Chapter 9
EU

9.1. Constitutional framework[1]

9.1.1. Relevant Charter rights

Several Charter rights are relevant in the context of the present case study. Many of them have been briefly introduced in Chapter 3, namely the right to private and family life (Article 7 CFR); the right to found a family (Article 9 CFR); the prohibition of discrimination (Article 21 CFR); the rights of the child (Article 24 CFR); the legal economic and social protection of the family (Article 33 CFR) and the right to free movement (Article 45 CFR).

Article 9 of the Charter is of particular relevance for the present case study, because it provides also for a right to marry.[2] The Article reads:

> 'The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

This Article greatly resembles Article 12 ECHR, and equally refers to national laws. The reference to 'men and women' has been taken out, however, rendering the provision gender-neutral.[3] As a result Article 9 CFR does not seem to stand in the way of granting same-sex couples access to marriage, but the wording of the Article does not require so either.[4] The scope of this Article is also broader in the sense that it does not focus on marriage exclusively, but also covers other forms of legal recognition of relationships. The Explanations to the Charter explain in this regard:

> 'This Article is based on Article 12 of the ECHR […]. The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right

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1 The present chapter – particularly its section 9.6 – is based on J. Rijpma and N. Koffeman,'Free Movement Rights for Same-Sex Couples Under EU Law; What role to Play for the CJEU? in: D. Gallo et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin, Springer 2014) pp. 455–491.

2 On the connection between the right to marry and the right to found a family in this Article, see ch. 3, section 3.1.

3 EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, p. 98, www.ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, visited June 2014.

4 *Idem*, p. 102.

is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.'[5]

There has not to date been any CJEU judgment in which this Charter Article has been referred to, safe interpreted.[6]

9.1.2. Relevant EU competences

The EU has no competence in the field of civil status or any related family law matters as such. For instance, there is no EU marriage institute and there are no EU rules on parental rights for same-sex couples. These concern matters where the Member States have deliberately refrained from attributing any competences to the Union.[7] Hence, in respect of legal recognition of same-sex couples, the EU cannot set, and therefore has never set, any binding Union standards, and this is not likely to change in the near future. Civil status is nonetheless relevant in some areas of EU law, where obviously the EU does have competence. For instance, references to civil status have been made in the EU Staff Regulations as well as under various EU non-discrimination instruments in the field of employment. Particularly in situations where same-sex couples have been concerned, such references have raised questions as to their interpretation (see sections 9.2 and 9.3 respectively).

Several of the EU's existing competences pertain to the present case study. The EU's competence to adopt equal treatment law and its application in respect of LGBT rights is discussed in more detail in section 9.3 below. Another important competence concerns the free movement of persons. The application of this freedom in the context of the present case study is extensively set out in section 9.6. The EU's competence to adopt measures relating to family law having cross-border implications (Article 81(3) TFEU), has been set out in Case Study I (see Chapter 3, section 3.1.3.3), and will therefore not be discussed separately here. Private International Law instruments that have been adopted on this legal basis, or that may potentially be adopted in the future, and that are relevant or may prove to be so for the present case study are discussed in section 9.7 below.

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5 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

6 This research was concluded on 31 July 2014. The provision has only been referred to by a few Advocate Generals in Opinions, for instance: Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:113, Opinion of AG Mischo and Case C-147/08 *Römer* [2011] ECR I-3591, ECLI:EU:C:2010:425, Opinion of AG Jääskinen.

7 In the words of Lenaerts '[…] Member States enjoy absolute discretion over the definition and legal effects of marriage, registered partnership, divorce, and other domestic issues […]'. K. Lenaerts, 'Federalism and the rule of law: perspectives from the European Court of Justice', 33 *Fordham International Law Journal* 2009–2010, p. 1338 at p. 1359.

9.2. The EU Staff Regulations and same-sex relationships

Under the present EU Staff Regulations the rights of staff members in same-sex relationships are fully equal to those of staff members in different-sex relationships. This has not, however, always been the case. As will be discussed hereafter, the CJEU exercised considerable judicial restraint when it was asked if certain terms in the Regulations, such as 'marriage', included 'non-traditional' unions, such as same-sex registered partnerships. As further explained in section 9.6.2.1 below, this line of case law has often been referred to in academia when discussing the definition of the term 'spouse' under the Free Movement Directive.

The *Dumay* case (1993) concerned an application for a widow's pension by the widow of Mr. Dumay, a Community Official who died in 1991.[8] While Mr. and Mrs. Dumay had cohabited for many years, they married in 1989 only. The European Commissions' Directorate General for Personnel and Administration rejected Mrs. Dumay's application, informing her that because they were married for less than five years, she did not qualify for a widow's pension. The CJEU, 'while aware of the social context' in which the action had been brought, did not consider that it was competent '[…] to widen the judicial interpretation of the specific terms used in the Staff Regulations in order to bring cohabitation' – *in casu* by a different-sex couple – 'within the definition of "marriage", or "cohabitee" within that of "husband" or "wife".'[9] The Court took account of the fact that any extension of those concepts would have 'serious legal and financial consequences' for the then Communities and for third parties.[10] It ruled that 'a change on that scale' could only be made by the Community legislature if it considered such a change to be necessary.[11] The Court did not consider it 'appropriate' in the case at hand to refer to provisions of national law for the purpose of interpreting the Community provisions in question.[12]

The subsequent case of *D. and Sweden* v. *Council* (2001),[13] concerned a same-sex couple and *de facto* had the same outcome as *Dumay*. A Swedish national, referred to as '*D.*', was working for the Council, and had concluded a registered partnership with another Swedish national of the same sex under Swedish law. *D.* applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations for EC Officials. The Council rejected his application on

8 Case T-65/92 *Dumay* [1993] ECR II-597, ECLI:EU:T:1993:47.

9 *Idem*, para. 30. The Court referred to its preceding *Reed* judgment. Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157.

10 Such financial considerations do not come back explicitly in later case law on the matter, although Reid and Caracciolo suggested it as a plausible explanation for the restrictive approach of the CJEU in Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304 (see below). E. Reid and E. Caracciolo Di Torella, 'The changing shape of the "European family" and fundamental rights', 27 *European Law Review* (2002) p. 80 at p. 86.

11 Case T-65/92 *Dumay* [1993] ECR II-597, ECLI:EU:T:1993:47, para. 30.

12 *Idem*, para. 31.

13 Joined Cases C-122/99 P & C-125/99 P *D. and Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304.

the ground that the provisions of the Staff Regulations could not be construed as allowing a registered partnership to be treated as being equivalent to marriage.[14] *D.* subsequently applied to the Court of First Instance (now General Court).[15] This Court dismissed his appeal, observing, *inter alia*, that for the purposes of the Staff Regulations the concept of marriage was to be understood as meaning '[…] a relationship based on civil marriage within the traditional meaning of the term'.[16]

In the subsequent appeal proceedings before the CJEU, *D.* and the Kingdom of Sweden, supported by Denmark and the Netherlands,[17] asserted that, since civil status was a matter which came within the exclusive competence of the Member States, terms such as 'married official' or 'spouse' in the Staff Regulations were to be interpreted by reference to the law of the Member States and not to be given an independent definition. The parties argued that where a Member State had legislated to give legal status to an arrangement such as a registered partnership, which was to be treated in respect of the rights and duties it comprised as being equivalent to marriage, the same treatment was to be accorded in the application of the Staff Regulations.[18] The Council, on the other hand, claimed that the wording of the Staff Regulations was unambiguous. To treat a registered partnership as being equivalent to marriage for the purposes of applying the Staff Regulations was to extend the scope of the benefits concerned, which, the Council alleged, required a prior assessment of its legal and budgetary consequences and 'a decision on the part of the Community legislature rather than a judicial interpretation of the existing rules.'[19] In the words of Bogdan '[…] the issue boiled down to the question whether under the Staff Regulations D. was to be considered married or not'.[20]

Basing himself on *Reed* (as discussed in section 9.6.1 below), Advocate General Mischo submitted that where the term 'spouse', or analogous terms such as 'marriage' or 'married person', were used in an EU Regulation, they were to be given an independent interpretation.[21] He held there to be no indication in the case

14 *Idem*, para. 5.

15 By the Treaty of Lisbon (2009) the Court of First Instance (CFI) was renamed to 'the General Court'.

16 Case T-264/97 *D.* v. *Council* [1999] ECR FP-I-A-00001, ECLI:EU:T:1999:13, para. 26–27, as paraphrased in para. 11 of the CJEU judgment. For a critical discussion of the judgment of the Court of First Instance, see C. Denys, 'Homosexuality: a non-issue in Community law?', 24 *European Law Review* (1999) p. 419.

17 As Tridimas put it: '[…] this was not a one-man legal struggle.' He noted that by contrast, no government intervened in support of the Council. T. Tridimas, *The General Principles of EU law*, 2nd edn. (Oxford, Oxford University Press 2006) p. 108.

18 See Joined Cases C-122/99 P & C-125/99 P *D. and Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, para. 29.

19 *Idem*, para. 31. In this connection, the Council furthermore pointed out that at the time when Regulation 781/98 was adopted a request by the Kingdom of Sweden for registered partnership to be treated as being equivalent to marriage had been rejected.

20 M. Bogdan, 'Registered Partnerships and EC law', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex couples in Europe* (Antwerp, Intersentia 2003) p. 171 at p. 172.

21 'An independent interpretation' was defined by AG Mischo as '[…] an interpretation which takes into account the situation in the whole Community, and not merely in one Member State.' Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council of the European Union* [2001] ECR I-4319, ECLI:EU:C:2001:113, Opinion of AG Mischo, para. 43.

at hand of a general social development allowing a registered partnership between two people of the same sex to be included within the term 'marriage'. He therefore concluded that the definition of 'marriage' included only 'traditional' marriage between two people of a different sex.[22] On the basis of the CJEU's case law, Mischo furthermore found that an official who had entered into a registered partnership was not in a situation comparable to that of a married official. He therefore concluded that the general principle of equal treatment did not require that the former was treated in the same way as the latter.[23]

In line with the Advocate General's Opinion,[24] the CJEU dismissed the appeals in their entirety. It ruled that 'married official' within the meaning of the Staff Regulations could not be interpreted as covering an official who had contracted a registered partnership.[25] It held it to be 'not in question' that, according to the definition generally accepted by the Member States, the term 'marriage' meant a union between two persons of a different sex.[26] The CJEU observed that in the preceding decade 'an increasing number of Member States' had introduced, '[…] alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties', were 'the same as or comparable to those of marriage'.[27] The Court also noted, however, that such arrangements were regarded in the Member States concerned as being distinct from marriage.[28] The CJEU therefore found that as 'Community judicature' it could not interpret the Staff Regulations in such a way that 'legal situations distinct from marriage' were treated in the same way as marriage.[29] The Court held it to be for the legislature instead to adopt measures in this matter. It noted, however, that the legislature had at that stage ruled out '[…] any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits reserved under the Staff Regulations for married officials'.[30]

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22 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council of the European Union* [2001] ECR I-4319, ECLI:EU:C:2001:113, Opinion of AG Mischo, para. 48.

23 *Idem,* para. 89.

24 See E. Ellis, 'Case note to Joined Cases C-122 & 125/99P, *D. and Sweden* v. *Council*. Judgment of the European Court of Justice of 31 May 2001, Full Court,' 39 *CMLRev* (2002) p. 151 at p. 152.

25 See R. Wintemute, 'Conclusion', in: R. Wintemute and M. Andenæs (eds.), *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law* (Oxford, Hart Publishing 2001) p. 759, at p. 767.

26 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, para. 34.

27 *Idem*, para. 35.

28 *Idem*, para. 36.

29 In the words of Bonini-Baraldi the *ratio decidendi* of the judgment lied in the assessment of the (dis)similiarity between registered partnership and marriage. M. Bonini-Baraldi, 'The Employment Equality Directive and other aspects of European Law', in: C. Waaldijk and M. Bonini-Baraldi, *Sexual orientation discrimination in the European Union, National laws and the Employment Equality Directive* (The Hague, TMC Asser Press 2006) p. 5 at p. 22.

30 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, para. 38.

This part of the judgment received much attention in legal academia. Ellis criticised that the Court had '[…] strayed into the dangerous territory of setting out what it regarded as the essential component of a "marriage" for the purposes of EU law, that is to say partners of opposite sex.'[31] According to Bogdan the reasoning of the Court amounted '[…] in fact, to an autonomous interpretation of the concept of marriage'. He also noted however, that such interpretation was 'not really independent' as it was 'based on the legal systems of the totality of Member States'.[32] The author also warned that one had to understand that the Court '[…] did not feel free to experiment by going beyond the views prevailing in the totality of Member States at that time'.[33] Others were less understanding in this respect.[34] Reid and Caracciolo Di Torella held that the Court's ruling did not reflect the social reality that existed at the time.[35] They furthermore pointed out that in *D. and Sweden* v. *Council*, a European notion was used to remove protection offered by the Member State,[36] and argued that the Court should have recognised the '[…] principle of respect throughout the Community for the civil status enjoyed by a national in their own Member State', as was also claimed by *D.*[37] The authors acknowledged that this would have resulted in 'some discrimination between the different Member States', but they held such disparity in treatment '[…] (unfortunately) a necessary consequence of the need to respect national choices.'[38]

Tridimas observed that the judgment implied that the Court would be '[…] prepared to equate same sex relations with marriage if there was a sufficient degree of political and social consensus at the national level and this had crystallised in the laws of the Member States'. The author posed the question of what precise degree of support from the laws of the Member States would be required for the Court to take that step of equation.[39] Lenaerts underlined that *D. and Sweden* v. *Council* '[…] dealt with a

31 Ellis 2002, *supra* n. 24, at p. 155.

32 Bogdan 2003, *supra* n. 20, at p. 173.

33 *Idem*. Ellis also found it '[…] wholly understandable that the Court concluded that the extension of the law to protect homosexuals was a step for the legislature rather than the judiciary.' She added '[i]ndeed' one has only to think of the criticism which the Court has attracted for its "activism" in far less controversial fields in the past to realize that this was a prudent course to take.' Ellis 2002, *supra* n. 24, at p. 156.

34 Reid and Caracciolo Di Torella held that the CJEU's approach in this case was '[…] in sharp contrast with the activist stand that the Court has taken on many occasions.' They gave the example of the CJEU's definitions of the concepts of indirect effect or state liability. Reid and Caracciolo Di Torella 2002, *supra* n. 10, at p. 86 and footnote 37.

35 *Idem*, p. 89.

36 *Idem*, p. 82.

37 *D.* had also claimed that because the decision treated his situation as being equivalent to that of an unmarried official, his right as a national of a Member State to have his civil status respected throughout the Community (also referred to by the applicant as 'the principle of the "integrity of a person's status"') had been infringed (see para. 42 of the judgment). As Reid and Caracciolo Di Torella observed, the CJEU did not challenge the existence of this principle, but side-stepped it, by holding (in para. 43) that '[…] in applying to the appellant a provision of the Staff Regulations concerning an allowance, the competent institution was not taking a decision affecting his situation with regard to his civil status.' Reid and Caracciolo Di Torella 2002, *supra* n. 10, at p. 85. Later on (at p. 90) the authors speak of 'the principle of the unicity of legal status'.

38 Reid and Caracciolo Di Torella 2002, *supra* n. 10, at p. 87.

39 Tridimas 2006, *supra* n. 17, at p. 108.

common definition of marriage in a field of exclusive competence of the EU' and that 'the case involved questions of statutory interpretation alone'.[40] The author warned that the ruling of the CJEU in *D. and Sweden* v. *Council* could not be extended without reservation 'to the mobility of same-sex married couples', as this judgment '[…] did not examine the alterations in the civil status of same-sex couples resulting from free movement' (on this point see also section 9.6.2 below).[41]

As regards *D.*'s claim that the principle of equal treatment of officials irrespective of their sexual orientation had been infringed, the CJEU held it to be 'clear' that it was not the sex of the partner which determined whether the household allowance was granted, 'but the legal nature of the ties between the official and the partner.'[42] This finding – by some referred to as a 'faulty reasoning'[43] – has been criticised for not addressing the claim that the requirement of marriage was indirectly discriminatory on grounds of sexual orientation, insofar as same-sex couples had no access to marriage.[44] The Court held, however, that the general principle of equal treatment was not violated, as – given the great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union in the 'Community as a whole' – the situation of an official who had registered a partnership between persons of the same sex could not be considered to be comparable to that of a married official.[45]

The CJEU held, furthermore, that the contested decision was 'not […] on any view, capable of constituting interference' in private and family life within the meaning of Article 8 ECHR.[46] While AG Mischo had also examined the case under Article 9 of the EU Charter of Fundamental Rights – which at that time was recently adopted, but still legally non-binding – the CJEU remained silent on this point.[47] *D.*'s sixth argument – that by depriving partners registered under the legislation in force in some Member States of the rights associated with their status under national law, a decision such as the contested decision constituted discrimination on grounds of nationality and at the same time an obstacle to the freedom of movement for

40 Lenaerts 2009–2010, *supra* n. 7, at p. 1358.

41 *Idem*, p. 1358, referring (in footnote 96) to H. Toner, *Partnership Rights, Free Movement and EU Law*, Hart Publishing: Oxford 2004, p. 187.

42 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, para. 47.

43 Wintemute 2001, *supra* n. 25, at pp. 767–769.

44 Tridimas 2006, *supra* n. 17, at p. 108. Bogdan called this line of reasoning 'hard to follow'. Bogdan 2003, *supra* n. 20, at p. 173.

45 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, paras. 50–51.

46 *Idem*, paras. 59–60. The Court considered: '[…] refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration.' See also Wintemute 2001, *supra* n. 25, at pp. 767–769.

47 See Reid and Caracciolo Di Torella 2002, *supra* n. 10, at p. 80. The authors criticised (on p. 83) the fact that the Advocate General omitted to refer to the prohibition of discrimination in Art. 21 of the Charter. They furthermore (on p. 89) suggested several possible explanations for the silence of the Court on this point, all reflecting 'the political sensitivity of the Court'.

workers – was declared inadmissible as this plea was introduced for the first time at the appeal stage. Bogdan considered it 'regrettable' that this argument was not examined on the content, as he claimed there to be 'an obvious risk' that registered partners would refrain from moving from one Member State to another if their status would not be accepted there (on this issue, see also section 9.6.3 below).[48]

A couple of years after the *D.* v. *Council* judgment, the EU Staff Regulations were amended to the extent that from then on the term 'spouse' was interpreted as including same-sex spouses.[49] The amendment further provided for an extension of entitlement to the household allowance to officials registered as stable non-marital partners, including those of the same sex.[50] To qualify as stable non-marital partners, the couple must produce a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners.[51] Given that, for example, the German registered partnership is also open to couples with no link to the German jurisdiction, it is submitted that in theory all EU officials and their same-sex partners – including those from countries which do not provide for any form of legal recognition of their relationship – can qualify as 'non-marital partners' and are thus entitled to the household allowance on the same footing as different-sex married officials. If the partners have practical and effective access to legal marriage in an EU Member State, they cannot qualify as non-marital partners for the purposes of the Staff Regulations.[52] This presumably holds for most – if not all – different-sex couples. For same-sex couples, however, often no marriage alternative is open.[53]

In *Roodhuijzen* (2009) the General Court gave an autonomous interpretation of the term 'non-marital partnership' within the meaning of the revised Staff Regulations, holding that it implied on the one hand, a union between two persons

48 Bogdan 2003, *supra* n. 20, at p. 173.

49 Accordingly a case similar to *D*, was dismissed. Order of the Court of First Instance of 3 April 2003, Case T-258/02 *Hendrikus Boukes* v. *European Parliament* [2003] OJ C171/27.

50 Council Regulation 723/2004/EC, Euratom of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities [2004] OJ L124/1, p. 37, annex I, para. 97. The present Staff Regulations can be found on www.ec.europa.eu/civil_service/docs/toc100_en.pdf, visited June 2014.

51 Art. 1d (77)(96)(1) of the Staff Regulations juncto Art. 1(2)(c)(i) of Annex VII to the Staff Regulations.

52 Art. 1d (77)(96)(1) of the Staff Regulations juncto Art. 1(2)(c)(iv) of Annex VII to the Staff Regulations. A 2010 staff case concerned an EU official with both Belgian and Moroccan nationality who was cohabiting in Belgium with a same-sex partner. The couple was refused the household allowance on the ground, that they did not satisfy the condition laid down in Art. 1(2)(c)(iv) of Annex VII to the Staff Regulations, since they had access to legal marriage in Belgium. The Civil Service Tribunal annulled the contested decisions, holding that the applicant's access to marriage in Belgium was not 'practical and effective', as he risked persecution on grounds of his homosexuality in Morocco. Case F-86/09 *W* v. *Commission* [2010] ECR 0000, ECLI:EU:F:2010:125.

53 If any of the EU Member States would give same-sex couples access to marriage, irrespective of their nationality or their habitual residence, all EU officials in a same-sex relationship would have access to marriage in a Member State and consequently none could qualify as 'non-marital partners'. However, since all States have made access to marriage dependent upon nationality and/or habitual residence, this does not hold.

and, on the other hand, certain formal aspects.[54] The Court noted that the concept of 'non-marital partnership' in the Staff Regulations had 'a certain resemblance to that of marriage',[55] but held that it could not be interpreted '[…] as covering solely partnerships exclusively designed, under national law, to have effects similar to those of a marriage.'[56] Evidence of cohabitation characterised by a certain stability was required by the Staff Regulations, but the partners were not required to be bound by specific reciprocal rights and obligations. The General Court rejected the Commission's submission that earlier case law confirmed that a term like 'non-marital partnership' could not be given an autonomous interpretation, as the civil status of persons fell within the exclusive competence of the Member States.[57] It called to mind that in *D.* v. *Council*, the CJEU had interpreted the concept of marriage 'as being in principle a Community concept'[58] and held that any such autonomous interpretation did not affect the exclusive competence of Member States with regard to the civil status of persons and the determination of the benefits deriving therefrom.[59]

9.3. EU NON-DISCRIMINATION LAW AND SAME-SEX RELATIONSHIPS

Over the years, in accordance with social developments, sexual orientation has gradually gained a more prominent position in EU non-discrimination law. This section sets out this development, both in legislation and case law. It also provides an outlook on relevant possible future developments in this realm of EU law.

