WHITE PAPER

Rights on the Move - Rainbow Families in Europe

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2 The Peace Institute – Institute for Contemporary Social and Political Studies – is a private independent non-profit research institution founded in 1991 by individuals who believed in peaceful conflict resolution, equality and respect for human rights standards. The institute develops interdisciplinary research, educational and advocacy activities aimed at creating and preserving open society capable of critical thought and based on the principles of equality, responsibility, solidarity, human rights and the rule of law. The Institute operates in areas of social sciences, humanities and law, in five thematic fields: human rights and minorities, politics, media, gender and cultural policies. It acts as an ally of vulnerable groups and acts against discrimination in partnership with them.

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Rights on the Move - Rainbow Families in Europe

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I. BACKGROUND

This White Paper is one of the results of a project entitled "Rights on the Move – Rainbow Families in Europe" which is supported by the European Commission within the framework of Fundamental Rights and Citizenship funding programme. The lead partner of the project is University of Trento, Italy.

This White Paper has been produced by the Peace Institute, a non-profit research institute based in Ljubljana, Slovenia. It has first been produced as a Conference Edition and its contents were considered at the conference in Trento on 16-17 October 2014. The final version of the White Paper was prepared taking into account findings from all deliverables of the project "Rights on the Move" and comments provided by interested stakeholders. The White Paper covers situation updated as of January 1, 2015.

The White Paper concerns the position of rainbow families—i.e. families wherein persons of the same legal gender play the parental roles—within the EU rules on free movement among EU Member States. The White Paper contains a brief analysis of the current rules on free movement as they apply or not apply to rainbow families (regulation *de lege lata*), exposes gaps and obstacles faced by rainbow families when they attempt to invoke their free movement rights (i.e. when they decide to move to and reside in another EU Member State), and sets forth recommendations for future legal regulation (regulation *de lege ferenda*). The White Paper does not contain an extensive legal analysis of all fields relevant to the free movement of rainbow families. Such an analysis will be comprised of other outputs of this project, in particular the Handbook and comparative research report.

The White Paper is divided to four main sections: the first section contains background information to the White Paper. The second section introduces the concept of free movement of EU citizens. The third section addresses legal issues relating to the legal recognition of marriages and same-sex partnerships; divorce and separation; immigration (family reunification) in cases when one partner is a third-country national, or when both are; adoption (both legal recognition of adoption decisions and access to adoption in other EU member states); reproductive rights; the effects of laws relating to LGBT free movement on children's rights; employment benefits and pensions; property regimes; inheritance; intersexuality recognition; transgender recognition; and assistance to victims of gender-based violence. The fourth section, which is central to the White Paper, contains conclusions and recommendation addressed at the European Union, and the fifth section comprises resources that were consulted in the course of preparing this White Paper.

In the course of the preparation of this White Paper the Peace Institute received assistance and feedback from project co-ordinator University of Trento as well as the project partners, in particular Alexander Schuster. Special thanks go to Helmut Graupner, Nelleke R. Koffeman and David de Groot who kindly provided comments to some sections of the paper. Katarina Vučko, legal counsel at the Peace Institute, and Jacob Rierson, intern at the Peace institute, provided valuable research assistance and language editing.

II. INTRODUCTION TO FREE MOVEMENT

Freedom of movement of persons is one of the four fundamental freedoms of EU law. It is recognized to EU citizens and their family members, and also, to some extent, to third country nationals.

The EU rules on free movement are encompassed in Article 21 of the Treaty on the Functioning of the European Union (TFEU) which states that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." Articles 45, 49 and 56 of TFEU set forth specific rules relevant for workers, the self-employed, and service-providers that are EU citizens.

These general provisions are further developed in Directive 2004/38/EC (Citizens Directive)[3] which defines free movement rights as the right to exit one's home Member State, the right to enter into and reside in a host Member State, the right to permanent residence, and the right to be protected from expulsion. Under Article 3, these rights apply to EU citizens "who move or reside in a Member State other than that of which they are a national." Directive 2014/54/EU[4] was adopted to facilitate free movement and support EU citizens and their family members who invoke their free movement rights, but the Directive does not, however, establish any new rights of individuals. Freedom of movement of workers is further defined by Regulation 492/2011/EU, which does not include any further reference to workers' families or family members.[5]

Under Article 3 of the Citizens Directive the same rights are also recognized to family members of EU citizens. Article 2 of the Directive includes the following persons as family members: a) the spouse; b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b); and d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point b). Stable partners are not included in the definition of family members to whom the same rights apply as to EU citizens. For stable partners only the host Member State's "duty to facilitate entry" is required by Article 3 (2) of the Directive.

The rationale behind the argument that family members of EU nationals are entitled to equal free movement rights as EU nationals is, that these rights cannot be fully exercised if the person moving to another EU Member State cannot be accompanied by their loved-ones – spouses, partners and children. This statement is equally relevant for all families, including rainbow families.

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77.

4 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128/8.

5 Regulation 492/2011/EU of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141/1.

Key areas for rainbow families

The variety of legislations in many of the EU Member States make it possible for LGBT EU nationals to have spouses, biological and adopted children and registered partners, and – regardless of the legislation – stable long-term partners. Therefore, the Citizens Directive is fully relevant for them.

Key areas for which free movement rights of rainbow families are directly or indirectly relevant are legal recognition of marriages and same-sex partnerships, immigration, legal recognition of adoption decisions, reproductive rights, children's rights, employment benefits and pensions, inheritance, property regimes, recognition of intersex and transgender status, and protection of victims of gender-based violence.

Rights related to free movement can be grouped into three clusters. First, there are rights that are already clearly enforceable under EU law and are achievable through the CJEU. Examples of such rights are pension and employment related rights. For example, in the *Römer* case[6] (the bases for which was set in *Maruko* case[7]) CJEU stated that registered same-sex partners must be treated equally to married opposite-sex partners in their access to supplementary retirement pension, as pensions are included in the meaning of "pay" under the Employment Framework Directive 2000/78/EC.[8] Further in the *Hay* case,[9] the CJEU decided that same-sex partners have rights to company bonuses (in this case salary bonus and days of special leave) when they enter into a registered partnership equal to those that opposite-sex couples obtain when they marry. Another example is parental leave protected by the Parental Leave Directive.[10]

The second group of rights concerns rights that are not protected on the EU level yet. Rights from this cluster that are most relevant for rainbow families are those in the scope of family law (e.g. right to marry, right to found a family), which is still entirely in the competence of the Member States, as defined in Article 9 of the Charter of Fundamental Rights. Also, as stipulated in Article 81 of the Treaty on the Functioning of the EU, unanimity is required in the Council for passing measures concerning family law with cross-border implications. In this area, the caselaw of the European Court of Human Rights can be invoked only in relation to contacts with children[11] and in relation to single adoption. According to cases *E.B. v. France*[12] and *Fretté v. France*,[13] if the state provides for a single person to adopt a child, such adoption procedures have to be free from discrimination on the grounds of sexual orientation.

The third cluster are rights that are to some extent addressed by EU law, but due to the lack of clear rules or CJEU caselaw on the matter, their status is not completely clear. For example, one of the main questions concerning free movement is whether recognition of the civil status of "spouse" from the Citizens Directive refers to same-sex spouses as well. Also, for family members who are registered same-sex partners it needs to be clarified whether registered partnership is equal to marriage in order to enable the exercise of free movement rights.

6 CJEU, *Jürgen Römer v Freie und Hansestadt Hamburg*, C-147/08.
7 ECJ, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, C-267/06.
8 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.
9 CJEU, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12.
10 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68/13.
11 See e.g. ECHR, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96.
12 ECHR, *E.B. v France*, Application No. 00043546/02.
13 ECHR, *Fretté v. France*, Application No. 36515/97.

III. LEGAL ISSUES

III. 1. Legal Recognition of Relationships, Divorce and Separation

Marriages and Same-Sex Partnerships

There are two aspects to the legal recognition of relationships. First there are situations when legal recognition of relationships *per se* is conducted through marriage certificates or certificates of partnership registration, in order to inscribe the fact of a marriage or a registered partnership into a state database. For these situations, private international law provisions are used, which comprise international conventions, EU law sources[14] and the national legislation of each Member State.

But there are also situations when the recognition of a marriage or partnership certificate *per se* is not required, but is a condition to invoke a further right that is dependent on that relationship. Such rights include free movement rights of family members, i.e. the right of entry and residence of family members of EU nationals in another EU Member State. Namely spouses, registered partners, or co-habiting partners that intend to jointly enter another EU Member State and reside there do not need to undergo relationship recognition in a separate procedure before they register their residence or apply for a residence permit; the recognition of their relationship is usually part of the administrative procedure of residence registration or the issuing of a residence permit. The recognition of their relationship is therefore a sort of preliminary question that needs to be resolved by the administrative body of the host Member State before a residence registration or residence permit is issued to a same-sex spouse or a registered or co-habiting partner. Therefore, legal recognition can either be regarded as a right on its own or as a pre-condition for invoking other rights that depend on the civil status of a family member, concretely a "spouse" or a "registered partner."

As Toner summarizes, some countries have specific provisions on recognition of partnerships; Nordic countries recognize each-others partnership unions, while elsewhere recognition depends on whether host Member States have a partnership law or not, meaning that the most difficult situations could arise in countries with no partnership law.[15]

14 In particular Council Regulation (EC) No 2201/2003 of 27 November 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, OJ L 338/1.
15 Toner, Helen: Partnership Rights, Free Movement, and EU Law, Hart Publishing, 2004, p. 45.

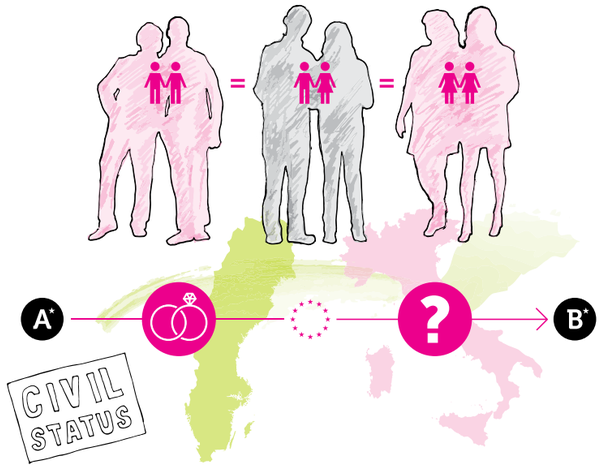
SPOUSES: The Citizens Directive, which includes spouses among family members, does not provide for any further guidance on whether spouses include same-sex spouses. It also does not specify whether there is a difference between spouses who married within the EU or outside the EU. So far the CJEU has only been asked to decide whether stable relationships can be brought under the definition of marriage (see cases *Roodhuijzen*[16], *D. and Sweden v. Council*,[17] *Reed*[18] and *Grant*),[19] but it has not yet been asked to decide on whether a same-sex marriage contracted in one Member State should be recognized in another.[20] This is the task that the CJEU will have to perform unless the Citizens Directive is amended to make the issue clear. The arguments in favour of such interpretation have been extensively developed by Rijpma and Koffeman, who argue that

> **[i]f the CJ were to interpret the term "spouse" under the Citizens Directive autonomously so as to include only different-sex partners, this would leave same-sex married couples deprived of recognition of their marital status under EU law. Requiring recognition only when the host Member State does, or on the basis of a case-by-case assessment, could leave a considerable number of couples without recognition.[21]**

REGISTERED PARTNERSHIPS: Following from the Citizens Directive, a number of questions need to be clarified in such cases: First, whether the possibility of a registered partnership is available in the host Member State at all; and second, if so, whether or not registered partnership is equivalent to marriage. The meaning of the term "equivalent to marriage" is unclear. It is not yet defined whether registered partnership has to contain all rights recognized to married couples, or whether some rights can be missing from the legal regulation and the regulation still be considered equivalent to marriage. This question remains subject to judicial interpretation before national courts, meaning that litigation would be required to arrive at an answer. An example of a question that courts would have to address is whether a couple from a Member State with weak partnership laws that moved to a Member State with stronger partnership laws would retain their stronger partnership rights after returning to the State with weak partnership law. Similarly, would a couple that registered in a country with strong partnership laws and subsequently moved to a country with weak partnership laws experience a downgrading of their partnership. Moreover, the Citizens Directive contains no reference to partnerships registered outside the EU and whether or not they should be treated differently than partnerships registered within the EU.

Another issue that is not clear is whether a Member State that does not provide for same-sex marriage, but that provides for registered partnerships equivalent to marriage, is obliged to treat same-sex spouses as registered partners. If not, the registered partner would fall under the definition of a stable partner, duly attested. However, in this case there is only a duty to "facilitate" entry imposed on the Member States and not to grant entry. This raises a new problem, as it is not entirely clear what "facilitate" means—though it certainly does not impose any strict duties on the Member States. These instances only involve the obligation to extensively examine personal circumstances of the partners (e.g. durability of partnership, financial or physical dependence, children, the presence of a joint bank account, etc.) and justify any denial of entry and residence.[22] In other words, a blanket policy of denying entry or residence to stable same-sex partners would violate the directive. As for the term "duly attested," marriages or partnerships that are formally registered fulfil this criterion. Since marriage and/or registered partnership remains inaccessible for same-sex partners in a number of Member States, leaving them with the option of cohabitation only, this discussion is particularly relevant for them.

16 ECJ, *Commission v. Anton Pieter Roodhuijzen*, C T-58/08.
17 ECJ, *D and Sweden v. Council of the European Union*, C-122/99 P and C-125/99 P.
18 ECJ, *State of the Netherlands v. Ann Florence Reed*, C-59/85.
19 ECJ, *Lisa Jacqueline Grant v South-West Trains Ltd*, C-249/96.
20 Rijpma and Koffeman, Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?, in: Gallo D. et al. (eds), Same-Sex Couples before National, Supranational and International Jurisdictions, Springer-Verlag 2014, p. 470.
21 Rijpma and Koffeman, p. 475.
22 Ibid., p. 474.



This provision on the duty to facilitate entry has already been criticised for its lack of clarity (see *Rahman* case)[23]; therefore a need for greater precision is evident.

