

After Amsterdam:

Sexual Orientation

and the
European
Union

Supported by the
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Federal Government



A Guide



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Chapter 4:

Towards equality in the freedom of movement of persons

by Kees Waaldijk

INTRODUCTION

Without any doubt, migration – or the freedom of movement of persons – is an area in which the Union has competence to enact binding legislation (Articles 3 and 14 EC). This is not only true for “workers from the Member States” (Articles 39 and 40 EC) but also for any other “citizen of the Union” (Articles 17, 18, and 43 EC) and for “nationals of third countries” (Articles 61, 62, and 63 EC). Therefore, migration is a field in which any measure combating sexual orientation discrimination would clearly fall within the scope of Article 13.

Just as free movement of persons belongs to the core business of the EU, restrictions on free movement of persons belong to the hard core of sexual orientation discrimination. Almost all Member States have immigration rules in force that treat same-sex partners less favourably than (married) different-sex partners. Often, these rules do not recognise same-sex partners at all.¹ Similarly, many national immigration rules contain various forms of discrimination on grounds of sex, national origin, health condition or age. Therefore, migration is also a field in which anti-discrimination measures, as provided for in Article 13, are much needed.

However, a binding legislative measure, based on Article 13, prohibiting discrimination on the grounds of sexual orientation (etc.) by the Member States in the area of migration would only solve part of the problem. It is not just the Member States that discriminate against gays and lesbians in their immigration rules, but also the Union itself. In one of the most important regulations, Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, certain immigration rights are made the exclusive privilege of heterosexual spouses. And this exclusion of same-sex (and other unmarried) partners has been copied since 1968 in various other EC rules on free movement.²

Therefore, Article 13 should not only be seen as an additional legal basis for prohibiting discrimination by Member States in this field but also as a persuasive invitation to abolish or amend discriminatory rules in EC law itself. The latter would normally be done through EC legislation, but it can partly also be done by way of judicial interpretation of the relevant regulations and directives. Article 13 should also be seen as a guiding principle for the drafting of measures on immigration policy required by the new Article 63 EC (see below).

Anti-homosexual discrimination in the field of migration takes several forms. In the context of rules on the immigration of foreign partners there are at least four possible categories – more (or easier) immigration rights may be given:

1. **to married (opposite-sex) spouses than to unmarried partners** – this is true for the EC rules and for most national rules; it amounts to indirect sexual orientation discrimination because same-sex partners cannot marry each other, as yet;
2. **to married opposite-sex spouses than to registered same-sex partners** – this will be the case in jurisdictions that do not recognise foreign partnership registrations; such discrimination could be called direct sexual orientation discrimination because the main difference between marriage and registered partnership is that the latter is open to same-sex couples;
3. **to married opposite-sex spouses than to married same-sex spouses** – this form of direct sexual orientation discrimination will only arise after at least one jurisdiction in the world has opened up the institution of marriage for same-sex couples;
4. **to unmarried opposite-sex partners than to unmarried same-sex partners** – this form of direct sexual orientation discrimination, common in the areas of employment and housing, seems rare in the field of immigration.³

To outlaw discriminations of type 1, through litigation or legislation, will probably be rather more difficult, and rather more revolutionary, than to outlaw those of types 2, 3 or 4. Outlawing discrimination of the latter three types would only benefit small groups of people and cause only limited change in some national or European immigration rules. However, such limited change might pave the way for eventually establishing full equality between married heterosexual spouses and unmarried homosexual partners.

There are, however, many other obstacles to the free movement of lesbians and gay men in the European Union; for example, more repressive criminal laws on homosexual acts, a lesser degree of legal recognition of same-sex partners in family and social security law, the non-availability of health insurance and pensions for same-sex partners. All such impediments may

severely limit the possibility and desirability for gays and lesbians to move to another country. Some of these obstacles may be directly challenged under the above-mentioned free movement provisions of the EC Treaty. This complex issue and the scope for using Article 13 to strengthen such challenges, however, will not be discussed here.

The rest of this chapter examines the two main categories covered by European immigration law: European Union citizens on the one hand, and third-country nationals on the other. As regards EU citizens, attention will be focused on the main subcategory: workers from one Member State who are employed in another Member State. Since similar rules apply to other categories of EU citizens moving within the EU (e. g., students, pensioners), the latter will not be discussed separately.