Particularly at the time when sexual orientation was not yet included as a prohibited ground in the Treaties, complaints concerning same-sex relationships were often construed as gender (or sex)[60] equality cases, for instance based on the so-called

54 Case T-58/08 P *Roodhuijzen* [2009] ECR II-3797, ECLI:EU:T:2009:385.

55 *Idem*, para. 93.

56 *Idem*, para. 89.

57 *Idem*, para. 58. The Commission referred to Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, paras. 34 and 35 and Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, paras. 59, 67 to 69 and 72.

58 *Idem*, para. 79.

59 *Idem*, para. 87.

60 As Gerards has explained: 'In legal discourse, the term "sex" is used to refer to biological, genetically determined differences between women and men, such as differences related to pregnancy and lactation or average differences in physical strength. Other differences between men and women appear to be more social than biological in nature, such as (perceived) differences in the relation between parent and child. To describe these "social" differences between the sexes, the term "gender" is usually employed. Thus, "sex" refers to a biological reality, whereas "gender" refers to a social reality. […] In practice, it is sometimes hard to separate the two notions, as it is not always easy to classify a difference between men and women as either socially constructed or biological in nature. The result is that academic writers, courts and legislators do not always carefully distinguish between the terms, rendering the difference rather fuzzy. Indeed, although the term "gender" is now used more often than "sex", many legal texts still primarily contain the ground "sex". Further, it is important to remember that not all states distinguish between the two notions in their own languages; often, "sex" and "gender" are covered by a single term.' J. Gerards, 'Discrimination grounds', in: D. Schiek et al. (eds), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford, Hart Publishing 2007) pp. 70–71.

Gender Equality Directives.[61] This was also the case in the much debated *Grant* case (1998), the first case in the field of EU non-discrimination law involving a same-sex couple.[62]

9.3.1. The *Grant* case (1998)

In 1995, Ms. Grant applied to her employer South-West Trains (SWT) for travel concessions for her female partner, with whom she claimed to be in a stable relationship for over two years. SWT refused to allow the benefit sought, on the ground that for unmarried persons such concessions could be granted only for a partner of the opposite sex.[63] Ms. Grant argued that this refusal constituted discrimination based on sex, prohibited by Article 119 EC Treaty (the present Article 157 TFEU) and Directive 75/117[64] (later repealed by Directive 2006/54/EC[65]). She pointed out that '[…] her predecessor in the post, a man who had declared that he had had a meaningful relationship with a woman for over two years, had enjoyed the benefit which had been refused her.'[66] Ms. Grant contended, next, that such a refusal constituted discrimination based on sexual orientation.[67]

Advocate General Elmer concluded that the refusal by Ms. Grant's employer constituted direct discrimination on the basis of gender, which could not be justified.[68] He disagreed with the argument put forward by the Commission that the case concerned the definition of a 'common law spouse' and was thus a family law issue which did not fall under the (then) EC Treaty.[69] He answered the question if the discrimination could be justified by reference to the employer's conception of morality, in the negative:

> 'South-West Train's justification amounts, in reality, to nothing more than saying that on the basis of its own private conceptions of morality that employer wishes to set aside a fundamental principle of Community law in relation to some people because it does

61 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19 and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

62 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63.

63 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 8.

64 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19.

65 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

66 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 9.

67 *Idem*, para. 18.

68 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1997:449, Opinion of AG Elmer, paras. 26, 38 and 43.

69 *Idem*, para. 27. In para. 34 of his Opinion Elmer concluded: 'Gender discrimination is […], in this case, not the result of family law legislation in the Member State in question and for that reason outside the scope of Community law.'

> not care for their life style. Whether the private conceptions of morality held by the employer in question correspond to those prevalent in the United Kingdom or not must be irrelevant in this connection. Under the Treaty it is the rule of law in the Community that the Court must safeguard; it is not its task to watch over questions of morality either in the individual Member States or in the Community, nor does it have any practical possibility of or political mandate for doing so. If a choice should have to be made in the Community between various views of morality that must be a task for the Community's political institutions, and hence it is for the legislature to make such choices by way of treaty or Community legislation.'[70]

The CJEU took a somewhat different approach in this case. It ruled that the refusal by Ms. Grant's employer to allow travel concessions to her same-sex partner, did not constitute prohibited discrimination.[71] The Court held, firstly, that the condition imposed by the employer's regulations applied 'in the same way to female and male workers' and could therefore not be regarded as constituting discrimination directly based on sex.[72] The Court next considered whether, with respect to the application of a condition such as that imposed by Ms. Grant's employer, persons who had a stable relationship with a partner of the same sex were in the same situation as those who were married or had a stable relationship outside marriage with a different-sex partner. It took note of the fact that the European Parliament had declared that it deplored all forms of discrimination based on an individual's sexual orientation,[73] but also noted that the Community had, at the time, not adopted 'rules providing for such equivalence'.[74] The CJEU furthermore took into account that most Member States either treated cohabitation by two persons of the same sex as equivalent to a stable same-sex relationship outside marriage only with respect to a limited number of rights, or did not recognise such cohabitation in any particular way.[75] Lastly, the CJEU referred to the case law of the ECtHR and the ECmHR, which at the time had not (yet) ruled that stable homosexual relationships fell within the scope of the right to respect for family life under Article 8 ECHR and who had interpreted the right to

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70 *Idem*, paras. 40–41.

71 Following *Grant* the English High Court withdrew its reference in the Perkins case (Case C-168/97, *R.* v. *Secretary of State for Defence, ex parte Perkins*), concerning the discharge of persons from the armed forces of a Member State on account of their sexual orientation. See M. Bell, 'Sexual Orientation Discrimination in Employment; An Evolving Role for the European Union', in: R. Wintemute and M. Andenæs (ed.), *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law* (Oxford, Hart Publishing 2001) p. 653 at p. 653.

72 Case C-249/96, *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 28. McInnes called this argument flawed, for failing to recognise 'that the terms "opposite-sex" and "same-sex" are in themselves sex-base criteria'. J. McInnes, 'Case note to Case C249/ 96, Lisa Jacqueline Grant v. South West Trains Ltd, Judgment of the Full Court of 17 February 1998, [1998] ECR I636', 36 *CMLRev* (1999) p. 1043 at p. 1049. See pp. 1050–1053 on the discussion whether discrimination on grounds of sexual orientation is a species of sex discrimination.

73 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 31.The CJEU did not refer to any specific EP Resolution or document.

74 *Idem*, para. 31.

75 *Idem*, para. 32.

marry of Article 12 ECHR as applying only to the traditional marriage between two persons of different biological sex.[76]

On these grounds, the CJEU concluded that in the state of the law within the Community at the time, stable relationships between two persons of the same sex were not regarded as equivalent to marriages or stable relationships outside marriage between persons of different sex.[77] The Court held it to be '[…] for the legislature alone to adopt, if appropriate, measures which may affect that position.'[78] The Court further rejected Ms. Grant's submission that differences of treatment based on sexual orientation were included in the 'discrimination based on sex' as prohibited by Article 119 EC Treaty (now 157 TFEU).[79] It ruled that Community law as it stood at the time did not cover discrimination based on sexual orientation. In this respect the Court noted, however, that the Treaty of Amsterdam (1999)[80] – which had not yet entered into force at the time[81] – provided for a Union competence in this respect.[82]

9.3.2. The inclusion of sexual orientation in the Treaties in 1999

Since the Treaty of Amsterdam, the Council is competent – on a proposal from the Commission and after consulting the European Parliament – to '[…] take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' The inclusion of this 'enabling clause'[83] – at the time Article 13 EC Treaty and presently Article 19 TFEU – was preceded by various discussions.[84] It has, for example, been reported that the Dutch Presidency at a certain moment suggested dropping the reference to, *inter alia*, sexual orientation, as it was

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76 *Idem*, paras. 33–34. The ECtHR later ruled in the case of *Schalk and Kopf* v. *Austria* (2010) that same-sex couples enjoy a right to respect for family life (see ch. 8 section 8.2.2.2).

77 *Idem*, para. 35. McInnes argued that the CJEU's discussion of the equivalence of same-sex and opposite-sex relationship could, implicitly be seen as 'one centred on morality'. McInnes 1999, *supra* n. 72, at p. 1053.

78 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 36.

79 This position was also taken by the European Commission. The Commission submitted, however, that the discrimination of which Ms. Grant complained was based not on her sexual orientation but on the fact that she was not living as a couple or with a spouse, and that therefore the difference of treatment applied by the regulations of her employer was not contrary to Article 119 ECT Treaty. Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 23.

80 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1.

81 The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999.

82 Case C-249/96 *Grant* v. *South-West Trains Ltd* [1998] ECR I-621, ECLI:EU:C:1998:63, para. 48. By some this was perceived as 'a sign of judicial deference to the Member States'. McInnes 1999, *supra* n. 72, at p. 1055. The author explains that '[i]n choosing to keep Article 13 as an enabling provision, as opposed to a judicially enforceable right to non-discrimination, the Member States have made it clear that they do not wish to relinquish their sovereignty. If, and only if, all the Member States agree will action be taken. Consequently, had the Court in *Grant* interpreted the existing law in such a way as to include sexual orientation discrimination, it would have been acting in defiance of the Member States.'

83 McInnes 1999, *supra* n. 72, at p. 1056.

84 According to McInnes, '[t]he disagreements during the IGC as to the actual grounds of protection in Article 13 are indicative of how controversial this area is and how difficult it is going to be to achieve the support of all the Member States.' McInnes 1999, *supra* n. 72, at p. 1056, referring (in footnote 58),

feared that its inclusion would prevent the clause from being accepted at all.[85] This suggestion was not, in the end, accepted by the Intergovernmental Conference.[86] Bell concluded that '[o]ne of the important lessons from the negotiation of Article 13 EC [was] the possibility of advancing sexual orientation issues when placed in the context of wider anti-discrimination law reform.'[87]

The adoption of the new Article 13 EC Treaty was at the time perceived as '[a]n important, but largely symbolic step'.[88] This is because the Council can only act unanimously,[89] and because the provision has no direct effect.[90] Nevertheless, soon after its creation, the new competence was employed. As Bell has explained, the European Commission '[k]een to build upon the existing momentum […] swiftly committed itself to proposing anti-discrimination legislation founded on the new competence.'[91] The two most prominent instruments adopted since Article 13 was included in the EC Treaty, are the Employment Equality Directive (2000/78/EC)[92] and the Race Equality Directive (2000/43/EC).[93] While the latter has no significant relevance for the present case study on same-sex relationships, interesting cases on the application of the Employment Equality Directive in situations concerning same-sex relationships have come before the CJEU.

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to: 'NonPaper No. 6, Fundamental Rights and Non Discrimination, Conference of the Representatives of the Governments of the Member States, Secretariat, Brussels, 26 Feb. 1997, Conf/3827/97.'

85 See McInnes 1999, *supra* n. 72, at p. 1056.

86 L. Flynn, 'The implications of article 13 EC – after Amsterdam, will some forms of discrimination be more equal than others?', 36 *CMLRev* (1999) p. 117 at p. 132, referring (in footnote 18) to 'Kingston, "Fundamental rights and non-discrimination in the Treaty of Amsterdam", in Tonra (ed.), *Legal and Constitutional Implications of the Amsterdam Treaty* (Institute of European Affairs, 1997), p. 49, 53.'

87 Bell 2001, *supra* n. 71, at p. 676.

88 K. Waaldijk, 'Towards the Recognition of Same-Sex Partners in EU law', in: R. Wintemute and M. Andenæs (ed.), *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law* (Oxford, Hart Publishing 2001) p. 635 at p. 648. Also McInnes expected in 1999 that Art. 13 EC Treaty would 'prove to be of greater symbolic that practical value.' McInnes 1999, *supra* n. 72, at p. 1057.

89 The present Art. 19(1) TFEU reads: 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

90 As Guild has explained, the provision 'clearly lacks sufficient clarity, precision and unconditionality'. E. Guild, 'Free Movement and Same-Sex Relationships', in: R. Wintemute and M. Andenæs (ed.), *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law* (Oxford, Hart Publishing 2001) p. 677 at p. 687. See also P. Craig and G. De Búrca, *EU law, Text, cases and materials*, 5th edn. (Oxford, Oxford University Press 2011) p. 868.

91 Bell 2001, *supra* n. 71, at p. 655, referring to 'Commission, "An action plan against racism", COM (1998) 183 (25 April 1998), at para. 2.2.2'.

92 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

93 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. In 2008 the Commission furthermore made a proposal for a Council Directive which aims to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. This proposal and its implications for the present case study are discussed in section 9.3.4.1 below.

9.3.3. The Employment Equality Directive and relevant case law

The Employment Equality Directive put in place a general framework to ensure the equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation, as regards access to employment or occupation and membership of certain organisations.[94] It was held that discrimination on the aforementioned grounds could undermine the achievement of the EU's objectives, '[…] in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.'[95] The Directive covers matters like harassment[96] and indirect discrimination,[97] and has been received as '[…] a significant advantage for lesbian and gay rights within European Union law'.[98]

Of particular interest for the present research is Recital No. 22 in the Preamble to the Directive, which reads:

> 'This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.'

The interpretation and legal status of this text was at stake in three prominent CJEU judgments concerning same-sex couples, namely *Maruko* (2008),[99] *Römer* (2011) and *Hay* (2013).[100] The discussion of these three judgments hereafter will make clear that neither Directive 2000/78, nor the Court's case law, require Member States to introduce a form of registered partnership.[101] As Tobler and Waaldijk have made clear, '[u]nder the constitutional framework set up by the […] Treaty the Member States retain the competence to decide on the forms of civil status that are available under their national legal system.'[102] However, once they introduce an alternative form of registration, States must observe the principle of equal treatment, so the case law shows.

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94 See www.europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c10823_en.htm, visited July 2013.

95 Recital 11 of Council Directive 2000/78/EC.

96 Art. 2(3) Council Directive 2000/78/EC.

97 Art. 2(2)(b) Council Directive 2000/78/EC describes indirect discrimination on grounds of sexual orientation as the situation '[…] where an apparently neutral provision, criterion or practice would put persons having […] a particular sexual orientation at a particular disadvantage compared with other persons unless: […] that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary […].'

98 Bell 2001, *supra* n. 71, at p. 675.

99 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179.

100 Case C-147/08 *Jürgen Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591, ECLI:EU:C:2011:286. Since both *Maruko* and *Römer* concerned a preliminary reference by a German Court, reference is also made to discussion of these cases and their follow-up in the German legal order in ch.10, section 10.3.4.

101 C. Tobler and K. Waaldijk, 'Case note to Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008', 46 *CMLRev* (2009) p. 743.

102 *Idem*.

9.3.3.1. The Maruko judgment (2008)

The principal question in *Maruko* was whether Directive 2000/78/EC precluded regulations governing a supplementary pension scheme under which, after the death of his registered partner, the surviving partner did not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though he had lived in a union of mutual support and assistance which had been formally constituted for life.[103] In its judgment of 1 April 2008 the Grand Chamber of the CJEU ruled that an occupational pension scheme as the one at issue in the *Maruko* case, was indeed precluded if, under national law, civil partnership placed persons of the same sex in a situation comparable to that of spouses so far as that survivor's benefit was concerned.[104] The CJEU left it up to the referring court to determine in a concrete case whether such comparability of situations could be found.[105]

Mr. Maruko and the Commission had qualified the refusal to grant a widower's pension to Mr. Maruko as indirect discrimination on grounds of sexual orientation, because two persons of the same sex could not marry in Germany and, consequently, could not qualify for the widower's pension, a benefit that was reserved to surviving spouses.[106] In their opinion, surviving civil partners had to be granted the widower's pension, because spouses and civil partners were in a comparable legal situation.[107] Advocate General Ruiz-Jarabo Colomer adopted a similar line of reasoning[108] and held in this respect:

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103 The discussion here will focus on the third and fourth questions as posed by the referring court. The third question focussed in particular at compatibility of the pension scheme with Art. 1 in conjunction with Art. 2(2)(a) of 2000/78/EC. The preliminary questions as to (other elements of) the scope of the Directive and the temporal aspect of the matter, will not be discussed here.

104 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179.

105 As further explained in Ch. 10, the CJEU noted in its judgment that the referring court itself had acknowledged that in Germany a 'harmonisation between marriage and life partnership' took place, which could be regarded as 'a gradual movement towards recognising equivalence' and that therefore registered civil partnership, while not identical to marriage, placed persons of the same sex in a situation comparable to that of spouses as far as the survivor's benefit was concerned. *Idem*, para. 69.

106 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 63.

107 H. Graupner, 'Comparing people or institutions? Sexual Orientation Discrimination and the Court of Justice of the European Union', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 271 at p. 275. As Graupner explains (on pp. 275–276) '[t]his conclusion was […] made under the assumption that, under national law, a registered partnership is equivalent to a marriage […]. Accepting such an assumption would lead to the strange, and perhaps even somewhat absurd, result that the lesser discrimination exhibited in Member States with a marriage-equivalent registered partnership would be outlawed, whereas the (arguably) more serious discrimination (prevalent in Member States without registered partnership or with a form of registered partnership inferior to marriage) would remain admissible. This would be the result notwithstanding that in both cases the parties involved were subjected to the same kind of unequal treatment.'

108 According to the AG, Mr. Maruko had been refused a survivor's pension '[…] because he was not married to his partner and [was] not a 'widower', a status which [was] restricted by law to the spouse of the deceased, and because there [was] no evidence that such a pension [had] been granted to other individuals in identical or analogous situations.' Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt*

> '[…] it is not for the Court to define emotional relationships between persons of the same sex, a matter which is the subject of fierce debate, […] or to rule on the effects which the legislation of each Member State attributes to the registration of such partnerships. […] [It] is not a question of developing "European matrimonial law" but of ensuring that the principle that there should be no discrimination […] is fully effective […].'[109]

In legal scholarship it had been likewise anticipated that the CJEU would find indirect discrimination on grounds of sexual orientation in a *Maruko* type of case.[110] It therefore came as a surprise to many that the CJEU established direct discrimination on this ground, instead.[111] The CJEU's approach has been welcomed by some, although it was regretted that the Court gave little explanation for its approach.[112] The CJEU was indeed brief on this point: it reiterated the definitions of direct and indirect discrimination as laid down in Article 2 of the Directive[113] and proceeded by examining the relevant German national law. It observed a gradual harmonisation between marriage and life partnership under German law and it concluded as follows:

> 'If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.'[114]

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der deutschen Bühnen [2008] ECR I-1757, ECLI:EU:C:2007:486, Opinion of AG Ruiz-Jarabo Colomer, para. 96.

109 *Idem*, para. 98, referring (in footnote 96) to *D. and Sweden* v. *Council* and Moliner Navarro, R.M., 'El matrimonio de personas del mismo sexo en el Derecho comparado', Matrimonio y adopción por personas del mismo sexo, Cuadernos de Derecho Judicial, no XXVI/2005, Consejo General del Poder Judicial, Madrid, 2006, p. 221 et seq.; (in footnote 97) to 'Alonso Herreros, D., 'Funcionamiento y eficacia de los Registros de uniones civiles de hecho en España y en otros países europeos', Cuadernos de derecho público, no 15, January-April 2002, p. 103 et seq.' and to Case C-117/01 *K.B* [2004] ECR I-541, ECLI:EU:C:2007:486, Opinion of AG Ruiz-Jarabo Colomer.

110 K. Waaldijk, 'Case note to ECJ (GC) judgment of 1 April 2008 in Case C-267/06 Tadao Maruko/Versorgungsanstalt der deutschen Bühnen' (in Dutch), 9 *European Human Rights Cases* 2008/65, who explains that most scholars anticipated indirect discrimination (Waaldijk referred to Bell 2001, *supra* n. 71, at p. 668 and 'K. Waaldijk & M. Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union*, Den Haag: Asser 2006, p. 42 en 115–117'), while some saw legal ground for finding direct discrimination (Waaldijk referred to Bell 2001, *supra* n. 71, at p. 668; Waaldijk 2001B, *supra* n. 88, at p. 645; H. Ytterberg, 'Sweden', in: K. Waaldijk & M. Bonini-Baraldi, *Combating sexual orientation discrimination in employment* (Leiden, Universiteit Leiden 2004) pp. 459–460 and R. Wintemute, 'United Kingdom', in: Waaldijk & Bonini-Baraldi 2004, p. 495).

111 Direct discrimination on grounds of sexual orientation is described in Art. 2(a) Directive 2000/78/EC as a situation '[…] where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on […] grounds [of sexual orientation]'.

112 Tobler and Waaldijk 2009, *supra* n. 101, at pp. 736–737.

113 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 66.

114 *Idem*, para. 72.