Rijpma and Koffeman also stress that in the case *Commission v. Germany*[24] the Court acknowledged that "the possibility for an EU citizen to be joined by his partner, whatever the legal status of their relationship, is instrumental to the free movement of persons."[25] Should recognition depend entirely on the host Member State, freedom of movement of rainbow families would be seriously restricted.[26]

Recognition of relationships is not only required to ensure the effective exercise of free movement rights irrespective of the sex of the partners, but also to ensure the respect of the right to family life guaranteed by Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (the fact that same-sex couples enjoy the protection of this provision was confirmed in ECHR case *Schalk and Kopf v. Austria*[27] and reiterated in *Vallianatos and others v. Greece*),[28] and to ensure the respect of the prohibition of discrimination on the grounds of sexual orientation codified in Article 21 (1) of the Charter of Fundamental Rights. Recognition of same-sex relationships would also be perfectly in line with the principle of mutual recognition within the EU. Tryfonidou argues that while Member States are free to refuse legal recognition to same-sex relationships in purely internal situations, they are not free to do so in case of same-sex relationships of migrant Union citizens, as this can amount to a violation of EU law.[29] Guild et al., however, point out the position of the Council, in that the current family law provisions of the host Member State are the only relevant ones for such recognition, otherwise "reverse discrimination" problem could arise.[30]

The recognition of a relationship—i.e. being recognized as one's spouse, registered partner, or duly attested co-habiting partner—is related to the recognition of the civil status of a person, though the latter is closely related to the recognition of civil

23 CJEU, *Secretary of State for the Home Department v. Rahman*, C 83/11. The term is also criticized in the literature. See e.g. Toner, Helen: Partnership Rights, Free Movement, and EU Law, Hart Publishing, 2004, p. 51.
24 ECJ, *Commission v. Germany*, C 249/86.
25 Rijpma and Koffeman, p. 476.
26 CJEU, *Gerardo Ruiz Zambrano v Office national de l'emploi*, C-34/09.
27 ECHR, ***Schalk and Kopf v Austria***, Application No. 30141/04.
28 ECHR, ***Vallianatos and others v. Greece***, Application No. 29381/09 and 32684/09.
29 Tryfonidou, Alina: EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition, paper presented at Rights on the Move Conference, 16-17 October 2014, p. 5.
30 Guild, Elspeth, Peers, Steve and Tomkin, Jonathan: The EU Citizenship Directive. A Commentary, Oxford University Press, 2014.

status documents. The fact that recognition of civil status documents is crucial for effective exercise of free movement rights has already been confirmed by the CJEU (see *Dafeki* case).[31] Also, while denying the recognition of a person's name and last name without a doubt limits free movement rights, as confirmed in cases *Garcia-Avello* and *Grunkin-Paul*,[32] denying the recognition of same-sex relationships inflicts even more disproportionate harm.[33]

Since recognition of civil statuses in the EU more generally is already recognised as an important issue, the European Commission addressed the area by issuing a 2010 Green Paper entitled *Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records*.[34] The Green Paper defines civil status records as "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."[35]

In the Green Paper, the Commission stated that "the legal status acquired by the citizen in the first Member State [...] should not be questioned by the authorities of the second Member State since this would constitute a hindrance and source of objective problems hampering the exercise of citizens' rights."[36] The commission recognized the difficulties EU citizens have in invoking their rights or complying with duties based on public documents, as these are very often not accepted by authorities of the host Member State without "bureaucratic formalities that are cumbersome for citizens."[37] The Commission further found that citizens are then faced with very specific questions, whose answers are often uncertain. This is particularly the case with same-sex partners and rainbow families. Due to the great variety of legal regulations in various Member States, uncertainty is even greater in relation to recognition of a same-sex spouse, registered partner, or cohabiting partner as a family member under the Citizens Directive.

The Commission emphasised that "it is time to consider abolishing the *apostille* and legalisation for all public documents in order to ensure that they can circulate freely throughout the EU."[38] The Commission put forth three policy options (1) administrative cooperation, (2) automatic recognition of civil status, or (3) the harmonization of conflict-of-law rules.

The reactions of the Member States indicate that the second option (automatic recognition) is unlikely for political reasons, while the third option was also not accepted with enthusiasm.[39] The European Parliament declared that it would be ready to support the plans for mutual recognition.[40] However, it needs to be taken into account that any measures in the field of family law, as already mentioned, have to be adopted by the Council with unanimity, and the parliament only has a consultative role in such legislative procedures.

It seems that, in any case, progress in relation to these issues will be slow and achieved only through partial steps. It will probably continue with the simplification of procedures in certain areas of recognition of documents, first in the area of business and economy. One such example is the *Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM/2013/228)*. The proposal explicitly states that it only concerns the recognition of the document, but not the content from which legal rights are derived.

It seems that, if mutual recognition in general is a problem for the Member States, it is foreseeable that recognition will be seen as even more problematic when it comes to same-sex marriages or partnerships, due to a persistent refusal of some Member States to provide for legal recognition of same-sex relationships.

31 CJEU, *Eftalia Dafeki v. Landesversicherungsanstalt Wurttemberg*, C-336/94.
32 ECJ, *Carlos García Avello v Belgian State*, C-148/02; ECJ, *Grunkin-Paul gegen Standesamt Niebüll*, C-353/06.
33 Rijpma and Koffeman, p. 483.
34 Green Paper entitled Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records (COM(2010)747), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF.
35 Ibid., p. 11.
36 Ibid., para 4.1.
37 Ibid., p. 3.
38 Ibid., para. 3.3.
39 http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm. See also Rijpma and Koffeman, p. 488.
40 *See* European Parliament Resolution on civil law, commercial law, family law and private international law aspects of the Action plan implementing the Stockholm Programme, 23rd November 2010, P7_TA(2010)0426. *See also* the Opinions of the Economic and Social Committee (OJ 2011 C 248, p. 113) and the Committee of the Regions, OJ 2012 C 54, p. 23.

EU Members
same-sex legal recognition of civil status

Marriage

- Belgium
- Denmark
- France
- Luxembourg
- Netherlands
- Portugal
- Spain
- Sweden
- United Kingdom (England, Wales, Scotland)

Registered partneship only

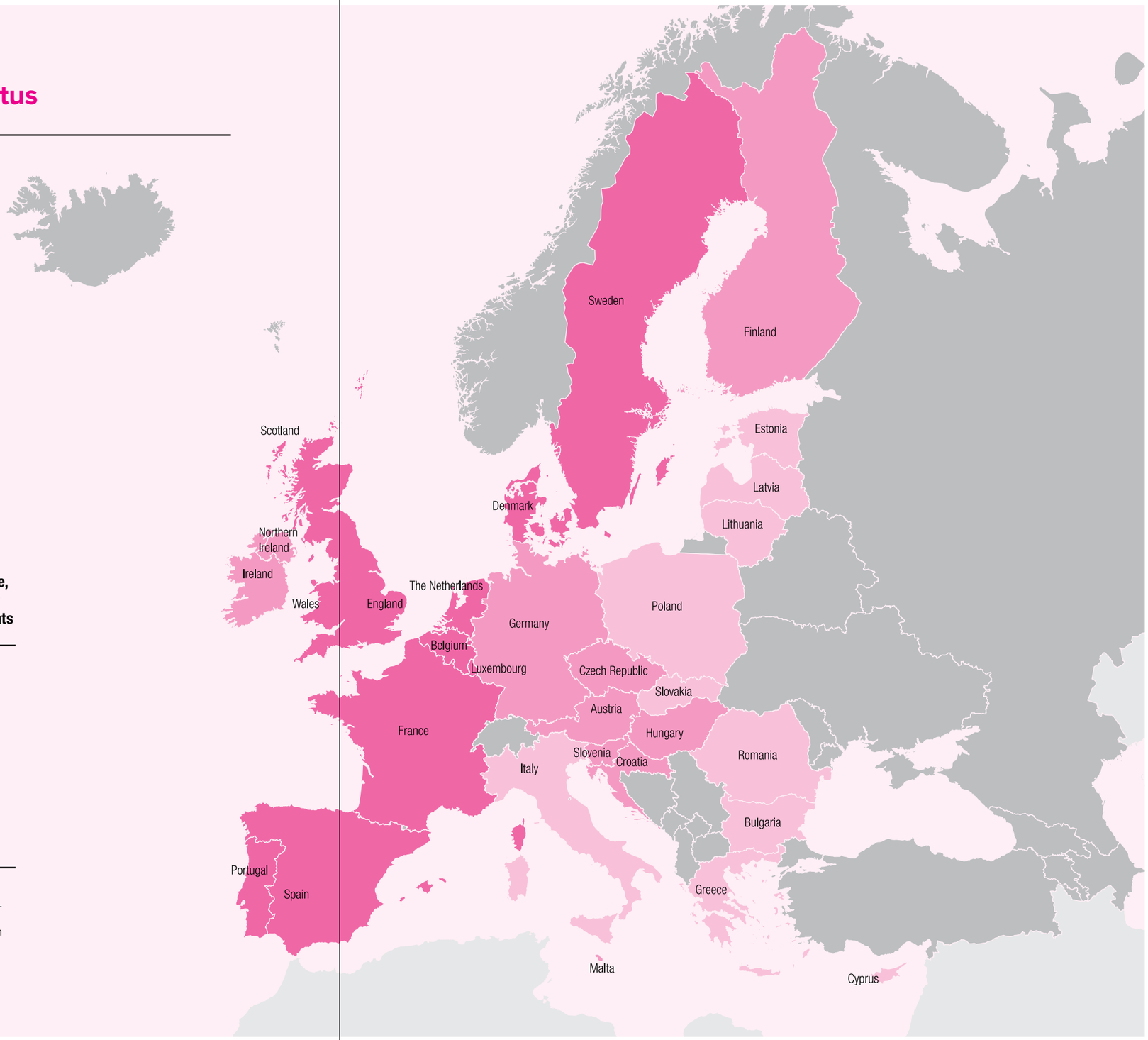
- Austria
- Croatia
- Czech Republic
- Finland*
- Germany
- Hungary
- Ireland
- Malta
- Slovenia

* In Finland, marriage was introduced with the new law which will enter into force on March 1, 2017.

Neither marriage, partnership or cohabitation rights

- Bulgaria
- Cyprus
- Estonia**
- Greece
- Italy
- Latvia
- Lithuania
- Poland
- Romania
- Slovakia

** In Estonia, registered partnership was introduced with a law that will enter into force on January 1, 2016.



Source: ILGA Europe and ROTM project updates as of 1 January 2015.

Divorce and Separation

Recognition of divorce and separation documents in one EU Member State that were issued in another EU Member State is governed by the *Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.*[41] The provision of Article 21 (1) of this regulation states that "a judgment given in a Member State shall be recognised in the other Member State without any special procedure being required." This general provision is followed by a provision specific for divorce, legal separation or marriage annulment. Namely, according to Article 21 (2) "no special procedure shall be required for up-dating the civil status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State."

The question that arises in this respect is whether these provisions are also applicable for divorce, legal separation or annulment in cases of same-sex marriages and same-sex partnerships. In other words, it is unclear whether divorce and annulment of "marriage" comprises both opposite-sex and same-sex marriages, and in addition whether "legal separation" is also relevant for dissolution of same-sex partnerships. The directive does not contain any reference to same-sex partners.

In any case, the interpretation of the directive needs to be restrictive, as recital 10 of the regulation states that the provisions do not apply to "other questions linked to the status of persons."

Similar issues arise with regard to sources of EU law that establish the basis for enhanced cooperation in relation to divorce and legal separation, namely *Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU)*,[42] and *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*. One of the aims of Regulation 1259/2010 is to "provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility."[43] This should be the case not only for opposite-sex spouses but also for same-sex spouses and registered partners. The argument that this should be the case (although it is not clearly spelled out) is strengthened by recital 30 of the Regulation, which specifically refers to the prohibition of discrimination on the grounds of, *inter alia*, sexual orientation, guaranteed by Article 21 of the Charter of Fundamental Rights.

41 Council Regulation (EC) No 2201/2003 of 27 November 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, OJ L 338/1.

42 The decision is a consequence of the lack of possibilities to achieve unanimity to amend the regulation 2201/2003, which became clear in the process of the preparation of amendments. See Proposal for a Council Regulation of 17 July 2006 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters [COM(2006) 399 final – not published in the Official Journal]. The proposal is a follow up to the Green Paper on applicable law and jurisdiction in divorce matters of 14 March 2005.

