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# ILGA-Europe's contribution to the Green Paper

**Less Bureaucracy for citizens:**

**Promoting free movement of public documents and recognition of the effects of civil documents**

COM(2010) 747 final

The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) is a European NGO with 294 national and local lesbian, gay, bisexual, trans and intersex (LGBTI) member organisations in 40 European countries, and works for human rights and equality for lesbian, gay, bisexual, trans and intersex people at European level.

ILGA-Europe enjoys consultative status at the Economic and Social Council of the United Nations (ECOSOC), participative status at the Council of Europe and receives financial support from the European Commission and other funders. It is also a member of the Platform of European Social NGOs. ILGA-Europe was established as a separate region of the ILGA in 1996. [www.ilga-europe.org](http://www.ilga-europe.org)

European Commission Register of interest representatives identification number: 32428573833-34

For more information about this contribution, please contact:

Silvan Agius, Policy Director –  
tel.: +32 2 609 54 17;  
mob.: +32 496 708 370;  
email: [silvan@ilga-europe.org](mailto:silvan@ilga-europe.org)



**TABLE OF CONTENTS**

1.....I  
**Introduction.....2**

2.....I  
**LGA-Europe’s Key Recommendations to the European Commission .....3**

2.1 ..... General recommendations 3

2.2 ..... Recommendations on the rights of same-sex partners 3

2.3 ..... Recommendations on the rights of children and other family members 4

2.4 ..... Recommendations on the rights of trans and intersex people 5

**3. The Current Situation of Same-sex Partners and the Issues that Future EU Proposals Should Address .....6**

3.1 ..... Current recognition of same-sex partners in national law 6

3.2 ..... Current threats to recognition of same-sex partners in national law 10

3.3 ..... Recognition of same-sex partners for the purpose of freedom of movement 12

3.4 ..... A case for the portability of rights of same-sex partners 16

3.5 ..... What should the EU do? 17

**4. The Current Situation of Children of Same-sex Partners and the Issues that Future EU Proposals Should Address..... 19**

4.1 ..... Current recognition of gay and lesbian parenting in national law 19

4.2 ..... Specific legal difficulties of children of same-sex parents in cross-border situations 20

4.3 ..... What should the EU do? 22

**5. The Current Situation of Trans and Intersex People and the Issues that Future EU Proposals Should Address..... 23**

5.1 ..... Current recognition difficulties of trans and intersex people 23

5.2 ..... Difficulties in changing name on academic certificates 25

5.3 ..... Problems posed by current identification documents 27

5.4 ..... Respecting the human rights of trans and intersex people in future European civil statu

**5. Response to the Specific Questions of the Consultation ..... 30**

**Annex A ..... Extracts from European Law 35**

A.1 ..... Council of Europe 35

A.2 ..... European Union 39

**Annex B ..... Parliamentary Assembly and European Parliament Resolutions 42**

B.1 ..... Parliamentary Assembly of the Council of Europe 42

B.2 ..... Extracts from European Parliament resolutions demanding freedom of

**Annex C ..... Recommendations by European Human Rights Institutions 45**

C.1 ..... Recommendations by the Commissioner for Human Rights 45

C.2 ..... Opinions of the European Agency for Fundamental Rights 47

**Annex D ..... Extracts from European Commission Reports Recognising the Need to Enforce Recognition 49**

## 1. INTRODUCTION

ILGA-Europe welcomes the opportunity to contribute towards the [Green Paper consultation](#). Over the years, ILGA-Europe has received a growing number of requests for assistance and advice from lesbian, gay, bisexual, trans and intersex (LGBTI) people who experience discriminatory non-recognition of their civil status documents upon exercising their right to freedom of movement within the EU.

Various issues have been raised with us. The most recurrent problem concerns the lack of recognition of the marital status of married or registered same-sex couples. Many same-sex parents also fear experiencing a loss of parental authority of the second-mother or the second-father when they travel or move to another Member State. Trans people whose gender on identification documents or passport does not match their gender presentation often experience difficulties at border control, and intersex people who cannot obtain suitable civil status documents without having their sex aligned with either 'M' or 'F' which on several occasions violates their right to bodily integrity.

The results of non-recognition of civil status documents from other Member States can be very severe. In France, until the change in national law in 2009,<sup>1</sup> resident surviving married/registered same-sex partner was subjected to 60% inheritance tax on all the family estate within France while no tax applied to domestic surviving spouses or PACSed partners.<sup>2</sup> Similar problems persist in several other Member States. Gay and lesbian non-biological parents may see their children taken away from them following a separation or an early death of their partner. Many trans and intersex people do not travel or leave their home country for fear of problems at border control or difficulties regarding recognition of their civil status documents in another EU Member State.

In view of the above, ILGA-Europe sees this Green Paper consultation and the Stockholm Programme proposals scheduled for 2013 as a promising opening in an area where lesbian, gay, bisexual, trans and intersex people suffer great discrimination on the basis of their sex, sexual orientation, gender identity, family or marital status, and as a result of homophobia and transphobia.

Prior to sending in this response ILGA-Europe's consulted with its EU member organisations, Transgender Europe (TGEU) and the wider European LGBTI community. This submission also refers widely to the European Union Agency for Fundamental Rights (FRA) reports on [Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity](#) and builds on the recommendations included in these reports. The submission also borrows extensively from Dr Matteo Bonini Baraldi report entitled, [Different Families, Same Rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender](#)

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<sup>1</sup> LOI n° 2009-526 du 12 mai 2009 de simplification et de clarification du droit et d'allègement des procédures introduces an article that acknowledges the existence of partnerships in other Member States and provided the legal ground for the government to issue instructions to clarify the application of the rules relating to the PACS to other partnerships, in terms of inheritance and taxes. The two instructions were adopted on 29 and 30 December 2009 respectively.

<sup>2</sup> See [Tax victory for UK civil partners](#), The Connexion (01 January 2010)

*Families and their Children*, published by ILGA-Europe in 2007.

## 2. ILGA-EUROPE'S KEY RECOMMENDATIONS TO THE EUROPEAN COMMISSION

### 2.1 General recommendations

Take into account the difficulties that are currently experienced by same-sex partners, trans and intersex people, and their children when formulating and implementing future regulations and policies on the promotion of free movement of public documents and recognition of the effects of civil status records.

- Gender neutral formulations are indeed useful to extend rights to all couples without discrimination. However, the Commission should also examine the existing structures of inequality on the grounds of sex, sexual orientation and gender identity and address the specific problems that LGBTI people, same-sex couples and their children may experience as a result of bureaucracy compounded with discrimination.
- Additionally:
  - In most Member States a registered or *de facto* same-sex partnership is the highest level of recognition that same-sex partners can access. As a result, formulations that automatically distinguish between marriage, registered partnership and other forms of *de facto* recognition are likely to indirectly discriminate against same-sex partners (since unlike heterosexual couples they do not have access to marriage in all EU Member States). The Commission should therefore not distinguish between marriages and registered partnerships unless there is a real difference in the scope of the two institutions with regards to the respective policy issue;
  - Formulations based on the binary gender construct, consist of two opposite sexes (men and women) should be avoided as they are problematic from the human rights perspective of trans and intersex people as such formulations perpetuate their invisibility.

In view of the above, the Commission should conduct impact assessments with the duties laid out in the Charter and consult with relevant stakeholders.

Draw on existing data and studies published by FRA, the forthcoming Council of Europe Commissioner for Human Rights' report entitled *Discrimination on grounds of sexual orientation and gender identity in Europe* (expected in June 2011) and other available studies to look into the specific cross-border issues and experience of discrimination of LGBTI people.

- The scope of future studies on cross-border issues should expressly cover LGBTI specific aspects.

### 2.2 Recommendations on the rights of same-sex partners

Ensure that anyone married or registered in any Member State is granted full portability of his or her personal status across the EU without discrimination on the grounds of sex, sexual orientation and gender identity.

- Ban restrictions that Member States may put in place to restrict their gay and lesbian nationals access to marriage or registered partnership in another EU Member State (e.g. through non-issuance of civil status documents to gays and lesbians).
- Adopt the necessary amendments to ensure that any definition of ‘family member’ includes and applies to the same-sex spouse of a migrant EU citizen, and that she or he is granted the right to enter, reside, work and enjoy social security in the host Member State.
- Where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law, unmarried same-sex partners in a stable relationship should also be treated on an equal footing with spouses/registered partners. Failure to do so would be tantamount to indirect discrimination on the ground of sexual orientation.
- Make sure that any current or future measures on private international law apply the principle of mutual recognition to court decisions or other arrangements involving same-sex couples.
- To this end:
  - Clarify that *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* applies to marriages of same-sex partners, and that the validity of marriages and the conditions for marriage are determined by the law of the place where the marriage was celebrated;
  - Extend the application of *Regulation (EC) No 2201/2003* to registered partnerships and possibly to other forms of legal cohabitation (where they are treated in a way comparable to married couples), and expressly exclude that any public policy claim can be made solely on the grounds that the decision concerns one of such schemes;
  - Clarify that *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems* applies to same-sex partners on an equal footing to different-sex partners, and that it is applicable to registered partners as well.
- Ensure that *COM(2011) 126 final - Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* and *COM(2011) 127 final - Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships* are adopted without any discriminatory amendments that would directly or indirectly introduce discrepancies between same-sex and different-sex couples.
- Same-sex and different-sex partners who have married or registered their partnership outside the EU should be treated equally.

### **2.3 Recommendations on the rights of children and other family members**

- Children should be treated equally, without distinction based on the sexual orientation or the gender identity of their parents.