1. EU CITIZENS: WORKERS

A. THE LEGAL SITUATION OF SAME-SEX PARTNERS

The immigration rights of married partners of EU citizen who are exercising their EU freedom of movement are completely governed by EC law. These citizens have the right to be accompanied by their married partner. For workers this is because of Article 10 of Council Regulation 1612/68 on freedom of movement for workers within the Community⁴:

Article 10

- 1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:**
 - (a) his spouse and their descendants who are under the age of 21 years or are dependants;**
 - (b) dependent relatives in the ascending line of the worker and his spouse.**
- 2. Member States shall facilitate the admission of any member of the family not falling within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.**
- 3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States.**

In the *Reed* case, the Court of Justice has held that the term “spouse” in Regulation 1612/68 “refers to a marital relationship *only*”.⁵ It would, therefore, appear that this regulation is of no use to a worker with a same-sex partner. In many cases, the easiest solution would be for them to rely *individually* on the freedom of movement. Then each of them would have an independent right to residence, for example as a worker, self-employed person, student or pensioner. However, sometimes this will not be possible for both, because of a lack of work, skills, means and/or age, or because the partner is not an EU citizen. So the question remains: Could a same-sex partner somehow be considered to be “his spouse” for the purposes of Regulation 1612/68?⁶

If the *Reed* judgment still stands, the only solution for same-sex partners would be to get married. This might soon be possible, if for example the Supreme Court of either Hawaii or Vermont ruled that same-sex marriage is possible. Moreover, the Dutch Parliament is likely to pass a bill to open up marriage for same-sex couples before the end of the year 2000.⁷ The Court of Justice could of course ignore North American developments and restrict the meaning of the word “spouse” to its traditional heterosexual notion. But for the Court to ignore a same-sex marriage validly contracted in the Netherlands would be highly problematic, because family law is still clearly the domain of the Member States. Therefore, we need to assume that the Court will respect the validity of such a marriage. The same-sex spouse would then be a “spouse” for the purposes of Regulation 1612/68, and there would be no discrimination of type 3 (see above). Such an outcome could be promoted by the inclusion of a non-discrimination clause in the regulation.

However, such a broadening of the notion of “spouse” would not be enough. At the very least, registered partners should also be brought under this term – in order to end discrimination of type 2. *Registered Partnership*, with most consequences of marriage attached to it, has been introduced in Denmark, Sweden, the Netherlands and, outside the EU, in Norway, Iceland, and Greenland. Similar legislation is being prepared in France, Belgium, Finland, Spain, Germany, Luxembourg, Portugal and, outside the EU, in the Czech Republic, Switzerland and Slovenia. This development in so many countries cannot be ignored at EU level. The great legal similarities between marriage and registered partnership would make it very easy for the Court of Justice to include registered partners in the term “spouse”.⁸ The judgment of the Court expected in the case of *D. and Sweden v. Council*⁹ will shed some light on the willingness of the Court to take that step. There is no need to wait for an immigration test case about the issue: Article 13 provides a powerful argument to amend Regulation 1612/68 so as to put registered partners in exactly the same position as married heterosexual partners.

At present unmarried (and unregistered) partners fall outside the notion of “spouse”. That was the central outcome of the *Reed* case. However, that case was about opposite-sex cohabitantes and not about same-sex cohabitantes who do not have the option of getting married. Furthermore,

it was decided in 1986, since when a lot has changed, both socially and in law.¹⁰ In its *Reed* judgment the Court of Justice itself said: “Regulation No 1612/68 has general application, is binding in its entirety and is directly applicable in all Member States. It follows that an interpretation given by the Court to a provision of that regulation has effects in all of the Member States, and that any interpretation of a legal term on the basis of social developments must take into account the situation in the whole community, not merely in one Member State.” The Court then concluded that there was no indication “of a general social development which would justify a broad construction”.¹¹ Given the subsequent legal developments in most of the Member States, these words can now be read with some hope. However, in the light of its judgment in the *Grant* case (see Chapter 2), it is far from certain that the Court could be persuaded to overturn *Reed*. A legislative amendment to Regulation 1612/68 seems the more secure road to end discrimination of types 1 and 4.