43 Recital 9.

RECOMMENDATIONS:

➔ **To continue the efforts of the European Commission in relation to the preparation of legislation on mutual recognition of public documents related to civil status.**

➔ **To ensure that documents concerning marriage and partnership registration related to same-sex partners are included in this legislation, and that the particular needs of same-sex spouses and partners in this respect are covered.**

➔ **To define the term "spouse" in the Citizens Directive to include married same-sex couples. Such amendments would prevent the downgrading of civil status of married couples to registered couples (in case the host member state provides for registered partnerships). Downgrading of a civil status from marriage to registered partnership due to exercise of citizens' free movement rights should be prevented.**

➔ **To unconditionally include registered and unregistered (co-habiting) same-sex partners among family members of Union citizens.**

➔ **The possible amendments to the Citizens Directive should take as a starting point the home Member State principle[44] (as opposed to the host Member State principle), meaning that if same-sex marriage is allowed in the home Member State, in line with the principle of mutual recognition the host Member State should recognize married partners as spouses even if the host Member State does not provide for same-sex marriage. Such amendments are required from the perspective of facilitating free movement, ensuring legal certainty and respect of non-discrimination on the grounds of sex and sexual orientation. Also, regulation in this field would make it possible for the interested parties to avoid unnecessary litigation. Similarly, the amendment should be clear that the home member state principle would not apply in cases where registered same-sex couples moving from an area with weak partnership laws to an area with strong partnership laws would have the effect of denying the couple the full protection of the new host member state's laws. In such a circumstance, the couple would enjoy the full protection of the stronger partnership laws. In such a case, Member States could be free to choose whether the protection of stronger host state laws would travel back with the couple if they returned to their home state with weaker partnership laws.**

➔ **To define explicitly whether Regulation 2201/2003 applies to divorce and annulment of same-sex marriages and whether legal separation applies to registered same-sex partnerships.**

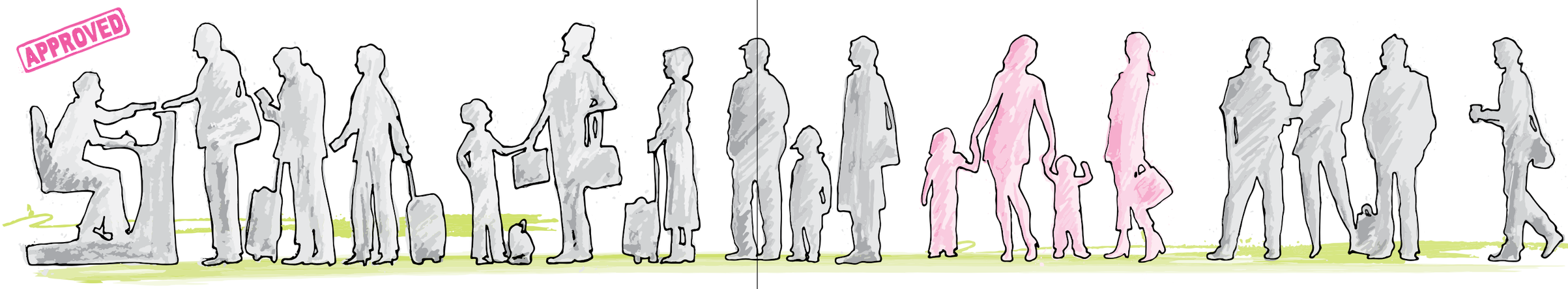
44 Home Member State principle" in the context of this White Paper indicates a Member State where the partners concluded marriage or registered partnership, while this is not necessarily the state of the partners' nationality. This member state is therefore a "home" of their civil status.

III. 2. Immigration

Third-country nationals do not enjoy free movement rights to the same extent as EU nationals. Indeed, if they wish to move to one of the EU Member States the EU law requires them to invoke one of the options provided for legal immigration.[45] This includes an option of being recognized as a family member of an EU national. Same sex partners who wish to pursue that option encounter similar issues of recognition of their civil status as EU nationals exercising their free movement rights. Since many non-EU states recognize same-sex partnerships either in the form of marriage or registered partnership, the issue arises in determining whether a same-sex spouse, registered partner, or unregistered partner who is a third-country national is recognized as a family member of a third-country national under EU law. This is particularly important because unlike EU nationals, third-country nationals do not enjoy independent free movement rights.

Family members who have the right to join a third-country national (hereinafter: a sponsor) in an EU Member State are listed in the Family Reunification Directive, Article 4.[46] This article states that the Member State should authorise entry and residence to the sponsor's "spouse". This raises the same issues as in the case of free movement of EU nationals. The key question that remains unclear is whether the term "spouse" includes same-sex spouses. The Directive does not provide for a clear response and there is no caselaw on the issue yet.

With regard to registered partners, the Directive does not impose the same obligation to the



45 Broadly speaking, the conditions for immigration to the European Union are stipulated in Council Directive (EC) 2003/109 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, and Council Directive (EC) 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17.

46 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12.

Member States to authorise entry. Namely, according to Article 4(3) of the Directive the Member States are free to choose whether they will allow entry to registered partners and co-habiting partners who are in a duly attested long-term relationship. If they choose to allow family reunification of the partners, they may consider as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof (as stipulated in Article 5(2) of the Directive. In addition, the Directive also provides for an option for the Member States to decide that registered partners are treated equally as spouses with respect to family reunification (Article 4 (3)).

The main difference between these provisions compared to the Citizens Directive is that the Member States have discretion as to whether they will allow entry and residence of registered partners at all. If a Member State decides to allow entry, the provisions raise further issues which are similar to those raised in the context of free movement, in particular whether registered partners experience a downgrading or upgrading of their partnership if they come from a Member State with weak partnership laws to a Member State with strong partnership laws. Similarly, the question remains what kind of further treatment, relative to registered partners, is afforded to co-habiting partners if they are authorised entry and residence.

In addition, a reading of the Directive's provisions shows that there is no duty to facilitate entry of co-habiting partners,[47] while there is such duty stipulated in the Citizens Directive. On this issue Rijpma and Koffeman point out that

> **[t]he weaker rights for third-country national partners 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.[48]**

Another question that arises with respect to third country civil statuses concerns second recognition: does recognition of third-country marriage or registered partnership in one EU member State mean automatic recognition in any other EU Member State? The issue remains unclear as it is not addressed in the EU law.

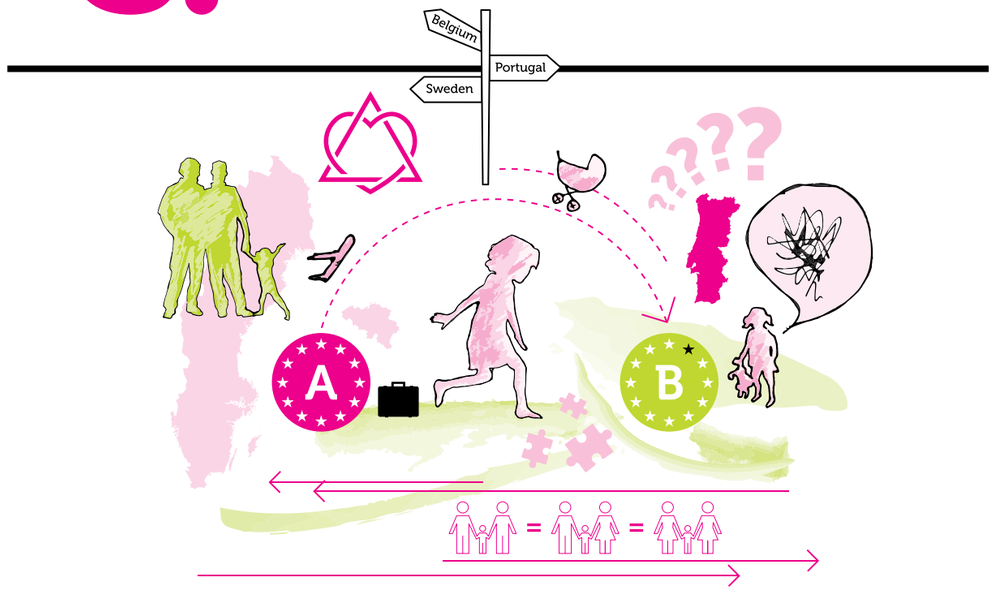
47 The need to provide family reunification rights to cohabiting same-sex partners is addressed in detail in Toner, Helen: Partnership Rights, Free Movement, and EU Law, Hart Publishing, 2004.

48 Rijpma and Koffeman, p. 486.

RECOMMENDATIONS:

- **To continue the efforts of the European Commission in relation to preparation of legislation on mutual recognition of public documents related to civil status.**
- **To ensure that documents concerning marriage and partnership registration related to same-sex partners are included in this legislation, and that the particular needs of same-sex spouses and partners in this respect are covered.**
- **To define the term "spouse" in the Family Reunification Directive to include married same-sex couples of the third country national (sponsor).**
- **To unconditionally include registered and unregistered (co-habiting) same-sex partners among family members of third country nationals (sponsors) and ensure their right to family unity is respected.**
- **To ensure that the home state principle is relied upon in relation to third country nationals that are registered partners and co-habiting partners who are in a duly attested long-term relationship with the sponsor. In other words, if a same-sex couple is married but the host Member State provides for registered partnership only, their civil status should not be downgraded to registered partnership. Similarly, if a host member state does not provide for registered partnership or marriage, they should not be regarded as not being in a legally recognised relationship at all.**
- **For second recognition of third-country statuses, a European Multilingual standard form (Annex III and IV of the Proposal COM/2013/228) could be used in order to later make recognition in another EU Member State easier. By using the form the host Member State that does not provide for marriage but for registered partnership only, would not be required to grant the rights attached to marriage, but only the rights attached to registered partnership. While this would still amount to downgrading, it would lessen the burden for a second recognition if the couple decides to move to another Member State.**

III. 3. Adoption



In the field of adoption, two issues are of particular importance. The first one is legal recognition of decisions of adoption in one Member State that have been issued by courts in another Member State, while the second one is access to an adoption procedure in one Member State by partners who are nationals of another Member State.

Access to adoption procedures depends on the national legislation of each EU Member State. Since adoption falls into the realm of family law they are in exclusive competence of the Member State. The EU has not yet adopted any measures for cross-border situations, and in order to do that unanimity is required. Therefore, access to adoption remains outside the EU competence.

Also, there are no specific EU law sources that would govern recognition of adoption decisions exclusively. On the international level adoption is governed by the European Convention on the Adoption of Children (revised). Article 7 which addresses the question as to who may adopt, provides for a possibility of states to allow adoption by two same-sex spouses, registered partners, or partners who are living together in a stable relationship. The provision reflects the reality in which some states already provide such an opportunity. With regard to second parent adoption for cohabiting couples, it is clear that it has to be allowed in Member States of the Council of Europe that provide for second parent adoption for unmarried opposite sex partners. This was confirmed by the ECHR in *X et al v Austria.*[49] International adoption, which may or may not include EU Member States, is governed by the 1993 Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Adoption Convention). This convention was ratified

49 ECHR, *X et al. v Austria*, Application No. 19010/07.

by all EU Member States. The convention therefore applies in cases that are of interest to this White Paper, i.e. cases of adoption of a child performed jointly or consecutively by same-sex couples (married, registered, or cohabiting) who are not nationals of the EU Member State where the adoption was performed. In other words, recognition of such adoption decisions is governed by international and not EU law. However, these cases become relevant for EU competence when adoptive parents exercise their free movement rights. The Convention applies to adoption by same-sex couple, as clarified by the Explanatory Report.[50] Also, according to Article 24 of the Convention, the recognition of an adoption may be refused by the state only if the adoption is manifestly "contrary to the state's public policy, taking into account the best interests of the child."[51] Even though this principle has to be interpreted narrowly,[52] the general wording of this provision gives room to possible restrictive interpretations that could hinder the recognition of adoption decisions issued to same-sex adoptive parents. The same issue arises in cases of second-parent adoption, when adoption was performed in one Member State while the family's place of residence is in a different Member State. Non-recognition of an adoption decision can have a negative impact on establishing the status and citizenship of the child,[53] which also affects the EU citizenship of the child.

TRUE STORY

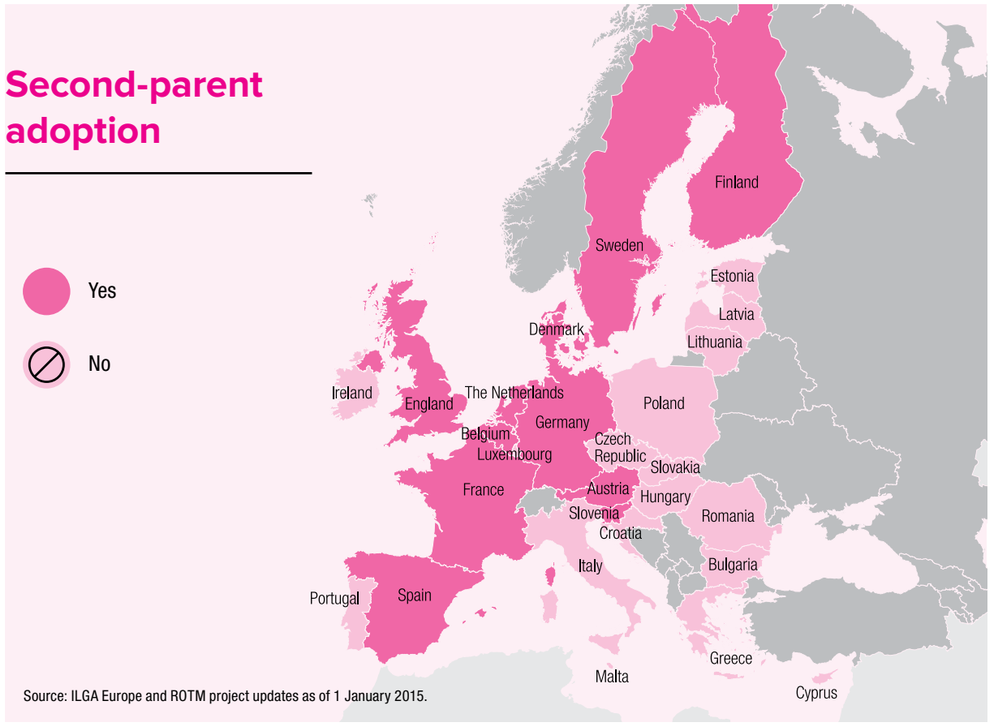
Two men, a Portuguese and a Swedish national, adopted a daughter born in the U.S. The family lives in Belgium. They are both fully recognized as her fathers in Sweden and Belgium, but Portugal does not recognize their adoption. They return to Portugal for holidays, where their daughter's status is unclear. (NELFA petition to the European Commissioner Viviane Reding, 24 September 2013)