- No right should be denied to children on the basis of an absence of a marital tie between the parents, or one of their parents' inability to establish a legal bond with that child (e.g. in the case of two lesbian mothers who are not legally enabled to adopt each other's children).
- Any right conferred by EU law should equally cover biological and adopted children of different-sex, same-sex and trans parents.
- Parental links established in one Member State should be automatically recognised across the whole EU territory.
- The right to free movement within the EU and the right to family reunification for third country nationals should encompass:
  - Any children for whom the migrant shares parental responsibility;
  - Any children of the migrant's spouse or registered partner or unmarried partner in a stable relationship;
  - Any other dependent of the migrant, their spouse, registered partner or unmarried partner in a stable relationship;

All rights granted to children of unmarried different-sex couples should be granted equally to children of unmarried same-sex couples.

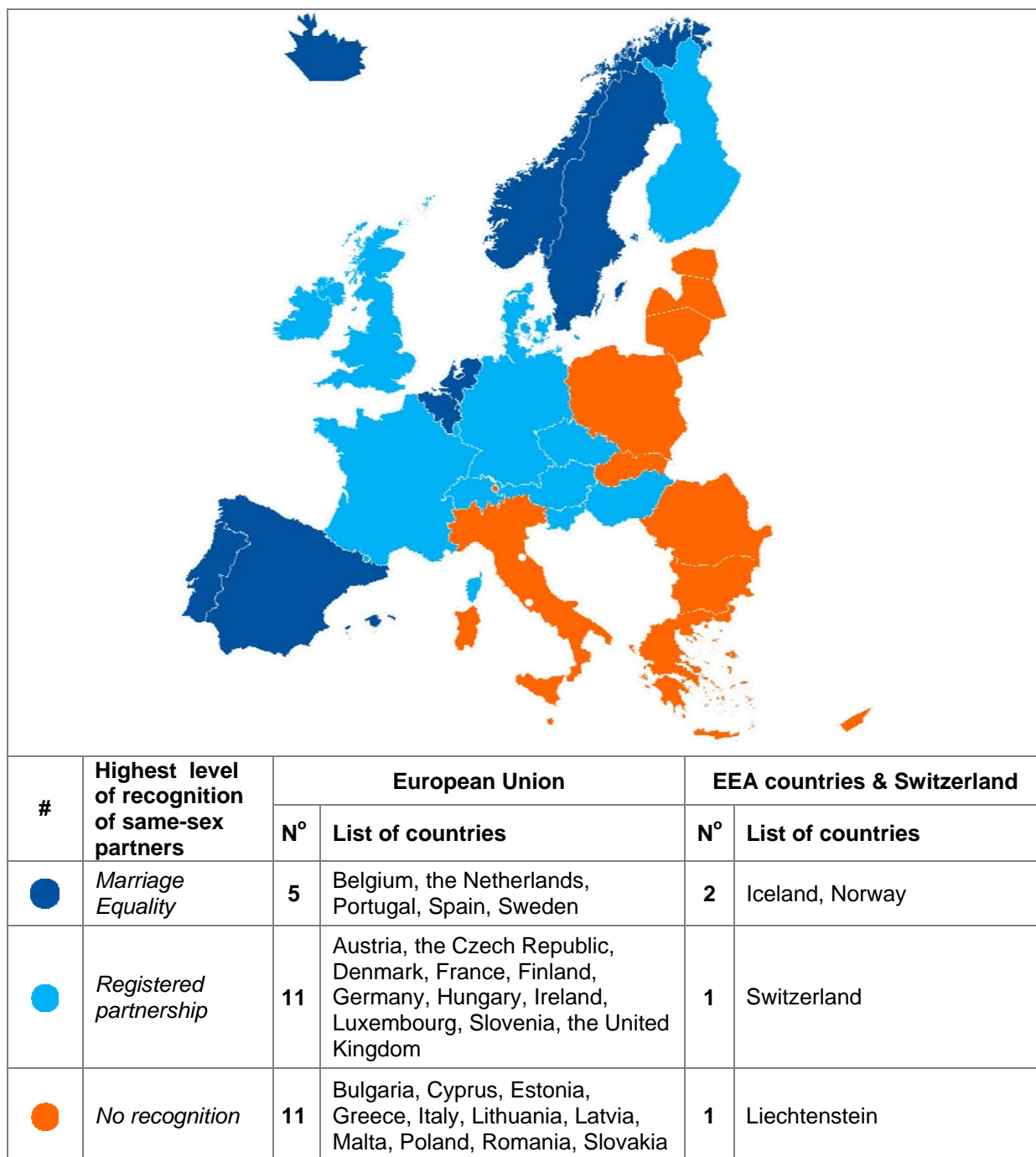
#### **2.4 Recommendations on the rights of trans and intersex people**

- Ban restrictions that the Member State of nationality may put in place to restrict its trans nationals access to gender reassignment, change of legal gender and/or change of name in another EU Member State (e.g. through non-issuance of civil status documents to trans people.)
  - Additionally trans people should have the possibility to: (i) change their name to a gender neutral name or that of another gender; and (ii) change the gender of the surname in the event that the home-country or national language has gendered family names, in either the place of birth, Member State of nationality or Member State of residence.
- Facilitate mutual recognition of change of name on academic certificates through a similar system to the European Credit Transfer and Accumulation System (ECTS).
- Introduce a privacy clause for those who change their European civil status document and/or those who have non-harmonised information (e.g. mismatch between the gender indicated and the gender of the chosen name).
- Consider not including sex in future European civil status certificates. Should this option not be feasible, the EU should consider the introduction of 'X' as a third option for those people who do not identify as either 'M' (male) or 'F' (female). This proposal is in conformity with International Civil Aviation Organisation (ICAO) standards.

### 3. THE CURRENT SITUATION OF SAME-SEX PARTNERS AND THE ISSUES THAT FUTURE EU PROPOSALS SHOULD ADDRESS

The debate for legal recognition of same-sex couples originated in Northern Europe in the 1970s. Since then, it has occurred throughout Europe and virtually all EU Member States have by now discussed some form of proposals to open marriage and/or introduce registered partnerships for same-sex partners.

#### 3.1 Current recognition of same-sex partners in national law





**Fig. 1** Map and table detailing the highest level of recognition of same-sex relationships in the EU-27, EEA countries and Switzerland

**Denmark** was the first country in the world to introduce the institution of registered partnership for recognition of same-sex couples in 1989, while **the Netherlands** was the first country to open civil marriage to same-sex couples in 2001.

### 3.1.1 Marriage Equality

Currently, **Belgium, Iceland, Portugal, the Netherlands, Norway, Spain, and Sweden** have marriage legislation that is open equally to different-sex and same-sex couples.

In **Luxembourg**<sup>3</sup> and **Slovenia**<sup>4</sup> bills for the opening up of marriage to same-sex partners are currently being discussed by the respective national parliaments. Additionally, debates on the opening up of marriage to same-sex partners are also taking place **Finland**<sup>5</sup>, **Denmark**<sup>6</sup>, **Britain**<sup>7</sup> and **Scotland**<sup>8</sup>. All five countries already provide same-sex partners the ability to enter registered partnerships.

In 2007, **Hungary**<sup>9</sup> had a bill proposing the opening up of marriage to same-sex partners but it failed to get on the agenda of the Parliament.

### 3.1.2 Registered Partnership

Registered partnerships are available as a parallel institution to marriage in **Austria, Belgium, the Czech Republic, Denmark, France, Finland, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Slovenia, Switzerland and the United Kingdom**. The registered partnership law adopted by Parliament in **Liechtenstein** earlier this year is subject to a popular referendum.<sup>10</sup>

Only in Belgium, France, Luxembourg and the Netherlands, registered partnerships are open to both same-sex and different-sex couples. Iceland, Norway and Sweden had such institutions open to same-sex couples as an alternative to marriage until they

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<sup>3</sup> Ouverture du mariage aux couples de même sexe et réforme de l'adoption (09 July 2010) [in French]

<sup>4</sup> Družinski zakonik [in Slovene]

<sup>5</sup> Laki rekisteröidystä parisuhteesta annetun lain kumoamisesta ja avioliittolain muuttamisesta [in Finnish] was on the agenda of the last Finnish Parliament prior to the elections of 2011. The adoption of the bill would have opened marriage to same-sex partners and suppressed the existing Registered Partnership Act. In 2010 the Ministry of Justice published a [study](#) [in Finnish] on the legal/technical issues related to the opening of marriage to same-sex partners. See [Gender-Neutral Marriage Law Possible by 2012](#), YLE.fi, (02 July 2010)

<sup>6</sup> The Danish Parliament has debated gender neutral marriage legislation in 2009 following a bill presented by the Liberal Alliance and in 2010 following a bill tabled by the Social Liberal Party. Following a recent question in parliament, the debate on marriage equality has re-emerged and features prominently in the current election campaigns in the country, with 65% of Danes supporting such legislation. See [Danskerne siger ja til homo-vielser, DR Forside](#), (24 April 2011) [in Danish]

<sup>7</sup> See [British government reportedly set to introduce full gay marriage equality](#), Pink News, (13 February 2011)

<sup>8</sup> See [Four of five main Scottish parties promise action on gay marriage](#), Pink News, (20 April 2011)

<sup>9</sup> T/3832 Az azonos neműek házasságkötéséhez szükséges jogi feltételek megteremtéséről [in Hungarian]

<sup>10</sup> See [Liechtenstein to decide on gay marriage](#), World Radio Switzerland, (27 April 2011)

introduced marriage equality for all couples and suppressed their respective registered partnership laws.

### 3.1.3 Prospect for recognition

To date, Bulgaria, Cyprus, Estonia, Greece, Italy, Lithuania, Latvia, Malta, Poland, Romania and Slovakia have not introduced legal recognition of same-sex couples in their respective national laws. This, however, does not mean that the prospect of recognition has not yet been considered in several of these countries.