Others considered the CJEU's decision to treat the case as a case of direct discrimination problematic.[115] There has been criticism of the fact that the logic was only applicable in States that had introduced a form of legal recognition of same-sex relationships comparable to marriage.[116] This involved a risk of 'differing approaches to comparability'[117] and some even called this a 'circular' reasoning.[118] Others noted that with this reasoning the CJEU strengthened citizens' rights, while displaying '[…] some respect for the constitutional differences between the Member States regarding same-sex relations.'[119] It has furthermore been observed that the Court opted for a finding of direct discrimination in *Maruko* '[…] in order to exclude the objective justification argument of fostering marriage, that had been accepted by the German courts on the basis of Article 6 of the German Constitution.'[120]

The referring court had also asked if – in the case that discrimination on grounds of sexual orientation was found – such discrimination was permissible by virtue of Recital 22 to the Directive, following which the Directive, as noted above, was held to be '[…] without prejudice to national laws on marital status and the benefits dependent thereon'. Both Mr. Maruko and the Commission asserted that the content of this Recital was not reflected in any of the enacting terms of the Directive.[121] According to the Commission, the Recital did '[…] no more than state that the European Union lack[ed] competence in matters regarding civil status.'[122] AG Ruiz-Jarabo Colomer concurred that the Recital had no binding force and 'merely' assisted 'with the interpretation of the provisions of the Directive'. He held that its significance was not to be overstated.[123] The employer of Mr. Maruko's deceased partner and the

115 M. Moschel, 'Germany's Life Partnerships: Separate and Unequal', 16 *Colum. J. Eur. L.* (2009–2010) p. 37 at p. 44 and J. Mulder, 'Some More Equal than Others? Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation', 19 *Maastricht Journal of European and Comparative Law* (2012) p. 505.

116 Moschel observed that the case brought '[…] no relief for nationals of Member States where the Member State [had] not provided for any legal recognition for same-sex relationships, as in those cases no comparison between similar situations [was] possible since no institution similar or parallel to marriage exist[ed].' *Idem*, at p. 44.

117 *Idem*, at p. 44.

118 J. Cornides, 'Three Case Studies on Anti-Discrimination', 23 *European Journal of International Law* (2012) p. 517 at p. 523.

119 H. de Waele and A. van der Vleuten, 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights', 19 *Mich. St. U. Coll. L. J. Int'l L.* (2010–2011) p. 639 at p. 662. Compare A. Eriksson, 'European Court of Justice: Broadening the Scope of European Nondiscrimination Law [notes]', 7 *International Journal of Constitutional Law* (2009) p. 731 at p. 744.

120 Tobler and Waaldijk 2009, *supra* n. 101, at p. 736, referring (in footnote 23) to 'Lembke, 'Sind an die Ehe geknüpfte Leistungen des Arbeitgebers auch an Lebenspartner zu gewähren? ', (2008) *NJW* p. 1631 at p. 1633'.

121 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 38. See also Tobler and Waaldijk 2009, *supra* n. 101, at p. 731.

122 Mr. Maruko asserted that '[…] if the Community legislature had wanted to exclude all benefits bound up with civil status from the scope of Directive 2000/78, the content of that recital would have been the subject of a particular provision among the enacting terms of the Directive.' Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 38.

123 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2007:486, Opinion of AG Ruiz-Jarabo Colomer, para. 76.

intervening United Kingdom government argued instead that on the basis of Recital 22, provisions of national law relating to civil status or to benefits dependent on that status, were excluded from the scope of the Directive.[124] The CJEU did not adopt this reasoning and ruled that Recital 22 could not affect the application of the Directive.[125] It acknowledged that civil status and the benefits flowing therefrom were '[…] matters which [fell] within the competence of the Member States and Community law [did] not detract from that competence'. It also recalled, however, that '[…] in the exercise of that competence the Member States [had to] comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination'.[126] On this ground, Tobler and Waaldijk called this an important case in the context of division of competences between the EU (at the time the EC) and the Member States, in particular in relation to civil status.[127] They argued that

> '[…] the fact that the Treaty does not give the EC an explicit competence in a given field, thereby leaving it with the Member States, does not mean that EC law from other areas – either on the level of Treaty provisions or that of secondary law – cannot apply in this field. Put differently, the Member States' competences are not "exclusive" in the sense that national legislation is immune from EC law. For the Member States, this may be difficult to accept, in particular where EC law touches upon fields that have traditionally been considered as Member State reserves, such as […] marriage.'[128]

Various other authors pointed out that the CJEU's finding in respect of Recital 22 was particularly important because the Recital had at the time been welcomed by Member States as providing strong protection for favourable treatment of spouses.[129] Bruns noted that States were still free to introduce an alternative registration form and to equalise this with marriage or not. However, once they decided to introduce such a registration or once they took the opportunity to equalise treatment, they were bound to observe the principle of equal treatment.[130]

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124 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 39. As Tobler and Waaldijk explain, '[…] when implementing this Directive, at least three Member States (Ireland, Italy and the United Kingdom) interpreted this recital as a basis allowing for more beneficial treatment of married partners.' Tobler and Waaldijk 2009, *supra* n. 101, at p. 732, referring (in footnote 22) to C. Waaldijk and M. Bonini-Baraldi, *Sexual orientation discrimination in the European Union, National laws and the Employment Equality Directive* (The Hague, TMC Asser Press 2006) p. 115.

125 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 60.

126 *Idem*, para. 59, under reference to Case C-372/04 *Watts* [2006] ECR I-4325, ECLI:EU:C:2006:325, para. 92 and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, ECLI:EU:C:2007:231, para. 23.

127 Tobler and Waaldijk 2009, *supra* n. 101, at p. 723.

128 *Idem*, p. 735. In footnote 31 the authors explain: 'Apart from the issue of competences, family law is a prime example of an area where EC law has an influence simply because of the frequent reference in EC law to concepts coming from this area; see e.g. Tobler, "Der Begriff der Ehe im EG-Recht", (2001) *Die Praxis des Familienrechts*, p. 479–499. More recently, see e.g. Art. 2 of Directive 2004/38/EC […].'

129 Moschel 2009, *supra* n. 116, at p. 42. See also Waele, de and Vleuten, van der 2011, *supra* n. 119, at p. 662.

130 M. Bruns, 'Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung', *NJW* (2008) p. 1929. Along similar lines, Eriksson observed that the finding of the Court meant that '[i]f the member states decide[d] to introduce a special civil status for homosexual couples,

The subsequent *Römer* case (2011)[131] '[…] provided the CJEU with the opportunity […] to specify or even extend the scope of the Maruko-judgment (and rule beyond comparability, on indirect discrimination).'[132]

9.3.3.2. The Römer judgment (2011)

The Grand Chamber of the CJEU ruled in *Römer* that a provision of national law under which a pensioner who had entered into a registered partnership received a supplementary retirement pension lower than that granted to a married pensioner could constitute discrimination on grounds of sexual orientation, prohibited by Directive 2000/78.[133] The Court held this to be the case if: (1) in the Member State concerned, marriage is reserved to persons of different sex and exists alongside a registered partnership which is reserved to persons of the same sex; and (2) there is direct discrimination on the ground of sexual orientation because, under national law, that registered partner is in a legal and factual situation comparable to that of a married person as regards that pension. The Court, like it had done in *Maruko*, left it to the referring court to assess the comparability of situations.[134] This time it gave more guidelines, however, and made clear that this assessment should focus '[…] on the respective rights and obligations of spouses and persons in a registered partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question'.[135]

Other than Advocate General Jääskinen, the CJEU did not address the referring court's question of whether, and under what conditions, an objective pursued by a Member State on the basis of a national constitutional norm, such as the protection of marriage, contained in Article 6(1) of the German Basic Law, could justify direct discrimination on ground of sexual orientation.[136] In this respect, the CJEU merely noted, in line with its previous *Maruko* judgment that as European Union law stood at that point in time, legislation on the marital status of persons fell within the competence of the Member States.[137]

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they [had to] do so in conformity with the principle of non discrimination as contained in Directive 2000/78/EC and ensure that they [were] not discriminated against in the field of employment.' A. Eriksson, 'European Court of Justice: Broadening the Scope of European Nondiscrimination Law [notes]', 7 *International Journal of Constitutional Law* (2009) p. 731 at pp. 745–746.

131 Case C-147/08 *Jürgen Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591, ECLI:EU:C:2011:286.

132 Graupner 2012, *supra* n. 107, at p. 279. As Tobler and Waaldijk explained, it was, for example, 'unclear whether, in countries without registered partnership, […] unregistered same-sex partners challenging their exclusion from a marital benefit, should invoke the prohibition of direct sexual orientation discrimination or that of indirect sexual orientation discrimination.' Tobler and Waaldijk 2009, *supra* n. 101, at p. 744.

133 In particular Art. 1 in conjunction with Arts. 2 and 3(1)(c).

134 Case C-147/08 *Jürgen Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591, ECLI:EU:C:2011:286, para. 52.

135 *Idem*, para. 52.

136 As rephrased by the CJEU in *idem*, para. 37.

137 *Idem*, para. 38.

Advocate General Jääskinen had underlined that it was exclusively for States to decide if they provided in their national legal order for a legal union between partners of the same sex. The AG had been of the opinion that it constituted discrimination on grounds of sexual orientation if a State did not provide for any form of legal recognition of same-sex relationships. He had held that, on grounds of the principle of equal treatment in combination with the obligation to respect the human dignity of homosexuals, States had an obligation to provide for some form of legal recognition for same-sex couples. Jääskinen had acknowledged, however, that this matter of civil law fell outside the scope of EU law.[138] With respect to matters that fell within the scope of EU law, on the contrary, such as matters within the scope of the free movement rules or within the scope of the Employment Equality Directive, the AG had held a reference to national law concerning civil status to be insufficient as justification for an infringement of these rights.[139] Jääskinen had questioned whether protection of the family and marriage could form a valid objective justification for indirect discrimination.[140] In any case, he had not seen how the disputed rule could be necessary and proportionate to attain this interest, as there was no causal relationship between this type of discrimination as a means and the protection of marriage as possible beneficial effect of this discrimination.[141] He had furthermore made a plea for the recognition of a general principle of EU law of non-discrimination on grounds of sexual orientation (see section 9.3.4.2 below). On this point also Jääskinen was not followed by the CJEU.

Graupner observed that the *Maruko* and the *Römer* cases ultimately boiled down to the issue of deciding upon the comparative parameters.[142] The author concluded that the Court's case law made clear that '[p]eople (couples) [were] to be compared, not abstract legal institutions'.[143] According to Graupner, the CJEU established an 'individual-specific comparison', whereby comparability has to be established in the light of the benefit concerned.[144] This line of reasoning was continued and even taken one step further in *Hay* (2013).[145]

9.3.3.3. The Hay judgment (2013)

The *Hay* case was not – unlike *Maruko* and *Römer* – decided by a Grand Chamber, and no Advocate General delivered an Opinion in this case. The CJEU held in this

138 Case C-147/08 *Jürgen Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591, ECLI:EU:C:2010:425, Opinion of AG Jääskinen, para. 76.

139 *Idem*, para. 77.

140 *Idem*, paras. 109–110. In para. 175 of his Opinion, the AG was even firmer in holding that it went without saying '[…] that the aim of protecting marriage or the family [could not] legitimise discrimination on grounds of sexual orientation.' The AG found it '[…] difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it.'

141 *Idem*, paras. 109–111.

142 Graupner 2012, *supra* n. 107, at p. 276.

143 *Idem*, at p. 281.

144 *Idem*, at pp. 276 and 280.

145 Case C-267/12 *Frédéric Hay* v. *Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECR 0000, ECLI:EU:C:2013:823.

case that partners who had concluded a civil solidarity pact under French law (*Pacte civil de solidarité* (PACS)) were in a comparable situation with spouses in respect of benefits that were granted under a national collective agreement to employees on the occasion of their marriage, such as days of special leave and a salary bonus.[146] Not granting an employee such benefits upon the occasion of the conclusion of a civil solidarity pact, constituted direct discrimination on grounds of sexual orientation in breach of Directive 2000/78, the Court held. Thereby it was relevant that under French law at the time same-sex couples had no access to marriage, rendering the PACS '[…] the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties.'[147] Because marriage was not open to same-sex couples, it was impossible for homosexual employees to meet the condition required for obtaining the benefit claimed, and they were thus directly discriminated against on grounds of sexual orientation.[148] The fact that the French PACS was open to both different-sex and same-sex partners and the fact that there were general differences between the systems governing marriage and the PACS arrangement – for example with respect to the reciprocal obligations under property law, succession law and law relating to parenthood – did not alter that conclusion. The Court summarised its position in this regard as follows:

> '[…] as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry.'[149]

The CJEU thus by itself examined the question of comparability, instead of leaving this matter to the referring court, as it had done in both *Maruko* and *Römer*. Moreover, for the first time the Court also addressed the question of justification. As it had found that there was direct discrimination, this could only be upheld if one of the justification grounds of Article 2(5) of Directive 2000/78 applied, namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others. By finding that none of these grounds had been relied upon in the main proceedings and stressing that Article 2(5) had to be interpreted strictly, the Court implied that the discrimination could not be justified.[150]

146 The Court reiterated that such an assessment of comparability had to be carried out 'not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned'. *Idem*, para. 33.
147 *Idem*, para. 36.
148 *Idem*, para. 44.
149 *Idem*, para. 37.
150 *Idem*, para. 46.

9.3.4. Possible future developments in EU non-discrimination law

9.3.4.1. Proposed horizontal Equal Treatment Directive

Under the present EU legal framework, discrimination based on sexual orientation is prohibited only in employment, occupation and vocational training (see above). In 2008 the Commission proposed a new Council Directive based on Article 19 TFEU, which would apply outside the field of employment.[151] The proposed Directive was aimed to combat discrimination based on religion or belief, disability, age or sexual orientation[152] in respect of social protection (including social security and health care), social advantages, education and access to and supply of goods and services which are available to the public, including housing.[153] Because of this 'broad-brush'[154] approach many doubted whether the proposal would receive the required unanimity in the Council.[155]

It has been submitted that in respect of legal recognition of same-sex relationships, the proposed Directive could imply 'a setback'.[156] The original proposal clearly held that the Directive was to be without prejudice to national laws on marital or family status, adoption and reproductive rights.[157] The Explanatory Memorandum explained in this respect:

> 'The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues.'[158]

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151 Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation', COM (2008) 426 final, 2008/0140 (CNS). See also L.B. Waddington, 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', 17 *European Law Review* (2011) p. 163.

152 Art. 1 of the Proposed Directive.

153 Art. 3 of the Proposed Directive.

154 M. Bell, 'The Principle of Equal Treatment; widening and deepening', in: P. Craig and G. De Búrca, *The evolution of EU Law*, 2nd edn. (Oxford, Oxford University Press 2011) p. 611 at p. 620.

155 Waddington 2011, *supra* n. 151, at pp. 163–164 and Bell 2011, *supra* n. 154, at p. 620.

156 B. Verschraegen, 'The Right to Private and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 255 at p. 268.

157 Art. 3(2) of the Proposed Directive. See also Recital No. 17 of the Preamble to the Proposed Directive which reads: 'While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws on marital or family status, including on reproductive rights. […]'. 'Family status' was held to include adoption. COM (2008) 426 final, p. 8.

158 COM (2008) 426 final, p. 6.

An amendment by the European Parliament provided more neutrally that the Directive would not '[…] alter the division of competences between the European Union and its Member States.'[159] It was furthermore explicitly held in the Memorandum that Member States remained '[…] free to decide whether or not to institute and recognise *legally* registered partnerships.'[160] The Explanatory Memorandum also underlined however that once national law recognised such relationships as comparable to that of spouses, then the principle of equal treatment applied.[161] The European Economic and Social Committee (EESC) was very critical on this point.[162] It acknowledged that marital status, family status and reproductive rights were matters on which Member States had competence to legislate, but did not accept that such competence was to '[…] wholly negate EU-wide legal protections against discrimination.'[163] The EESC believed that Article 3(2) as a whole had to be reconsidered, whereby 'any final formulation' had to state that '[…] national laws relating to marital status, family status or reproductive rights [had to] be implemented without discrimination against any persons on any of the grounds within the Directive.'[164] The Directive was debated for a number of years and in 2011 the legislative process stagnated.[165] The division of competences, the overall scope of the Directive and subsidiarity were deemed

159 The accompanying Recital 17 was changed into: 'While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the freedom of religion, the freedom of association, freedom of expression and freedom of the press. This Directive is without prejudice to the secular nature of the State, state institutions or bodies, or education. This Directive does not alter the division of competences between the European Union and its Member States, including in the area of marital and family law and health law.' European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)) [2010] OJ C 137E/68, Amendments 28 and 50.

160 COM (2008) 426 final, p. 8. See also the Commission, 'Staff working document accompanying the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Impact assessment (COM(2008) 426 final)', SEC (2011) 328 final where it was held (at p. 6) that the new Directive '[…] would only prohibit discrimination in the areas that fall within EC competence, so would not affect […] questions of marital status (e.g. same sex partnerships/marriages) or family law (e.g. adoption) […]'.

161 COM (2008) 426 final, p. 8, referring (in footnote 21) to Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179.

162 European Economic and Social Committee, 'Opinion on the 'Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation'', COM (2008) 426 final (Additional opinion) [2009] OJ C182/19.

163 *Idem*, para. 3.2.2.1. In para. 3.2.2.2, the EESC referred (in footnote 9) to Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 59.

164 *Idem*, para. 3.2.2.5.

165 The European Parliament declared in a 2012 Resolution to remain committed to the adoption of the Directive, which, so it was noted, had been blocked 'due to the objections of some Member States'. European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe (2012/2657(RSP)) P7_TA(2012)0222). The EU Fundamental Rights Agency has also held that '[e]qual protection against discrimination on the grounds of sexual orientation across all EU Member States would significantly improve if the EU-wide prohibition of such discrimination extended beyond the field of employment and occupation'. European Union Agency for Fundamental Rights, *EU LGBT survey, European Union lesbian, gay, bisexual and transgender survey, Results at a glance* (Luxembourg, Publications Office of the European Union 2013) p. 12, online available at www.fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf, visited June 2014.

amongst the pressing issues around which further discussion was considered to be needed.[166]

9.3.4.2. Non-discrimination on grounds of sexual orientation as a general principle of EU law?

As discussed above, Advocate General Jääskinen held in his Opinion to the *Römer* case (2011) that non-discrimination on grounds of sexual orientation was a general principle of EU law, on the same footing as non-discrimination on grounds of age.[167] From a pure legal viewpoint the AG held there to be no justification for a weaker protection of the principle of equal treatment in situations of discrimination on grounds of sexual orientation, when compared to the other prohibited grounds in Article 19 TFEU. Jääskinen held that if the CJEU recognised the existing sensitivities in this regard, it would attach value to unjustified prejudices, irrespective of their origin, and it would withhold members of a minority equal legal protection.[168] While the CJEU did not follow up this point, Graupner concluded that it was implicit in the CJEU judgment in *Römer*, that the prohibition of discrimination on the basis of sexual orientation was a general principle of Union law.[169] It is questionable, however, if this conclusion really can be drawn from the Court's ruling in that case.

9.4. LGBT RIGHTS IN THE EU'S FUNDAMENTAL RIGHTS AGENDA

LGBT rights take a prominent place on the EU's fundamental rights agenda. The reach of Union action in respect of fundamental rights is, however, limited to those areas in which the EU has competences under the Treaties. For the present case study the EU's competences in respect of the internal market (Articles 26 and 115(1) TFEU) and equal treatment (Article 19 TFEU) as discussed above, are most relevant.

Since 2010, the Commission has monitored the implementation of the EU Fundamental Rights Charter.[170] It, *inter alia*, sees to it that the prohibition on

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166 Press release 3131st Council meeting Employment, Social Policy, Health and Consumer Affairs, Brussels, 1 and 2 December 2011, 17943/1/11 REV 1, PRESSE 471, PR CO 75. The Dutch Government, for example, took the position that States had to be left as much room for making their own policy decisions in these matters. It held that access to social protection and education were matters to be regulated at national level. *Inventarisatie EU-regelgeving op subsidiariteit en proportionaliteit – Nederlandse lijst van actiepunten* [Inventory of EU regulation with a view to subsidiarity and proportionality – Netherlands list of action points], p. 14, point 50.

167 Case C-147/08 *Jürgen Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591, ECLI:EU:C:2010:425, Opinion of AG Jääskinen, para. 131.

168 *Idem*, para. 129.

169 Graupner 2012, *supra* n. 107, at p. 281, referring (in footnote 52), to para. 59 of the judgment, where the Court held that Directive 2000/78 '[…] does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds '[…], including sexual orientation.'