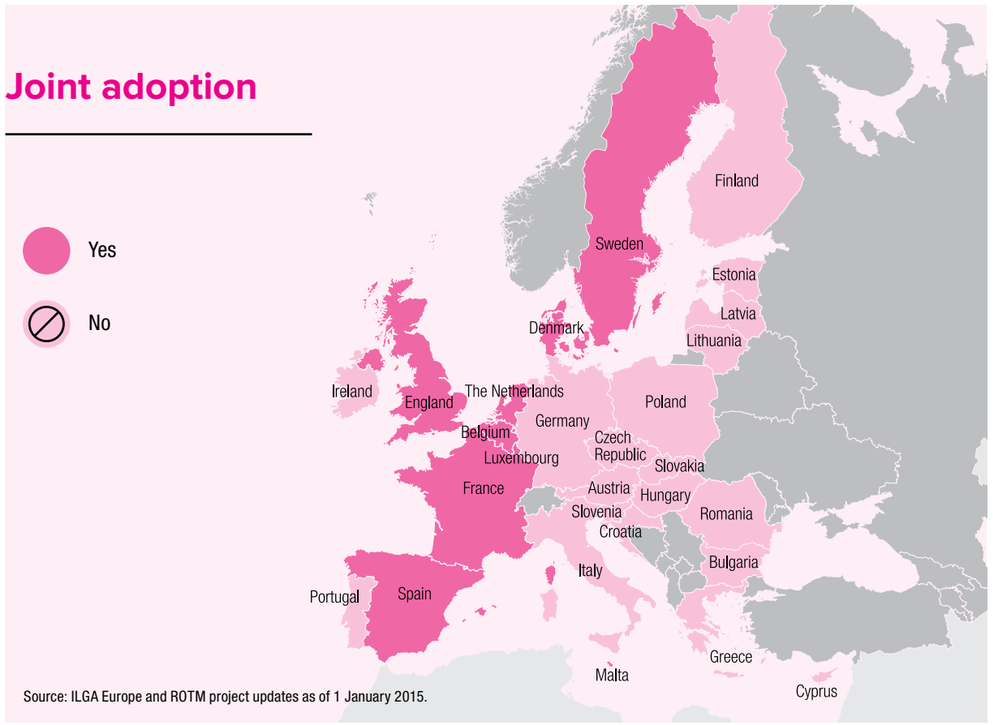
As with the recognition of relationships, recognition of adoption decisions can also take place in two different manners: the first one is recognition of a decision *per se* for the purposes of civil status records, and the second one is recognition of an adoption decision for a purpose of exercising a right that is dependent on the existence of parental rights. The latter case is very much relevant for rainbow families with adopted children who exercise their free movement rights. Namely, according to the Citizens Directive, family members of EU nationals who are authorised entry and residence in another EU Member State include "direct descendants under the age of 21 or dependants of the EU national's spouse or partner."[54] Even though the directive does not explicitly state so, descendants include adopted children who, pursuant to Article 11 of the Hague Adoption Convention, have the same rights and obligations as the EU national's biological children. Taking into account the best interest of the child, as well as the prohibition of discrimination on the grounds of sexual orientation, adopted children should be considered family members, based on the recognition of an adoption decision. This issue would arise only if the civil status of the adopted child was not yet appropriately inscribed into the state records. If it was, recognition of an adoption decision would not be necessary as a birth certificate produced by a child's adoptive parents would not reveal the adoptive status of the child. In such cases recognition for the purposes of issuing a residence permit based on free movement of the rainbow family would not be necessary.

RECOMMENDATIONS:

- **To continue the efforts of the European Commission in relation to the preparation of legislation on mutual recognition of public documents related to civil status.**
- **To ensure that documents concerning parental ties obtained through adoption related to same-sex partners are included in this legislation and that their particular needs in this respect are covered.**

50 Hague Conference Private International Law, Parra-Aranguren G. (1994) Explanatory report on the convention on protection of children and co-operation in respect of inter-country adoption, para. 82.
51 Article 24 of the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.
52 Saura, Nuria, The Multilevel legal Framework on the Best Interests of the Child in Relation to LGBT Families, Working paper, Rights on the Move project, p. 33.
53 Ibid., p. 34.
54 Article 2(2)(a-d) of the Citizens Directive.





III. 4. Reproductive Rights

In the field of reproductive rights, issues such as access to assisted reproduction technologies (ART) and surrogacy are particularly relevant for same-sex partners and their families.

These issues fall within the area of health where the EU only has a coordinating role, as specified, for example, in Article 6 (a) of TFEU. For ART more generally, two directives are relevant: the *In vitro* Diagnostic Medical Devices Directive[55] and the Tissues and Cells Directive.[56] In Vitro Diagnostic Medical Devices Directive provides for harmonisation of rules concerning the placement on the market of in vitro medical services devices, but does not affect the rules on conditions for access to ART. The Tissues and Cells Directive also does not affect conditions for access in a way that would be relevant for same-sex couples.

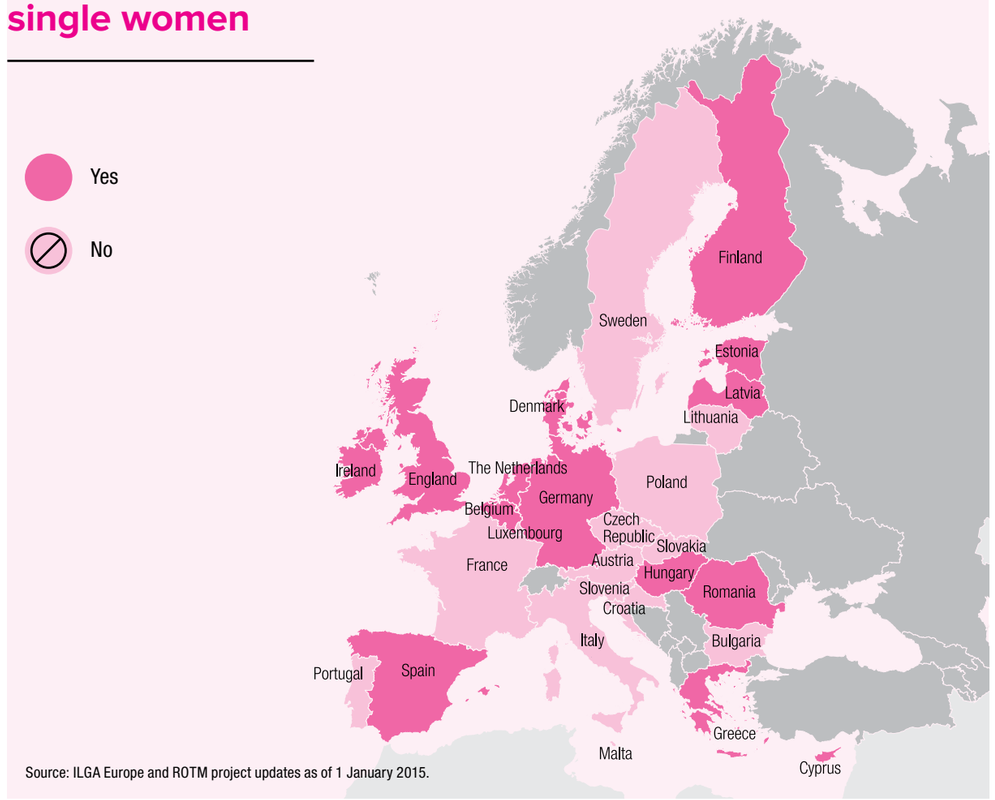
Further, the recently adopted Patient's Mobility Directive 2011/24/EU[57] which regulates the remuneration of payment for healthcare services used in one Member State by nationals of another EU Member State, is also relevant to the free movement of same-sex couples. Article 3(a) of this directive defines "healthcare" as "health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices." Does this definition include ART? This depends on the reasons for which ART is provided: If it is provided for infertility reasons (which are medical reasons) and if a person has access to them based on medical insurance, then the answer should be in the affirmative. For reimbursement eligibility under the Directive, it is necessary that the medical treatment undergone in another Member State is foreseen by the healthcare service the patent's home Member State.[58] However, the directive does not affect the conditions for access to ART or surrogacy. Namely, according to recital 7 of the Directive, no provision of this Directive should be interpreted in such a way as to "undermine the fundamental ethical choices of Member States."

As Koffeman argues, ART as medical activity "fall[s] in the definition of 'services' within the meaning of the TFEU, provided [it is] legally provided for remuneration in at least one EU Member State".[59] She adds that "[s]urrogacy may in itself also be considered as a service."[60] From this aspect, ART and surrogacy as services, if they are provided for remuneration, fall within the competence of the EU. However, apart from this fact this does not mean that the EU has any competence in expanding access to ART and surrogacy within the Member States to groups that are now excluded, including same-sex partners.

Recognition of public documents and judicial decisions related to ART and surrogacy therefore seem to be one of the issues where the EU has competence. Documents that are relevant in this regard are birth certificates for children born by way of ART[61] or surrogacy where two same-sex partners would be registered as (intended and legal) parents, judicial decisions granting parental rights to children born with surrogacy or adoption decisions in cases of second-parent adoption performed by the partner of the child's biological parent. Recognition of such decisions has already been discussed above in section III.3. It should be stressed again that in these cases non-recognition due to public policy reasons could and did take place,[62] which importantly affects the rights of all children concerned in addition to the parental rights of their parents.

55 Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331/1.
56 Directive 2004/23/EC of the European parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, OJ L 102/48; Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells, OJ L 38/40; and Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells, OJ L 294/32.
57 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88/45.
58 Busatta, Lucia, Could a common EU standard of access to MAR techniques be possible aslo for LGBT couples?, paper presented at Rights on the Move conference, 16-17 October 2014, p. 11.
59 Nelleke R. Koffeman, Legal Responses to Cross-Border Movement in Reproductive Matters within the European Union, Paper for Workshop no. 7. Sexual and reproductive rights: liberty, dignity and equality of the IXth World Congress of the IACL 'Constitutional Challenges: Global and Local, Oslo, Norway, 16-20 June 2014.
60 Ibid.

Access to ART for single women



Source: ILGA Europe and ROTM project updates as of 1 January 2015.

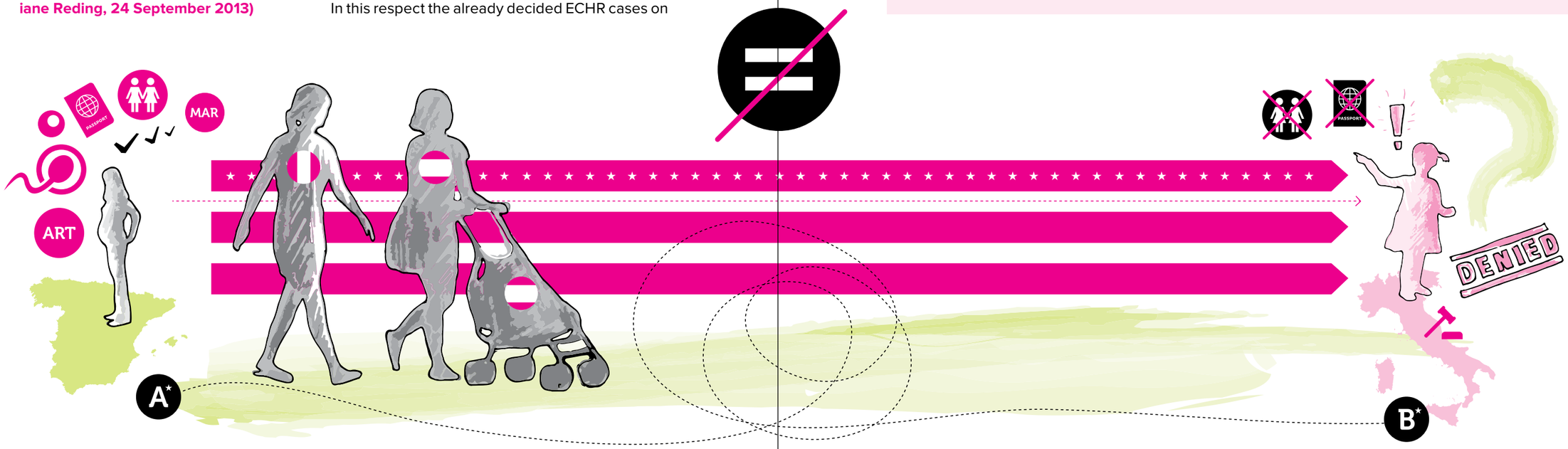
61 This includes both cases of children born through ART when the second parent was granted parental rights based on the second-parent adoption and is subsequently inscribed onto the birth certificate and cases when the second parent obtains parental rights and is inscribed onto the birth certificate immediately at the child's birth. See for example of the Netherlands that provides for such automatic recognition of parental rights since 1 April 2014.
62 Ibid., p. 10.

Two women, a Spanish national and an Italian national, live with their daughter in Spain. Their daughter was conceived through medically assisted reproduction (MAR) techniques. The Italian national provided the egg and the Spanish national carried the child, who was born in 2011. Turin's Register of Births, pursuant to the opinion of the Italian Public Prosecutor's Office, denied the couple's request that their daughter be granted Italian citizenship on the grounds that MAR techniques ought only to be available to heterosexual couples, only the woman who delivered the child can be considered the child's mother, and having two mothers is against Italian public policy. Their child, despite being conceived with the egg of an Italian national, cannot obtain Italian nationality and Italian passport. (NELFA petition to the European Commissioner Viviane Reding, 24 September 2013)

Similar problems could be encountered in cases that include the need to issue a passport by an EU Member State to a child born with surrogacy in another EU Member State.[63] As Koffeman argues,

> **refusal by an EU Member State to give recognition to a birth certificate issued in another Member States may prove problematic under EU law. If the intended parents are EU citizens they may rely on their free movement rights and they may also invoke the citizenship rights of the child. [...] Non-recognition of the birth certificate may well be considered a restriction of these free movement rights.[64]**

The main arguments supporting recognition of birth certificates for children born with surrogacy are related to the principle of the best interest of the child and protection of family life. In order for these two rights to be respected, actually and legally existing parental ties should be recognized. In this respect the already decided ECHR cases on



63 Ibid.
64 Ibid., 14.

recognition of adoption decisions and decisions on recognition of paternal rights concerning children born through surrogacy are relevant (see e.g. cases *Wagner*,[65] *Mennesson*[66] and *Labassee*[67]).