In **Romania**, a bill for the introduction of registered partnership was tabled in 2008 but died in the Senate following the elections held in the same year.<sup>11</sup> A new bill for the introduction of registered partnerships for same-sex and different-sex couples was tabled in 2011 and received a favourable recommendation from the Legislative Committee of the Chamber of Deputies.<sup>12</sup> Moreover, in 2004 the Senate in **Poland** had voted in favour of a registered partnership bill that was proposed<sup>13</sup>. The bill was subsequently sent to the lower chamber of Polish Parliament (Sejm) but it was never discussed or voted upon until the Sejm's end of the term in 2005. A new registered partnership bill based on the French PACS (open to both same-sex and different-sex couples) has been drafted, and is expected to be to the President of Parliament (Marszalek Sejmu) in May 2011.<sup>14</sup> Similarly, in **Latvia**, a proposal for a same-sex registered partnership bill had reached the Human Rights and Public Affairs Commission of the Parliament (Saeima) in 1999 but was eventually defeated<sup>15</sup>. A new proposal for a same-sex partnership law (consisting of a new law and amendments to several existing laws), is currently being discussed with various politicians and is expected to be tabled in Parliament in June 2011.

In **Greece** the ruling party had made promises of extending the proposal for the introduction of registered partnership legislation to same-sex couples<sup>16</sup>. To date, however, the proposed bill continues to refer exclusively to different-sex couples. As a result, two cases<sup>17</sup> regarding the lack of legal recognition of same-sex couples in Greece are now being examined by the European Court of Human Rights. Additionally, the case regarding the disallowed Greek marriages of same-sex partners that were celebrated in Tilos in 2008<sup>18</sup> has reached the Court of Appeal after two unfavourable decisions by lower courts.

In **Italy**<sup>19</sup> and **Bulgaria**<sup>20</sup> bills for the recognition of same-sex partners were introduced and debated in the respective national parliaments but were eventually dropped or opposed.

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<sup>11</sup> Pl nr. L646/2008 Propunere legislativă privind parteneriatul civil [in Romanian]

<sup>12</sup> See *Oficializarea legăturilor gay, interzisă în România*, Mediafax.ro, (14 February 2011) [in Romanian]

<sup>13</sup> Pierwotna wersja senackiego projektu ustawy o zarejestrowanych związkach partnerskich [in Polish]

<sup>14</sup> See "Związki rejestrowane" jak małżeństwo, Wirtualna Polska (8 February 2011) [in Polish]

<sup>15</sup> See *Latvia: Partnership Law Presented to the Media and Sent to Parliament*, ILGA Euroletter 74, (October 1999)

<sup>16</sup> See «Δεν αρκεί το σύμφωνο ελεύθερης συμβίωσης», TA NEA online, (20 September 2010) [in Greek]

<sup>17</sup> *Vallianatos & Mylonas v. Greece* (Application No. 29381/09) and *C.S. & Others v. Greece* (Application No. 32684/09)

<sup>18</sup> See *Greece sees first gay 'marriage'*, BBC, (03 June 2008)

<sup>19</sup> Istituzione del Registro delle unioni civili di coppie dello stesso sesso o di sesso diverso e possibilita` per le persone dello stesso sesso di accedere all'istituto del matrimonio (Presented on 8 July 2002) [in Italian]

<sup>20</sup> See *Controversy as Bulgarian Parliament debates new Family Code*, The Sofia Echo, (27 September 2008)

Furthermore, in 2010 **Cyprus** the Interior Ministry Permanent Secretary has informed the media that the country was going to examine the opening up of marriage to same-sex couples,<sup>21</sup> while in **Malta** the Prime Minister has promised to table a bill for the recognition of unregistered cohabitation<sup>22</sup>, which bill is expected to cover different-sex and same-sex couples indiscriminately. To date, neither promise was followed by a debate in the respective national parliaments.

No formal proposals towards the recognition of same-sex partners have yet been made in **Estonia**, **Lithuania** and **Slovakia**. Legal progress in Lithuania remains unlikely for the foreseeable future as the political context is very unfavourable.<sup>23</sup>

### 3.1.4 Case Law of the European Courts

#### 3.1.4.1 *European Court of Human Rights (ECtHR)*

In the case of **Kozak**<sup>24</sup> the ECtHR ruled that 'de facto marital cohabitation' must be understood to include persons in a same-sex relationship in **Poland**. This ruling was the second of its kind, and affirms that if Member States provides certain rights to cohabiting different-sex partners, the same rights have to be made available equally to same-sex partners. Poland has not yet implemented this ruling, however, a group of experts was set up within The Ministry of Home Office and they are responsible for its implementation.

In the case of **Schalk & Kopf**<sup>25</sup> the Court made it clear that same-sex couples fall within the notion of 'family life', and considered it 'artificial' to maintain a distinction between different-sex and same-sex couples for the purpose of Article 8 of the European Convention on Human Rights. The Court also made clear references to the Charter of Fundamental Rights of the European Union, the Family Reunification Directive and the Freedom of Movement Directive (see *Annex A Section A.1* for the relevant paragraphs of the judgement).

#### 3.1.4.2 *Court of Justice of the European Union (CJEU)*

There are no CJEU decisions on the right of same-sex couples to freedom of movement and portability of civil status as yet at no such cases have reached the court to date. However, in the case of **Maruko**<sup>26</sup> the CJEU dealt with whether in the application of EU law Member States should treat same-sex registered partners equal to different-sex spouses "if registration places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit". The CJEU ruled that the refusal to grant the survivor's pension to life partners constitutes direct discrimination on grounds of

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<sup>21</sup> See *Government to look at legalising gay marriage*, Cyprus Mail, (28 February 2010)

<sup>22</sup> See *Government drafting law on cohabitation*, Sunday Times of Malta, (28 March 2010) and *Cohabitation law in the works - PM*, The Times, 29 March 2010

<sup>23</sup> See European Parliament resolution of 19 January 2011 on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania

<sup>24</sup> *Kozak v. Poland* (Application no. 13102/02) Judgement of 2 March 2010

<sup>25</sup> *Schalk and Kopf v. Austria* (Application no. 30141/04) Judgement 24 June 2010

<sup>26</sup> *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (Case C-267/06) Judgement of 1 April 2008

sexual orientation, when the surviving spouses and surviving life partners are in a comparable situation as regards that pension. The CJEU made clear that the criterion for such a comparable situation is whether the partners “live in a union of mutual support and assistance which is formally constituted for life” (Paragraph 67). A criterion which it deemed to be fulfilled by the German registered partnership. (Paragraphs 62, 67-69).

### 3.1.5 Reflection on the developments

The resume above shows various interesting developments. Firstly, that significant progress has taken place across Europe with regard to the recognition of same-sex couples over a relatively short period of time. Secondly, the registered partnership model introduced by Denmark in 1989 an alternative registration of same-sex couples served as a model for subsequent legislation adopted by other countries until in 1999 France opened its PACS (registered partnership) to both different-sex and same-sex partners without distinction, thus changing the purpose and scope of the institution. When the Netherlands opened the institution of marriage to same-sex partners in 2001, an entirely equal model of recognition was established, whereby marriage and registered partnership continued to exist as parallel institutions open to all couples without distinction on the ground of sexual orientation.

Therefore, we see that while the institutions of marriage and registered partnership were originally separate institutions for different-sex and same-sex partners respectively, the situation in 2011 is more blurry:

- a) In **Belgium**, and **the Netherlands** both institutions are equally available to different-sex and same-sex partners;
- b) **Sweden**, **Norway** and **Iceland** suppressed the institution of registered partnership when they opened marriage to both different-sex and same-sex partners;
- c) **France** and **Luxembourg** have registered partnerships that are open to both different-sex and same-sex partners albeit marriage remains a different-sex only institution.

The above trend is likely to extend to other countries as well, as the legislative proposals referred to above seem to indicate.

Finally, it is important to note that not one country that has legally recognised same-sex couples has so far suppressed (or narrowed) such recognition, clearly indicating that legal recognition of same-sex partners has a normalising effect on public opinion.

## 3.2 **Current threats to recognition of same-sex partners in national law**

While the progress highlighted above is outstanding provided the relatively short period of time during which it took place, one also needs to look at a parallel trend that has spread from country to country in Eastern Europe. In fact, various countries have reacted to the increased openness towards same-sex partners in their neighbouring countries by introducing discriminatory provisions in their constitutions or family law to restrict marriage to one man and one woman.

### 3.2.1 Legal restriction of recognition to different-sex partners (effectively banning recognition of same-sex partners)

The Constitution (Article 46) and Family Code (Article 7) of **Bulgaria**; the Family Law Act (Article 10) of **Estonia**; the Constitution (Article 110) and Civil Code (Article 35.2) of **Latvia**; the Constitution (Article 38) of **Lithuania**; the Constitution (Article 18) of **Poland** restrict the definition of marriage to a different sex-sex institution only. The Constitution (Article 48) and Law 287/2009 of the Civil Code (Articles 258-9) of **Romania** prohibits the recognition of same-sex couples domestically, and prohibits recognition of marriages and registered partnership of same-sex couples that were registered elsewhere. **Hungary** has followed the same pattern and in April 2011 adopted an amended Constitution (Article L) that restricts marriage to one man and one woman.

While respecting the principle of subsidiarity, the trend in Central and Eastern Europe should be taken into account by the Commission and directly addressed when formulating future initiatives on the recognition of the effects of civil documents. Otherwise it is highly probable that some of the Member States in question will use their domestic legislation to limit or nullify existing legal ties of same-sex couples as their children while within their national territory.

### 3.2.2 Administrative restrictions - non-issuance of civil status documents (effectively restricting access to recognition in another country)

**Poland** and **Estonia**, but potentially other Member States as well, are known to deny the issuance of civil status documents to gay and lesbian nationals who request such documents for the purpose of marrying or registering their partnership in another Member State. A petition against Poland was submitted by Kampania Przeciw Homofobii to the Committee on Petitions of the European Parliament on this matter (Petition N° 632/2008). The European Commission responded that the practice did not breach the Freedom of Movement Directive. However, it added that,

"At the present time there is no Community instrument relating to the issuing of civil status records.