A starting point for the inclusion of cohabitants in Regulation 1612/68 can be found in Article 10(2) which provides that Member States shall “facilitate the admission of any member of the family not falling within the provisions of paragraph 1 if dependent on the worker (...) or living under his roof in the country whence he comes”. The difficulty is in two f-words in this provision. The use of the word “facilitate” indicates that such family members do not have a genuine right to immigration; there is only a vague duty for the Member States to facilitate family reunion. And the use of the word “family” makes it doubtful whether the provision covers cohabitants, especially same-sex cohabitants. It has been argued that same-sex partners should indeed be counted as “member of the family”.¹² This would be in line with the gradually widening interpretation the European Court of Human Rights is giving to the notion of “family life” in Article 8 of the European Convention on Human Rights.¹³ It is also evident from the wording of Article 10(1) that Article 10(2) deals with “family” outside the already broad circle of spouses, parents, children, grandparents and grandchildren. It would therefore be in line with the principle of Article 13 EC to interpret this provision as at least also covering cohabiting partners of either sex. Here too, a legislative amendment to that effect would be the safest road to equality. Simultaneously, the duty to facilitate should be converted into a real right. The additional conditions of being “dependent” on the worker or of living under the same roof seem more than sufficient to stop any improper use of such a right.

B. PROPOSED CHANGES TO THE LAW

The Commission has accepted that Regulation 1612/68, including its provisions on family members, needs to be amended. It submitted a proposal to this effect to the Council on 14 October 1998.¹⁴ The proposal, based on Articles 40 and 251 EC, would only require a qualified majority in the Council.

The new text proposed for the first paragraph of Article 10 is as follows:

1. **The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:**
 - (a) **his spouse or any person corresponding to a spouse under the legislation of the host Member State, and their descendants;**
 - (b) **relatives in the ascending line of the worker and his spouse;**
 - (c) **any other member of the family of the worker or that of his spouse who is dependent on the worker or is living under his roof in the Member State whence he comes.**

The Commission also proposed that a new Article 1a be included in Regulation 1612/68:

Article 1a

Within the scope of this Regulation, all discrimination on grounds of sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation shall be prohibited.

With these proposed amendments some steps would indeed be taken on the road to fuller equality for same-sex partners of EU workers. Although the proposal is not directly based on Article 13, the Commission apparently also sees it as a contribution to the implementation of that article. However, the proposal is too vague to guarantee an end to *all* discrimination on the ground of sexual orientation.

As regards discrimination of type 4, the proposed anti-discrimination provision in Article 1a should be sufficient to stop any Member State from giving lesser immigration rights to unmarried same-sex partners than to unmarried opposite-sex partners. It follows from the *Grant* judgment that the Court of Justice labels such a distinction as discrimination on the grounds of sexual orientation. The proposed Article 1a would make it clear that Member States are forbidden to make such a distinction relating to the free movement of workers and their partners.

It would probably also be sufficient to deal with discrimination of type 3, between married same-sex spouses and opposite-sex spouses.

However, with regard to discrimination of type 2, between registered partners and married spouses, the proposal is not specific enough. The words “any person corresponding to a spouse under the legislation of the host Member State” suggest that registered partners from one Member State only need to be given the same immigration rights as married spouses in another.

er Member State with registered partnership legislation. That would of course limit the free movement of registered partners of EU workers to a still small number of Member States. This can be solved by adding the words “or of the Member State whence he comes” or by deleting the words “under the legislation of the host Member State”. A first effort to amend the proposal to that effect was narrowly defeated in the Parliament on 4 May 1999.¹⁵

Also with regard to discrimination of type 1, between unmarried cohabitees and married spouses, the proposal is not specific enough. It continues using the word “family”, which the national authorities might continue to interpret as excluding unmarried partners (of the same-sex). It is not certain that the Court would be prepared to interpret the word “family” in line with the anti-discrimination provision in the proposed new Article 1a. Therefore a clause should be added, providing that the expression “member of the family” in Article 10(1)(c) also covers the cohabiting partner of either sex.