It needs to be stressed that in reproductive rights matters with cross-border elements, many difficulties have been noted in general, regardless of whether the couple that was exercising their rights was same-sex or opposite-sex. These difficulties span from bans on access to information, to refusals to provide medical aftercare, to non-recognition of judicial and administrative decisions.[68]

RECOMMENDATIONS:

- **The directive definition of medical services should be broadened to explicitly include assisted reproductive technologies.**
- **To explore the possibility for same-sex spouses, as well as registered and unregistered same-sex partners to be afforded access to ART.**
- **To codify the home member state principle such that children born to same-sex couples that were conceived through ART or surrogacy are given equal legal protection in their new host Member State. This should include the guarantee that civil status documents (i.e. birth certificates) of children born with ART or surrogacy are recognized in all Member States, regardless of whether the host member State provides for such services and access of same-sex couples to them. This should also include the right of a child to access citizenship of their parents under the same conditions as other children, as well as the right to obtain passport and other identity documents.**

65 ECHR, *Wagner and J M W L v. Luxembourg*, Application No. 76240/01.
66 ECHR, *Mennesson v. France*, Application No. 65192/11.
67 ECHR, *Labassee v. France*, Application No. 65941/11. See also Saura, Nuria, The Multilevel legal Framework on the Best Interests of the Child in Relation to LGBT Families, Working paper, Rights on the Move project, p. 53.
68 Koffeman, Nelleke R., Legal Responses to Cross-Border Movement in Reproductive Matters within the European Union.

III. 5. Children's Rights and Parental Responsibilities

LGBT couples' legal status and interactions with inconsistent laws of various Member States have a direct effect on the rights of their children. These rights include, *inter alia,* the right to family life, the right not to be discriminated against, the right to equality with other children under the law, and the rights to be heard and to have their best interests be a primary consideration in matters affecting them.[69]

Such rights are codified prolifically in numerous conventions, regulations, and even judicial decisions. Any discussion of the free movement of LGBT families must take these rights into account, as shortcomings in laws affecting LGBT families threaten to undermine the European Union's commitment to the rights of the child.

TRUE STORY

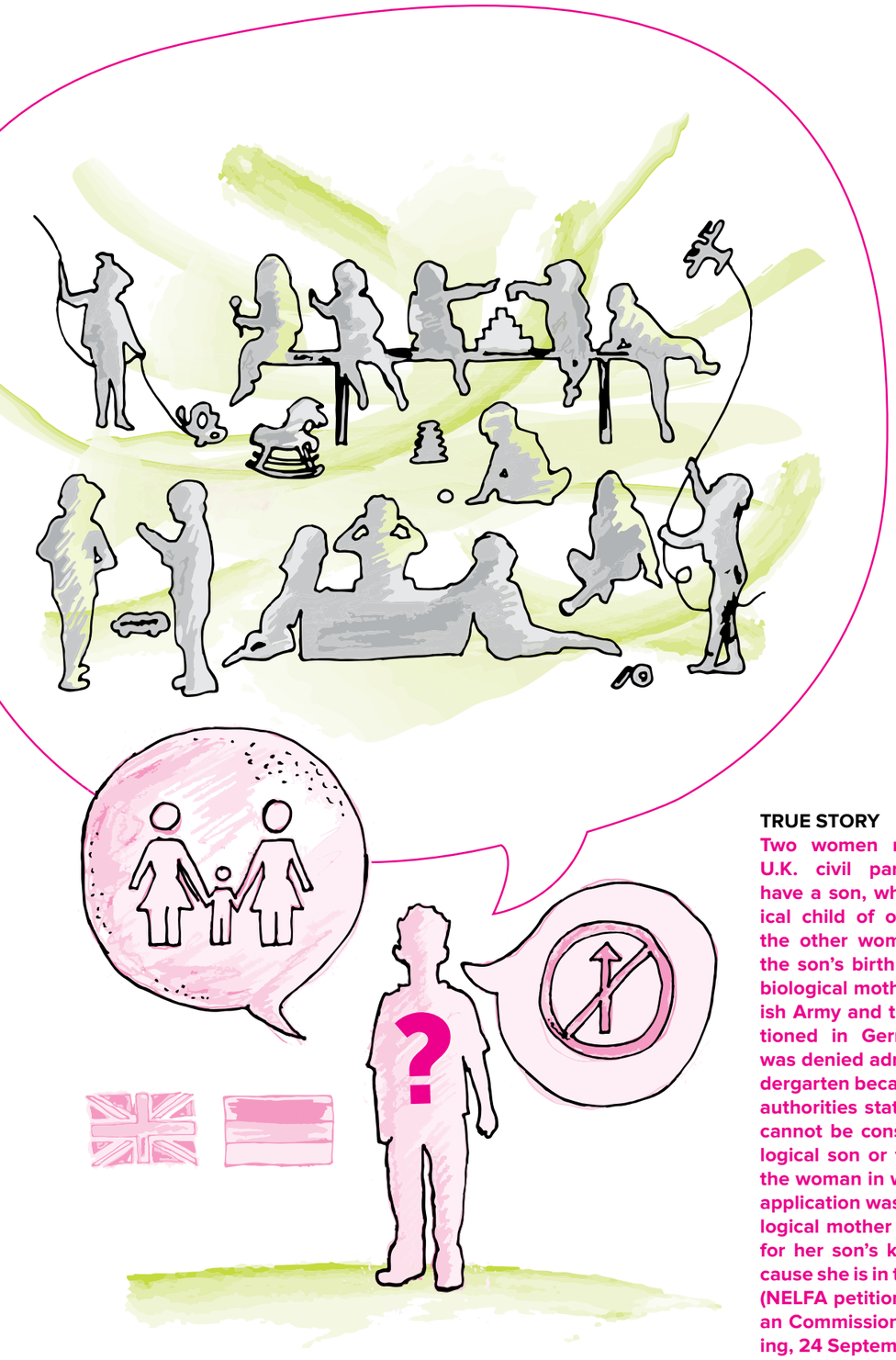
Two women, a Finnish and French national, live in France with the Finnish national's two biological children, who were born in France. They have been in a French civil partnership (PACS) since 2004, but France does not recognize the French national as the children's parent. The children are thus Finnish nationals. The French national is a legal guardian (by way of a court decision), but the children cannot inherit from her, use her surname, obtain French citizenship, and if their biological parent should die, the guardianship would end and a judge would have to decide whether they could remain with her. In addition, Finland refuses to recognize this partnership because it differs substantially from Finnish partnership, meaning the French national is ineligible for second-parent adoption under Finnish law. (NELFA petition to the European Commissioner Viviane Reding, 24 September 2013)

The importance of the rights of the child is emphasized repeatedly throughout EU law. Broadly speaking, beginning with Article 24 of the Charter of Fundamental Rights of the European Union, the EU commits to protecting children's rights to their own well-being, free expression, relationships with their parents, and to ensuring that their best interests are a primary consideration in all matters relating to them.[70] *The UN Convention on the Rights of the Child* (CRC)—the most widely ratified of the UN's Human Rights Instruments[71]— expands on the Charter of Fundamental Rights' guarantees: Article 2 of CROC encourages Member States to ensure that children within their jurisdiction will not endure discrimination "of any kind;" Article 3 stresses that, in States' lawmaking, legislative bodies must make children's interests a primary consideration; Article 8 enjoins States to "undertake to respect the rights of a child to preserve his or her identity, including [...] family relations as recognized by law;" Article 12 emphasizes children's right to have their opinion heard and taken into account in matters concerning them, especially judicial proceedings; and lastly, Article 21 states that, in States with adoption measures, "the best interests of the child shall be the paramount consideration" in making adoption decisions.[72] Additionally, *the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;* the *Convention on the Civil Aspects of International Child Abduction;* and *Council Regulation (EC) No 2201/2003 of 27 November 2003* all reiterate the European Union's commitment to these rights.[73]

Further, the last decade in particular has seen numerous efforts to expand children's rights and generate action towards securing them. For example, the *Communication from the Commission Towards an EU Strategy on the Rights of the Child* recognizes the consequences of insufficiently investing in policies affecting children, and thus proposes taking into account the child's perspective as part of an effort to include consideration of children's rights in all programs and projects funded by the EU.[74] This Communication also stressed that children's rights are an independent area of such concern that it should not simply be folded into a broader effort to bolster human rights in general. More recently, the *Optional Protocol on a Communications Procedure* would allow children to submit complaints regarding specific violations of their rights under the Convention's two previous optional protocols.[75] That is to say, the Communication would give greater weight to children's opinions on their own well-being and would strengthen their autonomy over their own rights.

Moreover, two judgments handed down by the CJEU give judicial backing both to children's right to be heard and the notion that parents' legal status can impermissibly harm children's rights. While these cases do not involve same-sex couples, they are nevertheless relevant because they strengthen children's rights irrespective of the sexual orientation of the children's parents. In *Joseba Andoni Aguirre Zarraga v. Simone Pelz*,[76] the court affirmed that Article 42 of Regulation No 2201/2003, read in the light of Article 24 of the Charter of Fundamental Rights, requires that, in court proceedings affecting a child's rights (in this case, in the context of divorce and the potential removal to a different EU Member State), a child must be given the opportunity to express his or her opinion on his or her own well-being, though this opinion is not dispositive of a case's outcome. Next, in *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEM),[77] the court held that the deportation of a father, since his children were of an age that would effectively require them to be deported along with him, would deprive said children of their fundamental right to family life. The court also stressed, albeit in dicta, that the CJEU has an important role in safeguarding the protection of EU fundamental rights. It even went so far as to propose that "the availability of EU fundamental rights protection [should be] dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence*"[78] [emphasis in original]. The particulars of *Zambrano* do not directly map onto the hardships faced by LGBT families, but the case nevertheless suggests not only that legal measures aimed at par-

69 Saura, Nuria, The Multilevel legal Framework on the Best Interests of the Child in Relation to LGBT Families, Working paper, Rights on the Move project, p. 6.
70 Article 24, Charter of Fundamental Rights of the European Union.
71 United Nations Treaty Collection, Convention on the Rights of the Child, visited July 15th, 2014.
72 United States Convention on the Rights of the Child
73 See the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; the Convention on the Civil Aspects of International Child Abduction; and Council Regulation (EC) No 2201/2003 of 27 November 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.
74 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child, COM(2011) 60.
75 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. The two other optional protocols referred to are the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.
76 *Joseba Andoni Aguirre Zarraga V Simone Pelz,* Case C 491/10 PPU (2010).
77 *Gerardo Ruiz Zambrano V Office national de l'emploi* (ONEM), Case C-34/09 (2010).
78 Ibid. at Paragraph 163.



TRUE STORY

Two women registered in a U.K. civil partnership. They have a son, who is the biological child of one woman and the other woman is listed on the son's birth certificate. The biological mother is in the British Army and the family is stationed in Germany. The son was denied admission into kindergarten because the German authorities stated that the son cannot be considered the biological son or the stepchild of the woman in whose name the application was made. The biological mother could not apply for her son's kindergarten because she is in the British Army. (NELFA petition to the European Commissioner Viviane Reding, 24 September 2013)

ents can impermissibly interfere with children's fundamental rights, but that the Court may do well to expand its competence to hear complaints regarding violations of fundamental rights.

The above discussion begs querying whether it is acceptable to subordinate children's rights by denying their LGBT parents anything short of full equality under the law with opposite-sex parents. In other words, is there any reason to consider a child's opinion on his or her well-being in instances of deportation, but not consider his or her opinion regarding denying his or her parents' right to free movement and immigration?

The discussion above concerning the recognition of same-sex unions in another EU Member State is relevant for children living in rainbow families. Namely, non-recognition of such unions affects the rights of children who live with their same-sex parents as well.[79] As Saura points out,

> **"[c]hildren born from a non-recognised parenthood due to a non-recognised partnership can have a *de facto* non-recognition of some economic and social rights entitled by the possession of a legal civil status of their parents, or of him or herself. The extreme manifestation of this deprivation of rights would be being statelessness. But this would be contrary to the principle of the best interests of the child, set up by the CRC, and to the right of protection of private and family life, without discrimination."[80]**

Further, as Falletti emphasizes, a similar situation could arise in a number of EU member States, as out of the 28 EU Member States, 15 (Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia) do not allow access to assisted reproduction technologies and on joint or second parent adoption for same-sex couples. All three ways of recognition of parental rights of same-sex partners are provided for only in Belgium, Denmark, the Netherlands, Spain, Sweden and the United Kingdom. Finland recognizes access to in vitro fertilization and the second parent adoption, while Austria, Germany, and Portugal allow second-parent adoption. France only saw the possibility of joint adoption after the 2013 reform. Surrogacy is an option in Greece, the Netherlands, Belgium, and in the United Kingdom.[81]

Denying LGBT parents the benefits of equal free movement rights constitutes a form of discrimination against not only them, but their children as well, in contravention of the UN Convention on the Rights of the Child. Recognizing that having one's parents denied equality under the law causes a social stigmatisation. It cannot be in the best interests of children to have their parents denied equality. This undermines the numerous commitments to make children's best interests a primary consideration listed above. Further, it would be contradictory to the *Communication from the Commission Towards an EU Strategy on the Rights of the Child* and the aforementioned CJEU decisions—all of which evince burgeoning recognition of the need to more deliberately safeguard the rights of children, and in particular their opinions on their best interests—to stifle their voices in a context so important to their identities and well-being.

79 Saura, Nuria, The Multilevel legal Framework on the Best Interests of the Child in Relation to LGBT Families, Working paper, Rights on the Move project, p. 8.
80 Ibid., p. 14.
81 Falletti, E.: LGBTI Discrimination and Parent–Child Relationships: Cross-Border Mobility of Rainbow Families in the European Union, Family Court Review, Volume 52, Issue 1, January 2014, p. 29.