The Commission is examining the question of recognition of civil status records in the European Union in order that, for example, citizens' marriages and partnerships may be taken into consideration in countries other than those in which they were contracted."

The Polish authorities' unwillingness to issue certificates of civil status documents continues. However, according to a recent announcement, the Polish Ministry of Interior is working towards removing existing discriminatory practices.<sup>27</sup> No similar works are understood to be underway in Estonia.

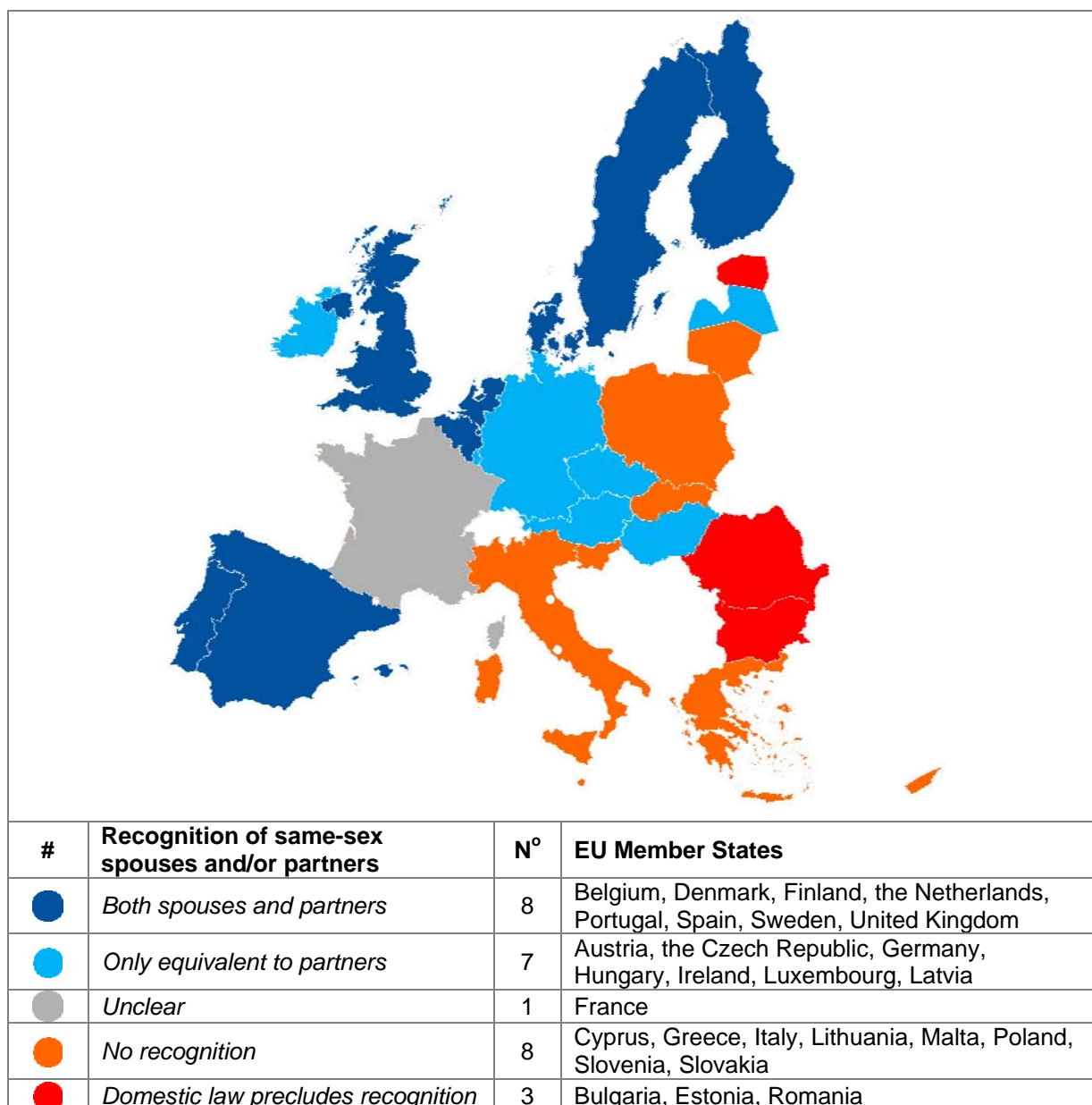
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<sup>27</sup> See *Poland to end gay marriage abroad discrimination*, thenews.pl (27 April 2011)

### 3.2.3 Non-recognition of marriages and registered partnerships of same-sex partners that are registered in third countries

Many Member States refuse to recognise marriages and registered partnerships that are contracted in third countries, which practice should constitute direct sexual orientation discrimination. (See *Section 3.3* for more details)

### 3.3 Recognition of same-sex partners for the purpose of freedom of movement



**Fig. 2** Map and table of recognition of same-sex 'spouse' and/or 'partner' for the purpose of freedom of movement in the EU-27 according to Dir 2004/38/EC based on FRA published data<sup>28</sup>

<sup>28</sup> European Union Agency for Fundamental Rights. (2010). *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*. pg. 54-55



The map and table above display a very problematic situation. Seven years have passed since the adoption and entry into force of the Freedom of Movement Directive. Yet, while foreign marriages of heterosexual partners are recognised as equivalent to domestic marriages in all 27 Member States, 19 Member States do not meet the minimum requirements as laid out in the Freedom of Movement Directive and provide both spouses and registered same-sex partners with the possibility of entering and residing in their respective country without denying them their civil status. This is so, even when domestic legislation recognises that same-sex partners fall within the meaning of family life. In **Austria, the Czech Republic, Germany, Ireland and Luxembourg**, same-sex spouses are likely to be treated like domestic same-sex registered partners but not provided with the same level of recognition of domestic different-sex spouses. The situation of same-sex spouses who move to **Hungary and Latvia** is unclear. In spite of the existence of domestic registered partnership legislation, and the change of law for the purpose of freedom of movement of EU citizens the situation of spouses and registered partners in **France** remains unclear, while **Slovenia** does not recognise non-domestic same-sex spouses and partnerships.

It is noteworthy to add that according to a 2008 European Commission report on the application of Directive 2004/38/EC<sup>29</sup>, "[s]ame-sex couples enjoy full rights of free movement and residence in thirteen Member States which consider registered partners as family members." According to the report, these 13 countries were Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Italy, Lithuania, Luxembourg, Portugal, the Netherlands, Spain, Sweden and the United Kingdom. The report made no reference to the 14 other countries that did not provide same-sex couples with their rights to free movement and residence. Needless to say, ILGA-Europe was disappointed by this report since it failed to address the discrimination that same-sex couples are subjected to by many Member States. Moreover, the information that the European Commission refers to does not tally with that of the FRA in the case of Bulgaria, Italy and Lithuania, raising doubts about the depth of the research that had been undertaken.

Only 11 Member States responded to a questionnaire that was circulated by the LIBE Committee of the European Parliament in preparation of its report on the application of Directive 2004/38/EC.<sup>30</sup> Yet, the responses provided by the **Austrian, Cypriot, Czech, Polish, Slovak and Romanian** governments clearly failed to meet the minimum requirements of the Freedom of Movement Directive. In fact, the Annex to the Report stated the following:

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<sup>29</sup> Brussels, 10.12.2008 COM(2008) 840 final Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

<sup>30</sup> Report of 24 March 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)). See the Annex to the Report entitled *Dilemmas in the Implementation of Directive 2004/38 on the Right of Citizens and their Family Members to Move and Reside Freely in the EU – Briefing Paper* that was prepared by Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs.



### **2.1.2. Same-Sex Marriages and Registered Partnership: An Uneven Recognition**

*For those EU nationals who are entitled, under the national law of their home MS, to marry someone of the same sex, there is no clarity on the recognition of their marriages across the EU for the purpose of exercising free movement rights.<sup>(23)</sup> Not only is this disparity in the recognition of different types of union misleading, but it also gives rise to frustration and exclusion of some citizens of the Union. For instance, in the **Czech Republic** while same-sex marriages are not permitted under national legislation, those concluded in another MS are recognized and the spouse is treated as family member of an EU citizen.<sup>(24)</sup> **Austria, Cyprus, Poland and Slovakia**, on the other hand, do not recognize same-sex marriages or partnerships whether they take place on their territory or abroad.<sup>(25)</sup> Registered partners also encounter problems when seeking to enforce their free movement rights. According to Articles 2 and 3 of the Directive, the duty on MS is to permit the residence of registered partners in the same way which they do for their own nationals (which presupposes that registered partnerships are recognized in the state). In some states this obligation has been interpreted more favourably. This has been the case in **Spain** which recognizes same sex registered partnerships and where the rules for entry and residence of registered partners are the same as for spouses.<sup>(26)</sup> In **Slovenia** however the Aliens Act does not recognize these when concluded abroad even though their conclusion within the country is permitted under the Registration of a Same-Sex Civil Partnership Act. In **Romania** same gender partnerships are not recognized, but ‘taken into consideration’ if they were “registered before proper authorities and under legal provisions of the Member State of origin or provenience ... and only for the purpose of their exercise of right of free movement on Romanian territory”.<sup>(27)</sup>*

*In addition, as regards the children of same sex partnership, the Directive 2003/86 on the right of family reunification<sup>(28)</sup> and the right to non-discrimination require that children be granted entry and residence rights regardless of their parents’ legal status and sexual orientation. In respect to those MS which do not recognize same sex marriages or/and partnerships, this situation may consequently interfere with the right of the child to be with both his/her parents.*

<sup>(23)</sup> Article 2 (2) and 3 of Directive 2004/38. On this point see Carlier, J.Y. and E. Guild (2006).