170 Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (Communication)', COM (2010) 573 final.

discrimination on grounds of sexual orientation under Article 21 of the Charter is applied systematically in the preparation, adoption and implementation of EU law.[171] In the 2010 annual report on the implementation of the Charter, the Commission reiterated its position that '[t]he benefits of EU rules guaranteeing free movement and residence apply also to same-sex couples.'[172] In the report of the following year, the Commission qualified homophobia as 'incompatible with the founding values of the EU' and held that it was using all the powers at its disposal to fight against this phenomenon. It explained that it '[…] followed-up petitions and parliamentary questions on discriminatory practices on grounds of sexual orientation, when they concerned matters falling within EU competence.'[173] One such case concerned the refusal of Polish authorities to issue certificates on civil status to citizens who wished to marry or conclude a registered partnership with a person of the same sex in a Member State where this was possible (see also section 9.6.3 below). The Commission furthermore implements 'a comprehensive anti-discrimination policy' which includes the 'funding of a communication campaign to inform citizens about their rights; funding of NGO networks fighting against discrimination faced by LGBT people in the EU; conducting studies and exchanging good practices related to these issues.'[174]

The Commission is not the only EU institution actively advocating for LGBT rights. Indeed, the European Parliament (EP) has been '[…] a principal driving force in bringing LGB rights onto the European political agenda.'[175] From early on it has strongly condemned discrimination on the basis of sexual orientation and in its non-binding Resolutions and Recommendations on the issue, the Parliament did not limit itself to those areas of law in which the EU has competences. For example, as early as 1994 the EP passed a resolution on equal rights for homosexuals and lesbians in the EC, in which it also appealed to the Commission to present a draft Recommendation, that as a minimum would seek to end, *inter alia*, the exclusion of same-sex couples from access to marriage or from 'an equivalent legal framework', as well as 'any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children'.[176] More recently, in 2012, the Parliament explicitly called on Member States to provide same-sex couples access to legal institutions such as cohabitation, registered partnership or marriage, as it considered that as a result their fundamental rights were 'more likely to be safeguarded'.[177] The freedom

171 European Commission, *2010 Report on the Application of the EU Charter of Fundamental Rights*, p. 44, www.ec.europa.eu/justice/fundamental-rights/files/annual_report_2010_en.pdf, visited June 2014.

172 *Idem*, p. 44.

173 *Idem*, p. 52.

174 Www.ec.europa.eu/justice/fundamental-rights/homophobia/index_en.htm, visited June 2014.

175 Www.ilga-europe.org/home/guide_europe/eu/lgbt_rights/european_parliament, visited June 2014.

176 European Parliament Resolution on equal rights for homosexuals and lesbians in the EC, [1994] OJ C61/20, pp. 40–43.

177 European Parliament Resolution of 24 May 2012 on the fight against homophobia in Europe (2012/2657(RSP)) P7_TA(2012)0222, para. 9 and European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010–2011)(2011/2069(INI)), P7_TA(2012)0500, para. 103.

of movement for same-sex couples is further amongst the priorities of the European Parliament's Intergroup on LGBT rights.[178]

It was also the European Parliament that requested that the EU Fundamental Rights Agency (FRA) investigated LGBT discrimination and homophobia in the EU.[179] Since its foundation in 2007, discrimination on grounds of sexual orientation has been one of the thematic areas in which the FRA carries out its tasks.[180] The FRA has frequently reported on legislative and policy developments in the Member States on issues concerning LGBT rights that strictly speaking do not come within the EU's competences, such as hate crimes and legal recognition of same-sex couples.[181] In the FRA's annual report on 2012 it was explained in respect of the latter, that some EU citizens had claimed that there were obstacles to the right of free movement 'as a result of either the absence of provisions on legal recognition of same-sex couples or the lack of harmonisation throughout the EU.' The agency held that '[d]espite the lack of direct EU competence in the area of family and private life, observing developments in this field help[ed] in understanding the application of the EU right to free movement for all, including same-sex couples wishing to move between Member States.'[182] The FRA has, *inter alia*, pled for the incorporation of same-sex partners 'whether married, registered, or in a *de facto* union', within the definitions of 'family member' in relevant areas of EU law, '[…] in particular employment related partner benefits, free movement of EU citizens, and family reunification of refugees and third-country nationals'.[183] The European Parliament subsequently called on the

178 See www.lgbt-ep.eu/work, visited June 2014. According to its website, the Intergroup is '[…] an informal forum for Members of the European Parliament who are committed to upholding the fundamental rights of lesbian, gay, bisexual and transgender (LGBT) people.' In August 2013 the Intergroup had 153 Members.

179 European Parliament press release of 17 May 2013, REF 20130513IPR08207, www.europarl.europa.eu/news/en/pressroom/content/20130513IPR08207/html/International-Day-against-Homophobia-MEPs-react-to-LGBT-survey-findings, visited June 2014.

180 Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012 (2008/203/EC) [2008] OJ L 63/14 and Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013–2017 for the European Union Agency for Fundamental Rights (252/2013/EU) [2013]OJ L 79/1.

181 See European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Comparative legal analysis* (Luxembourg, Publications Office of the European Union 2008) online available at www.fra.europa.eu/en/publication/2010/homophobia-and-discrimination-grounds-sexual-orientation-eu-member-states-part-i, visited June 2014 and European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Comparative legal analysis. 2010 update* (Luxembourg, Publications Office of the European Union 2010), online available at www.fra.europa.eu/en/publication/2012/homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender, visited June 2014.

182 European Union Agency for Fundamental Rights, *Fundamental rights: challenges and achievements in 2012, Annual report 2012* (Luxembourg, Publications Office of the European Union 2013) p. 155, online available at www.fra.europa.eu/sites/default/files/annual-report-2012_en.pdf, visited June 2014.

183 European Union Agency for Fundamental Rights 2010, *supra* n. 181, at p. 9.

Commission and Member States to implement the relevant FRA opinions to the greatest possible extent.[184]

In 2013 the FRA conducted an online EU-wide LGBT survey.[185] On the basis of its results the FRA, *inter alia*, took the position that '[e]qual protection against discrimination on the grounds of sexual orientation across all EU Member States would significantly improve if the EU-wide prohibition of such discrimination extended beyond the field of employment and occupation', as proposed by the European Commission in its Proposal for an Equal Treatment Directive (see 9.3.4.1 above). The Parliament called on the Commission to carefully examine the results of this survey, and to take 'appropriate action'.[186] The Parliament has also called on the Commission, Member States and relevant agencies 'to work jointly on 'a comprehensive multiannual policy' to protect the fundamental rights of LGBT people, by means of 'a roadmap, a strategy or an action plan'.[187]

9.5. Cross-border movement of rainbow families in the EU; some statistics

There are no exact and exhaustive EU-wide statistics on the cross-border movement of same-sex couples within the EU. For example, there are no statistics available in respect of the number of same-sex couples who go from one EU Member State to another to have their relationship legally recognised by means of a registered partnership or marriage. Nor are there any statistics available concerning the number of same-sex couples, or individuals with a homosexual orientation, who are deterred from making use of their free movement rights, because of restrictive legislation in the host Member State. There are not even exhaustive and reliable numbers available regarding the number of same-sex partners of EU citizens who were given entry and residence as a 'family member' under the Free Movement Directive when moving to another EU Member State (see section 9.6.2 below). Nevertheless, there are some statistics available that may give some context to the present case study.

According to Eurostat, 12.8 million EU citizens – accounting for 2.5 per cent of the total EU population – were living in another Member State in the year 2011.[188] In 2014 that number was held to have risen to nearly 14 million.[189] Further, in 2011

184 European Parliament Resolution of 24 May 2012 on the fight against homophobia in Europe (2012/2657(RSP)) P7_TA(2012)0222, para. 5.

185 European Union Agency for Fundamental Rights 2013B, *supra* n. 165.

186 *Supra* n. 184, para. 6.

187 European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

188 Eurostat press release of 11 July 2012, STAT/12/105, online available at www.europa.eu/rapid/pressReleasesAction.do?reference=STAT/12/105&format=HTML&aged=0&language=EN&guiLanguage=en, visited June 2014.

189 The European Commission held in 2014 that nearly 14 million EU citizens were residing in a Member State of which they were not a national. See European Commission, *The Future EU Justice and Home Affairs Agendas: Questions and Answers*, Memo of 11 March 2014, Strasbourg, online available at www.europa.eu/rapid/press-release_MEMO-14-174_nl.htm,

the Commission held that '[o]f the approximately 122 million marriages in the EU, around 16 million (13%) ha[d] […] a cross-border dimension.'[190] In respect of registered partnerships, the latest figures stem from 2007. In that year there were reportedly approximately 211,000 registered partnerships in the EU, of which over 41,000 had an 'international dimension'.[191]

These European figures are not broken down into same-sex and different-sex couples. One may, however, assume that the statistics on the number of marriages include at least some same-sex marriages, as there are (increasingly more) EU Member States in which same-sex couples have access to marriage. The registered partnership statistics presumably include an even higher number of same-sex couples, as considerably more States provide for a registered partnership, where in most cases such a partnership is not open to different-sex couples, but to same-sex couples only. One would need statistics on the number of same-sex couples in the EU to make an estimate of the potential number of people that are involved. Such statistics are not, however, available. Some have tried to estimate the number of rainbow families in the EU. *ILGA-Europe*, for example, has estimated that within the EU at least 43,000 children were growing in same-sex families.[192]

In any case, even though no complete or exhaustive statistics are available, there is considerable anecdotal evidence which shows that cross-border movement of same-sex couples and their families is taking place within the EU.[193]

visited June 2014. In 2013, at the website of the European Commission (last updated 16 July 2013), it was held that there were 'around 16 million international couples in the EU including a certain number of same-sex couples.' See www.ec.europa.eu/justice/discrimination/orientation/legal-aspects/index_en.htm, visited July 2014.

190 In a 2014 Commission Communication it was held: 'Of 2.4 million marriages celebrated in the EU in 2007, about 300,000 fell into this category. So did 140,000 (13 per cent) of the 1,040,000 divorces that took place in the EU in the same year. In addition, 8,500 international couples in registered partnerships were dissolved by separation and 1 266 were ended by the death of one of the partners.' Commission, 'Bringing Legal Clarity To Property Rights For International Couples' (Communication), COM (2011) 125 final, p. 2. See also Commission, 'EU Citizenship Report 2010, Dismantling the obstacles to EU citizens' rights', COM (2010) 603 final, p. 5.

191 This international dimension included international registered partnerships and couples in a registered partnership who were living abroad or who were having property abroad. SEC (2011) 328 final. See also European Economic and Social Committee, 'Opinion on COM (2011) 126 final and COM (2011) 127 final' [2011] OJ C376/87.

192 ILGA-Europe, *ILGA-Europe's contribution to the Green Paper* (ILGA-Europe 2011) p. 19, online available at www.ilga-europe.org/home/publications/policy_papers/green_paper_april_2011, visited June 2014. *ILGA-Europe* refers (in footnotes 37 and 38 respectively) to: 'E. Jansen, *Gay and lesbian family planning in Germany: Options and constraints* (2009)' and 'L. Hodson, *The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European Perspective* (2008)'.

193 For such anecdotal evidence reference is also made to Ch. 10, section 10.4.1; Ch. 11, section 11.4.1 and Ch. 12, section 12.4.1 respectively.

9.6. Free movement law and rainbow families – open questions

While free movement of persons under the original EEC Treaty was limited to the economically active, i.e., the workers (Article 3(1)(c) EEC Treaty, now Article 45 TFEU), this gradually has been extended to economically inactive EU citizens. Under the present Article 21 TFEU every citizen of the Union has the right 'to move and reside freely within the territory of the Member States'.

Already at an early stage it was clear to the Union legislature that if an EU citizen's (a worker's) right to move were to be effective, he had to be allowed to be joined by his relatives. Since this right was not written expressly in the Treaty, it was laid down in secondary legislation (first Regulation 1612/68[194] and later Directive 2004/38[195]). Once exercised, this right remains effective also upon return to the home State.[196] Although more recently, in line with a less economic-oriented approach to citizenship, the rights of family members have increasingly been placed in the light of the right to respect for family life,[197] these rights remain first and foremost instrumental to the right of free movement of the EU citizen. They are derived rights, which exist only by virtue of the EU citizen's right of free movement and the family tie between him and his relative. Since the free movement rights are really rights of the EU citizen, the nationality of the family member is irrelevant. Further, the right of an EU citizen to be joined by his close relatives does not depend on a prior right of residence of these family members in the home Member State.[198] Being one of the fundamental Treaty freedoms, the CJEU has always interpreted the freedom of movement of persons broadly and the exceptions to it narrowly.[199] This is particularly true also for the provisions of Directive 2004/38 the Free Movement Directive, which aims to facilitate the exercise of the fundamental right to free movement of EU citizens.[200]

194 Council Regulation (EEC) 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2. Regulation 1612/68 was for the greater part repealed by the later Directive 2004/38 (see section 9.6.2 below).

195 European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

196 Case C-370/90 *Surinder Singh* [1992] ECR I-4265, ECLI:EU:C:1992:296, para. 21. In addition, the Court has held that the possibility for an EU worker to be joined by his long-term stable partner who does not fall within the definition of 'family' as laid down in secondary legislation, may constitute a social advantage to the worker, requiring at least equal treatment as regards the right of entry and residence of long-term partners of nationals of the host Member State. Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157, para. 28.

197 Commission, 'Proposal for a European Parliament and Council Directive 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 (2001) 257 final, p. 5. See Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769, ECLI:EU:C:2006:429, para. 53 and the references to the case-law of the ECtHR therein.

198 Case C-127/08 *Metock* [2008] ECR I-6241, ECLI:EU:C:2008:449, para. 58.

199 Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, ECLI:EU:C:2004:262, paras. 64–65.

200 Case C-127/08 *Metock* [2008] ECR I-6241, ECLI:EU:C:2008:449, para. 89.

There has never been a free movement case before CJEU involving an EU citizen with a same-sex partner, safe a same-sex couple with children.[201] There are consequently many open questions as to the free movement rights of rainbow families. Some guidance may be found in preparatory documents and in the CJEU's free movement case law. In legal scholarship, where the issue has been discussed quite extensively,[202] reference has often also been made to the CJEU's case law in employment cases, as discussed in section 9.3 above. Hereafter the matter is first assessed under Regulation 1612/68 (section 9.6.1) and the Free Movement Directive (section 9.6.2 below) as where a secondary law instrument is available, this must be applied first.[203] However, as primary law has precedence over secondary law, any such application must still be assessed in light of the latter. When the application of secondary law results in an unjustified restriction of the fundamental Treaty freedom found in primary law, the conflict must be resolved either through a harmonious interpretation of secondary law or by applying directly the Treaty freedom.[204] Section 9.6.3 therefore provides for an assessment of the free movement rights of rainbow families under primary law. Although other free movement issues are conceivable in relation to the present case study,[205] the focus here lies on the primordial free movement of persons.

Third-country nationals (TCNs) do not fall under the free movement regimes as laid down in the Treaties and the Free Movement Directive, as these exclusively apply to EU citizens. Third-country nationals and their families fall under a distinct and less favourable regime that has been developed in the Area of Freedom, Security and Justice (AFJS),[206] and of which the Family Reunification Directive[207] forms a prominent part. This Directive and the rights of entry and residence that it grants to limited categories of third-country nationals are discussed in section 9.6.4 below.

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201 Lenaerts has called the mobility of same-sex married couples '[a]nother aspect of family law that [was] likely one day to find its way to Luxembourg'. Lenaerts 2009–2010, *supra* n. 7, at p. 1355. See also Rijpma and Koffeman 2014, *supra* n. 1, at p. 489.

202 E.g. C. Karakosta, 'Portability of same-sex marriages and registered partnerships within the EU', 2 *Cyprus Human Rights Law Review* (2013) p. 53 and M. Župan, 'Registered partnership in cross-border situations – where invisibility to law lies?', in: N. Bodigora-Vukubrat et al. (eds.), *Invisible Minorities in Law* (Hamburg, Verlag Dr. Kovac 2013) p. 95.

203 Following the 'Tedeschi principle', substantive Treaty rules are applied only in the absence of secondary legislation. Case 5/77 *Tedeschi* [1977] ECR 1555, ECLI:EU:C:1977:144.

204 K. Ensig Sørensen, 'Reconciling secondary legislation and the treaty rights of free movement', 17 *European Law Review* (2011) p. 339.

205 The interesting question of whether the conclusion of marriage and the registration of a partnership can be qualified as the provision of services and therefore whether nationality and residency requirements to enter into marriage or registered partnership constitute obstacles to the freedom to receive services, is not examined in detail here. It is only noted that if marriage and registered partnership can be regarded as services under the Treaty, the argument could be made that the nationality and residency requirements that Member States like the Netherlands set for the conclusion of a marriage or the registration of a partnership under their national laws, form an obstacle to the freedom to receive services. Such a restriction on the free movement of services recipients is, however, probably quite easily to justify on public policy grounds.

206 Art. 79 TFEU.

207 European Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, [2003] OJ L251/12.

9.6.1. Regulation 1612/68 and workers with rainbow families

Regulation 1612/68 provided for the free movement of workers and their families. When the Regulation was drafted, a proposal was made to include a Recital holding that discrimination on grounds of sexual orientation represented an obstacle to the free movement of workers and their families, which could seriously impair the integration of migrant workers exercising their right to freedom of movement, and that of their families, into the host country.[208] No such Recital was, however, included in the final version of the Regulation, although it was provided that freedom of movement constituted 'a fundamental right of workers and their families' which required 'equality of treatment'. It was also held in the Preamble that '[…] obstacles to the mobility of workers [had to] be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'. Article 10(1) of the Regulation accordingly provided that 'irrespective of their nationality' certain family members had the right to install themselves with a worker who was a national of one Member State and who was employed in the territory of another Member State. These concerned the worker's spouse and their descendants who were under the age of 21 years or were dependants and dependent relatives in the ascending line of the worker and his spouse.[209]

In the *Reed* case (1986),[210] the question was raised if Article 10(1) was to be interpreted as meaning that in certain circumstances a person who had a stable relationship with a worker within the meaning of that provision was to be treated as his 'spouse'.[211] Ms. Reed was a British national who unsuccessfully applied for a residence permit in the Netherlands on the ground that she was living with Mr. *W.* in a stable non-marital relationship. *W.* was also a British national and he legally resided in the Netherlands as a worker within the meaning of the Treaty. The Netherlands government argued that a dynamic interpretation of the term spouse was only acceptable if it were based on developments in social and legal conceptions that were visible in the whole of the Community.[212] The Commission concurred that in the Community as it stood at that time it was 'impossible to speak of any consensus' that unmarried companions were

208 The proposed Recital No. 5 read: 'Whereas discrimination on grounds of sex, race or ethnic origin, religion or convictions, disability, age or sexual orientation represents an obstacle to the free movement of workers and their families; whereas the integration of migrant workers exercising their right to freedom of movement, and that of their families, into the host country can be seriously impaired by discrimination of this kind; whereas it is therefore essential to prohibit such discrimination within the scope of Regulation (EEC) No 1612/68 […].' Proposal for a European Parliament and Council Regulation amending Council Regulation 1612/68/EEC on free movement for workers within the Community [1998] OJ C344/9. See Guild 2001, *supra* n. 90, at p. 687.

209 Art. 10(2) Regulation 1612/68 provided that Member States had to facilitate the admission of any member of the family not coming within the provisions of paragraph 1, if they were dependent on the worker or living under his roof in the country whence he came.

210 Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157.

211 This concerned the third question as posed by the referring court.

212 According to the Netherlands government there was no reason to give the term 'spouse' an interpretation which would go beyond the legal implications of that term, which embraced rights and obligations which did not exist between unmarried companions.' Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157, para. 10.

to be treated as spouses.[213] The Court proved sensitive to this line of argumentation. It ruled that because Regulation 1612/68 had general application, was binding in its entirety and was directly applicable in all Member States, 'any interpretation of a legal term on the basis of social developments' had to 'take into account the situation in the whole Community, not merely in one Member State.'[214] It ruled that '[i]n the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation,' it was to be held that the term 'spouse' in Article 10 of the Regulation referred to a marital relationship only.[215] The Court concluded:

> '[…] Article 10(1) of Regulation No 1612/68 cannot be interpreted as meaning that the companion, in a stable relationship, of a worker who is a national of a Member State and is employed in the territory of another Member State must in certain circumstances be treated as his 'spouse' for the purposes of that provision.'[216]

The Court redressed the issue, however, by application of the 'social advantage' concept ex Article 7(2) of Regulation 1612/68.[217] It held that '[…] the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion [was] not a national of the host Member State, [could] assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers'.[218] It made clear that if a Member State permitted the unmarried companions of its nationals, who were not themselves nationals of that Member State, to reside in its territory, it could not refuse to grant the same advantage to migrant workers who were nationals of other Member States.[219]

The CJEU thus ruled in *Reed* that non-marital partners were not 'spouses' within the meaning of Regulation 1612/68. In 2004, this Regulation was, for the greater part, repealed and replaced by Directive 2004/38. Because by that time some States had introduced alternative forms of registration of (same-sex) relationships, the question was raised when the latter Directive was drafted, of whether explicit provision had to be made for these registration forms.

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213 According to the Commission the problem could not be resolved by means of a broad construction of Art. 10 of Regulation 1612/68. *Idem*, para. 11.

214 *Idem*, paras. 12–13.

215 *Idem*, para. 15.

216 *Idem*, para. 16.

217 *Idem*, para. 28. See also M. Fallon, 'Constraints of internal market law on family law', in: J. Meeusen et al. (eds.), *International family law for the European Union* (Antwerpen, Intersentia 2007) p. 149 at p. 174.

218 *Idem*, para. 28.

219 *Idem*, para. 29.

