential step towards inclusive and equal Union, it is not gapless.¹⁸⁸ It only requires recognition for birth certificates issued by Member States and thus do not guarantee a recognition of those issued in third countries. This is especially crucial for male same-sex couples who often become parents through surrogacy provided outside the EU.¹⁸⁹ Another problem is that the judgment leaves to interpretation the extent of this obligation of recognition.¹⁹⁰ In other words, it does not specify whether family ties should be recognized by Member States solely to guarantee freedom of movement and family reunification, or also for all legal purposes after the family has been admitted to the host Member State.¹⁹¹ As we know, this recognition for other legal purposes is essential for free movement and family reunification to be meaningful.¹⁹²

¹⁸⁴ *Ibid.* paragraphs 56, 57

¹⁸⁵ *Ibid.* paragraphs 63, 64, 65

¹⁸⁶ *Ibid.* paragraph 69

¹⁸⁷ European Law Blog, Tryfonidou, A. (2021, December 21) *supra nota* 181

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Tryfonidou, A. (2019) *supra nota* 53, p. 10

The refusal to legally recognize the family ties between the children and parents in rainbow families creates an obstacle for free movement and thus amounts a breach of EU law.¹⁹³ As held in ECtHR case-law, the right to family life under Article 8 ECHR includes also rainbow families¹⁹⁴ and the non-recognition can breach the right to private and family right under that Article.¹⁹⁵ Even though states can regulate themselves whether to allow same-sex couple to become joint parents in their territory, they must do it in accordance with Article 14 ECHR that prohibits discrimination on grounds of sexual orientation.¹⁹⁶ In addition, refusal to legally recognize rainbow family as a family for other legal purposes than family reunification and residence permits, might cause great inconvenience and impossibility to live normal family life and thus will impede the right to free movement.¹⁹⁷ The obstacles to free movement can be acceptable with certain justifications but as seen in case *V.M.A v. Stolichna*¹⁹⁸, the public policy cannot be the basis for refusal to legally recognize birth certificate with same-sex parents because it does not require Member States to allow, in their national legislation, same-sex couples to enter parenthood in their territory.

¹⁹³ Tryfonidou, A. (2020) *supra nota* 52, p. 191

¹⁹⁴ Court decision, 15.3.2012, *Gas and Dubois v. France*, no. 25951/07, paragraph 37

¹⁹⁵ Court decision, 26.6.2014, *Menesson v. France*, no. 65192/11; Court decision, 28.6.2007, *Wagner and J.M.W.L. v. Luxemburg*, no. 76240/01

¹⁹⁶ Tryfonidou, A. (2020) *supra nota* 52, p. 186

¹⁹⁷ Tryfonidou, A. (2019) *supra nota* 53, pp. 25, 27

¹⁹⁸ Case C-490/20, *V.M.A v. Stolichna*, paragraph 56

4. THE POSSIBLE SOLUTIONS TO THE CURRENT OBSTACLES

It is essential that as the concept of the family evolves and includes forms other than the traditional nuclear family, the EU legislation and its judiciary also develop at the same pace to ensure an equal and inclusive Union. Rainbow families' and same-sex couples' right to move and reside freely is recognized in EU free movement law, but on the practical level, especially due to differences in family law and marital matters between Member States, the situation is not that simple.¹⁹⁹ The EU does not have the competence to require Member States to have common practices on how these issues are dealt with in national law, but it has an obligation to ensure that every EU citizen and, under certain conditions, their family members can enjoy the right to move and reside freely within EU without discrimination based on inter alia sexual orientation that is prohibited by EU anti-discrimination law.²⁰⁰

4.1. Enforcement of the judgments of the Court of Justice of the European Union

What can the EU do then? At first, EU should guarantee the enforcement of CJEU judgments related to the free movement of same-sex couples and rainbow families. In its LGBTIQ Equality Strategy 2020-2025 (Strategy), the Commission highlighted the importance of correct application of the EU free movement law and held that the correct implementation of the *Coman* judgement is essential.²⁰¹ In 2021, three years after the judgment, Mr. Hamilton still waited for his residence permit, and the couple submitted the case to the ECtHR.²⁰² In addition to Romania, it is also uncertain whether the other Member States respects the judgment.²⁰³ In an answer given by Ms. Dalli, on behalf of the European Commission on March 2022,²⁰⁴ it was told that in