<sup>(24)</sup> Act No. 326/1999 Coll. On the Residence of Aliens in the Territory of the Czech Republic.

<sup>(25)</sup> As reported by both national Parliaments in their answers to the questionnaire. Slovenia does not recognize same sex marital unions either.

<sup>(26)</sup> Royal Decree No 240/2007, 16.02.2007 on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states party to the Agreement of the European Economic Area which, according to the questionnaire recognizes that “partners, whatever their sex, are subject to the same rules as spouses if they are registered in a public register established for this purpose in a Member State of the EU or EEA. There is also no discrimination with regard to children”.

<sup>(27)</sup> GEO no. 102/2005 on the free movement of citizens of the Member States of the European Union and the EEA on the Romanian territory.

<sup>(28)</sup> Council Directive 2003/86/EC on the right to family reunification, 22.09.2003, OJL 251.

Indeed, **Cyprus** responded to the question: “What about children of same sex couples?” by stating, “The Cyprus legislation doesn’t recognise same sex partners as «other» family members of the union citizen” indicating that it would not recognise filiation of same-sex couples without consideration of the best interest of the child.

The above shows that much remains to be done by the European Union to ensure that Member States respect existing EU legislation (and each other's legal regimes) with regard to the rights of same-sex partners. Namely,

- They need to take note that in all five EU countries that permit same-sex partners to marry, such marriages are celebrated under the same acts of laws as marriages of heterosexual partners. At the moment, marriages of heterosexual partners celebrated in any Member State are recognised as equivalent to national marriages in all other EU Member States. In the case of same-sex spouses, this is only true for eight Member States.

It is clear that non-recognition of the civil status of same-sex spouses hinders their rights and freedoms guaranteed by EU law. Therefore, the EU needs to make sure that all Member States extend recognition to foreign marriages without discrimination on the basis of sexual orientation.

- Registered partners often encounter various problems of recognition. Registered partners may still encounter recognition difficulties in Member States where registered partnership regimes for domestic same-sex couples exist.<sup>31</sup> Often this is done under the pretext that the registered partnership of the country of origin and the host Member State are different institutions.<sup>32</sup>

Once more, such non-recognition may be a discriminatory travesty. It is unlikely that Member States have invested time to map out what are the exact rights/duties that apply under each and every marriage/partnership law and objectively proceeded to classify each and every partnership law as similar or different to their domestic registered partnership regime. In any case, differences in rights and entitlements in the different marriage regimes do exist as well (e.g. criteria for divorce, social security entitlements etc). Such differences are never used by host Member States to disallow the civil status of different-sex spouses.

In a nutshell non-recognition of registered partners from other EU Member States should be deemed to constitute indirect discrimination on the grounds of marital status, and direct discrimination on the grounds of sexual orientation. Consequently:

- In Member States where registered partnerships exist, all resident registered partners should be treated according to the domestic registered partnership regime.
- In Member States where same-sex partners are able to marry but no registered partnership regime exists, all resident registered partners should be treated in an equivalent manner to domestic spouses.

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<sup>31</sup> Refer to the parliamentary questions asked by the European Parliament: *Recognition of UK civil partnerships in France* E-0706/09 (10 February 2009), and *British Civil Partnership in France* E-1133/10 (4 March 2010)

<sup>32</sup> One such example is the lack of full recognition of UK civil partnership in Spain where federal marriage equality and registered partnerships in several of the different autonomous communities exists. See *British Civil Partnerships – worthless in Spain?* rtn, (22 April 2010)

- In Member States where no registered partnership exists, and same-sex partners are not able to marry, resident registered partners should as a minimum be able to maintain recognition of their status (e.g. for the purpose of hospital visitation rights etc)

### 3.4 A case for the portability of rights of same-sex partners<sup>33</sup>

#### Case 1: **Bad practices in recognition of marriage of same-sex partners**<sup>34</sup>

*In 2005 a court in **Italy** had to decide whether two male Italian citizens could register in Italy the marriage that they had contracted in The Hague. After moving back to Italy, the two men had chosen to request the registrar of the city where they lived to record them as 'married' in the national registry of births, marriages, and deaths. Upon the refusal of the registrar, who was also supported by an opinion of the Ministry of the Interior that he had requested, the couple sued the State. The local court rejected the claim, and so did the Rome Court of Appeal: the marriage was considered non-existent under Italian law and contrary to Italian public policy. The Court based its reasoning on the notion of 'family' which can be found in the 1948 Italian Constitution, thereby putting the debate on highly contentious grounds such as constitutional values and principles. It concluded that the Italian Constitution refers only to the traditional marital relationship between people of different sex, and that this conception finds its justification "in the sentiment, the culture, and the history of our national community" which come before the law books.*

This scenario is far from reassuring. Views taken by national courts or governments tend to exacerbate the arguable presence of (legal) obstacles that may adversely affect the possibility of moving around Europe with a partner, either married or unmarried, either of the same or of a different sex, either citizen of the EU or not, and with children born and/or raised within such unions. This shows that some Member States are reacting very cautiously to changes happening in other Member States. In this context, the European Union needs to be more firm to guarantee EU citizens' individual rights against a backdrop of fragmented recognition and direct discrimination on the ground of sexual orientation masked under claims of 'traditional values'.

#### Case 2: **Good practices in recognition of marriage of same-sex partners**

*A marriage of same-sex partners contracted in Belgium between a Belgian national and a third country national had some consequences in **Luxembourg**. Initially it had some negative consequences: the Minister of Foreign Affairs and Immigration of Luxembourg held that the third-country national could not obtain a permit to stay in the country. The Minister claimed that he could not obtain the benefits deriving from the Act of 9 July 2004 (on legal consequences of certain partnerships) because he was already married. In his decision, the Minister implicitly affirmed the validity of the Belgian marriage. The decision was appealed to the Administrative Court of the Grand Duchy which, in its decision of 3*

<sup>33</sup> This Section is based on Bonini Baraldi (2007).

<sup>34</sup> See the decisions published and commented, in Famiglia e Diritto 4 (2005), p. 411; and in Famiglia e Diritto 2 (2007), p. 166 [in Italian]

*October 2005, held that the Ministry did not enjoy absolute discretion but was bound by Article 8 of the ECHR and had to take into account the right to respect for private and family life. The Court concluded that the State would contradict itself if, after having enacted a law permitting same-sex partners to 'declare' their partnership, it refused residence to a spouse ('conjoint') of a Belgian national.*

The favourable outcome of the Luxembourg case demonstrates that the legal effects of a same-sex marriage should not be limited to a single Member State when this impacts on fundamental rights of the individual. In this context ensuring portability of personal status can be a viable solution. In general, using the formula 'portability of personal status' is preferable to 'mutual recognition of civil status' because it reflects more adequately the importance of the matter for the individual. Also, the chosen formula does not prescribe one method: mutual recognition could well be one of the avenues for ensuring portability of personal status. However, other methods could also be considered, such as complete unification of family law in Europe, and/or other actors could be involved.

More generally, why is portability of personal status such a central issue at this time? It is because there are few justifications for allowing the mutual recognition of separation, divorce, annulments, arrangements concerning property division or maintenance obligations, or even wills, if it is not possible to clear up some preliminary questions: who is to be considered tied to whom? Since when and according to which legal scheme? with what legal consequences? In a way, determining an individual's personal status is the first question to be considered because it generates most of the situations that flow from being married or not, from being in a registered partnership or not, from being the parent/child of someone or not. The recognition of these legal links makes a real difference in people's lives and has a clear impact on fundamental rights of the individual. In concrete terms, it allows partners and family members to access partner benefits in employment, survivor's pensions, inheritance, or the right to entry and residence in another Member State.

### **3.5 What should the EU do?**

Article 10 of the TFEU is an equality mainstreaming article hence placing an obligation to mainstream 'sexual orientation' and 'sex' (including 'gender identity'<sup>35</sup>) equality in all EU policies and legislation, including in current and future legislation. Article 19 of the TFEU provides the EU with the ability to take action to combat discrimination on the ground of sex and sexual orientation, as does Article 21 of the Charter of Fundamental Rights which contains a non-discrimination clause including the grounds of sex and sexual orientation. Any Member State or EU measure must therefore take these developments into account. Of course, LGBTI people are not isolated individuals: they do form couples and families, they do move around, their relationships do break up and separate. Issues concerning the legal treatment of same-sex couples and their children are a good illustration of the impact that different EU policies can have on individual rights, on the role of the EU in the public sphere and, ultimately, on its legitimacy.

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<sup>35</sup> Following the decision in *P v S and Cornwall County Council*, (Case C-13/94) [Decision of 30 April 1996](#)

The fact that a growing number of countries are opening their marriages to same-sex partners and/or introducing registered partnership legislation outside a shared European vision or project has led to significant differences in the rights and responsibilities these unions entail. Not only has substantial law historically evolved in a scattered and fragmented way, but only a handful of Member States have conflict rules governing the recognition of foreign same-sex partnership regimes and these rules differ considerably. Other countries that have no regime of their own are at a loss about how to deal with new foreign partnerships. Uncertainty and protection of national sovereignty over family matters seem to be the most common feelings in several European capitals, in contrast with an increasing circulation of people, lifestyles, family structures, work arrangements and legal models.

Thus, the EU has a vital role to play if fundamental rights are not to be seen only as market-unifier tools, but as specific instances of the important values that underpin a community of citizens. European institutions should find a way to guarantee freedom and justice for all individuals living in that community and for the family arrangements that matter to them. To date, legislation has only very timidly embraced the contention that excluding marriages of same-sex partners and registered partnerships (often the only option available to same-sex couples) means excluding lesbian, gay and bisexual people from exercising treaty rights, or making the exercise of universal human rights unduly cumbersome.