RECOMMENDATIONS:

➔ **Even though family law is outside EU competence, there should be endeavours undertaken to strengthen children's rights, or a commitment to upholding the consideration of their well-being generally, but also specifically in the context of children of same-sex partners.**

➔ **The European Commission should clarify when and in what contexts children's opinions regarding their own well-being should be taken into account in order to ensure that they are heard in all matters that concern them, including matters that concern them by way of affecting their (LGBT) parents. This would bolster the EU's commitment to safeguarding children's best interests and recognizing their right to be heard. In addition, the Commission should embrace the approach advocated in *Zambrano* and allow people to bring actions directly before courts to redress violations of fundamental rights set forth in the Charter without requiring a directly applicable Treaty provision or secondary legislation. This would facilitate the development of caselaw regarding the extent to which Member State legislation that affects LGBT families leads to impermissible violations of children's rights.**

➔ **Lastly, the Commission should have a study conducted that examines both the affects that legal stigmatization of same-sex couples has on their children, and the relative well-being of children of same-sex couples whose union is recognized as equal under the law. This will invariably lead to more informed policymaking regarding the best interests of children.**

III. 6. Employment Benefits and Pension

The caselaw on the rights of LGBT persons to employment and pension benefits evinces a clear trend towards expanding equal access to such benefits. While this is an undeniably positive step towards the equal treatment of LGBT persons, this expansion is inherently limited insofar as States have license to discriminate on the basis of sexual orientation in state-run social security schemes that affect same-sex couples who exercise their free movement rights as well.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation prohibits discrimination based on sexual orientation in the workplace, including both directly and indirectly discriminatory payment schemes. In *Maruko*[82] the CJEU held that the Directive applied to a private pension scheme that denied survivorship pension benefits to the same-sex life partner of a former employee on the grounds that said partner was not the married spouse of the former employee. Because the pension scheme's payment calculations are based on a worker's employment, as opposed to being a purely statutory system of social protection, the Court held that the scheme was not exempt from being covered by the Directive. The Court left it to the referring German court "to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme,"[83] and if the referring court determines that life partners are in a comparable situation (and not, it is worth noting, an identical or even equivalent situation—a less demanding standard), then the pension scheme is in violation of the Directive.

The Court took this precedent a step further in the *Römer* case.[84] There, the court was dealing with a pension scheme run by a state administrative body (not a purely private scheme) that taxed the pensions of married former employees at a lower rate than unmarried former employees, causing the latter to receive a pension of lesser value than the former. The Court found that, because the employee at issue was not a public servant, but rather under a civil-law contract of employment, his employer was in effect acting like a private employer. Thus, the pension scheme was not a statutory social protection scheme, meaning it was within the Directive's purview.

Next, in the *Hay* case,[85] the Court extended the Directive's applicability to a different kind of employment benefit. French civil law provides for bonuses and a certain amount of time off upon the occasion of an employee's marriage. While same-sex marriage was not lawful in France at the time, the State recognized only civil solidarity pacts (PACS). The petitioner in *Hay* requested the benefits afforded to marrying employees around the time he was to form a PACS with his same-sex partner and was denied. The Court held that, though PACS are

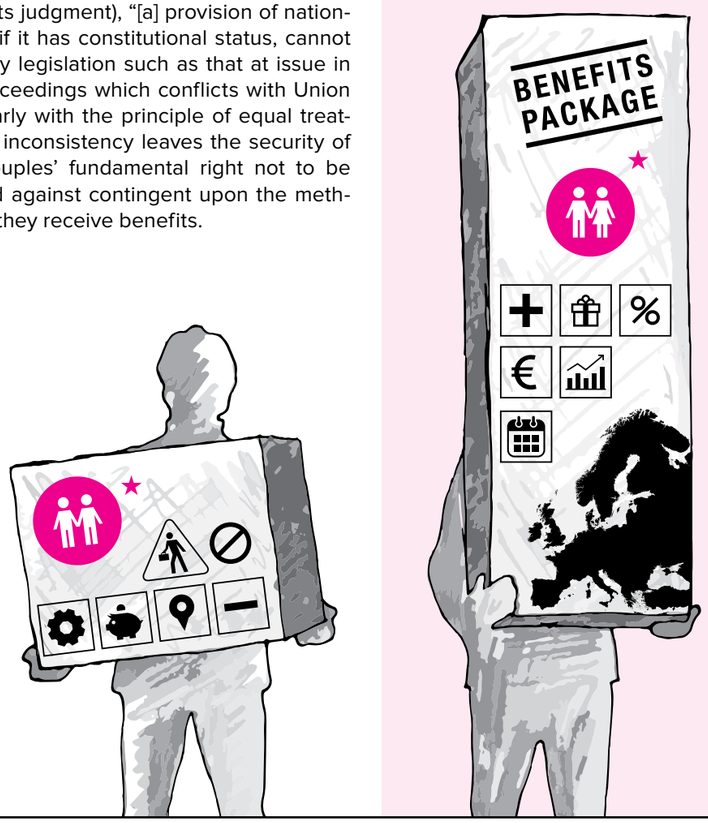
82 CJEU, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, C 267/06.
83 Id at paragraph 73.
84 CJEU, *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C 147/08.
85 CJEU, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C 267/12.

available to opposite-sex and same-sex couples alike, the denial of benefits nonetheless constituted a form of employment discrimination based on sexual orientation, making the denial inconsistent with the Directive. The described case law is highly relevant for LGBT families' free movement situations and employment-related rights since work in another EU Member State remains one of the primary reasons for Union Citizens moving among the Member States.

It is clear that courts are willing to use the Directive to extend employment (and employment-related) benefits to same-sex couples, and this is laudable. What is less clear, from *Maruko* and *Römer* in particular, is what a court would do when faced with a statutory, state-run social protection scheme that discriminates against same-sex couples. Recitals 13 and 22 to the Directive's make clear that it does not apply to such schemes, but as the Court notes in the final sentence of its opinion in *Römer* (as opposed to its judgment), "[a] provision of national law, even if it has constitutional status, cannot in itself justify legislation such as that at issue in the main proceedings which conflicts with Union law, particularly with the principle of equal treatment."[86] This inconsistency leaves the security of same-sex couples' fundamental right not to be discriminated against contingent upon the method by which they receive benefits.

RECOMMENDATIONS:

➔ **The European Union should extend the applicability of Directive 2000/78 to cover statutory schemes of social security to truly protect social rights of same-sex couples. This has already been attempted with the proposal of the so-called 'horizontal directive'.[87] Its intention was to extend the prohibition of discrimination to the fields outside employment. Even though the prospects for the adoption of the horizontal directive are unsure, the European Commission should continue with endeavours to achieve its adoption.**



86 *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C 147/08 at paragraph 180 (May 10th, 2011).
87 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 final – Not published in the Official Journal].

III. 7. Property Regimes

Property regimes become relevant in cases of divorce of married same-sex couples or separation of registered or unregistered same-sex couples, as well as in cases when one of the spouses or partners dies (the latter situation is discussed below in section III.8. on inheritance).

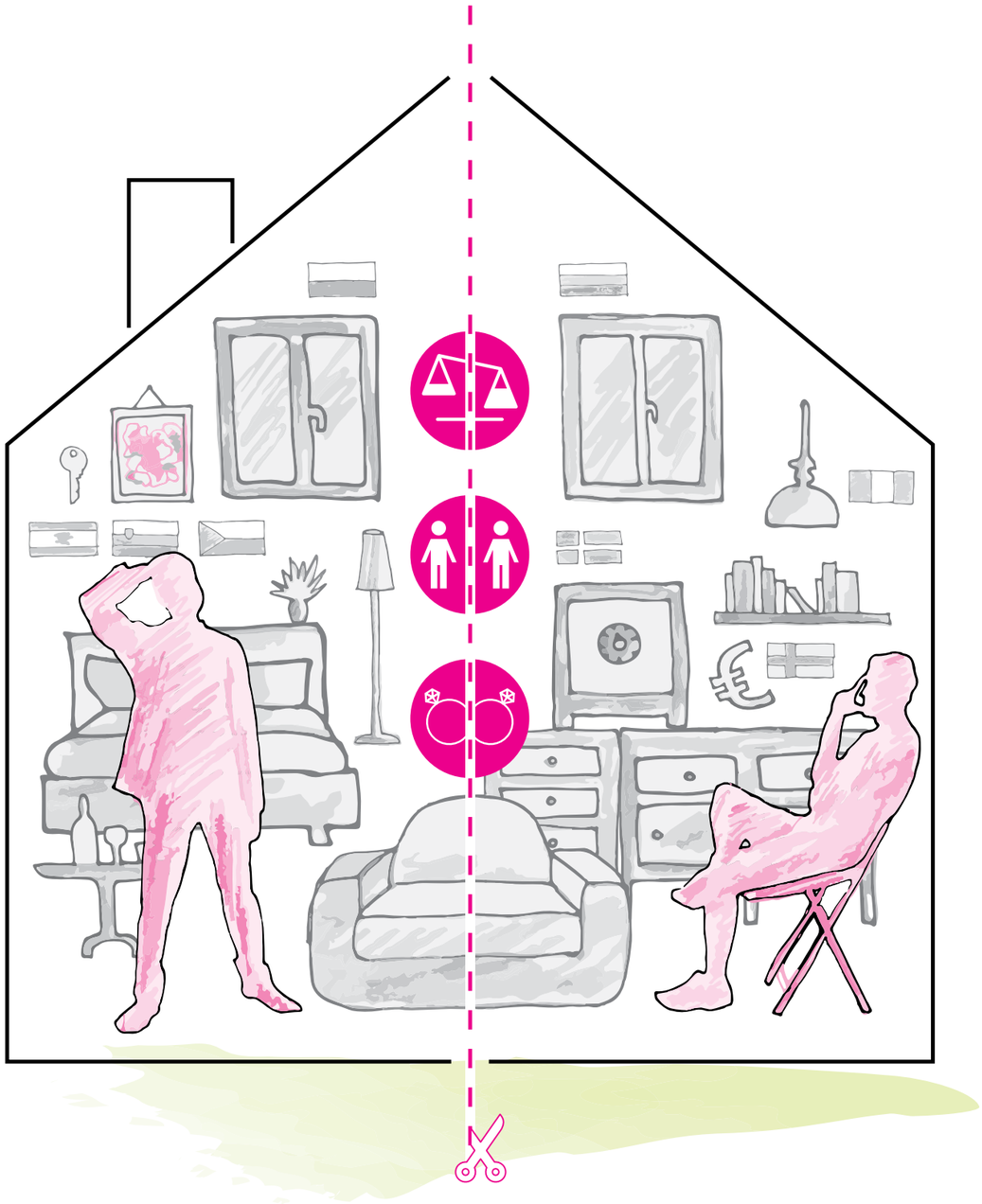
The issue becomes relevant for EU law in cross border cases, i.e. in cases when partners have nationalities of different Member States, live in a Member State that is different from the Member State of their nationality, and/or have joint property in yet another Member State.

In order to address this issue, which is relevant for divorced or separated partners in general, the European Commission launched a *Green Paper of 17 July 2006 on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition*.[88] The aim of the Green Paper was to outline the current situation of the conflict of laws and identify the legal systems that have very limited or incomplete norms governing such situations. Its aim was to address this problem and propose solutions to remedy it. The Green Paper addresses not only the consequences of divorce of married couples, but also the consequences of separation of registered partners as well as co-habiting partners, taking into account the new reality where unions other than marriage are becoming more and more frequent. While the Green Paper does not provide for a definition of "spouse," and therefore does not make clear whether the term "spouse" includes same-sex spouses, it is consistent in describing registered partnership as a **partnership of two people who live as a couple and have registered their union with a public authority established by the law of their Member State of residence. For the purposes of the Green Paper, this category will also include relationships within unmarried couples bound by a "registered contract" along the lines of the French "PACS".[89]**

In addition, non-marital cohabitation is also defined broadly as a "situation in which two people live together on a stable and continuous basis without this relationship being registered with an authority."[90] None of these definitions requires that the registered or cohabiting partners have to be of opposite sex in order to fall within the scope of the Green Paper.

On the international level the issues are governed by the *Convention of 14 March 1978 on the law applicable to matrimonial property regimes*. However, since only three EU member States have ratified this Convention (France, Luxemburg and the Netherlands), it is not applicable across the EU.

88 Green Paper of 17 July 2006 on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition [COM(2006) 400 – Not published in the Official Journal].
89 Ibid., p. 3.
90 Ibid.



To fill this gap and based on the Green Paper the European Commission issued two proposals for Council Regulations, one with regard to matrimonial property regimes[91] and the other with regard to the property consequences of registered partnerships.[92] In content the two proposals are the same; however, in order to maximise the chances of their adoption, the consequences of dissolution of registered partnership are kept separate. The purpose of the two proposals is "to establish a clear legal framework in the European Union for determining jurisdiction and the law applicable to matrimonial property regimes and facilitating the movement of decisions and instruments among the Member States."[93] The regulation's proposals also address recognition of judicial decisions issued in these matters.

Again there is a possibility not to recognise a judicial decision for reasons of public policy. From the perspective of same-sex partners and rainbow families it has to be ensured that the fact that partners are of the same sex does not constitute a public policy ground for refusal, even in the Member States that provide for no legal recognition of same-sex relationships.

This White Paper does not deal any further with the substance of the two proposed regulations. However, it does wish to point out that same-sex married, registered, and co-habiting partners need to be covered by the two regulations. Therefore, it needs to be ensured that the two regulations will not distinguish between couples based on their sex and sexual orientation.

RECOMMENDATIONS:

- **Make clear that, even in Member States that do not legally recognize same-sex partnerships, sexual orientation cannot be a public policy grounds for judicial decisions on matrimonial property.**

- **Make clear that the proposed Council Regulations apply equally to same-sex couples as they do to opposite-sex couples.**

91 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].

92 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].

93 COM(2011) 126 final, p. 3; COM(2011) 127 final, p. 3.

III. 8. Inheritance

Inheritance regimes become relevant in cases when one member of a same-sex couple dies. Similarly, as with regard to property regimes, the issue becomes relevant for the EU law in cross-border cases, i.e. in cases when partners have different nationalities, live in a Member State that is different from the Member State of their nationality, and/or have joint property in yet another Member State.