¹⁹⁹ COM(2020) 698 final *supra nota* 13

²⁰⁰ Tryfonidou, A. (2019) *supra nota* 53, p. 21

²⁰¹ COM(2020) 698 final *supra nota* 13

²⁰² ILGA Europe (11 June 2021), Freedom of movement for same-sex spouses: The Coman Case, 3 years on, retrieved from: <https://www.ilga-europe.org/blog/freedom-movement-same-sex-spouses-coman-case-3-years> 6 May 2022

²⁰³ Tryfonidou, A. & Wintemute, R. (2021), *supra nota* 9, p. 43-45

²⁰⁴ Answer given by Ms. Dalli on behalf of the European Commission (1 March 2022) E-005164/2021 Accessible: https://www.europarl.europa.eu/doceo/document/E-9-2021-005164-ASW_EN.pdf

regards of the judgment, discussions with all Member States have begun. EU must ensure that the judgment is implemented correctly in every Member State and especially in Member States where marriage is not available for same-sex couples, it must be ensured that a same-sex spouse of Union citizen can enjoy from automatic family reunification right under the Article 2(2)(a) of Free Movement Directive.²⁰⁵ In its Resolution of 14 September 2021 on LGBTIQ rights in the EU (Resolution 2021),²⁰⁶ the European Parliament called the Commission to take enforcement actions against those Member States which do not comply with the judgement. This means launching an infringement procedure under Article 258 TFEU against a Member State for not fulfilling an obligation under the Treaties.²⁰⁷ An answer on behalf of the Commission on 1.3.2022²⁰⁸ held that no infringement procedure has not yet been initiated. The Commission must also ensure that all Member States comply with the judgment in case *V.M.A v. Stolichna*²⁰⁹ which obligates a Member State to issue an identity document to a child who is a national of that Member State and is minor and to recognize a birth certificate, that has been issued within EU, and that shows that the child has two parents of same sex.

Although properly enforced, both judgments, the *Coman* or the *V.M.A v. Stolichna*, leave open questions for the EU to answer. The former holds that the obligation to recognize same-sex spouse only applies to marriages concluded lawfully in another Member State.²¹⁰ This leaves an open question about whether same-sex spouse in marriage concluded outside EU enjoys the same automatic family reunification and residence right.²¹¹ The same question is relevant for the latter, which only obligates Member States to recognize birth certificates which have been issued in another Member State.²¹² Another problem in the *Coman & Hamilton* judgment is the condition of ‘genuine residence’ according to which a Union citizen can claim, when returning to a Member State he/she is a national, right to family reunification only when the stay in that other Member State has lasted over three months and during that time the family life has been either created or strengthened.²¹³ This puts same-sex couples who do not have a legal opportunity to

²⁰⁵ Kochenov, D.V. & Belavusau, U. (2020) After the celebration: Marriage equality in EU Law post-*Coman* in eight questions and some further thoughts. *Maastricht Journal of European and Comparative Law*, 2020, Vol. 27(5) 549–572, SAGE p. 561

²⁰⁶ Resolution (2021/2679(RSP) *supra nota* 14

²⁰⁷ Falkner, G. (2018) A causal loop? The Commission’s new enforcement approach in the context of non-compliance with EU law even after CJEU judgments, *Journal of European Integration*, 40:6, 769-784. p. 770

²⁰⁸ Answer given by Ms. Dalli on behalf of the European Commission (1 March 2022) *supra nota* 204

²⁰⁹ Case C-490/20, *V.M.A v. Stolichna*

²¹⁰ Tryfonidou, A. (2019) *supra nota* 56, p. 14

²¹¹ *Ibid.*

²¹² European Law Blog, Tryfonidou, A. (2021, December 21) *supra nota* 181

²¹³ Tryfonidou, A. (2019) *supra nota* 56, p. 15

get married in their home Member State and for that reason travel to another in unfavorable position and prevent them from just get married in another Member State without having to live there over three months.²¹⁴ The judgment also leaves it open whether the term ‘spouse’ includes same sex spouse under Family Reunification Directive (Directive 2003/86/EC) from which third country nationals and their family members can derive the right to family reunification.²¹⁵ Another limiting factor of the judgment is that it only obligates recognition in relation to family reunification and residence permit, but it does not require recognition for other legal purposes such as inheritance, pensions or medical care.²¹⁶ This same problem is apparent in the *V.M.A v. Stolichna* ruling as well.²¹⁷ All these open questions should be clarified by the CJEU in its case-law when given an opportunity to do so.