The brief analysis given in this chapter allows some conclusions to be articulated. It appears rather clear that what is lacking is a common perspective based on two contentions:

1. that all citizens should be able to:
  - validly acquire a personal status of their choice elsewhere in the Union (especially if it is not possible in their own State);
  - have a portable status wherever they go (including returning to their home State); and
  - circulate freely with an unmarried or unregistered partner.
2. that respect for fundamental rights of LGBTI families must be ensured each time that rights and benefits are attached to family members for any given purpose.

Under the present fragmentation, the division of competences within the EU, with its emphasis on national sovereignty over family matters, could even provide a favourable competitive environment. Neither Member States nor the European Union should feel uncomfortable with a system where EU citizens are allowed to make use of the law that best recognises their rights and to make these rights portable. Suffice it to recall that, in the economic domain, the Community has been able to develop several important principles, such as the prohibition of double regulation, home State control on production and marketing of goods, subjecting the service provider only to the requirements of the Member State where he or she is established. To sum up, it is increasingly difficult to explain to the ordinary citizen why the EU should favour the circulation of goods and economic globalisation and not that of individual rights and aspirations.

#### 4. THE CURRENT SITUATION OF CHILDREN OF SAME-SEX PARTNERS AND THE ISSUES THAT FUTURE EU PROPOSALS SHOULD ADDRESS

This submission takes the simple premise that it cannot be in the best interest of children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests, simply on the basis of their birth status, or their parents' sexual orientation or gender identity. ILGA-Europe therefore believes that the question of the rights of children raised in lesbian, gay, bisexual, trans and intersex families (LGBTI-families) should form part of the wider dialogue about children raised in relationships based on love and care that fall within 'the increasing diversity of family structures'<sup>36</sup> in the European Union.

While segregated statistics on the number of children that are currently growing in LGBTI-families are difficult to compile and rarely available, the figures that exist show that they constitute a sizable group. According to a 2009 research carried out on behalf of the German Ministry of Justice (BMJ), at least 7,000 children are growing up in same-sex families in Germany.<sup>37</sup> If these figures are then extrapolated to the EU population at the same rate of incidence, the number of children growing in same-sex families must be at least 43,000. The challenge for EU policymakers is thus to ensure that all of these children and others in a similar situation enjoy their human rights and legal protection equally.<sup>38</sup>

##### 4.1 Current recognition of gay and lesbian parenting in national law

Currently, seven European countries provide same-sex partners the rights to adopt jointly, namely, **Belgium, Denmark, Iceland, the Netherlands, Spain, Sweden**, and the **United Kingdom**. Furthermore, a total of 11 countries allow the non-biological same-sex partner to adopt their partner's child/ren, namely, **Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Slovenia, Spain, Sweden**, and the **United Kingdom**.

Danish and UK registered partners are able to adopt children on an equal footing to different-sex spouses. In contrast, in Portugal, while marriage was opened to same-sex partners, previous restriction on joint adoption and on second-parent adoption persist.

As a result of the ECtHR decision in the case of **E.B.**<sup>39</sup> exclusion of individuals from the application process for adoption of children simply because of their sexual orientation is discriminatory and is in breach of the European Convention of Human Rights.

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<sup>36</sup> 'The increasing diversity of family structures' is acknowledged in the text of the Parental Leave Directive (Dir 2010/18/EU)

<sup>37</sup> Jansen, E., *Gay and lesbian family planning in Germany: Options and constraints* (2009)

<sup>38</sup> Hodson, L., *The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European Perspective* (2008) ILGA-Europe

<sup>39</sup> *E.B. v. France* (Application no. 43546/02) Judgement of 22 January 2008

## 4.2 Specific legal difficulties of children of same-sex parents in cross-border situations

Needless to say, the varying degrees of non-recognition of same-sex partners (discussed at length in Chapter 3 of this submission) have an automatic negative impact on the rights of children of gay and lesbian parents. This section now provides a close look at the compounded difficulties that children of same-sex parents experience in cross border situations.

### 4.2.1 Absence of automatic parental recognition

The principle of 'presumption of paternity' is not extended to the second lesbian mother in any of the EU Member States even when the couple is married or registered. This means that all children of same-sex partners have to be subsequently adopted (where possible) by the non-biological parent through a second parent adoption in order for them to establish a legal link with both parents.

As indicated above, second-parent adoptions are only possible in nine EU Member States, as well as Iceland and Norway. This procedure may take up to six months to complete and leaves the child with only one legal parent for the duration of that period.

Children of same-sex couples coming from the other 18 Member States cannot establish a legal link to one of their parents and as a result their rights to freedom of movement in the EU are significantly hampered.

### 4.2.2 Inability to establish a legal tie to the second parents

Children of same-sex couples are not able to establish a legal parental tie to both of their parents in eighteen EU Member States. This absence exposes the children to various risks and unnecessary hardship and the following cross-border case that was presented to the Committee on Petitions of the European Parliament on this matter indicates (Petition No. 0283-11):

**Case 3: Children of Finish-French couple with only one parental link**

*Kaisa is Finnish and Claire is French and they officially registered their PACS in France in 2004 where they reside. Kaisa gave birth to children in Paris in 2000 and in 2006 respectively, but the children only have Finnish citizenship as France does not recognise Claire as the second mother. On the other hand, Finland does not recognise Kaisa and Claire's PACS. Therefore, Claire cannot become a legal parent in Finland either, in spite of Finland's recognition of second parent adoption.*

*Some practical problems can be solved because Claire has managed to get limited parental authority over the two children as a guardian, thanks to a legal action she brought in France. But this authority is very limited:*

- *Claire will remain legal guardian only until the children are 18*
- *Only as long as Kaisa is alive and agrees for Claire to be a guardian*

*However, this legal guardianship prevents their children from (1) inheriting property and belongings from their second parent and her family; (2) using her surname; (3) having French citizenship and a French passport like her.*

*If Kaisa dies while the children are under 18, the guardianship of Claire will end automatically. In that case, the children would be considered orphans. A judge would then decide whether or not Claire could adopt them. The guardianship may also end before the children turn 18, either on Kaisa's unilateral request, or that of Claire, in case of a separation for instance. Neither is the right of the children to keep contact with both of their parents thus guaranteed, nor is their right to obtain financial support from both of their parents.*

The difficulties that the children of Kaisa and Claire have to face are surely not in their best interest. They cannot enjoy the same rights that other children of their age have, because France does not allow them to establish a link to their second-mother while Finland refuses to recognise the link between the two mothers on the pretext that the French PACS is not equivalent to the Finnish registered partnership.

The children are therefore the ones left exposed by both systems to unnecessary hardship. This is both the result of lack of foresight that is embedded in most national registered partnership laws which do not have a clause to recognise other partnerships as equivalent to domestic partnerships, and also lack of good will on the part of Member States to sort out such difficulties for the best interest of children and citizens.

Provided the current European mobility patterns acknowledged in the Green Paper, the precarious situation of these two children must be shared by many other children in similar cross-border situations.

#### 4.2.3 Parental ties stripped away from children upon movement to another Member State

The questionnaire circulated by the LIBE committee to assess the implementation of the Freedom of Movement Directive (referred to *Section 3.3* above) asked Member States "What about children of same sex couples?" clearly asking whether children have the right to join their parents while exercising their right to Freedom of Movement. **Cyprus'** brief response was, "The Cyprus legislation doesn't recognise same sex partners as «other» family members of the union citizen."

This disrespect to children's parental ties is unfortunately neither unique to Cyprus nor only theoretical as the following example will show:



**Case 4: Children of a same-sex couple resident in Belgium rendered *de facto* orphans in Greece**

*Kemal (a USA national) and Stavros (a Greek national) are two men who live in Brussels, **Belgium**. They were married under Massachusetts law in 2003 and their marriage is recognised in Belgium. Since 2004, they have adopted 2 babies, a girl who is now 6 and a boy who is now 4 years old. Both babies were born in Belgium and are Belgian and USA nationals. The first adoption was an individual adoption by Stavros, followed by a second-parent adoption by Kemal. The second adoption was a joint adoption. Greek courts have recently refused to recognise the two adoptions, which are valid under Belgian law. According to their decisions, under Greek law, Stavros is not the father of the two children and they are not eligible for Greek nationality, because the first adoption was by a man who was not married to a woman (Court reasoning: "unmarried people are not allowed to adopt in Greece"), and the second adoption was by two men (Court reasoning: "Greek society is not yet ready to accept a child with two fathers").*

#### **4.3 What should the EU do?**

The EU should make sure that children are treated equally, without distinction based on the sexual orientation or the gender identity of their parents. No right should be denied to children on the basis of an absence of a marital tie between the parents, or one of their parents' inability to establish a legal bond with that child (e.g. in the case of two lesbian mothers who are not legally enabled to adopt each other's children).

Any right conferred by EU law should equally cover biological and adopted children of different-sex, same-sex and trans parents. All rights granted to children of unmarried different-sex couples should be granted equally to children of unmarried same-sex couples.

Parental links established in one Member State should be automatically recognised across the whole EU territory.

## 5. THE CURRENT DIFFICULTIES OF TRANS AND INTERSEX PEOPLE AND THE ISSUES THAT FUTURE EU PROPOSALS SHOULD ADDRESS

ILGA-Europe welcomes the European Commission's reference to "birth, [...] marriage, [...] and also [sur]name change following [...] change of sex [...]" clearly indicating that the Commission is keen on investigating ways to address problems that are experienced by trans and intersex people in getting their civil status documents recognised in another Member State.

In the Issue Paper on *Human Rights and Gender Identity*, the Council of Europe Commissioner for Human Rights recommends the development of,

"expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents" (*Recommendation 3*).

Sections 3.2 *Legal recognition of the preferred gender* and 3.2.1 *Conditions for the change of sex and name* of the same document elaborate the recommendation further and frame it within the human rights framework.