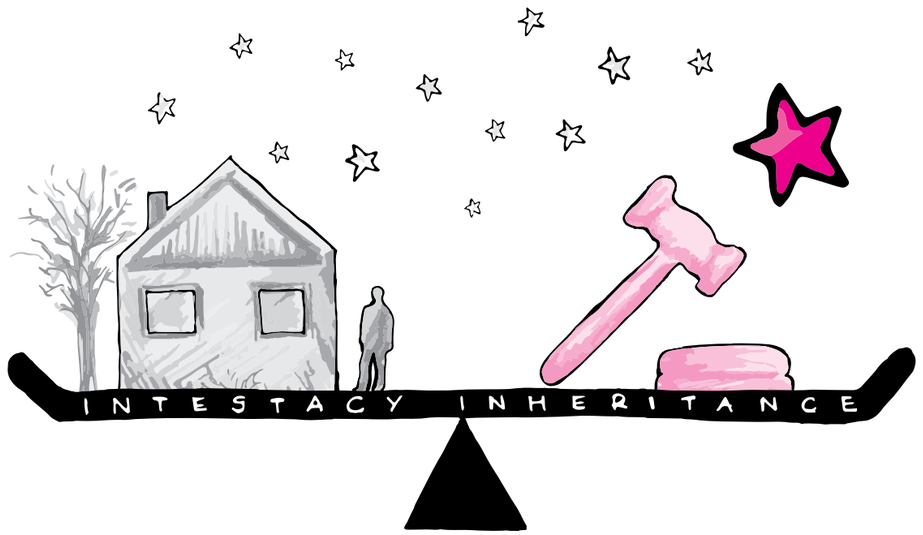
The competence of the EU law is quite limited in this area. The only relevant source is Regulation 650/2012 on succession.[94] Some of the most important provisions that concern same-sex partners are those on applicable law, defined from Article 20 onwards. Unlike in the cases of the death of one member of an opposite-sex married couple, the law of which country applies in case of death of a same-sex partner makes an enormous difference. Indeed, some of the Member States exclude same-sex partners from statutory inheritance, and if their law applied the survivor would be treated less favourably as if a law of another EU Member State applied.

For example, in cases of intestacy, Bulgaria, Cyprus, and Estonia do not give any automatic inheritance rights to either registered or unregistered partners. Austria, the Czech Republic, Finland, Germany, and Greece treat registered partners the same as married spouses. Belgium only confers to registered spouses the right of usufruct, while France only confers the right of undisturbed possession over the family home. None of these ten countries give any automatic inheritance rights to unregistered partnerships, though Czech law gives some secondary inheritance interest to anyone that lived with the deceased for a year prior to their death.

Taking this fact into account, it would have been useful if the regulation included a provision to the effect that if there is no agreement between the partners as to which of the laws of Member States to which the survivor and the deceased are connected should apply, the law of the Member State which is most favourable for the survivor should be used. Such or similar provision should be included in Article 21 of the regulation.

Further, as for recognition of succession decisions, the same issues can be invoked as in the case of property regimes. Specifically, it has to be ensured that in cases where a same-sex spouse or partner dies, the survivor has no problems having his or her decision on succession recognised due to public policy arguments stipulated in Article 40 of the Regulation.

94 Regulation 650/2012 of the European Parliament and of the Council 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, OJ L 201/107.



Article 1(2)(a) of the Regulation states that the "status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects" are excluded from the scope of the Regulation. With the claim that their succession decisions are recognized equally to succession decisions issued to survivors in opposite sex partnerships, same-sex partners are not claiming to have their civil status recognized in any way. The argument concerns only recognition of legal effects on equal grounds to opposite-sex partners.

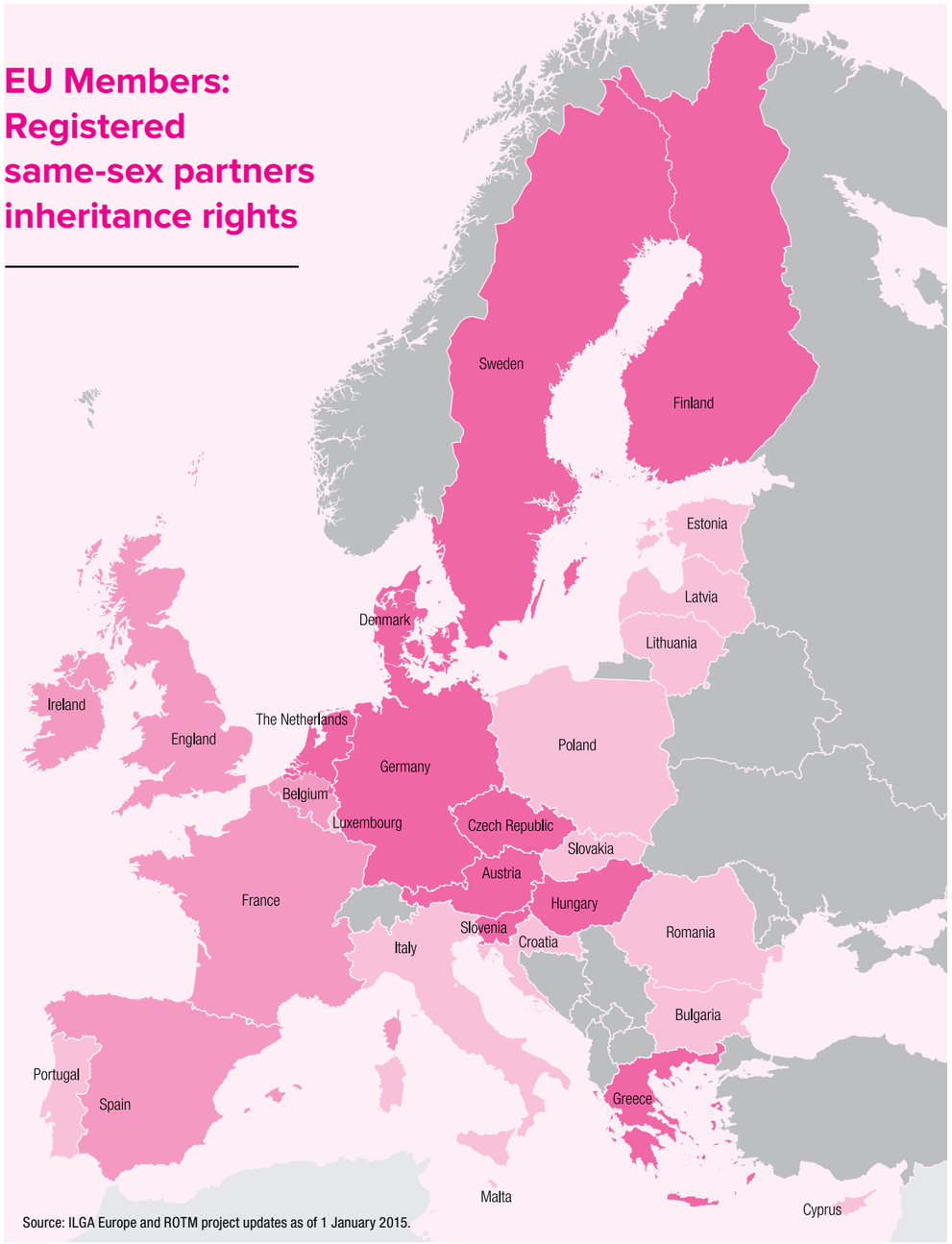
Similarly, this provision does not affect in any way the arguments that the law that is most favourable for the partner should apply. Regardless of which law applies it does not affect the civil status of the partner in any way.

RECOMMENDATIONS:

- **When no choice of law is specified in a will, the laws of the Member State to which either same-sex partner has a connection that is would afford the surviving spouse the greatest material benefit.**

- **In cases of intestacy, registered and unregistered same-sex partners should be treated the same as opposite-sex spouses or co-habiting partners, respectively. That is to say, if the laws of a member state grant, for example, the right of continued tenancy to surviving opposite-sex common law partners or dependent domiciliaries, that same right should be extended to unregistered same-sex partners.**

EU Members: Registered same-sex partners inheritance rights



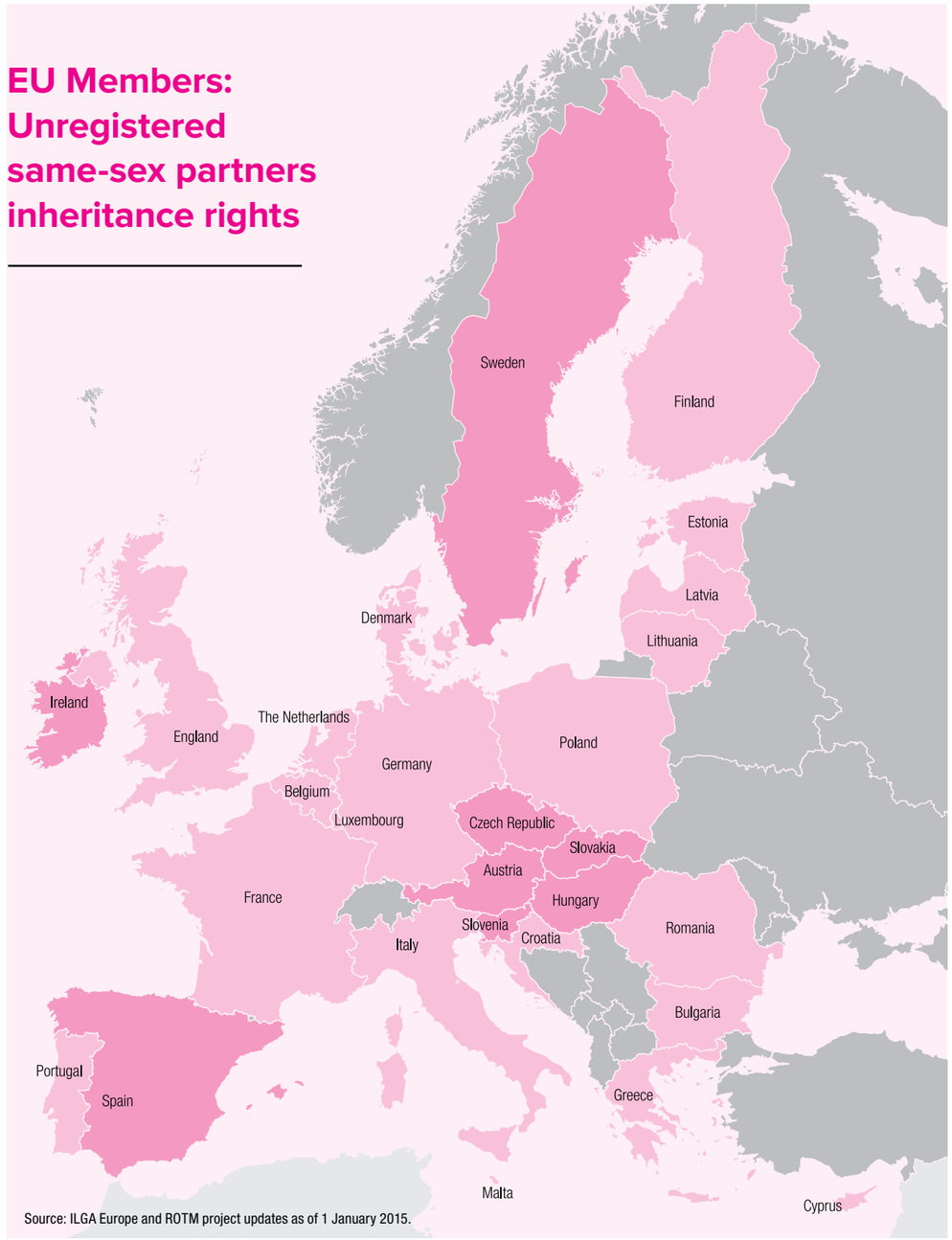
Source: ILGA Europe and ROTM project updates as of 1 January 2015.

Yes

Partial

No

EU Members: Unregistered same-sex partners inheritance rights



Source: ILGA Europe and ROTM project updates as of 1 January 2015.

Partial

No

III. 9. Intersexuality Recognition

For the purposes of this White Paper intersex individuals are considered individuals with intersex legal status, i.e. status that is not male or female.

In some countries (Australia, New Zealand, Bangladesh, India, Nepal) it is already possible to select "X," "other," or "indeterminate" as a valid third category besides male (M) or female (F). Intersex status is distinguished from sexual orientation and gender identity. On 1 November 2013, Germany became the first EU Member State where it is possible to register new-borns with characteristics of both sexes as "indeterminate gender." Such registration is possible on birth certificates, passports and other official documents.[95] Parents that do not wish to select the child's sex and submit the child to genital surgeries can choose such an option. There are arguments that support this solution as well as arguments that oppose it, in particular due to the lack of follow-up policies that would make sure equality is guaranteed to persons whose gender is marked as indeterminate. Leaving aside this otherwise extremely important discussion, the issue that is relevant for this White Paper is the one of (non)recognition of intersex status in another EU Member State. Namely, the question is, would another EU Member State recognize the intersex status of a baby or would it require the family to select a gender of the baby? The EU legislation is completely silent on the issue meaning that a child, if exercising free movement rights with his/her family, would be in an uncertain position in another EU Member State. Would he or she be issued a residence permit that contains a mandatory gender category?