Now when the CJEU has clarified, through the judgements of *V.M.A v. Stolichna* and *Coman & Hamilton*,²¹⁸ that the terms ‘direct descendant’, ‘spouse’, ‘parent’ and ‘primary carer’ in Free Movement Directive include same-sex couples and rainbow families, it should also clarify that term ‘partner’ under Article 3(2)(b) if given a chance to do so. In addition, the CJEU should rule that, when Member States are examining the personal circumstances of the Union citizen and his/her family member in relation to the facilitation of entry and residence under the Article 3 of the Free Movement Directive, the examination should be completed without discrimination on grounds of sexual orientation. It should also ensure, at least to the extent required in ECHR and established by ECtHR case-law,²¹⁹ equal treatment between same-sex and opposite-sex couples in unregistered partnerships regarding non-employment related benefits such as succession of tenancies and health and accident insurance.

4.2 European Union legislation

Even though, CJEU has held in its case-law²²⁰ that a child-parent relationship can be either biological or legal and that the category of ‘direct descendant’ includes both, biological and adopted child of the Union citizen, rainbow families encounter problems with recognition child-

²¹⁴ *Ibid.*

²¹⁵ *Ibid.* pp. 15–16

²¹⁶ Kochenov, D.V. & Belavusau, U. (2020) *supra nota* 205, p. 562-563

²¹⁷ European Law Blog, Tryfonidou, A. (2021, December 21) *supra nota* 181

²¹⁸ Case C-673/16, *Coman & Hamilton*; Case C-490/20, *V.M.A v. Stolichna*

²¹⁹ *Karner v. Austria*, no. 40016/98; *P.B. and J.S. v. Austria*, no. 18984/02

²²⁰ Case C-129/18, *SM v. Entry Clearance Officer*, *supra nota* 177, paragraph 54

parent relationship if the child has been born via adoption or surrogacy. In 2022, the Commission will propose legislation that ensures mutual recognition of parenthood within the Union.²²¹ This comes over five years after the European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions,²²² in which it called the Commission to propose an act of cross-border legal recognition of adoptions carried out within EU. The legal recognition of adoptions within EU would benefit economically both the citizens and public administration as well as ensure better protection of the best interests of the child and rights deriving from the EU citizenship.²²³ The Commission has noted that a legislative proposal for the recognition of adoption orders within EU is a very sensitive subject and would require unanimity in the Council.²²⁴ In general, the Parliament calls, in Resolution 2021, the Commission to guarantee continuity of family links within EU when rainbow families exercise their right freedom of movement, at least to the extent required by ECHR.²²⁵ What comes to surrogacy which is largely prohibited in EU, the ECtHR has given an advisory opinion,²²⁶ in which it held that the recognition of the relationship between non-biological parent and the child does not have to be automatic or to happen by recognizing the birth certificate from abroad in which the legal relationship is stated, but a state may provide another means such as adoption. If EU will follow ECHR scope on this matter, in cases where the child has born via surrogacy, the legal recognition of birth certificates would not become obligatory.

In resolution 2021, the Commission has been demanded to adopt the Equal Treatment Directive first proposed in 2008.²²⁷ The Directive²²⁸ would extend the prohibition of discrimination based on sexual orientation to, inter alia, social protection, social advantages and education which is much broader than the areas of employment, occupation and vocational training now covered by the Directive 2000/78 (Framework Employment Directive).²²⁹ The new directive has been held up by some Member States because it has been seen as overstepping on national competences

²²¹ COM(2020) 698 final *supra nota* 13

²²² Resolution (2015/2086(INL)) *supra nota* 158

²²³ Evas, T. (2016) *supra nota* 148, p. 13

²²⁴ European Commission (10 April 2017) Follow up to the European Parliament resolution of 2 February 2017 on cross border aspects of adoptions, SP(2017)188

²²⁵ Resolution (2021/2679(RSP)) *supra nota* 14

²²⁶ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. 10.4.2019, Request no. P16-2018-001)

²²⁷ Resolution (2021/2679(RSP)) *supra nota* 14

²²⁸ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final - CNS 2008/0140

²²⁹ Howard, E. (2018) *supra nota* 75, p. 4

and according to progress report issued in November 2021, much work is still needed in order to reach the required unanimity among the Member States.²³⁰ The adoption of such legislation is essential in order to fill the gaps in current legislation and to guarantee an equal Union.