### 5.1 Current recognition difficulties of trans and intersex people

#### 5.1.1 Trans people

Legal gender recognition in the preferred gender role is very problematic for many trans people across Europe. Gender recognition is indeed only possible after certain conditions are met, which often include a mental disorder diagnosis, sterilisation, divorce requirement, a 'real life test' and irreversible genital surgeries. The laws of **Portugal**, **Spain** and **the United Kingdom** are considered to be some of the best in this respect as they allow trans people to change their name and legal gender without having to undergo sterilisation and irreversible genital surgeries. In **Austria** and **Germany**, the Supreme Courts have rendered surgical and divorce requirements unconstitutional.

On the other hand, the situation in **Lithuania** may be deteriorating further. In fact, the Lithuanian government has not as yet honoured the ECtHR judgement in the case of *L*<sup>40</sup> and is now considering banning gender reassignment altogether.<sup>41</sup> **Ireland** and **Slovenia** do not provide an adequate procedure for trans people to have their gender rectified. In another nine EU Member States and accession countries, trans people are facing legally unstable situations as they have to go through lengthy administrative or court proceedings to change name and or gender, namely, **Bulgaria**, **Croatia**, **Iceland**, **France**, **Lithuania**, **Luxembourg**, **Hungary**, **Estonia** and **Poland**.

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<sup>40</sup> *L. v. Lithuania* (Application no. 27527/03) Judgement of 11 September 2007

<sup>41</sup> See *Lithuania ignores European court decision and proposes to ban gender reassignment* (09 March 2011)

Trans people who reside or live in another Member State often encounter compounded difficulties as the following examples indicate:

**Example 1: Danish trans man residing in Germany<sup>42</sup>**

*A trans man is undergoing legal and social transition in Germany. He changed his first name into a male name according to the German transsexual law (Transsexuellengesetz – TSG). Since he is a Danish citizen he holds a Danish passport, which still indicates his gender as ‘F’ for female. According to Danish legislation, his change of gender is only possible in Denmark.*

*When he booked a trans-continental flight to Canada the flight company insisted that due to increased security measures they had to indicate his title as ‘Mrs’. This not only causes confusion but forces him to constantly have to explain the contradictory information on the ticket, exposing him to further discrimination.*

*It has to be mentioned, that in Denmark change of documents for trans people is lengthy and bound to very strict protocols. It is regulated exclusively by the Sexological Clinic at the National Hospital, which has an unusual high refusal rate (63%) for taking in trans people in comparison to other European countries. A negative decision by this Clinic cannot be contested.*

**Example 2: French trans man residing in Germany**

*Due to restrictive and lengthy procedures for change of name and/or gender in France, he has not changed his name and gender officially yet exposing him to regular problems. His appearance is male but all his civil status documents identify him as female. As a result, every time that he deals with German authorities he has to explain who he is and why there are female names on his passport. When filling the registration form for residency in Germany he had entered the legal female names and checked the male check-box. The clerk, however, ‘corrected’ the entry and told him that as long as his papers are not changed she is “sorry, but there is nothing [she] could do but to restate what is written in the passport”.*

*Once, while travelling from France to Germany, an official at border control checked his identification documents and commented to his colleague (loud enough for other passengers to hear), “Have a look at this guy! He has three female first names on his passport.” He subsequently asked the trans man whether he was using a falsified passport.*

*He also does not have a bank account in Germany, since he has no legal basis for opening one under his male name. His French bank account features his male name as a bank clerk showed goodwill. However, his not being able to have a bank account in Germany is hampering his activities significantly when performing freelance jobs. Moreover, without obtaining a change to his civil status documents he doubts that he will be able to find a job again in the financial consultancy sector.*

<sup>42</sup> Tobias Raun, *Denmark – A transgender Paradise*

### 5.1.2 Intersex people

The situation of intersex people is not currently regulated in any of the Member States or by the EU. As a result intersex people cannot obtain a suitable identification document (e.g. birth certificate, ID card or passport) nor service (e.g. bank card or insurance policy) unless they legally align their gender as either 'female' or 'male'. This often involves medical and surgical interventions that may be unnecessary for the individual but are still performed by medical practitioners in order to align intersex people with the current gender binary order of society.

The current lack of legal recognition of intersex people makes freedom of movement, anti-discrimination and indeed the whole human rights framework inaccessible to many intersex people.

### 5.2 **Difficulties in changing name on academic certificates**

In most EU Member States there are no clear procedures on how names can be changed on academic certificates of trans people that were acquired prior to the trans person's legal name change. Where such procedures exist, they tend to depend very much on the academic institution itself, as opposed to clear and standard rules and procedures. The best practice comes from German transsexual law (*Transsexuellengesetz – TSG*), where Article 5 'Privacy Clause' prohibits disclosure of change of name and/or gender. This prohibition extends to educational and employment certificates and any issuing institution can be forced to alter the documents.

The general absence of clear procedures has been demonstrated in a recent case in **the Netherlands** brought by a trans man against the University of Amsterdam. The university had repeatedly denied a trans man a change of name on his diploma, arguing that such a name change would be equal to fraud. The Dutch Equal Opportunities Commission ruled that the refusal by the university amounted to indirect sex discrimination, citing the Human Rights Commissioner of the Council of Europe's *Issue Paper on Human Rights and Gender Identity* and its recommendations.<sup>43</sup> Subsequently, the Dutch Minister for Education announced a change of policy for all educational institutions in the country.

ILGA-Europe received a similar case from a transman from **Luxembourg**. Following his legal name and gender change, he sought a change of name on his university diplomas and asked the Education Ministry to issue him new diplomas under the new name. The Ministry informed him that this was not possible, as it was likely that different members of the exam commission were no longer available (either retired or dead). The transman complained that this was going to expose him to recurrent breaches of his privacy due to the female name on the certificates. To solve his problem, the Ministry proposed that they issue a new certificate that certifies that "X [his new identity] received the Diploma that is registered in the State Archives under Y [his old female name]." This was only done for the highest diploma and no similar possibility was provided for the earlier

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<sup>43</sup> See *Justus Eisfeld, Transsexual Graduate, To Get New Dutch Diploma*, Huffington Post (30 November 2010)

diplomas. The reasons for this are various including the fact that one of the educational institutions previously attended no longer exists.

The situation is further complicated for those trans people who request a change of academic certificates in the Member State of residence as is illustrated for the following examples:

**Example 3: Austrian trans man residing in Germany**

*A trans man has undergone his medical transition in Germany, and his legal gender recognition in Austria. Austria's decree has no prohibition of disclosure clause and thus his training institution cannot be made to change his educational certificate as he was legally female at the time when he finished his education. He is as a result experiencing recurrent problems when seeking employment in Germany.*

**Example 4: Romanian trans man residing in Germany**

*He holds a Romanian University entry exam certificate (Abitur), and has changed his name into a male name in Germany. He also plans to change his legal gender according to the German transsexual law (Transsexuellengesetz – TSG), which is available to residents, if their home country has no equivalent gender recognition legislation. It is expected that Romanian authorities will recognise the decision according to German law and issue a new Romanian birth certificate to him, however, there is no regulation that would ensure that his academic certificates are changed as well. Contradictory names on certificates and identification documents may pose a serious threat to his future educational career and employability especially in view of possible scepticism towards foreign academic certificates. He presented his situation to the Office for the Recognition of Foreign Qualifications at the Regional Commission in Stuttgart and was told that despite the prohibition of disclosure (Offenbarungsverbot) in the German transsexual law there was no possibility to change his school leaving certificate or issue an equivalent with his male name, that would be recognized in Germany.*

Complications about gender recognition and lack of respect of privacy make student mobility programmes unattractive for many trans students. One such case was reported to ILGA-Europe:

**Example 5: German exchange student outed by Danish school as transgender**

*A German exchange student found that the Copenhagen Business School would not allow him to use an email-address with a different name than his female passport name. This created significant problems for him in interacting with course-mates and professors as the course-work often required the usage of that email address.*

*When the school had, published a year book of all exchange students with a picture, the full passport name and home-town University of the student were published. The year book was distributed among all exchange students, and as the difference between his*

*presented gender role and his passport data became apparent he was marginalised and made to feel like an outcast by his co-students from one day to another.*

*He recounted: "People with whom I had established friendly bonds over the first weeks and I used to socialize with would not talk to me anymore. I was like air to them. I had never experienced anything like this before and was shocked. I felt very alienated for a good part of my exchange semester from the other international students. I did not know where to turn to since I already had experienced that the school was not very helpful in accommodating my gender identity."*

In view of the above, the EU should facilitate the mutual recognition of change of name on academic certificates through a similar system to the European Credit Transfer and Accumulation System (ECTS). The EU should also look into possible coordination efforts that can be had between Member States to allow trans people to change name on academic certificates in the least bureaucratic way possible. Furthermore, privacy around the identity of trans and intersex students should be guaranteed in exchange programmes and by all receiving institutions.

### **5.3 Problems posed by current identification documents**

Gendered identification documents are prevalent across Europe. In addition to academic certificates (dealt with in the previous section), birth certificates, identification documents, passports, marriage certificates and filiation documents as well as other civil status documents record the sex of the person amongst other personal characteristics. The available choice for such sex is 'M' for male and 'F' for female. No other option is possible and procedures for the change of the recorded sex tend to be lengthy and expensive. **Germany** is the only exception in the EU with regard to the recording of sex on ID cards. Sex is however recorded on other documents in Germany as well.

The gendered documents pose great problems to several trans and intersex people who either do not identify with either male or female, or cannot change their legal gender during their transition and are as a result stuck with the wrong gender marker on their identification documents.

Further to the recorded sex, in many countries additional gendered restrictions do apply in terms of:

- *chosen names* – two restricted sets of names for all males and females born in the country;
- *identity numbers* – numbers attributed to males and females are gendered as even and odd numbers denote one or another sex;
- *other elements* – e.g. in Turkey men's ID cards are blue while women's cards are reddish pink.