9.6.2. The Free Movement Directive and EU citizens with rainbow families

The Free Movement Directive (Directive 2004/38, also often referred to as 'Citizens' Directive') grants EU citizens a general right of entry and stay of three months.[220] After three months the residence right is maintained if the EU citizen can prove themselves to be economically active or either a student or a person of independent means.[221] Importantly, as noted above, the Directive lays down the rights of family members of the EU citizen to join him in the host Member State. Once these family members have been granted entry and residence in the host Member State, they are also entitled to take up employment or self-employment there,[222] and they must be treated equally to the nationals of that Member State within the scope of the Treaty.[223]

During the deliberations in the preparation of the Free Movement Directive, the European Parliament made a plea for the inclusion of same-sex partners in the scope of the Free Movement Directive.[224] It proposed recognising as family members the spouse and registered partner, irrespective of sex, on the basis of the relevant national legislation, and the unmarried partner, irrespective of sex, with whom the Union citizen had a durable relationship, if the legislation or practice of the host and/or home Member States treated unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation.[225] The Council, however, was reluctant to opt for a definition of the term 'spouse' which made a specific reference to spouses of the same sex.[226] It noted that at the time, only two Member States provided for same-sex marriages and referred to CJEU's definition of marriage in *D. and Sweden* v. *Council* (see section 9.2 above).[227] The Council furthermore held that recognition of registered partners or unmarried partners had to be based exclusively on the legislation of the host Member State. It noted in this respect that '[r]ecognition for purposes of residence of non

220 Art. 5 and 6(1) Directive 2004/38.

221 Art. 7 Directive 2004/38.

222 Art. 23 Directive 2004/38.

223 Art. 25(1) Directive 2004/38.

224 The original Commission proposal was laid down in COM (2001) 257 final.

225 See the paraphrasing in Commission, 'Amended proposal for a Directive of the European Parliament and of the Council 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 (2003) 199, pp. 10–11. The original Amendments 14, 15 and 16 read:
'(a) the spouse, irrespective of sex, according to the relevant national legislation;
(b) the registered partner, irrespective of sex, according to the relevant national legislation;
(c) the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/or home Member State treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation […].'

226 Common Position (EC) No 6/2004 adopted by the Council on 5 December 2003 with a view to adopting Directive 2004/.../EC of the European Parliament and of the Council of… on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004/C 54 E/02), p. 28.

227 See also M. Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union', 12 *European Review of Private Law* (2004) p. 613 at p. 621.

married couples in accordance with the legislation of other Member States could pose problems for the host Member State if its family law [did] not recognise this possibility.' The Council added that '[t]o confer rights which [were] not recognised for its own nationals on couples from other Member States could in fact create reverse discrimination' and this had to be avoided according to the Council.[228] It was observed that the Council discussions revealed that several Member States stuck 'to a very traditional definition of the family'.[229]

The European Commission subsequently amended its proposal in line with the Council's Position. It reportedly felt that '[…] harmonisation of the conditions of residence for Union citizens in Member States of which they [were] not nationals' was not supposed to 'result in the imposition on certain Member States of amendments to family law legislation, an area which [did] not fall within the Community's legislative jurisdiction.'[230] The Commission preferred to restrict the proposal to the concept of spouse as meaning 'in principle' spouse of the opposite sex. Under reference to *Reed*, it indicated that this could be different if there would be 'subsequent developments'.[231]

According to the Commission its amended proposal presented 'an equitable solution' to the issues as identified during the deliberations in Parliament and Council.[232] Others qualified the final text as '[…] a compromise which did not deliver as much for same-sex couples as many had hoped.'[233] According to Toner the Directive clearly showed the existence of '[…] a considerable reluctance to use EU law to push skeptical and reluctant Member States too far along the road of recognition of [non-traditional] relationships until they are ready and willing to adopt such measures in national law.'[234] Lenaerts observed that the EU legislature opted for a 'hands-off approach', leaving the sensitive decision as to the definition of the term 'spouse' to judicial interpretation.[235] Bell held that the overall picture painted by the Free Movement Directive was that of a legislature '[…] caught between acknowledging the pace of social and legal change within the Member States whilst respecting those states unwilling to see these changes crystallised in EU law.'[236] The author held that '[…] the ambiguity on same-sex marriage, the partial free movement rights for

228 Common Position (EC) No 6/2004, *supra* n. 226, at p. 28.

229 H. Toner, 'Immigration Rights of Same-Sex Couples in EC Law', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex couples in Europe* (Antwerp, Intersentia 2003) p. 178 at p. 181.

230 COM (2003) 199, at p. 3.

231 *Idem*, at pp. 10–11.

232 *Idem*, at p. 3.

233 H. Toner, 'Migration rights and same-sex couples in EU law: a case study', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 285 at p. 287.

234 *Idem*, at p. 289.

235 Lenaerts held that '[…] if a national court asks for guidance in the interpretation of this concept, the [CJEU] would have no choice but to provide a definition through the medium of common-lawmaking.' Lenaerts 2009–2010, *supra* n. 7, at pp. 1355–1356. In footnote 83 Lenaerts referred to: 'H. Toner, *Partnership Rights, Free Movement and EU Law*, 2004, p. 60–68', who reportedly explained '[…] that the regime laid down in the directive was the result of a political compromise among conservative and liberal Member States.' For further discussion of this question, see section 9.6.2.1 below.

236 Bell 2004, *supra* n. 227, at p. 626.

registered partners and the non-rights for unmarried partners [left] the Directive rather fork-tongued in the signals it [was] sending.'[237]

The present Article 2 of Directive 2004/38 provides that the term 'family member' covers both the 'spouse' and '[…] the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State'.[238] Provision has also been made for unmarried and unregistered partners: on the basis of Article 3(2)(b) the host state has an obligation 'to facilitate entrance' of 'the partner with whom the Union citizen has a durable relationship, duly attested'. Article 24 provides that '[…] all Union citizens residing on the basis of this Directive in the territory of the host Member State […] enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.' The benefit of this right is extended to third-country national family members who have the right of residence or permanent residence.[239] Further, Recital No. 31 of the Preamble to the Free Movement Directive, holds that

> '[i]n accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as […] sexual orientation.'[240]

Following Article 27(1) of the Free Movement Directive, Member States may restrict the freedom of movement and residence of Union citizens and their family members on grounds of public policy, public security or public health. Any measure taken on ground of public policy must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned, which conduct must represent 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[241]

As the CJEU has never ruled upon this issue, it remains an open question if or when same-sex partners of EU citizens can be regarded as 'family members' within the meaning of the Free Movement Directive.[242] This question becomes vital if the

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237 *Idem*, at p. 626.

238 Art. 2(a) and (b) Directive 2004/38 respectively. The term 'family member' furthermore covers the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner and the dependent direct relative in the ascending line and those of the spouse or partner. Art. 2 (c and d) Directive 2004/38. As noted by Fallon this excludes registration following the law of a third State. Fallon 2007, *supra* n. 217, at p. 175.

239 Art. 25(1) Directive 2004/38.

240 As Lenaerts explains: 'This would mean, for example, that once a person is qualified as "a family member," the host Member State cannot deprive him or her from receiving the benefits to which he or she is entitled under Directive 2004/38/EC just because of his or her sexual orientation […].' Lenaerts 2009–2010, *supra* n. 7, at p. 1360, footnote 108.

241 Art. 27(2) Directive 2004/38.

242 Lenaerts has noted that in any case the definition of 'family member' was considered to be a 'broad' one. Lenaerts 2009–2010, *supra* n. 7, at p. 1355.

relative of an EU citizen cannot himself claim free movement rights.[243] Should a preliminary reference on this issue be made to the CJEU,[244] there would be various possible avenues the Court could take.

In exploring these avenues, a distinction must be drawn between same-sex spouses, same-sex registered partners and same-sex stable (or '*de facto*') partners, respectively. The following subsections discuss different views on how the relevant Directive provisions must be read for each of these respective civil statuses and types of relationships. A recurring question in the academic debate on the matter has been – and still is – whether and if so, the extent to which the CJEU's case law in other realms of EU law, such as in staff cases or in non-discrimination cases, applies in this context. The following subsections intend to unravel these different arguments and try to analyse what the (minimum) requirements of EU law are in this respect.

9.6.2.1. Same-sex spouses

The term 'spouse' under Article 2(2)(a) of Directive 2004/38 is not defined. In fact, the EU legislature deliberately left definition of this term to the judiciary.[245] Because it concerns a term of EU law, the CJEU is indeed competent to interpret and define the term 'spouse'.[246] So far, there has not been a case before the CJEU in which it has been asked if the term 'spouse' in the Free Movement Directive also covers same-sex spouses. The only relevant free movement case concerning the definition of 'spouse' is the above discussed *Reed* ruling, in which the Court ruled that unmarried partners were not covered by the term 'spouse' as at the time provided for in Regulation 1612/68.

Various claims can and have been made in respect of what the CJEU could and should rule if the question is referred to it whether 'spouse' in Article 2(2)(a) of Directive 2004/38 includes same-sex spouses. In the first place, the view can be defended that

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243 In fact, most free movement cases that have been brought before the Court regarding the rights of family members of EU citizens have concerned third-country national relatives.

244 Art. 267 TFEU. 'In theory, the Court could be seized of a question concerning the compatibility of national rules on the recognition of same-sex relationships with EU law through infringement proceedings. These could be initiated either by the Commission or a Member State, if they were to believe that (non-)recognition would amount to a violation of EU law. However, infringement proceedings initiated by Member States are extremely rare for their political implications. Likewise, the Commission has discretion to initiate infringement proceedings and is unlikely to do in such a sensitive area. It is therefore more probable that a case would reach Luxembourg by way of a preliminary reference from a national judge, who in domestic proceedings is confronted with a case in which a same-sex couple challenges the non-recognition of their relationship on the basis of EU law.' Rijpma and Koffeman 2014, *supra* n. 1 at p. 460.

245 Lenaerts 2009–2010, *supra* n. 7, at pp. 1355 and 1360.

246 As Bogdan has rightly observed, the concept of marriage in EU law is 'in principle an autonomous concept, independent of the definitions of marriage in national legal systems'. M. Bogdan, 'Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden', 78 *Nordic Journal of International Law* (2009) p. 253 at pp. 255–256, referring (in footnote 8) to the *Reed* judgment. In the words of Lenaerts '[…] if a national court asks for guidance in the interpretation of this concept, the ECJ would have no choice but to provide a definition through the medium of common-lawmaking.' Lenaerts 2009–2010, *supra* n. 7, at pp. 1355–1356.

because Article 2(2)(a) Directive 2004/38 makes no reference to national laws, an independent and uniform interpretation of this term of EU law is in place. Others have questioned whether Article 2(2)(a) lends itself to autonomous interpretation.[247] An alternative approach therefore claims that the Court should defer to national law, either the law of the host Member State or that of the home Member State. These different options are now explored in more detail.

It is settled CJEU case law that '[…] the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.'[248] Because Article 2(2)(a) of Directive 2004/38 does indeed not make any express reference to national law, the question arises as to what independent and uniform meaning could be given to the term 'spouse' in this provision.

For the interpretation of a provision of European Union law its wording, the context in which it occurs and the objectives pursued by the rules of which it is part must be considered.[249] In the present case, a textual interpretation of Article 2(2)(a) has been held to provide limited guidance, since the wording of Article does not make any reference to the (combined) gender of the spouses.[250] When applying a contextual and a teleological interpretation, it has been noted that the legislature deliberately chose not to provide for same-sex couples explicitly (see above).[251] It furthermore made separate provision for registered partnerships – at the time the most common alternative to marriage for same-sex couples – and made recognition of such partnerships subject to the legislation of the host Member State. These considerations support the conclusion that the EU legislature did not intend to oblige the Member States to recognise same-sex spouses as spouses for the purposes of the Free Movement Directive.

247 Rijpma and Koffeman 2014, *supra* n. 1, at p. 468.

248 Case C-34/10 *Oliver Brüstle* v. *Greenpeace eV* [2011] ECR I-9821, ECLI:EU:C:2011:669, para. 25, under reference to Case 327/82 *Ekro* [1984] ECR 107, ECLI:EU:C:1984:11, para. 11; Case C-287/98 *Linster* [2000] ECR I-6917, ECLI:EU:C:2000:468, para. 43; Case C-5/08 *Infopaq International* [2009] ECR I-6569, ECLI:EU:C:2009:465, para. 27 and Case C-467/08 *Padawan* [2010] ECR I-10055, ECLI:EU:C:2010:620, para. 32.

249 Case C-648/11, *MA a.o.* [2013] ECR 0000, ECLI:EU:C:2013:367, para. 50; Case C-19/08 *Petrosian* [2009] ECR I-495, ECLI:EU:C:2009:41, para. 34 and Case C-403/09 *Detiček* [2009] ECR I-12193, ECLI:EU:C:2009:810, para. 33 and Case C-287/98 *Linster* [2000] ECR I-6917, ECLI:EU:C:2000:468, para. 43, under reference to Case 327/82 *Ekro* [1984] ECR 107, ECLI:EU:C:1984:11, para. 11. See also P. Rott, 'What is the Role of the ECJ in EC Private Law? – A Comment on the ECJ judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald', 1 *Hanse Law Review* (2005) pp. 7–9.

250 Rijpma and Koffeman 2014, *supra* n. 1, at p. 468.

251 A 2008 report of the for Fundamental Rights (FRA) was very critical in this respect, deeming it a problem that the EU legislature '[…] failed to impose a clear obligation on the host Member State to recognise as 'spouse' a person of the same-sex validly married under the laws of the Member State of origin.' This was considered an 'omission in the wording of the Directive.' European Union Agency for Fundamental Rights 2008, *supra* n. 181, at p. 63.

In interpreting the term 'spouse', the CJEU could also – as it did in *Grant* and *D* v. *Council* – refer to the national laws of the various EU Member States.[252] These indicate certain social and legal developments,[253] which the CJEU may be inclined to follow, even though it is under no Treaty obligation to do so and even though it would be somewhat circular to base the definition of an EU law term on the implementation of that same EU provision at national level. The Court could thereby take into account the number of Member States that have opened up marriage to same-sex couples[254] as well as the number of Member States that authorise the entry and residence of same-sex spouses as 'spouse' for the purposes of the Free Movement Directive.[255] The primordial question will then be whether those numbers are enough to prompt the CJEU to rule that 'spouse' within the meaning of Article 2(2) Directive 2004/38 includes same-sex spouses. While some have held that new social and legal developments in only a few Member States could not justify an autonomous interpretation of the term 'spouse',[256] others have not outright rejected this idea. Lenaerts and Gutierrez-Fons have held that *Grant* illustrated that '[…] the existence of divergences among national legal systems may not *automatically* rule out the incorporation, into the EU legal order, of a legal principle which is recognized in only a minority of Member States'. The authors explained this as follows:

> '[…] since the [CJEU] follows an evaluative approach in the discovery of general principles, incorporation may take place where "such a legal principle is of particular significance [for the project of European integration], or where it constitutes a growing trend".'[257]

If applied in the present context, it must be assessed whether the increased legal recognition of same-sex relationships throughout the EU Member States can

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252 In 1998, in *Grant*, the Court held that in the state of the law within the Community at that time, stable relationships between two persons of the same sex were not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. The Court came to a similar conclusion in Joined Cases C-122/99 P & C-125/99 P *D. and Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:30.

253 Compare Waaldijk 2001B, *supra* n. 88, at p. 648, who held it to be likely that the EU would follow 'the standard sequence followed by the member states' in resect of recognition of same-sex partners in fields other than employment.

254 In 2014 eight Member States had opened up marriage to same-sex couples, namely the Netherlands, Belgium, Portugal, Spain, Denmark, Sweden, France and the United Kingdom, while it was anticipated that Luxembourg would do so as of 1 January 2015.

255 This concerns at least nine Member States (Belgium, Denmark, Finland, Italy, the Netherlands, Portugal, Spain, Sweden, and the UK). See Rijpma and Koffeman 2014, *supra* n. 1, at p. 470, referring (in footnote 90) to: European Union Agency for Fundamental Rights 2010, *supra* n. 181, at p. 46 and Ministry of the Interior of Italy, Administrative Guideline n. 8996 of 26 October 2012.

256 Bogdan 2009, *supra* n. 246, at pp. 255–256, referring (in footnote 8) to *Reed*. In this respect Bogdan had previously noted that in *D. and Sweden* v. *Council* (2001) the interpretation of 'marriage' had 'not [been] really independent' as in it had been 'based on the legal systems of the totality of Member States'. Bogdan 2003, *supra* n. 20, at p. 173. Referring to *Grant*, Lenaerts and Gutiérrez-Fons observed that the CJEU would be 'careful before adopting an "EU" solution', where there were important divergences among national legal systems. The authors pointed out that for EU law to develop in this field, legislative action was said to be needed. K. Lenaerts, J.A. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law', 46 *CMLRev* (2010) p. 1629 at p. 1634.

257 *Idem*, at p. 1635.

constitute a growing trend, as well as whether an interpretation of 'spouse' as covering same-sex spouses is of particular significance for European integration.

Altogether, it cannot be ruled out that if the CJEU were to interpret the term 'spouse' under Article 2(2)(a) autonomously, it would conclude that it sees at different-sex spouses only. In this regard it must be noted that the Directive sets a minimum norm only; States are free to offer more protection and thus to recognise also same-sex spouses as 'spouse' for the purposes of the Directive. On the basis of the equal treatment provision (Article 24 of the Directive) there is even an obligation to do so for States who authorise the entry and residence of same-sex spouses of their own nationals as 'spouse' for the purposes of the Directive. They must apply the same rules to the same-sex spouses of migrating nationals of other EU Member States.[258] States who do not provide for same-sex marriages under their national laws, are free, nevertheless, to recognise migrating same-sex spouses as 'spouse' for the purpose of the Free Movement Directive. States may also decide to authorise the entry and residence of a foreign same-sex spouse under Article 2(2)(b) or Article 3(2) (see sections 9.6.2.2 and 9.6.2.3 below).

If the CJEU, on the other hand, were to adopt a uniform definition of 'spouse' as including same-sex spouses, reverse discrimination – whereby nationals of the host Member States would be treated less favourably when compared to EU citizens migrating to that Member State – would be the result in those States that do not foresee in same-sex marriages. While the Council held this to be undesirable (see 9.6.2 above), the practice of reverse discrimination is in itself not at variance with EU law.

As explained by Lenaerts, the fact that the CJEU is competent to define the concept 'spouse' does not necessarily imply that the Court has to adopt an independent definition of 'spouse', if ever asked to interpret it.[259] According to the author this would '[…] foster uniformity and legal certainty, but it would disregard the sensitivities of some Member States to the benefit of others.'[260] Others have submitted that '[…] in view of the legislative developments in the Member States since *D.* v. *Council*, the CJEU [was] no longer in the position to identify in EU law or in the general principles of Union law criteria enabling it to define the meaning and scope of marriage by way of independent interpretation'.[261] As an alternative it has therefore been claimed that the CJEU should defer to national law as interpreted by national courts.

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258 See Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157.

259 Lenaerts 2009–2010, *supra* n. 7, at p. 1356. This conclusion is supported by the finding of the CJEU that '[…] the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must *normally* [emphasis added] be given an independent and uniform interpretation throughout the European Union.' See *supra* n. 248.

260 *Idem*, at pp. 1356–1357.

261 Rijpma and Koffeman 2014, *supra* n. 1, at pp. 470–471, referring (in footnote 95) to Case T-43/90 *Díaz García* [1992] ECR II-2619, ECLI:EU:T:1992:120, para. 36 and Case T-85/91 *Khouri* [1992] ECR II-2637, ECLI:EU:T:1992:121, para. 32.

In interpreting Article 2(2)(a) of the Directive, the CJEU may defer to either the law of the host State or to that of the home State. The home State principle is strongly embedded in EU free movement law and has its basis in the principle of mutual recognition. Application of the latter principle in this context has been held to be consistent with the Directive's objective to promote free movement,[262] as well as to serve legal certainty.[263] Taking the principle of mutual recognition as a starting point, it has been claimed, recently, even by EU institutions, that 'a spouse is a spouse'.[264] In its 2009 *Guidance for better transposition and application of the Free Movement Directive*, for example, the Commission held that '[m]arriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive.'[265] While the wording 'in principle' leaves room for exceptions, former Justice Commissioner Reding, while addressing the European Parliament in 2010, was considerably firmer. She held:

> 'If you live in a legally-recognised same-sex partnership, or marriage, in country A, you have the right – and this is a fundamental right – to take this status and that of your partner to country B. If not, it is a violation of EU law, so there is no discussion about this. This is absolutely clear, and we do not have to hesitate on this. The Free Movement Directive does not give the Member States discretion to discriminate – no EU directive does. We should not allow a mythology to be developed saying that, actually, it is possible to discriminate. We have to be very firm on the principles.'[266]

In fact, the Commissioner thus made an argument for the portability of civil statuses within the European Union. She argued that once an EU citizen and his or her same-sex partner have married under the law of one Member State, all other Member States, regardless of their own national laws, *must* recognise this partner as 'spouse' within the meaning of the Free Movement Directive. The Commissioner stressed, in this regard, that in applying the Directive, Member States have to respect fundamental rights, including the prohibition of discrimination on the grounds of sexual orientation (Article 21 Charter).

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262 *Idem*, at p. 471.

263 *Idem*.

264 Compare Barnard who has held that a 'spouse' in the meaning of the Free Movement Directive is '[…] the person to whom the EU citizen is married under the laws of the state where the marriage was entered into.' C. Barnard, *The substantive law of the EU. The four freedoms*, 2nd ed (Oxford, Oxford University Press 2007) p. 418. Bogdan observed in 2003 that it was at that time 'very doubtful' whether (then existing) EC law contained any 'country-of-origin principle' with regard to civil status. Bogdan 2003, *supra* n. 20, at p. 173.

265 It must be noted that the Commission 'in principle' extended the mutual recognition principle to outside the EU context, by holding that marriages 'validly contracted anywhere in the world' have to be recognised. Commission, 'Communication 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, p. 4, para. 2.1.1. See critically Toner 2012, *supra* n. 233, at p. 290.

266 Tuesday, 7 September 2010 – Strasbourg, PV 07/09/2010 – 17 CRE 07/09/2010 – 17, online available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100907+ITEM-017+DOC+XML+V0//EN&language=EN, visited 24 June 2014.