The good thing about the proposed text is, of course, that it gives a genuine right to other family members – and not just an obligation for the Member States to “facilitate”. However, the Parliament has considerably watered down this proposal by approving on 4 May 1999 an amendment taking out the words “or is living under his roof in the Member State whence he comes”.¹⁶

2. THIRD-COUNTRY NATIONALS

No legal binding EC rules exist, as yet, to regulate the immigration of foreign partners of non-EU citizens. The new Article 63(3), however, provides that within five years of the entry into force of the Amsterdam Treaty, EC rules must be adopted with regard to several aspects of immigration law, including family reunion. Thus, immigration policy has been transferred from the so-called third pillar of the EU to the first pillar, the EC. Now both the Parliament and the Court of Justice will have a role to play in this field.

The drafting of such rules is likely to be inspired by the non-binding resolution on the “Harmonisation of national policies for family reunification”, adopted by the immigration ministers of the Member States on 1 June 1993¹⁷, and by the proposal of the Commission for a “Convention on rules for the admission of third-country nationals to the Member States of the European Union”, submitted to the Council on 30 July 1997.¹⁸

The 1993 resolution contains seventeen “Principles governing Member States’ Policies on Family Reunification”. These principles are not legally binding, but the ministers “agreed to seek to ensure by 1 January 1995 that their national legislation is in conformity with these principles” (paragraph 5 of the preamble). The principles only apply to “family members of non-EC nationals who are lawfully resident within the territory of a Member State on a basis which affords them an expectation of permanent or long-term residence” (principle 1). According to principle 2, the Member States will “normally grant admission” to “the resident’s spouse (that is, a person bound to him or her in a marriage recognized by the host Member State)” and to their children. As far as other “family members” are concerned, the Member States only “reserve the possibility” of permitting their entry and stay “for compelling reasons which justify the presence of the person concerned” (principle 10).

The 1997 Commission proposal for a convention is even more explicit in its exclusion of unmarried partners. According to Article 26(1) the “spouse” of a legally resident third-country national will only be admitted if “the marriage is compatible with the fundamental principles of the law of the Member State”. And of other family members, only dependent descendants and ascendants will be considered for family reunification (Article 26(3)).

Evidently, the non-discrimination principle of Article 13 has so far been absent in the drafting of EU texts on family reunification. Article 13 may now have an important role to play in guaranteeing that the EC immigration rules to be adopted on the basis of Article 63 EC will recognise the full equality of married, registered, unmarried, opposite-sex and same-sex partners of third-country nationals. Simultaneously, Article 12 EC, prohibiting discrimination on the basis of nationality, may help to guarantee that there will be no discrimination between EU citizens and third-country nationals as regards their family reunification rights.¹⁹

A different but related issue is the recognition of refugees. Article 63(1) EC also requires the adoption, within five years after 1 May 1999, of EC rules with “minimum standards with respect to the qualification of nationals of third countries as refugees”. On 10 February 1999, the Parliament passed a “Resolution on the harmonisation of forms of protection complementing refugee status in the European Union” (A4-0450/98). In paragraph 14 the Parliament “proposes that complementary protection should apply (...) to persons who have fled their country of origin, and/or cannot return because they have justified fears of being (...) subjected to (...) violence on account of their sexual orientation (...)”. Although it may be difficult to classify the non-admission of a person with a well-founded fear of being persecuted for reasons of homosexuality as *direct* discrimination on the basis of sexual orientation, Article 13 can be used as a powerful argument that such a person should indeed qualify as a refugee.²⁰

In conclusion it is submitted that Article 13 should serve both as a legal basis and as a political impetus to broaden and strengthen one of the core elements of EC law: the free movement of

persons. It should guarantee this freedom equally to EU citizens and third-country nationals, whatever their civil status or sexual orientation, and to their partners, whatever their nationality or sex.

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¹ See K. Waaldijk: "The Legal Situation in the Member States", in K. Waaldijk and A. Clapham (eds.): *Homosexuality: A European Community Issue*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1993, pp. 71-130; see also the regularly updated World Legal Survey of ILGA at <http://www.ilga.org>.

² See directives 73/148, 75/34, 90/364, 90/365, 90/366, 93/96.

³ However, it applied in the United Kingdom from 1985 until 1994.

⁴ Official Journal [1968] L 257/2.

⁵ C-59/85, *Netherlands v. Ann Florence Reed* [1986] ECR 1283, para. 15, emphasis added.