The Commission should, by proposal for judicial review under Article 263 TFEU, remove from Article 2(2)(b) of the Free Movement Directive,²³¹ the condition of granting an automatic right to entry and residence to partner of Union citizen in registered partnership, only when the host Member State treat registered partnerships as equivalent to marriage. As we wait for the CJEU to rule on broader definition for the term ‘partner’ in the Article 3(2)(b) of the Free Movement Directive, the Commission should issue a non-binding Communication that would clarify that the term also includes partner of same sex. The Commission should, as requested by Parliament in the Resolution 2021, propose legislation that would recognize the parents mentioned in birth certificate, regardless of their marital status, for all purposes of national law as well as to recognize, again for the purposes of national law, the marriages and registered partnerships formed in another Member States at least to the extend required in case law of ECtHR.²³²

As said in the Strategy, the EU free movement law recognizes same-sex couples and rainbow families right to move and reside freely within the EU and in order to this be a reality for these people, EU must ensure correct application of this law.²³³ According to the Strategy, the Commission will review the guidelines on free movement in 2022 so that they would better correspond to the needs of different types of families, especially rainbow families.²³⁴

²³⁰ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report, Brussels, 23 November 2021, 14046/2

²³¹ OJ L 158, 30.4.2004 *supra nota* 4, Article 2

²³² Resolution (2021/2679(RSP) *supra nota* 14

²³³ *Ibid.*

²³⁴ COM(2020) 698 final *supra nota* 13

CONCLUSION

This thesis aimed to assess the current legal situation of cross-border recognition of same-sex couples and rainbow families within the EU by going through the relevant primary and secondary legislation and by identifying the challenges these people encounter when exercising their right to free movement. It also introduced the case-law of CJEU and ECtHR in relation to same-sex couples and rainbow families. Finally, this thesis proposed how EU could, by amending EU legislation, by ruling in CJEU for these minorities and by enforcing relevant CJEU judgments, solve these challenges and guarantee more equal and inclusive Union.

This thesis concentrates to the questions of what the challenges are, under the current legal situation of cross-border recognition within EU, encountered by same-sex couples and rainbow families when exercising their right to free movement and how the EU could solve these challenges and guarantee that the right to free movement is a reality for these minorities. Due to the lack of EU competence, Member States' national legislation on family law varies widely within the Union. However, the EU has the opportunity and the obligation to intervene in activities that endanger or violate EU law, and thus family law matters with a cross-border implications fall within the EU's competence.

In theory, EU anti-discrimination legislation and legislation on free movement should together guarantee free movement without discrimination on the grounds of sexual orientation, but as we have seen, this does not always work in practice. Based on this research same-sex couples and rainbow families encounter various problems if their relationships or family links are not recognized on the internal borders of the EU. These problems include the non-recognition of relationships and familial links, which could, at worst, lead to family breakdown. Other problems include non-recognition for other legal purposes such as education, pensions, inheritance and medical care after the couple or family has been admitted to the Member State. While non-recognition creates a variety of practical and legal problems, it also creates insecurity and uncertainty for these couples and families. Non-recognition can violate the right to free movement and the EU must therefore act to safeguard this right.

The Free Movement Directive (Directive 2004/38/EC) has been written without reference to same-sex couples or rainbow families and should therefore be clarified. The CJEU has already taken steps in this direction in the cases of *Coman & Hamilton* and *V.M.A v. Stolichna* through which it, inter alia, specified that the term ‘spouse’ under the Article (2)(2)(a) of the Free Movement Directive, includes spouse of same sex and ruled for the recognition of birth certificates of children with same-sex parents within EU. The CJEU should continue ruling for the same-sex couples and rainbow families when given a chance to do so, but these rulings are not meaningful if they are not enforced correctly. The EU must thus ensure the enforcement of the judgments around EU and should begin with these two, already ruled cases. The Commission must also propose legislation for mutual recognition of parenthood and birth certificates as well as to adopt the Equal Treatment Directive first proposed in 2008. The EU should also clarify the terms used in Free Movement Directive, so that it would better correspond to the needs of same-sex couples and rainbow families.

As a concluding remark, the author states that same-sex couples and rainbow families still encounter various challenges under the current legal situation when exercising their right to free movement within EU. These challenges are largely based on that their civil statuses or family links are not recognized in all Member States. EU must, in accordance with its competences, amend its legislation and ensure the judgments of the CJEU are properly enforced in order to ensure an equal and non-discriminatory Union for all.

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