This approach has also been taken in various reports of the EU Fundamental Rights Agency (FRA). Its 2008 Legal study on homophobia and discrimination on grounds of sexual orientation concluded that any refusal to grant a same-sex spouse, who entered into marriage under the laws of an EU Member State, an automatic and unconditional right of entry and residence, would constitute '[…] a form of direct discrimination on grounds of sexual orientation, in violation of Article 26 of the International Covenant on Civil and Political Rights, the general principle of equality, and of the prohibition on discrimination as reiterated in Article 21 of the Charter of Fundamental Rights.'[267] This view was later repeated in other FRA publications on the subject matter.[268]

Apart from the non-discrimination argument, other grounds have been put forward to support the view that a spouse is a spouse. Costello, for example, based an argument on the CJEU judgment in the *Metock* case (2008).[269] The author held that this judgment's '[…] insistence that the time and place of the marriage [were] irrelevant to the enjoyment of the EC residence rights could lend some support to the assertion that a spouse [was] a spouse, in that it seem[ed] to remove marriages from the normal realms of private international law on recognition of legal relationships contracted elsewhere.'[270]

While the former Justice Commissioner has thus advocated application of the host State principle in all situations, Lenaerts has made a plea for leaving room for States to justify refusals to authorise entry and residence of same-sex spouses on the basis of overriding requirements. In principle, the author and CJEU Judge considered application of the home State principle to be 'most consistent with the fundamental freedoms' and held that the term 'spouse' under Article 2(2)(a) of the Free Movement Directive had to be interpreted 'in light of the principle of mutual recognition'.[271] However, because the EU legislature deferred to the judiciary on this point, the CJEU would have to proceed on the basis of a case-by-case analysis, 'while embarking on an analogous legal reasoning to *Maruko*'.[272] According to Lenaerts, Member States should be entitled to invoke overriding reasons of general interest to justify a refusal to recognise a same-sex spouse as spouse under the Free Movement Directive. Any justification advanced by a Member State '[…] would have to be applied in compliance with fundamental rights, particularly the protection of family life.'[273] In the words of Lenaerts, the Court would thus engage '[…] in a balancing exercise, scrutinizing whether the reasons put forward by the host Member State pass muster under free movement law.'[274]

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267 European Union Agency for Fundamental Rights 2008, *supra* n. 181, at p. 70.

268 E.g. European Union Agency for Fundamental Rights 2010, *supra* n. 181, at p. 46.

269 Case C-127/08 *Metock* [2008] ECR I-6241, ECLI:EU:C:2008:449.

270 C. Costello, 'Metock: free movement and "normal family life" in the Union', 46 *CMLRev* (2009) p. 587 at pp. 615–616.

271 Lenaerts 2009–2010, *supra* n. 7, at pp. 1360–1361.

272 *Idem*, at p. 1359.

273 *Idem*, at p. 1360.

274 *Idem*, at pp. 1360–1361.

Lenaerts' alternative proposal to assess each case individually has been held to carry the risk of leading to 'conceptual confusion, legal uncertainty and unnecessary litigation'.[275] Also, various questions are left unanswered; it is not explained what is meant by an interpretation 'in light of the principle of mutual recognition', nor which overriding reasons of general interest are considered suitable 'to pass muster under free movement law'. As noted above, Article 27(1) of the Directive provides for a limited number of grounds, of which only public policy has been held to be possibly applicable in the situation where a host State imposes restrictions on the free movement of an EU citizen and his or her same-sex partner. It has been submitted that the mere fact that the spouse (or more generally the partner) of a migrating EU citizen is of the same sex cannot be said to constitute the required personal conduct which represents '[…] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[276]

In fact, Lenaerts' proposal for the interpretation of this secondary law provision is based on a primary law reasoning. The application of primary law in this areas is discussed in section 9.6.3 below. First, however, the rights of same-sex registered partners and same-sex stable partners under the Free Movement Directive, are discussed.

9.6.2.2. Same-sex registered partners

Article 2(2)(b) of Directive 2004/38 expressly refers to the laws of the Member States. It defines the term 'registered partner' as '[…] the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State'. Because of the explicit choice for the host State principle in Article 2(2)(b), the dominant view is that the obligations of States, and the corresponding rights of migrating same-sex couples, are dependent upon the laws of the host State.

It is not entirely clear, however, how the phrase 'equivalent to marriage' should be interpreted. It can be debated, for example, if the French PACS meets this standard. The CJEU judgment in the *Hay* case may be held to support a conclusion in the affirmative, but one must be aware that the Court in that case only found comparability in respect of certain benefits that were granted on the occasion of marriage. Hence

275 Rijpma and Koffeman 2014, *supra* n. 1, at p. 472.

276 Art. 27(2) Directive 2004/38. Rijpma and Koffeman 2014, *supra* n. 1, at p. 479. Papadopoulou has held in this regard: 'Allowing for wide and open-ended grounds for restrictions on free movement within the EU based on the ambiguous notion of 'public order' would severely undermine the supremacy and autonomy of EC law and underestimate the depth and force of European integration. It can therefore safely be concluded that even Member States whose national laws do not recognize same-sex partnerships will still be obliged to grant access to same-sex married spouses of EU citizens or third-country nationals legally residing in their territory.' L. Papadopoulou, 'In(di)visible Citizens(hip): Same-sex Partners in European Immigration Law', 21 *Yearbook of European Law* (2002) p. 229 at pp. 235–236.

such comparability does not necessarily imply the finding of equivalence to marriage as required in the context of the Free Movement Directive. A related question is who is to decide if a national registered partnership regime is equivalent to marriage.[277] A further question is whether a couple that has concluded a partnership under a relatively weak regime, such as a French PACS, is able to 'boost' its PACS by moving to a Member State that provides for a stronger registered partnership, and if so, whether they could subsequently retain stronger partnership rights upon return to their home Member State.[278]

Host States that do not provide for any registered partnership equivalent to marriage in their national laws, are under no obligation to recognise the registered partner of a migrant EU citizen as 'family member' within the meaning of the Free Movement Directive, although they are of course free to do so.[279] In this situation the couple presumably falls under the rules on stable partners in a 'durable relationship' (Article 3(2), as discussed below). If the host State, however, provides for a partnership for same-sex couples that is equivalent to marriage, it must authorise the entry and residence of same-sex registered partners from other Member States as 'family member' within the meaning of Directive 2004/38.[280] This has made some conclude that there were '[…] two zones of migration for registered partners within the Union'.[281]

Former Justice Commissioner Reding has instead argued that host States have to recognise the registered partners from migrating EU citizens, regardless of their own national laws (see the quote in section 9.6.2.1 above). Thus, in her opinion, even host States who do not provide for any form of legal recognition of same-sex relationships under their national laws, would have to authorise entry and residence of same-sex registered partners from other Member States under the Free Movement Directive. This view seems rather difficult to reconcile with the wording of Article 2(2)(b), which clearly reflects the host State principle. It is furthermore provided that only host States which in their national laws provide for a partnership 'equivalent to marriage', have to authorise entry and residence of the (same-sex) registered partners of nationals of other EU Member States. To claim that *any* host State, including those which in their national laws do not provide for any legal recognition of same-sex relationships, has to recognise same-sex registered partners as 'family member' within the meaning of Article 2(2)(b) may be stretching the interpretation limits of this text too far. The Commissioner's position furthermore raises the question

277 In the employment cases *Maruko* (2008) and *Römer* (2011), the CJEU left this to the national courts to assess, while in *Hay* (2013) the CJEU was prepared to examine this itself. See section 9.4 above.

278 Rijpma and Koffeman 2014, *supra* n. 1, at p. 473, referring (in footnote 109) to Toner 2012, *supra* n. 233, at pp. 288–289.

279 *Idem*, at p. 473, explaining in footnote 105 that Portugal, Belgium, Sweden and Denmark indeed do so.

280 As Fallon has pointed out, the wording of the Directive seems to exclude recognition of a registered partnership concluded outside the EU. Fallon 2007, *supra* n. 217, at p 175.

281 Bell 2004, *supra* n. 227, at p. 624. The author explained that '[i]n an inner zone of states that include registered partnership in their domestic legislation, there is unrestricted free movement. In the outer zone of states without registered partnership legislation, admission of the couple will be at the discretion of the national authorities.'

of how Member States who do not provide for any other form of legal recognition of relationships but marriage, should implement this in practice, namely whether they should treat such foreign registered partnerships as marriages, or create a new institution in their national laws.

The statements by former Commissioner Reding have not been supported by the Commission on all occasions. In 2010 a Luxembourg national petitioned to the European Parliament to have the Commission investigate the non-recognition by Luxembourg of the British civil partnership that he and his partner had concluded in the UK.[282] The petitioner held that this non-recognition constituted a restriction on his and his partner's right to freedom of movement within EU.[283] In its response of May 2011, the Commission commented:

> 'There is currently no EU legislation providing for the mutual recognition of registered partnerships in the European Union. The European Union, although committed to providing its citizens with a wide spectrum of civil rights, has no role to play in relation to Member States' decisions to recognise registered partnerships. It is up to each Member State to resolve this issue and decide whether or not to recognize partnerships registered in other Member States. The issue raised by the petitioner is of exclusive competence of the Member States. However, the Commission is aware of the possible difficulties faced by EU citizens and has therefore published a Green Paper in order to obtain views on ways to reduce these problems.'[284]

The Commission thus held otherwise than Commissioner Reding had done earlier. In fact, it did not even explicitly qualify the matter as a free movement issue, although it did acknowledge, that the situation was problematic for EU citizens in the situation of the petitioner. The Green Paper to which it referred is discussed in section 9.7.3 below.

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282 The petitioner, who entered into a civil partnership in United Kingdom, and, therefore, could not engage in a Luxembourg civil union, considered that the two forms of partnership had to be regarded as equivalent.

283 This petition was similar to an earlier petition of 2009, namely Petition 1052/2008 by Aldwyn Llewelyn (British) on legal rights in connection with cohabitation agreements in France (PACS) and Britain (civil partnerships). In response to that petition the Commission had also underlined that there was at the time no Community legislation providing for recognition of civil partnerships in the European Union. It also acknowledged, however, that the situation in which the petitioner found himself '[…] could raise issues relating to Community law, in particular the principle of the ban on discrimination on grounds of nationality and the right of Union citizens to reside freely in the territory of another Member State.' In this case the Commission had written a letter to the French Minister of Justice on the issue, although the comment to the petition does not make clear what the content or tenor of that letter was. The Commission did in any case welcome the final adoption by the National Assembly of a proposal for a law designed to recognise foreign partnerships in France.

284 European Parliament, Committee on Petitions (2011), Petition 0178/2010 by Oliver Hepworth (British), on the non-recognition of the British civil partnership by Luxembourg, 6 May 2011, PETI_CM(2011)464844, online available at: www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/866/866779/866779en.pdf, visited June 2014.

9.6.2.3. Same-sex stable partners

Same-sex stable partners of EU citizens who do not enjoy an automatic right of entry and residence in the host Member State as 'family members' within the meaning of Article 2(2) of the Free Movement Directive may, nevertheless, fall within the scope of Article 3(2) of this Directive. Following the latter provision the host State has an obligation 'to facilitate entrance' of 'other family members' who are members of the household of the Union citizen in the State of origin and of 'the partner with whom the Union citizen has a durable relationship, duly attested'. The host Member State must undertake an extensive examination of the personal circumstances and must justify any denial of entry or residence to these partners.[285] In examining their situation on the basis of its own national legislation, the host State must take into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence on the EU citizen.[286]

The general prohibition of discrimination on grounds of nationality ex Article 24 of the Directive must be observed when applying this Article. Thus, a State may not authorise the entry and residence of all unmarried stable same-sex partners of its own nationals, while refusing to do so for migrating EU citizens. Further, following Recital No. 31 of the Preamble to the Directive, States may not discriminate on grounds of sexual orientation when applying the Directive. They may not thus, for example, systematically refuse same-sex partners when applying this provision.[287] It has furthermore been observed that States cannot adopt a blanket policy of not admitting unmarried partners under any circumstances, as they have to assess each case individually.[288]

The obligations of the host State under Article 3(2) are defined in considerable looser terms than under Article 2(2).[289] The language of facilitation has been called 'hazy and unclear'.[290] A 2010 FRA report qualified the 'duty to facilitate' as '[…] a vague expression which does not necessarily translate into practical consequences in the absence of specific and inclusive yardsticks.'[291] The CJEU's has case law given only limited guidance since.[292] In *Rahman* (2012), the CJEU ruled that Article 3(2) imposes '[…] an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third

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285 Art. 3(2) Directive 2004/38. See also COM (2009) 313 final, p. 4.

286 Recital 6 and Art. 3(2) Directive 2004/38.

287 This also follows from the obligation to respect fundamental rights – including the right to family life – in applying the Directive ex Art. 6(3) TEU. In 2011 Malta amended its law implementing Art. 3(2) Directive 2004/38 under which same-sex partners could not qualify as durable, duly attested partners. It did so in response to an inquiry and negotiations by the Commission. European Union Nationals and their Family Members (Amendment) Order, 2011 (L.N. 329 of 2011).

288 Bell 2004, *supra* n. 227, at p. 625.

289 European Union Agency for Fundamental Rights 2008, *supra* n. 181, at p. 63.

290 Toner 2012, *supra* n. 233, at p. 289.

291 European Union Agency for Fundamental Rights 2010, *supra* n. 181, at p. 50.

292 The CJEU further ruled that because of its imprecise formulation the provision could not be relied on directly against a Member State. Case C-83/11 *Rahman* [2012] ECR 0000, ECLI:EU:C:2012:519, para. 21 and 24.

States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.' States are left a wide discretion as regards the selection of the factors that could be relevant for the examination of the applicant's personal circumstances. As a minimum they had to guarantee that they employed criteria that are consistent with the normal meaning of the term 'facilitate' and of the words relating to 'dependence' used in Article 3(2), and which do not deprive the provision of its effectiveness.

It is furthermore unclear how the terms 'partner' and 'durable relationship, duly attested' in this context should be interpreted. Following guidelines of the Commission on the Directive national rules on durability of the partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, other relevant aspects, such as a joint mortgage or children, should also be taken into account.[293] The guidelines do not mention legal recognition of the relationship in another Member State as relevant criterion in this regard.

Generally, the application of this discretionary provision is unlikely to be problematic in States which provide in their national laws for some form of legal recognition of same-sex relationships. In the words of Toner, it is '[…] unlikely that we would find any State treating registered partnership as equivalent to marriage without granting residence rights for a non-national partner in some form or other.'[294] It has been submitted, particularly in view of the wide discretion left to States in *Rahman*, that '[…] a host Member State that does not provide for any form of legal recognition of same-sex relationships, must accept that the condition that the relationship is duly attested is fulfilled in case the partners have entered into a registered partnership or marriage in another state.'[295]

9.6.2.4. Children of same-sex couples

Following Article 2(2)(c) of the Free Movement Directive, the children ('direct descendants') of an EU citizen qualify for entry and residence as family members of the EU citizen. This only holds for children under the age of 21 or who are dependants. These rights extend to the children of the spouse or registered partner[296] of the EU citizen. Even though the Directive does not specify this, it may be presumed that the EU citizen and/or his spouse or registered partner do not have to be the biological and genetic parents of the child, so it as long they are its legal parent(s). Hence, also adopted children qualify as family members under the Free Movement Directive and may consequently join their parent(s) when they move within the EU.

Complications could arise where the partner of a migrating EU citizen is not recognised by the host State as a family member under the Directive. For example,

293 COM (2009) 313 final, at p. 4.
294 Toner 2012, *supra* n. 233, p. 287.
295 Rijpma and Koffeman 2014, *supra* n. 1, at p. 475.
296 As defined in Art. 2(2)(b), see above.

a situation could arise in which a third-country national same-sex registered partner of an EU citizen has a child with whom the EU citizen has not (yet) established parental links. When the partner is not recognised as a family member under the Directive, neither is the child. Matters may become even more complicated when the relationship of the partners has not at all been legally recognised in the home State. Where the child is a member of the household of the EU citizen, its entry and residence must be facilitated.[297] Borg-Barthet has observed that the child could thus '[…] be granted free movement rights by virtue of the vertical relationship with one parent, while the horizontal relationship between the parents does not benefit similarly.' The author held that '[i]n theory, the child could be denied the right to reside with one of its parents', but found it more likely that in practice the right to free movement would be denied '[…] to the entire family, including any EU citizens in the family'.[298] As Borg-Barthet also noted, there have indeed been reports of rainbow families being denied free movement rights.[299]

9.6.3. The free movement of rainbow families under primary law

The foregoing discussion of the rights of migrating EU citizens and their family members under Directive 2004/38 has shown that there are various situations conceivable where application of the Directive does not preclude host States from refusing entry and residence to same-sex spouses and registered partners of EU citizens as family members under Article 2 of the Directive. This may leave these same-sex partners with a mere right to have their entry and residence 'facilitated' under Article 3 of the Directive. What is more, even if entry and residence are indeed facilitated by a host Member State, the same-sex couple (and their family) may experience the consequences of the different regime in the host State in everyday life. When their civil status is downgraded or when their relationship is not at all legally recognised in the host State, the couple (or family) may experience difficulties, for instance in making their property rights effective, in obtaining social and fiscal benefits or in founding a family.[300] Where they have children, this may also affect them, particularly when their parental links are not legally recognised in the host State.

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297 Art. 3(2)(a) provides that host States must facilitate the entry and residence of 'any other family members, irrespective of their nationality' who, in the home State are dependants or members of the household of the EU citizen having the primary right of residence. This also applies where serious health grounds strictly require the personal care of the family member by the Union citizen.

298 J. Borg-Barthet, 'The principled imperative to recognise same-sex unions in the EU', 8 *Journal of Private International Law* (2012) p. 359 at p. 364.

299 Borg-Barthet referred (at pp. 364–365) to cases reported by *ILGA-Europe* in its contribution to the Green Paper of 2011. ILGA-Europe 2011, *supra* n. 192. This Green Paper is further discussed in section 9.7.3 below.

300 For instance when same-sex couples have no access to AHR treatment, or where they may not jointly adopt a child.

Because any application of secondary law must be commensurable with primary law,[301] these situations require an examination under the Treaty rules. Space does not allow a detailed examination of each possible individual case at this place, but a couple of observations about the relevant legal examination can be made.

Where an EU citizen and his or her same-sex partner (and their children) move to another Member State, this situation comes within the scope of the free movement of persons as provided for under Articles 21 and 45 TFEU (see above). It must next be examined whether there is a restriction of these rights. Not only rules that discriminate on the basis of nationality, but also national rules which hinder free movement or make the use of free movement rights less attractive are incompatible with the Treaties.[302] A refusal to grant entry and residence to the same-sex partner of a migrating EU citizen may indeed constitute such a restriction. The CJEU has on various occasions stressed that the possibility for an EU citizen to be joined by his or her partner, whatever the legal status of their relationship, is instrumental to the free movement of persons.[303] Therefore, when the EU citizen is not allowed so, particularly when he or she is economically active, this may constitute a restriction of his right to free movement.[304] The view has furthermore been taken that an EU citizen who wishes to use his or her free movement rights, but is effectively confined to the territory of those Member States that recognise his or her same-sex marriage or registered partnership, is effectively deprived of the 'genuine enjoyment' of his or her citizenship rights in part of the EU territory.[305]

While in practice entry and residence may in many cases be facilitated under Article 3(2) of the Free Movement Directive, the couple or family may, as noted above, still come across difficulties once resident in the host Member State. The effects of the non-recognition or downgrading of their civil status may have a (great) impact on their daily life in that State. While the CJEU has never pronounced itself on this particular issue, it has been submitted that a change in the civil status of incoming same-sex couples may be seen as an obstacle to free movement.[306] The Court has in any case held that changes in a person's surname constitute such obstacles, as they have been held liable to cause serious inconvenience for those concerned at both

301 In case of conflict, the conflict should be resolved either through a harmonious interpretation of secondary law or by applying directly the Treaty freedom. See Ensig Sørensen 2011, *supra* n. 204.

302 Case C-415/93 *Bosman* [1995] ECR I-4921, ECLI:EU:C:1995:463. In the words of Toner: 'Choice, and effective freedom to exercise that choice (not just legal rights subjected to conditions making them unattractive and unreasonable to exercise in practice), is the cornerstone of Community law on free movement, whether of goods, persons, establishment or service. […] The entire structure of free movement law is built around the concept that borders should be eliminated as far as possible.' Toner 2003, *supra* n. 229, at p. 186.

303 Rijpma and Koffeman 2014, *supra* n. 1, at p. 476, referring (in footnotes 120 and 121) to Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157, para. 28 and Case 249/86 *Commission* v. *Germany* [1989] ECR 1263, ECLI:EU:C:1989:204, para. 11.

304 *Idem*, at p. 476.

305 *Idem*, at p. 478.