⁶ Unfortunately, the use of male pronouns to indicate both men and women is excessively common in EC rules.

⁷ Bill 26672, introduced in Parliament on 8 July 1999; see translation and summary of it in *Euro-Letter* of August 1999 and updates on this draft legislation at www.coc.nl/index.html?file=marriage.

⁸ K. Waaldijk: "Free Movement of Same-Sex Partners", *Maastricht Journal of European and Comparative Law*, 3/1996, pp. 271-285; and K. Waaldijk: "La libre circulation des partenaires de même sexe", in D. Borrillo (ed.): *Homosexualités et Droit*, Paris: Presses Universitaires de France 1998, pp. 210-230.

⁹ D. is employed by the Council and claims spousal benefits for his registered partner. In this case the Court of First Instance, in its judgment of 28 January 1999 (T-264/97) refused, in my opinion erroneously, to respect Swedish family law in the field of EU staff law.

- ¹⁰ Since then, it has been repeatedly suggested that unmarried/unregistered cohabitantes should also be brought under the term "spouse", see further: H. C. Taschner: "Free movement of students, retired persons and other European citizens", in H. G. Schermers et al. (eds.): *Free Movement of Persons in Europe*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1993, pp. 427-436; H. U. Jessurun d'Oliveira: "Lesbians and Gays and the Freedom of Movement of Persons", in K. Waaldijk and A. Clapham, above note 1, pp. 289-316.
- ¹¹ Paragraphs 12, 13 and 15 of the judgment of 17 April 1986.
- ¹² See further:
M. Supperstone and D. O'Dempsey: "Immigration: The Law and Practice", London: Longman 1994;
A. Clapham and J. H. H. Weiler: "Lesbians and Gay Men in the European Community Legal Order", in K. Waaldijk and A. Clapham, above note 1, pp. 7-69;
N. Blake: "Family Life in Community Law: The Limits of Freedom and Dignity", in E. Guild (ed.): *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union*, The Hague/Boston/London: Kluwer Law International 1999, pp. 7-17.
- ¹³ See for example the ECHR judgment of 22 April 1997 in the case *X, Y and Z v. the United Kingdom*.
- ¹⁴ COM(1998) 394 final – 98/0229(COD), adopted by the Commission on 22 July 1998; Official Journal [1998] C 344/9.
- ¹⁵ Amendment 6 to the *Hermange Report* of the European Parliament: A4-0252/99.
- ¹⁶ Amendment 7 to the *Hermange Report* of the European Parliament: A4-0252/99.
- ¹⁷ SN 2828/1/93 WGI 1497 REV 1; for the full text and a commentary see: E. Guild: "The Developing Immigration and Asylum Policies of the European Union", The Hague/Boston/London: Kluwer Law International 1996.
- ¹⁸ COM(97) 387 final – 97/0227 (CNS), Official Journal [1997] C 337/9; for a commentary see: S. Peers: "Raising Minimum Standards, or Racing for the Bottom? The Commission's Proposed Migration Convention", in E. Guild, above note 12, pp. 149-166.
- ¹⁹ See M. Bell: "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?", *Maastricht Journal of European and Comparative Law*, 1/1999, pp. 5-28.
- ²⁰ See A. Tanca: "European Citizenship and the Rights of Lesbians and Gay Men" in K. Waaldijk and A. Clapham, above note 1, pp. 267-288.



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The Treaty of Amsterdam,

which came into force on 1 May 1999, marks a significant milestone for lesbians and gay men in the European Union.

The changes introduced by the Treaty include a new clause, Article 13, which covers discrimination on the grounds of sexual orientation, together with sex, racial or ethnic origin, religion, belief, disability and age. This is the first time that any express reference to discrimination on grounds other than sex or nationality has appeared in the Treaties. It follows extensive campaigning by non-governmental organisations, including ILGA-Europe.

Article 13 ends any doubt about whether the Community has the legal competence to adopt legislation and policies to address discrimination on the grounds listed within it. The debate is now about what action can and should be taken. But what does Article 13 mean? What are the implications of the new Treaty? What opportunities does it offer for concrete action on discrimination?

ILGA-Europe has produced this **guide** as a contribution to that debate and to promoting wider participation in it.