The question also remains whether intersex individuals are protected by the EU gender equality legislation. Tobler and Agius argue this remains unclear since not only is there no mention of intersex status in the EU gender equality legislation, but also the definition of the ground of sex is still "based on the male/female binary sex model."[96]

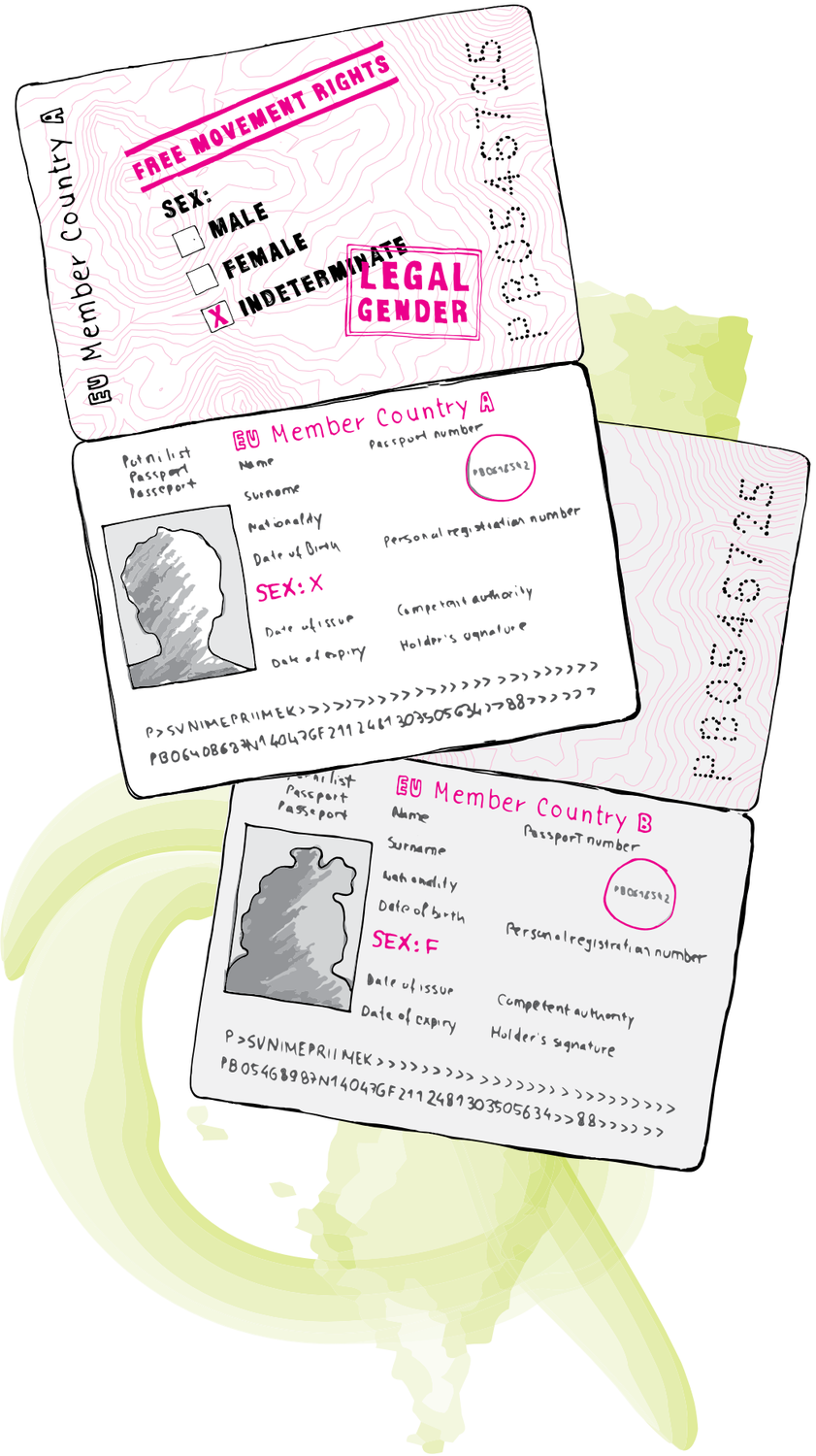
RECOMMENDATIONS:

➔ **Clarify the definition of prohibited discrimination to explicitly include discrimination based on any gender expression.**

➔ **Codify the home Member State principle in such a way that guarantees that intersex persons are not forced to submit to a binary sex model when moving between EU Member States.**

95 *Cf.* http://en.wikipedia.org/wiki/Intersex.

96 Trans and Intersex People. Discrimination on the grounds of sex, gender identity and gender expression, European Network of Legal Experts in the non-discrimination field, Written by Silvan Agius & Christa Tobler, Supervised by Migration Policy Group, June 2011, p. 82.



III. 10. Transgender Recognition

Gender identity and gender expression do not appear anywhere in present EU primary or secondary law, except for the Directive 2012/29/EU.[97] However, as Tobler and Agius find, some specific EU law provisions exist that are relevant in this area.

CJEU caselaw shows that "under certain circumstances discrimination against trans people may amount to discrimination on the grounds of sex." In cases *P. v S. and Cornwall County Council*,[98] *K.B. v. National Health Service Pensions*,[99] and *Richards*,[100] CJEU stated that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.[101] Therefore, in areas in EU competence (e.g. employment) EU law applies in relation to transgendered persons.

Further, gender identity is mentioned in a *Strategy for equality between women and men 2010-2015*, where the European Commission stated that it "is also studying the specific issues pertaining to sex discrimination in relation to gender identity."[102] Further, in the Annex 199 that accompanies the strategy, the Commission explicitly states, "in line with the jurisprudence of the European Court of Justice on gender identity and gender discrimination, [it] will pay particular attention to this aspect in the overall monitoring of the implementation of the relevant Directives."[103]

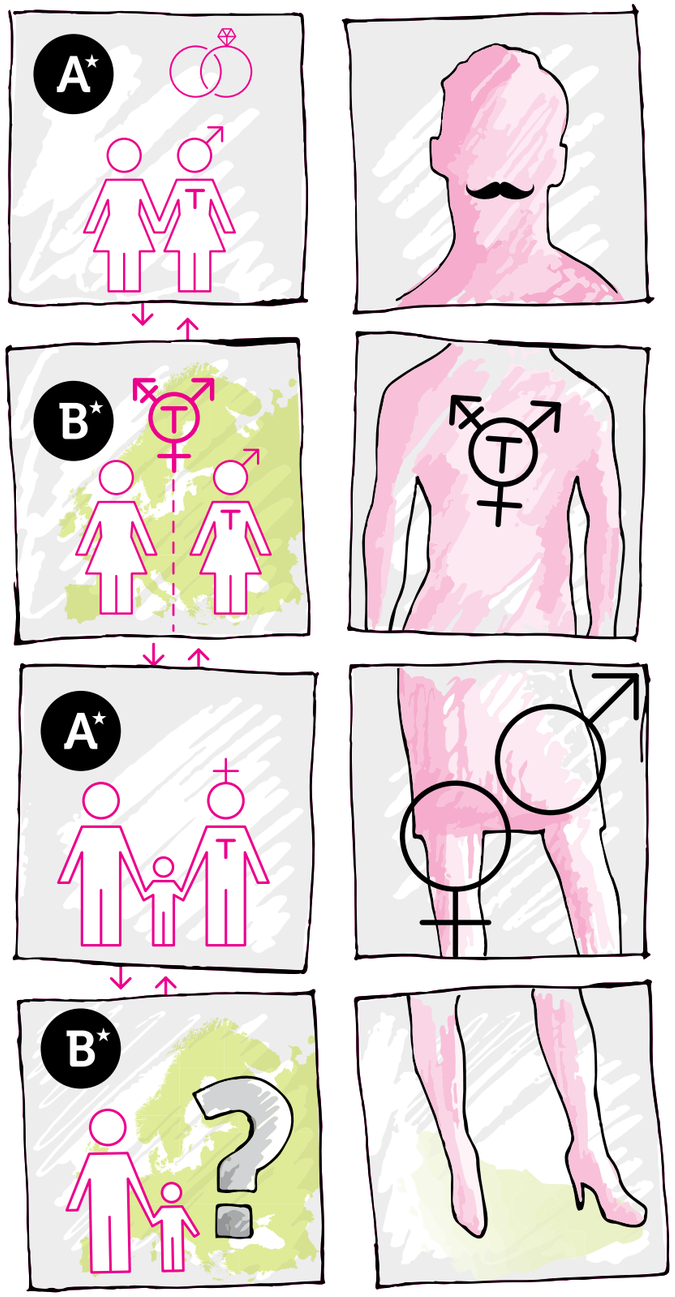
The questions of particular relevance for this White Paper are: What happens to the child if a parent, who retained reproductive functions after gender reassignment, cannot change legal gender? Will EU law apply to a transsexual who exercised free movement rights after he gave birth to a child but is a man on paper?

Another question is what would happen when an EU national who had undergone gender reassignment wishes to reside in another EU Member State that does not recognize gender reassignment, such as Ireland?[104] Would the new birth certificate be recognised by such Member State? Taking into account gender equality legislation, should EU law be applicable in such free movement cases? Also, what would happen in Member State B (that requires compulsory divorce) in case of a spouse of a person who had undergone gender reassignment in Member State A that does not impose a compulsory divorce? Would the spouse be recognized as a family member for the purposes of free movement? While this depends on the national legislation of Member State B, the issue falls within the competence of the EU if the spouses exercise their free movement rights.

97 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.
98 ECJ, *P v S and Cornwall County Council*, Case C-13/94.
99 ECJ, *K.B. v. National Health Service Pensions Agency*, Case C-117/01.
100 ECJ, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04.
101 Tobler and Agius, p. 33.
102 European Commission, Strategy for equality between women and men 2010-2015, available at: http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_en.pdf, p. 32.
103 European Commission, Actions to implement the Strategy for Equality between Women and Men 2010-2015, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm, p. 18.
104 Free Legal Advice Centres Ireland: "Lydia Foy and the Struggle for Transgender Rights in Ireland", September 2013, available at: http://www.flac.ie/download/pdf/lydia_foy_struggle_for_transgender_rights_in_ireland_sept_2013.pdf.

RECOMMENDATIONS:

➔ **Similar to the recommendation in the previous section, to clarify the definition of prohibited discrimination to include explicitly discrimination based on any gender expression, trans or otherwise.**



III. 11. Victims of gender-based and homophobic violence

In order to make sure that restraining orders issued in one EU Member State can be recognised in another EU Member State, Directive 2011/99 on the European protection order[105] and Regulation 606/2013 on mutual recognition of protection measures in civil matters[106] were adopted.

The directive and the regulation are relevant for members of LGBTI community who benefit from such restraining orders generally, or specifically for crimes related to gender based or homophobic violence.

Recognizing that victims of crime need to receive appropriate information, support, and protection and need to be able to participate in criminal proceedings, first the Council Framework Decision 2001/220/JHA[107] and then Directive 2012/29/EU were adopted.[108] This directive is relevant for rainbow families in two aspects. First, it is applicable to gay, lesbian, and bisexual victims of homophobic violence, and to transgender and intersex victims of gender-based violence. Second, under this directive, victims entitled to protection are not just persons who have suffered harm—which includes physical, mental, or emotional harm, or economic loss which was directly caused by a criminal offence—but also family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. Under the directive, "family members" means the "spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim" (Article 2 (1)). Same-sex partners seem to be included in this definition as "spouses" should cover same-sex spouses as well, while registered and cohabiting same-sex partners should be covered by "a person living with the victim in a committed intimate relationship."

Also, according to the Directive (Article 22(3)) vulnerable victims include "victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics" and "victims whose relationship to and dependence on the offender make them particularly vulnerable." The provision further states that victims of "human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime [...] shall be duly considered." In this context it needs to be ensured that gay, lesbian, bisexual persons as well as transgender and intersex individuals are considered as "particularly vulnerable."

In the field of sexual violence against gays, lesbians and transgender persons, two directives are of

105 Directive 2011/99/EU of the European parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338/2.
106 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181/4.
107 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1.
108 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.

relevance: the Human Trafficking Directive[109] and the Directive on Combating Sexual Abuse of Children.[110] The Human Trafficking directive contains a provision on vulnerability defining it as a "position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved" (Article 2(2)). In the application of this directive it needs to be ensured that sexual orientation and gender identity are taken into account in assessing vulnerability.

109 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: is generally relevant as it provides for measures to prevent, support, protect the victims and to punish perpetrators, OJ L 101/6.
110 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ L 335/1.

RECOMMENDATIONS:

- **Clarify that Directive 2012/29/EU covers both registered and unregistered same-sex partners.**
- **Ensure that the Directive's definition of 'particularly vulnerable' persons includes gay, lesbian, bisexual, transgender, and intersex persons.**

IV. CONCLUSIONS AND RECOMMENDATIONS

The above discussion reveals that the unencumbered free movement within the European Union is not yet a reality for LGBT persons and their families. Tensions exist between the rights and principles enshrined at the Union level and the laws of various Member states, tensions that prevent the promise of equality between same-sex and opposite-sex family units from being realized. The Commission can and should implement measures to ensure LGBT families the legal protections they are entitled to.

It is an open question whether the term "spouse" includes same-sex spouses, as well as whether a more- or less-favorable definition in one Member State travels with a couple to other Member States. Thus, laws on divorce and legal separation may or may not govern such occurrences as they relate to same-sex couples. LGBT third country nationals who are either married or in a registered partnership with an EU citizen do not know what their immigration rights are, leaving Member States free to split stable families apart. Parental rights, especially with regard to adopted children and children conceived with medical assistance, are contingent upon how States view same-sex couples' unions. Children's rights in general—as codified at the EU level in numerous treaties, directives, and Court of Justice precedents—are relegated to a secondary importance behind States' license to deny their parents equality. One's sexual orientation can be grounds for a reduced pension or the denial of survivorship benefits and inheritance rights altogether. Individuals who do not self-identify as either male or female may be forced to do so. Lastly, it is unclear whether LGBT victims of crimes, particularly sexual violence and hate-based crimes, and their families receive the same legal protection as everyone else.

The European Commission should first unambiguously clarify that the term "spouse," whenever and wherever it is used, does indeed include same-sex spouses. It should, moreover, codify the home Member State principle, whereby LGBT family units cannot have their legal status and protections in any way reduced should they move to a country with less favorable partnership laws. This approach should also specify that couples moving from less- to more-favorable legal regimes may have their status enhanced, otherwise these persons would be trapped in unfavorable regimes simply by accident of birth.

It is incumbent upon the European Commission to take action in this area. The European Union has a laudable commitment to ensuring basic human rights for all of its citizens, and foremost amongst these is the right to equality under the law. Failing to act would undermine this commitment. It is of great importance that on 8 January 2014 the European Parliament passed a resolution titled *EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*[111] calling for creation of a comprehensive policy instrument that would guarantee equality on the grounds of sexual orientation and gender identity. It also called upon the European Commission to produce guidelines for such implementation of EU free movement and family reunification legislation that will ensure respect for all forms of families that are legally recognized under the national laws of EU Member States. The legal problems encountered by rainbow families that are described in this White Paper show a clear demand for EU action now.

111 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)).

V. SOURCES

LIST OF CASES:

- CJEU, *Eftalia Dafeki v. Landesversicherungsanstalt Wurttemberg*, C-336/94.
- CJEU, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12.
- CJEU, *Gerardo Ruiz Zambrano v Office national de l'emploi*, C-34/09.
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