306 Lenaerts 2009–2010, *supra* n. 7, at p. 1359. See also Karakosta 2013, *supra* n. 202, at pp. 66–68.

professional and private levels.[307] The Court has furthermore acknowledged that civil status documents are of great importance to the free movement of persons.[308] Further, in relation to legal persons, the Court has held in cases such as *Centros* and *Überseering*, that the failure to recognise the legal personality of a company set up under the laws of another Member State could amount to a violation of the freedom of companies to move their business elsewhere within the EU.[309] It has been submitted that legal personality is, like marriage, a construct of national law, and that by analogy the non-recognition of a marriage could also be considered to constitute a restriction of the free movement of persons.[310]

The next question is which grounds may be invoked in order to justify such restrictions to the free movement rights. The Treaty itself provides for three grounds, namely public policy, public security and public health. Since the non-recognition of same-sex marriages or registered partnerships would amount to a restriction that does not differentiate on the basis of nationality, additional overriding reasons of public interest could also be invoked.[311] The public policy argument is the broadest ground for justification, and possibly a public moral argument could be brought under this heading.[312] The Court has at the same time consistently underlined that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.[313]

Further, even if a justification ground has been accepted by the CJEU, the measure must still pass the proportionality test. It must be examined whether the measure is suitable for securing the objective which it pursues and whether it does not go beyond what is necessary in order to meet the pursued objective. Whether these criteria would be satisfied in cases where same-sex relationships are refused recognition or where the civil status of same-sex couple is downgraded, has been questioned.[314] It has thereby been noted that once a same-sex marriage or registered partnership has been recognised for the purpose of entry and residence, the couple is 'firmly drawn within the scope of EU law', at which point general principles and

307 Case C-148/02 *Garcia Avello* [2003] ECR I-11613, ECLI:EU:C:2003:539 and Case C-353/06 *Grunkin* [2008] ECR I-7639, ECLI:EU:C:2008:559. In *Konstantinidis* the Court had held that the misspelling of an EU citizen's name could create an inconvenience to such a degree that it would interfere with his freedom to exercise the right of establishment. Case C-168/91 *Konstantinidis* [1993] ECR I-1191, ECLI:EU:C:1993:115.

308 Case C-336/94 *Dafeki* [1997] ECR I-6761, ECLI:EU:C:1997:579, para. 19.

309 Case C-212/97 *Centros* [1999] ECR I-1459, ECLI:EU:C:1999:126, para. 22 and Case C-208/00 *Überseering* [2002] ECR I-9919, ECLI:EU:C:2002:632, para. 82.

310 Rijpma and Koffeman 2014, *supra* n. 1, at p. 477, referring (in footnote 128) to M. Melcher, 'Private international law and registered relationships: an EU perspective', 20 *European Review of Private Law* (2012) p. 1075 at p. 1081.

311 Case C-55/94 *Gebhard* [1995] ECR I-4165, ECLI:EU:C:1995:411, para. 35.

312 Rijpma and Koffeman 2014, *supra* n. 1, at pp. 478–479. For a contrary viewe see D. Kochenov, 'On options of citizens and moral choices of states: gays and European federalism', 33 *Fordham International Law Journal* (2009) p. 156 at p. 203.

313 Case C-36/02 *Omega* [2004] ECR I-9609, ECLI:EU:C:2004:614, para. 30 and Case C-33/07 *Jipa* [2008] ECR I-5157, ECLI:EU:C:2008:396, para. 23.

314 Rijpma and Koffeman 2014, *supra* n. 1, at p. 480.

fundamental rights – including the prohibition on discrimination on grounds of sexual orientation – apply as a matter of EU law.[315]

Another open question is what value the CJEU would attribute to an argument against the recognition of same-sex relationships based on a Member State's national identity under Article 4(2) TEU. In its case law the Court has given only limited guidance on the definition of this concept, and there have only been a handful of cases where this was accepted as a justification for an obstacle to free movement.[316] It has often been held to be a limited concept, which should be defined as national constitutional identity,[317] while not every rule of a constitutional nature would qualify for protection under Article 4(2) TEU.[318] In *Sayn-Witgenstein* (2010) and *Runevič-Vardyn* (2011) the CJEU held that rules regarding the composition and spelling of surnames constituted justified restrictions on the basis of national identity.[319] Also, in *Sayn-Wittgenstein* the constitutional rule was held to protect not only constitutional identity, but also pursued the principle of equality, which has been recognised as a general principle of EU law as well. In *Toressi* (2013), by referring, *inter alia*, to national identity under Article 4(2) TEU,[320] the Court accepted that the objective of promoting and encouraging the use of one of the official languages of the host State constituted a legitimate interest which, in principle, justified a restriction to the free movement of workers under Article 45 TFEU. When applied in the context of the present case study, the question must, for instance, be answered of whether the definition of marriage as a union between two people of a different-sex in a Member State's constitution would qualify as part of that State's national identity. If it were, the next issue to be examined would, again, be whether the restrictive measure complied with the principle of proportionality.[321] Here, weight could be attributed to the question of

315 *Idem*, at p. 484.

316 Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, ECLI:EU:C:2010:806 and Case C-391/09 *Runevič-Vardyn* [2011] ECR I-3787, ECLI:EU:C:2011:291.

317 G. van der Schyff, 'The constitutional relationship between the European Union and its member states: the role of national identity in article 4(2) TEU', 37 *European Law Review* (2012) p. 563, at pp. 567–568. In a judgment of 2014, the Court confirmed that national identity within the meaning of Art. 4(2) TEU saw at the fundamental political and constitutional structures or the essential functions of the Member State. Joined Cases C-58/13 and C-59/13 *Torresi, nyr,* ECLI:EU:C:2014:2088.

318 Case C-213/07 *Michaniki* [2008] ECR I-9999, ECLI:EU:C:2008:544, Opinion of AG Maduro, para. 33. See Case C-393/10 *O'Brien* [2012] ECR 0000, ECLI:EU:C:2012:110, para. 49 as regards the status of a Member State's judiciary Case C-399/11 *Melloni* [2013] ECR 0000 ECLI:EU:C:2012:600, Opinion of AG Bot, para. l42 as regards fundamental rights included in national constitutions.

319 In *Sayn-Wittgenstein* the Court ruled that the Austrian prohibition to use titles of nobility as part of the surname could be saved on the basis of the public policy exception. The rule formed part of the country's constitutional identity as a Republic and implemented the fundamental constitutional objective of equality before the law. In *Runevič-Vardyn,* the Court allowed a Lithuanian rule under which the spelling of names in official documents would have to comply with the rules governing the spelling of the official national language. See *supra* n. 316.

320 The Court furthermore referred to the fourth subparagraph of Art. 3(3) TEU and Art. 22 CFR, following which the Union must respect its rich cultural and linguistic diversity.

321 As noted by Rijpma and Koffeman '[i]n *Sayn-Witgenstein* the Court exercised a – very light – proportionality test itself, while in *Runevič-Vardyn* it referred back to the national court, hinting at the disproportionality of at least part of the measure'. Rijpma and Koffeman 2014, *supra* n. 1, at p. 482, referring (in footnote 156) to L. Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein

whether the objective pursued by the restrictive measures had an equivalent at EU level.[322]

There are other situations conceivable in which the free movement rights of EU citizens in same-sex relationships may be obstructed. For example, an obstacle to free movement may be formed by refusals by Member State authorities to issue civil status records to same-sex couples who request such documents for the purpose of marrying or registering their partnership in another Member State. This was the case for Poland, until the Commission intervened in the matter,[323] and has been reported to be the case in Estonia.[324] Further, it has been pointed out that for same-sex third-country national partners of EU citizens it may be harder to obtain EU citizenship through marriage.[325]

9.6.4. The Family Reunification Directive and third-country nationals with rainbow families

The Family Reunification Directive (2003/86) – which applies to third-country nationals – provides for more discretion for States than the Free Movement Directive.[326] When a third-country national resides lawfully in a Member State he or she or his or her family members may apply for family reunification to be joined with him/her. While spouses are amongst the family members whose entry and residence States must authorise,[327] the authorisation of entry and residence of the third-country national registered partner or the third-country national unmarried partner, with whom 'the sponsor' is in a 'duly attested stable long-term relationship', is left to the

v. Landeshauptmann von Wien, judgment of the Court (second chamber) of 22 December 2010', 49 *CMLRev* (2012) p. 671 at p. 692.

322 See Rijpma and Koffeman 2014, *supra* n. 1, at p. 483.

323 European Commission – Directorate-General for Justice, *2011 Report on the Application of the EU Charter of Fundamental Rights* (Luxembourg, Publications Office of the European Union 2012) p. 52, online available www.ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf, visited June 2014. See also www.equal-jus.eu/node/229 and www.equal-jus.eu/node/237 visited June 2014.

324 ILGA-Europe 2011, *supra* n. 192.

325 A. Tanca, 'European Citizenship and the Rights of Lesbians and Gay Men', in: K. Waaldijk and A. Clapham, *Homosexuality: a European Community issue, Essays on Lesbian and gay rights in European Law and Policy* (Dordrecht, Martinus Nijhoff Publishers 1993) p. 271 at p. 280.

326 European Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, deals with the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States [2003] OJ L 251/12. The Family Reunification Directive determines the conditions under which third-country nationals residing lawfully on the territory of the Member States may exercise the right to family reunification. The separate and less favourable regime for third-country nationals has been held to appear '[…] difficult to reconcile with the EU's commitment to a "fair" policy towards third-country nationals who reside legally on the territory of its Member States, the aim of which should be to grant them rights and obligations comparable to those of EU citizens'. Rijpma and Koffeman 2014, *supra* n. 1, at p. 486, referring (in footnote 171) to Art. 67(2) TFEU and the Stockholm Programme [2010] OJ C115/1, para. 6.1.4.

327 Art. 5(1)(a) Directive 2003/86.

discretion of the Member States.[328] They may decide that registered partners are to be treated equally as spouses with respect to family reunification.[329]

In respect of spouses, similar questions arise as under the Free Movement Directive (see 9.6.2 above), however if it were accepted that the term does not cover same-sex spouses, the consequences would be much graver. This is so because of the Member States' discretion in respect of unmarried partners under the Family Reunification Directive and the absence of a corresponding duty to facilitate the entry of long-term stable partners.

When implementing and applying the provisions of the Directive, Member States are bound to observe fundamental rights.[330] Recital No. 5 of the Preamble to the Family Reunification Directive furthermore provides that Member States must give effect to the provisions of the Directive without discrimination on the basis of, *inter alia*, sexual orientation. According to the Commission, it flows from this Recital that 'Member States that recognise same-sex marriages within their national family law should also do so in application of the Directive.'[331] Conversely, it can be held that host States that do not recognise same-sex marriages under their national law, are under no obligation to recognise same-sex marriages legally concluded in other Member States. The Commission has furthermore held Recital No. 5 to imply that '[...] whenever same sex registered partners are recognised under national family law and Member States apply the "may" clause of the Directive for registered partners, they should also do so for same sex partners.'[332] This 'may clause' only binds the host State which applies it. If the same-sex couple subsequently moves to another Member State, it is for this new host State to decide if the relationship is recognised for family reunification purposes.

A 2010 FRA report argued in even broader terms that '[…] the same-sex spouse of the sponsor [had to] be granted the same rights as would be granted to an opposite-sex spouse.'[333] On the basis of the States' obligation to implement the Directive without discrimination on grounds of sexual orientation, while observing fundamental rights such as the right to respect for family life, this report supported the view that a spouse is a spouse.[334] It was furthermore submitted that the fact that the Family

328 Art. 4(3) Directive 2003/86.

329 *Idem.*

330 Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769, ECLI:EU:C:2006:429, paras. 62–64.

331 Commission, 'Green paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)', COM (2011) 735 final, p. 4.

332 *Idem*. See also European Union Agency for Fundamental Rights 2008, *supra* n. 181, p. 151.

333 European Union Agency for Fundamental Rights 2010, *supra* n. 181, at p. 50.

334 *Idem*. The relevant para. reads: 'The Directive does not define the meaning of 'spouse' in Article 4. However, the Member States should take into account their obligations under Art. 6(1) and 6(3) of the Treaty on European Union (TEU), to comply with the EU Charter of Fundamental Rights and with fundamental rights as general principles of EU Law. […] Where, by denying the possibility for the same-sex spouse to join the sponsor, a Member State does not allow a durable partnership to continue, this would result in a disruption of private and family life and could constitute a violation of Article 8 ECHR where the relationship could not develop elsewhere, for instance due to harassment against LGBT people in the countries of which the individuals concerned are nationals or where they could

Reunification Directive granted more rights to the spouse of the sponsor, than to the unmarried partner of the sponsor, could 'generate a form of indirect discrimination', as the option of marrying was often not open to same-sex couples.[335]

States must furthermore authorise the entry and residence of the joint minor children of the sponsor (the third-country national who is residing lawfully in a Member State) and his or her spouse.[336] This also holds for the children of either of them, where the sponsor or his or her spouse has custody and the children are dependent on him or her.[337] The authorisation of entry and residence for children of third-country national same-sex couples who are in a registered partnership or who are unmarried, is left to the discretion of the Member States.[338]

The definition of 'family' under the Family Reunification Directive is also employed under the Long-term Resident Directive, which grants third-country nationals who have been legally present in EU territory a more permanent residence right, as well as a (limited) right to move to a second Member State.[339] This implies that if a long-term resident has entered into a (same-sex) registered partnership in one of the Member States[340] and wishes to move to another Member State, it is up to the discretion of the second Member State to allow him or her to bring his or her registered partner.

9.7. European Private International Law and rainbow families

As illustrated by Chapters 10 and 12 on German, Dutch and Irish legislation, all EU Member States have their own set of conflict-of-laws rules. Over the years, a couple of EU instruments have entered into force, or have been proposed, that approximate certain elements of these national Private International Law regimes in respect of family law. These instruments have as their legal basis Article 81(3) TFEU (or any of its predecessors), according to which the Union is competent to take measures for the approximation of the laws and Regulations of the Member States in 'family law with cross-border implications'. For many of these instruments it is debated if they apply to same-sex relationships.

Since 2007, the EU has been a Member of the Hague Conference on Private International Law.[341] It has ratified the Protocol of 23 November 2007 on the Law

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establish themselves. In addition, the Directive should be implemented without discrimination on grounds of sexual orientation. The implication is that the same-sex spouse of the sponsor should be granted the same rights as would be granted to an opposite-sex spouse.'

335 *Idem*. Such reasoning could be analogously applied to the Free Movement Directive, although there in more cases same-sex couples may have the alternative option of registered partnership.

336 Art. 5(1)(b) Directive 2003/86.

337 Art. 5(1)(c) and (d) Directive 2003/86.

338 Art. 4(3) Directive 2003/86.

339 Art. 2(e) Directive 2003/109.

340 Art. 16(1) Directive 2003/109.

341 Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law (2006/719/EC) [2006] OJ L297/1. The European Community became a Member of the Hague Conference on 3 April 2007. With the entry into force of the Treaty of Lisbon on

Applicable to Maintenance Obligations,[342] and it is debated whether this instrument applies to same-sex relationships.[343] The EU is no party to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages, and it is equally widely discussed if this could be interpreted as extending to same-sex marriages.[344] The same holds for the Hague Adoption Convention (1993),[345] which 'does not deal specifically with adoption by homosexual couples.'[346]

9.7.1. The *Brussels I* and *Brussels II bis* Regulations and subsequent EU PIL instruments

The *Brussels I* Regulation of 2000 provides for rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in EU Member States.[347] Because the Regulation does not apply to matrimonial matters,[348] *Brussels II*[349] was subsequently adopted, which was soon replaced by the present *Brussels II bis*.[350] The latter Regulation applies in civil matters relating to

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1 December 2009, the European Union replaced and succeeded the European Community as from that date. The Hague Conference on Private International Law is 'a global inter-governmental organisation', which aims at the 'progressive unification' of private international law rules. See the website of the Hague Conference, www.hcch.net/index_en.php?act=text.display&tid=26, visited June 2014.

342 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, online available at www.hcch.net/index_en.php?act=conventions.text&cid=133, visited June 2014. See also Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC) [2009] OJ L 331/17.

343 Following its Art. 1(1), the Protocol applies to maintenance obligations '[…] arising from a family relationship, parentage, marriage or affinity'. See also D. Martiny, 'Workshop: cross-border recognition (and refusal of recognition) of registered partnerships and marriages with a focus on their financial aspects and the consequences for divorce, maintenance and succession', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 225 at p. 246.

344 E.g. Bell 2004, *supra* n. 227, at p. 627, referring (in footnote 70) to H.U. Jessurun d'Oliveira, 'Freedom of movement of spouses and registered partners in the European Union', in: J. Basedow et al. (eds), *Private Law in the international arena – From national conflict rules towards harmonization and unification, Liber amicorum Kurt Siehr* (The Hague, TCM Asser Press 2000) p. 527 at p. 534 and K. Siehr, 'Family unions in private international law', 50 *Netherlands International Law Review* (2003) p. 419 at p. 426. See also Martiny 2012B, *supra* n. 343, at p. 233.

345 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, entry into force on 1 May 1995.

346 D. Martiny, 'Private International Law Aspects of Same-Sex couples under German Law', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 189 at p. 219.

347 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2010] OJ L 12/1. The regulation supersedes the Brussels Convention of 1968, which was applicable between the EU countries before the regulation entered into force. See also Ch. 3, section 3.6.3.

348 *Idem*.

349 Council Regulation 1347/2000/EC of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19.

350 Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,

divorce, legal separation and the annulment of marriage, as well as to all aspects of parental responsibility. The latter excludes decisions on adoption.[351] It provides for automatic recognition of all judgments without any intermediary procedure being required. Recognition of judgments relating to matrimonial matters and matters of parental responsibility may be refused if such recognition is manifestly contrary to public policy.[352] In cases concerning parental responsibility, this exception may only be applied if it is in the best interests of the child. Generally any such application of the public policy exception must be in conformity with the Charter of Fundamental Rights, of which also the prohibition of discrimination (Article 21) is particularly relevant in the present case study.[353]

The *Brussels I* and *Brussels II bis* Regulations function as a backbone for Union action in the field of cross-border civil matters. In fact, *Brussels II* has been perceived as marking 'the beginning of the 'Europeanisation' of family law', '[…] with Member States ceding competence in core areas of social policy', as it was '[…] the first EU measure to deal exclusively and directly with core family law matters'.[354]

It has been much debated if same-sex marriages and registered partnerships fall within the scope of *Brussels II bis*.[355] As Martiny explained, at the time of the drafting of the Regulation a same-sex marriage was not a familiar element of the Member States' family law, '[…] so that only a change of the concept based on systematic and teleological arguments could justify including same-sex marriages in the Regulation's scope.'[356] So far none of the EU institutions have provided guidance on the matter.[357] Wautelet has argued that '[…] the principle of autonomous interpretation probably means that there is today no room for application of the *Brussels II bis* Regulation when the court is seized of a petition concerning a same-sex marriage.'[358]

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repealing Regulation 1347/2000/EC [2003] OJ L338/1. Somewhat confusing, this Regulation is referred to as *Brussels II Bis* or *Brussels II A*, or sometimes as 'the new Brussels II'.

351 Art. 3(b) Regulation 2201/2003.

352 Arts. 22 and 23 Regulation 2201/2003.

353 Compare Recital No. 58 of the Preamble to European Parliament and Council Regulation 650/2012/EU of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

354 M. Ní Shúilleabháin, 'Ten years of European family law: Retrospective reflections from a common law perspective', 59 *International and Comparative Law Quarterly* (2010) p. 1021 at pp. 1021-1023.

355 Wautelet has called looking for the answer to this question 'a frustrating experience, as there is very limited practice on the subject.' P. Wautelet, 'Private International Law aspects of same-sex marriages and partnerships in Europe – Divided we stand?', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 143 at pp. 158–159. Verschraegen has opined that the Regulation does not apply to same-sex relationships. Verschraegen 2012, *supra* n. 156, at p. 267.

356 Martiny 2012B, *supra* n. 343, at p. 236.

357 There is, for instance, no mention of same-sex couples in: Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000', COM (2014) 225 final.

358 Wautelet 2012, *supra* n. 355, at p. 160, referring (in footnote 82) to M. Ní Shuilleabhan, *Cross-Border Divorce Law. Brussels II bis* (Oxford, Oxford University Press 2010) pp. 110–111 and 114–116.

The dominant view is, further, that the Regulation is not applicable to registered partnerships.[359] ILGA-Europe has urged the European Commission to 'clarify' that the *Brussels II* Regulation '[…] applies to marriages of same-sex partners, and that the validity of marriages and the conditions for marriage are determined by the law of the place where the marriage was celebrated'.[360] ILGA-Europe furthermore has recommended extending the application of this Regulation '[…] to registered partnerships and possibly to other forms of legal cohabitation (where they are treated in a way comparable to married couples), and expressly exclude that any public policy claim can be made solely on the grounds that the decision concerns one of such schemes.'[361]

There is, furthermore, uncertainty in respect of the application of other EU PIL instruments to same-sex relationships, such as the EU Regulation on maintenance of 2008[362] and the 2012 Regulation on succession.[363] In respect of divorce and legal separation, only few Member States could reach agreement through enhanced cooperation.[364] Following Article 13 of the relevant Regulation 1259/2010, the courts of a participating Member State whose laws do not provide for divorce or do not deem the marriage in question valid for the purposes of divorce proceedings, are not obliged to pronounce a divorce by virtue of the application of this Regulation. According to Wautelet this '[…] seem[ed] to open up the possibility for States to refuse to entertain a petition for divorce filed by same-sex partners.'[365]

All in all, the existing EU PIL instruments provide very little guidance in respect of cross-border cases involving same-sex couples and rainbow families. While,

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359 Martiny 2012A, *supra* n. 346, at p. 221, referring (in footnote 190) *inter alia* to R. Wagner, 'Das neue Internationale Privat- und Verfahrens- recht zur eingetragenen Lebenspartnerschaft' ['The new international private and procedural law on civil partnerships'], 21 *IPRax* (2001) p. 281 at p. 282 and Martiny 2012B, *supra* n. 343, at p. 236.

360 ILGA-Europe 2011, *supra* n. 192, at p. 5.

361 *Idem*.

362 Council Regulation 4/2009/EC of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. As Storskrubb explains, the Regulation is closely linked to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations and the Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance. E. Storskrubb, 'Civil Jusitice – A newcomer and an unstoppable wave?', in: P. Craig and G. De Búrca, *The evolution of EU Law*, 2nd edn. (Oxford, Oxford University Press 2011) p. 313.

363 European Parliament and Council Regulation 650/2012/EU of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. Following its Art. 1(3)(a) this Regulation does not apply to '[…] the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects'. Martiny has argued that the Regulation applies to same-sex registered partners. See Martiny 2012B, *supra* n. 343, at pp. 247 and 249.

364 Council Regulation 1259/2010/EU of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10. On enhanced cooperation, see Art. 20 TEU.

365 Wautelet 2012, *supra* n. 355, at p. 182. Martiny considered this Regulation to apply to situations involving two nationals from Member States with same-sex marriages. Martiny 2012B, *supra* n. 343, at pp. 238–239.

as hereafter discussed, initiatives have been taken for new PIL instruments that may prove very relevant to the present case study, none of them expressly refers to same-sex couples.

9.7.2. Proposals for Regulations on property regimes (2010)

In 2006 the Commission launched '[…] a wide-ranging consultation exercise on the legal questions which arise in an international context as regards matrimonial property regimes and the property consequences of other forms of union.'[366] The consultation addressed questions that arise in connection with determination of the law applicable to property and the ways in which the recognition and enforcement of court decisions can be facilitated. In 2010, this exercise resulted in two separate proposals for Council Regulations, one on matrimonial property regimes and the other on the property consequences of registered partnerships.[367]

The proposals aimed to establish 'a comprehensive set of rules of international private law' applicable to matrimonial property regimes as well as to the property consequences of registered partnerships, and to facilitate 'the movement of decisions and instruments among the Member States.'[368] It was held that '[g]iven the nature and the scale of the problems experienced by European citizens', these objectives could be achieved only at Union level.[369] At the same time, the Commission stressed

366 Commission, 'Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition', COM (2006) 400. As the Green Paper explains at p. 3: '[T]he adoption of a European instrument relating to matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan […]. The programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council and the Commission at the end of 20003, provided for the development of an instrument on jurisdiction and the recognition and enforcement of decisions as regards matrimonial property regimes and property consequences of the separation of unmarried couples. The Hague programme, which was adopted by the European Council on 4 and 5 November 2004 and established the implementation of the mutual recognition programme as a first priority, and the Council and Commission Action Plan implementing it called on the Commission to submit a Green Paper on "the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition".' See Hague Programme, "Strengthening freedom, security and justice in the European Union", included in the conclusions of the Presidency of the European Council of 4 November 2004 and Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union [2005] OJ C198/1.

367 Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes', COM (2011) 126 final and Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships', COM (2011) 127 final.

368 COM (2011) 126 final, p. 3 and COM (2011) 127 final, p. 3. Coester furthermore observed that non-discrimination was an important motive ('Leitgedanke') of the proposed Regulations. M. Coester, 'Art. 17b EGBGB unter dem Einfluss des Europäischen Kollisionsrechts', 22 *IPRax* (2013) p. 114 at p. 116.

369 COM (2011) 126 final, p. 4 and COM (2011) 127 final, p. 4.

that it was not trying to harmonise the Member States' laws concerning matrimonial property regimes and the property aspects of registered partnerships.[370]

The text of both proposals is gender neutral; there is no mention of terms like 'husband' or 'wife'.[371] Furthermore, neither of the Proposals refers explicitly to same-sex couples, not even in the Explanatory Memorandum.[372] Initially it was held in both proposals that the terms 'marriage' and 'registered partnership' were defined by the national laws of the Member States. The European Parliament later subtly nuanced this. In respect of marriage, the new Recital No. 10 reads:

> 'This Regulation covers issues in connection with matrimonial property regimes. It does not define "marriage", which is defined by the national laws of the Member States. Rather, it adopts a neutral attitude towards that concept. This Regulation does not affect the definition of the concept of marriage in the national law of the Member States.'[373]

In respect of registered partnerships it is provided as follows:

> 'This Regulation covers matters arising from the property consequences of registered partnerships. "Registered partnership" is defined here solely for the purposes of this Regulation. For the purposes of this Regulation, a registered partnership is a form of union other than marriage. The actual substance of the concept of a registered partnership is defined in the national laws of the Member States.'[374]

In respect of the applicable law, married couples had a choice of law under the Commission proposals,[375] while the property consequences of registered partnerships were governed by the law of the State of registration.[376] The Explanatory Memorandum made clear that this principle was adopted '[…] in view of the differences between the national laws of those Member States that make provision for registered partnerships'. The principle was furthermore held to be '[…] in line with the Member States' laws on registered partnerships, which usually provide for application of the law of the State of registration, and do not offer partners the option

370 *Idem*.

371 Martiny observed that this 'gender-neutral approach', showed 'that there [was] an intention that same-sex marriages [were] not [to] be treated differently from opposite-sex marriage under matrimonial law.' The author suggested that under the influence of changes in substantive family law within the Member States, the Court could also change its position. Martiny 2012B, *supra* n. 343, at p. 237, referring (in footnote 26) to Bogdan 2009, *supra* n. 246, at p. 255.

372 Wautelet found it 'striking' that the text was 'very timid'. Wautelet 2012, *supra* n. 355, at p. 182.

373 European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011)0126 – C7-0093/2011 – 2011/0059(CNS)), P7_TA(2013)0338, Amendment 1.

374 European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM (2011)0127 – C7-0094/2011 – 2011/0060(CNS)), P7_TA(2013)0337, Amendment 3.

375 Proposed Arts. 16 and 17 COM (2011)126 final.

376 Proposed Art. 15 COM (2011) 127 final.

of choosing any law other than the State of registration, even though they may be entitled to conclude agreements between themselves.' Lastly, it was held to ensure '[…] the unity of the law applicable to all properties owned by the couple that [were] subject to the property consequences of registered partnerships, whatever their form or location.'[377] While the Commission claimed to have verified that the proposal complied with the prohibition of discrimination ex Article 21 CFR, the Fundamental Rights Agency (FRA) issued harsh criticism, holding that this distinction between married couples and registered partners in respect of the choice of law constituted indirect discrimination on grounds of sexual orientation.[378] The amended version of the Regulation on the property consequences of registered partnerships, as adopted by the European Parliament in September 2013, subsequently also provided for a choice of law for registered partners.[379]

Both proposals provide for public policy exceptions,[380] however, it has been explicitly held that these may not be discriminatory.[381] The application of a rule of the law determined by the Regulation can be refused only if such application is 'manifestly incompatible' with the public policy of the forum or the Member State concerned.[382] The accompanying Memorandum of the Proposal in respect of matrimonial property regimes explained:

> 'Considerations of public interest dictate that courts in the Member States be given the possibility in exceptional circumstances of setting aside the foreign law in a given case where its application would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public policy exception in order to set aside the law of another Member State or to refuse to recognise or enforce a decision, authentic instrument or legal transaction drawn up in another State if the application of the public policy exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination.'[383]

For registered partnerships it is explicitly provided that the application of a rule of the law determined by the proposed Regulation can '[…] not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships.'[384] The forum of habitual residence may however decline jurisdiction on this ground. Proposed Article 5(2) provides that in

377 COM (2011) 126 final, p. 8.

378 European Union Agency for Fundamental Rights, *Opinion on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*, Opinion No. 1/2012 (FRA, Vienna 2012), online available at www.fra.europa.eu/fraWebsite/research/opinions/opinions_en.htm, visited June 2014.

379 European Parliament, *supra* n. 373, Amendment 3.

380 Proposed Art. 23 COM (2011) 126 final and Proposed Art. 18 COM (2011) 127 final.

381 Consideration 25 of COM (2011) 126 final and Considerations 20–21 of COM (2011) 127 final. In both proposals reference is made to Art. 21 CFR. See also Art. 17 of the version of the Registered Partnership Regulations adopted by the European Parliament in September 2013. European Parliament, *supra* n. 373.

382 Proposed Art. 23 COM (2011) 126 final and European Parliament, *supra* n. 373, Amendment 70.

383 Consideration 25 of COM (2011) 126 final.

384 Proposed Art. 18(2) COM (2011) 127 final.

situations other than the death of one of the partners or the separation of the partners the forum of habitual residence may decline jurisdiction '[…] if their law does not recognise the institution of registered partnership'.

9.7.3. Green Paper on recognition of civil status records (2010)

In 2010 the Commission published a Green Paper on the recognition of civil status records,[385] which has been discussed in Chapter 3, section 3.6.3.1. The Green Paper is also important for cross-border cases involving same-sex couples, even though this matter was not explicitly addressed in the Green Paper, a fact of which Toner was very critical:

> '[…] as before, the Commission does not seem to address head-on the issues involved here. For example, there is no explicit mention at all of the cross-border recognition of the validity [of] same-sex marital relationships, and the only mention of registered partnership appears to be the possibility of a change of surname involved after such a partnership is entered into! […] there are far wider and more problematic issues than this involved.'[386]

The Green Paper is also relevant for migrating rainbow families, as civil status records were defined in the Green Paper as including records recording birth, filiation, adoption and recognition of paternity.[387]

As explained in Chapter 3, three policy options were proposed by the Commission in the Green Paper: (1) assisting national authorities to cooperate more effectively '[…] until there [was] greater convergence of MS' substantive family law'; (2) automatic recognition of civil status situations established in other Member States; or (3) harmonisation of conflict-of-law rules.[388]

The Commission explained that automatic recognition (the second option) would be '[…] simple and transparent […] with respect to all citizens exercising their right of freedom of movement throughout the European Union', and that it would provide the citizen with 'legal certainty'. It was also maintained that the host Member State '[…] would not have to change its substantive law or modify its legal system.' Some disagreed with this observation. The UK House of Lords, for example, held:

> 'Contrary to the Commission's assertion, that would involve a significant change to the law of a Member State, for example if a same sex marriage legally contracted and registered in

385 Commission, 'Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'', COM (2010) 747 final.

386 Toner 2012, *supra* n. 233, at pp. 290–291.

387 According to the Green paper, civil status records are '[…] records executed by an authority in order to record the life events of each citizen such as birth, filiation, adoption, marriage, recognition of paternity, death and also a surname change following marriage, divorce, a registered partnership, recognition, change of sex or adoption.' See COM (2010) 747 final, para. 4.1.

388 The Green Paper made clear that the Commission had 'neither the power nor the intention […] to modify the national definition of marriage.' COM (2010) 747 final, para. 4.3.

> Member State A had to be given effect in Member State B which did not otherwise permit or recognise same-sex marriages.'[389]

In respect of registered partnerships, this question may be even more important, as it has not been made clear what 'automatic recognition' entails if the host State does not provide for any form of registered partnership under its national law. Must this State then treat the foreign partnership as 'marriage' under its national law? The latter option would indeed not require any change of substantive domestic law, but it may also be politically sensitive. The Commission acknowledged automatic recognition could '[…] prove to be […] complicated in [...] civil status situations such as marriage' and noted that in any case, this possibility had to take 'due account of the public order rules of the Member States.'[390]

In respect of the harmonisation of conflict-of-law rules the Commission held that this

> '[…] might be another possible way of allowing citizens to exercise fully their right to freedom of movement while providing them with greater legal certainty in relation to civil status situations created in another Member State. A body of common rules developed in the European Union would enshrine the right which would be applicable to a cross-border situation when a civil status event takes place. This right would be defined on the basis of one or more connecting factors taking into account citizen mobility.'[391]

The Green Paper also stressed that the Commission had '[…] neither the power nor the intention to propose the drafting of substantive European rules on, for instance, […] marriage or to modify the national definition of marriage.'[392]

Some of the State authorities and interested parties that had an input in the Consultation process[393] explicitly addressed issues concerning same-sex relationships. The Dutch Ministry of Justice, for example, held subsidiarity to be 'the key principle' in this context. Accordingly, it welcomed the Commission's observation that the EU had no competence to intervene in the substantive family law of Member States. 'However', it was added, '[…] this [did] not alter the fact that the Netherlands [would] continue to push for the multilateral recognition of same-sex marriages and registered partnerships in the EU.'[394] The Federal Government of Germany was very critical in respect of the recognition option as proposed by the Commission. It believed that this was

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389 House of Lords, European Union Committee, p. 5, online available at www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/uk_house_lords_en.pdf, visited June 2014.

390 COM (2010) 747 final, para. 4.3.

391 *Idem*.

392 *Idem*.

393 See the official Commission website on the public consultation www.ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm, visited June 2014. No contributions by the Irish authorities were published on this website.

394 The Netherlands asserted that '[…] any issue that can be regulated more effectively by the member states [was] not [to] be decided in Brussels.' Dutch response to COM (2010) 747 final, p. 2, online available at ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/netherlands_minjust_en.pdf, visited May 2012.

'[…] an unbalanced, systematically incorrect and incoherent makeshift solution.'[395] The German government considered the harmonisation of conflict-of-laws rules the only appropriate solution. The German *Bundesrat* for its part acknowledged that automatic recognition probably came 'closest to a Community ideal' and could for that reason be a desirable goal, but held that this could only be achieved if the applicable conflict-of-laws rules were first harmonised.[396] ILGA-Europe made a strong plea for the portability of rights of same-sex partners in its response to the Green Paper.[397] The NGO umbrella organisation held that all EU citizens had to be able to

> '[…] validly acquire a personal status of their choice elsewhere in the Union (especially if it is not possible in their own state); have a portable status wherever they go (including returning to the State); and circulate freely with an unmarried or unregistered partner.'[398]

ILGA-Europe furthermore held that there were specific legal difficulties for the children of same-sex parents in cross-border situations as '[…] the varying degrees of non-recognition of same-sex partners' had 'an automatic negative impact on the rights of children of gay and lesbian parents.'[399] The LGBT interest organisation stressed that in a majority of EU Member States children could not establish full parental links with both their same-sex parents.[400] Also, it was noted that there was a risk of parental links being stripped away from children upon movement to another Member State (see also 9.6.2.4 above).

As noted in Chapter 3 section 3.6.3.1, no further legislative initiative has been taken in respect of recognition of civil status documents, although in 2014 the Parliament called on the Commission to '[…] make proposals for the mutual recognition of the effects of all civil status documents across the EU, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement'.[401]

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395 Federal Government observations on COM (2010) 747 final, p. 14, online available at www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/germany_minjust_en.pdf, visited June 2014.

396 *Idem*, pp. 12–13 and Bundesrat Resolution of 15 April 2011, Document 831/10, point 12, online available at www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/germany_parliament_en.pdf, visited June 2014.

397 ILGA-Europe 2011, *supra* n. 192.

398 *Idem*, at p. 20.

399 *Idem*.

400 It was claimed that this was so, as there was no second-parent adoption for same-sex partners in those countries. This may have been partly redressed as a result of ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07 (see ch. 8, section 8.2.4.1.2).

401 European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

9.8. Conclusions

While LGBT rights form a prominent part of the EU's fundamental rights agenda (section 9.4) and while EU institutions have undoubtedly played a stimulating role in respect of the promotion of LGBT rights in the Member States, the actual protection that EU law offers in this regard has its limitations. Limitations, first of all, exist in the fact that the EU does not have competences in all areas of law, for instance, not in substantive family law. In addition, in some areas where the EU does have competence, for example in respect of free movement, there remain open questions as to the application of the relevant rules in cases concerning same-sex couples and rainbow families.

Full equal rights for same-sex couples have been guaranteed by the EU legislature under the EU Staff Regulations since 2004. Staff cases are of EU law *pur sang* in the sense that the Member States' national legislation is not affected by them. On the other hand, as certain entitlements depend on the civil status of the staff member, national legislation still plays an important role in the obtainment of equal rights under EU law. That also holds for EU non-discrimination law (section 9.3). Importantly, the CJEU has held that there is direct discrimination on grounds of sexual orientation where at national level certain employment benefits are reserved to spouses, while marriage is reserved to different-sex couples only and while under national law, a same-sex registered partner is in a legal and factual situation comparable to that of a spouse as regards that benefit. The existence of some form of civil status under national law has thus been decisive in the *Maruko*, *Römer* and *Hay* judgments, and it has therefore been held 'arguable' that the Union's approach in this realm of EU law has perpetuated 'the individuality of each Member State's family law traditions.'[402] It remains to be seen what the Court would rule in a case where there is no alternative form of recognition at national level. In *Grant* (1998) the Court expressly held that in respect of a certain employment benefit the situation of a same-sex couple in a non-marital relationship was not comparable to that of a married couple, but whether this would still be upheld today, particularly after the *Hay* judgment, remains to be seen.

The rights that are granted to same-sex couples under EU free movement law are equally dependent on national legislation on civil status. Both the Free Movement Directive and the Family Reunification Directive leave room for host States to apply their own national standards to migrating same-sex couples. While in respect of registered partners, the host State principle is clearly adopted by the EU legislature under the Free Movement Directive, this is less clear in respect of the term 'spouse'. It has been observed that '[…] an uneven landscape with respect to freedom of movement and family reunification for same-sex couples' exists.[403] Both

402 Borg-Barthet 2012, *supra* n. 298, at p. 359.

403 European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States. Summary of findings, trends, challenges and promising practices* (Luxembourg, Publications Office of the European Union 2011) p. 28, online available at www.fra.europa.eu/en/publication/2011/

up and downgrading of foreign same-sex marriages and registered partnerships takes place.[404] While various Member States changed their definition of 'family member' to include same-sex partners for the purposes of free movement and family reunification,[405] in some Member States, contrary developments have taken place.[406] The diverse practice has been heavily criticised, since as a consequence '[…] the freedom of movement of LGBT persons is restricted and not uniformly recognised throughout the European Union'.[407] While the Parliament has repeatedly called on the Member States and the Commission to guarantee the free movement of rainbow families,[408] no legislative change has yet been implemented in this regard, rendering it even more probable that the matter will one day be decided by the CJEU. When confronted with a preliminary reference concerning the interpretation of the term 'spouse', it has been explained that the CJEU has different options; it may interpret this term independently or apply a host State or a home state principle. The home State principle would provide the strongest protection of the free movement rights of both the EU citizen and his or her same-sex spouse. In most situations the entry and residence of a same-sex spouse will presumably be facilitated on the basis of Article 3(2) of the Directive.

This is different for same-sex spouses of third-country nationals, as the Family Reunification Directive does not provide for such a fall back option like Article 3(2) of the Free Movement Directive. The entry and residence of same-sex registered

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homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender, visited June 2014.

404 Costello 2009, *supra* n. 270, at pp. 615–616. See ch. 10, section 10.4.6 and ch. 11, section 11.4.4, which shows that under German and Irish Private international law, foreign same-sex marriages are 'downgraded' to the German and Irish civil partnership.

405 European Union Agency for Fundamental Rights, *Annual Report 2011; Fundamental rights: challenges and achievements in 2011* (Luxembourg, Publications Office of the European Union 2012). The report refers (on p. 134) to Austria, Estonia, Greece, Latvia, Malta, Romania, Slovakia, Slovenia as well as Lithuania. In 2008, the Commission concluded in its report on compliance with the Free Movement Directive that '[s]ame-sex couples enjoy[ed] full rights of free movement and residence in thirteen Member States which consider[ed] registered partners as family members.' COM (2008) 840, para. 3.1. at p. 4. The Commission indicated that these thirteen states were: BE, BG, CZ, DK, FI, IT, LT, LU, PT, NL, ES, SE and the UK. Toner has called this a '[…] laconic and quite possibly dubiously accurate assessment'. Toner 2012, *supra* n. 233, at p. 290.

406 The 2011 annual report of the European Union Agency for Fundamental Rights pointed out: '[…] [N] ew legislation in Romania prohibits the transcription/registration of civil status certificates or extracts issued by foreign authorities for same-sex marriages or same-sex civil partnerships concluded abroad. This transcription is a requirement for obtaining entry and residence into Romania for spouses or partners, which necessarily only recognise partnerships between men and women.' European Union Agency for Fundamental Rights 2011A, *supra* n. 405, at p. 135.

407 European Union Agency for Fundamental Rights 2008, *supra* n. 181, at p. 64.

408 The Parliament has repeatedly called on the Commission and the Member States to ensure that the Free Movement Directive was implemented without any discrimination based on sexual orientation. European Parliament Resolution of 26 April 2007 on homophobia in Europe, P6_TA(2007)0167 and European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe (2012/2657(RSP)) P7_TA(2012)0222, para. 4. In 2014, the Parliament asked the Commission to produce '[…] guidelines to ensure the Free Movement Directive and the family reunification Directive were '[…] implemented so as to ensure respect for all forms of families legally recognised under Member States' national laws.' European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)).

partners and same-sex stable partners of third-country nationals is, moreover, within the discretion of the Member States, although they may not discriminate on the basis of sexual orientation when implementing this Directive.

What has furthermore become clear is that while the authorisation of the entry and residence of same-sex partners of EU citizens or third-country nationals is an essential step, the story does not end there. Same-sex couples may still encounter difficulties in their daily lives if their relationships are not legally recognised in the host Member State. In cases involving EU citizens such difficulties can possibly be challenged on the basis of the primary free movement rules, as set out in section 9.6.3. The EU legislature may also redress these issues by adopting instruments on the basis of Article 81(3) TFEU, the legal basis for the approximation of conflict-of-laws rules concerning family law. The proposed Regulations on Property regimes (section 9.7.2) are a clear step in that direction and possibly further EU PIL instruments on the basis of the Green Paper on recognition of civil status records may follow. That is still in the future, however, and for the time being the automatic recognition of civil status records is not in sight.