In cross border situations many trans and intersex people find themselves in significant difficulties, as exemplified by the following case:

**Example 6: British/German trans man residing in Lithuania**

*The British Embassy did not know how to handle the legal gender recognition of a British national residing in Lithuania and holding a German birth certificate. He did not want to be submitted to the Lithuanian requirements for legal gender recognition, especially the need to undergo genital reassignment surgery and sterility surgery. He therefore filed a complaint against these procedures with the Lithuanian Ombudsman. However, the Lithuanian health minister did not support the case and the trans man has now filed an action against the Lithuanian state.*

#### **5.4 Respecting the human rights of trans and intersex people in future European civil status certificates**

There are various measures that the EU can undertake in future European civil status documents to respect trans and intersex people's human rights.

The EU should consider not including sex in future European civil status certificates. **Germany** already does not include sex on its identification documents, and the absence has not caused any difficulties to the function of such documents.

##### **5.4.1 Refer to current high standards on trans and intersex people's citizenship**

The trans report entitled *To Be Who I Am* issued by the New Zealand Human Rights Commission in 2007 makes detailed references to trans and intersex people's citizenship issues including their right to adequate gender markers on identification documents and their right to privacy.

The EU will also find various good practices within its own Member States as well. It should always strive to adopt the highest standards on trans and intersex people's citizenship.

##### **5.4.2 Address restriction to change of gender posed by conflicting national rules and procedures**

The EU should ban restrictions that the Member State of nationality may put in place to restrict its trans nationals access to gender reassignment, change of legal gender and/or change of name in another EU Member State e.g. through non-issuance of civil status documents to trans people who may need them prior to undergoing legal gender reassignment in another EU Member State.

The EU should also look into ways to ensure that trans people have the choice to change the name to the gender of their choice or a gender neutral name; and the possibility to change the gender of the surname in the event that the Member State of citizenship or national language has gendered family names.

#### 5.4.3 Alternative to 'M' and 'F' on identification documents and passports

Should the option not to include sex on European civil status documents not be feasible, the EU should consider the introduction of 'X' as a third option for those people who do not identify as either 'M' (male) or 'F' (female). Such an option is already permitted by the International Civil Aviation Organisation (ICAO) standards whereby the sex data field on the travel document must be completed with the letter 'M' for male, 'F' for female or 'X' for unspecified. Such a proposal will already be considered in the Universal Periodic Review (Eleventh Session) of **Denmark**.<sup>44</sup>

Such an option is not new, and is indeed already available in various countries. In **India** the passport application form allows three gender categories, namely, 'Male', 'Female' and 'Others'.<sup>45</sup> In April 2007 almost 400 'X' passports had been issued in **New Zealand** according to the Department of Internal Affairs, and clear guidelines on access to 'X' passports are available on the Department's website.<sup>46</sup> Similar passport options also exist in **Australia**<sup>47</sup>, **Malaysia**, **Nepal** and **South Africa**.

The option to have 'X' on the passport should in no circumstance become a default category for all trans and intersex people. On the contrary, expedient procedures to change name and gender on civil status documents should be available to all trans people who wish to undergo such changes, while 'X' should be reserved for those who specifically ask for it.

#### 5.4.4 Introduction of a privacy clause

Finally, a privacy clause should be introduced for those who change their European civil status document and/or those who have non-harmonised information (e.g. mismatch between the gender indicated and the gender of the chosen name).

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<sup>44</sup> See *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 (Denmark)* Section 4.49, Human Rights Council Working Group on the Universal Periodic Review Eleventh session (28 January 2011)

<sup>45</sup> See *Passport Application Form (No.1)*, Government of India, Ministry of External Affairs

<sup>46</sup> See *Information for transgender applicants*, The Department of Internal Affairs, [passports.govt.nz](http://passports.govt.nz)

<sup>47</sup> See *Sex and Gender Diverse Passport Applicants*, Australian Passport Office



## 6. RESPONSE TO THE SPECIFIC QUESTIONS OF THE CONSULTATION

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**Question 1:** *Do you think that the abolition of administrative formalities such as legalisation and the apostille would solve the problems encountered by citizens?*

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ILGA-Europe supports the European Commission's reasoning in section 3.3.a of the Green Paper. It is clear that the apostille is a carryover from a previous reality when EU Member States were not closely connected and governed by various treaties, including amongst others the Schengen Agreement and the Treaty on the Functioning of the European Union.

The abolition of administrative formalities such as legislation and the apostille are much needed and would help to solve various problems. However, ILGA-Europe does not believe that such abolitions will by themselves solve the problems outlined in this submission, such as:

- The non-recognition of marriages of same-sex partners in 19 Member States;
- The child's loss of a parental tie to the non-biological gay/lesbian parent; or
- The incorrect gender and names recorded on civil status documents of trans and intersex people.

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**Question 2:** *Should closer cooperation between Member States' authorities be envisaged, in particular as regards civil status records, and if so, in what electronic form?*

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ILGA-Europe supports the European Commission's outline in section 3.3.b of the Green Paper, as closer cooperation between Member States' authorities will surely help solve various problems regarding civil status records. ILGA-Europe also supports the use of electronic means as is outlined. Nevertheless, ILGA-Europe does not believe that such cooperation between Member States will by itself be enough to solve the problems outlined in this submission.

Cooperation between Member States may indeed be useful to approximate what is recorded on civil status documents, and how changes to such documents can be effected. Cooperation can also be useful in order to guarantee continuation of entitlements and rights across borders. However, it is very unlikely that cooperation between Member States alone will solve problems around non-recognition of same-sex spouses and their filiation to their children, for example, as the problem in such instances are not related to the civil status records *per se* but rather with institutionalised discrimination on the grounds of sexual orientation.

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**Question 3:** *What do you think about the registration of a person's civil status events in a single place, in a single Member State? Which place would be the most appropriate: place of birth, Member State of nationality or Member State of residence?*

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ILGA-Europe believes that the registration of EU citizens' and residents' civil status documents in a single place may indeed be very useful in guaranteeing freedom of

movement without unnecessary bureaucracy and/or difficulties in having civil status documents recognised. However, the right standardised choice for all Europeans between their place of birth, their Member State of nationality or their Member State of residence may be difficult to strike, as it is indeed very likely that whichever standard solution is chosen, it will not work out to the advantage of all EU citizens and residents.

The EU should therefore consider:

- Providing citizens with the right to choose where their civil status certificates are to be held (provided that their request meets certain minimum criteria).
- Providing citizens with the option to have their various civil status documents duplicated into a centralised European registry.

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**Question 4:** *Do you think that it would be useful to publish the list of national authorities competent to deal with civil status matters or the contact details of one information point in each Member State?*

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ILGA-Europe supports this proposal. We also believe that it would be very helpful if SOLVIT or another EU centralised information centre was made available as a one-stop-shop to provide assistance to citizens who experience difficulties regarding the recognition of civil status records.

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**Question 5:** *What solutions do you recommend in order to avoid or at least limit the need for translation?*

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ILGA-Europe supports the European Commission's outline in section 3.3.c of the Green Paper. We believe that it will indeed be very useful to have multilingual forms based on those produced by the International Commission on Civil Status Conventions (CIEC), which require no translation and are applicable to similar circumstances across the EU.

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**Question 6:** *What kind of civil status certificates could be the subject of a European civil status certificate? Which details should be mentioned on such a certificate?*

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ILGA-Europe supports the option for EU citizens to voluntarily ask for European civil status documents as indicated in section 3.3.d of the Green Paper. Indeed, ILGA-Europe believes that EU citizens should be able to request European civil status to a whole range of issues, which amongst others include: 'birth, filiation, adoption, marriage, recognition of paternity/maternity, death and also surname change following marriage, divorce, a registered partnership, recognition, change of sex or adoption.'<sup>48</sup> In addition to this list ILGA-Europe proposes the addition of academic qualifications and the ability to change name and gender on all civil status documents.

It should logically follow that European civil status documents should make it easy for Europeans to have all of their civil status documents gathered in one country/centralised registry. Additionally, civil status documents should not carry contradictory information about citizens. Hence, a trans person who has his or her gender and name changed

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<sup>48</sup> As listed in the Green Paper.

should automatically have the change of name and gender reflected on all of his or her civil status documents.

As outlined elsewhere in this submission (See Chapter 5, especially section 5.4.2), ILGA-Europe proposes that European civil status certificates do not include a 'sex' category. German identity cards should offer a good example. In the event that this will not be feasible, the EU should follow the highest level of current human rights standards and follow the recommendations of the Commissioner for Human Rights of the Council of Europe, and existing best practice found in Member States and third countries.

Alternative options should also be made available for trans and intersex people who identify as neither male nor female. (See Section 5.4.3).

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**Question 7:** *Do you think that civil status issues for citizens in cross-border situations in the EU could be effectively solved by national authorities alone? In this case, should not the EU institutions provide at least some guidance to national authorities (possibly in the form of EU recommendations) to ensure minimum consistency of approaches with a view to finding practical solutions to the problems faced by citizens?*

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ILGA-Europe does not believe that adequate solutions to the various problems highlighted in this submission can ever be established by national authorities alone. Instead, we fear that any solutions that are drawn out will be patchy and likely to perpetuate institutional arbitrariness in terms of which documents are recognised and which are not.

ILGA-Europe believes that the EU should take a regulatory role in order to provide EU citizens with the certainty that they deserve in terms of the rights that apply and the procedures with which such rights can be accessed.

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**Question 8:** *What do you think of automatic recognition? To which civil status situations might this solution be applied? In which civil status situations might it be considered unsuitable?*

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Through the various real life examples presented in this submission, ILGA-Europe has aimed at providing an illustration of the problems that are experienced by gay, lesbian, bisexual, trans and intersex people, and their children as a result of the absence of automatic recognition of their civil status. Automatic recognition (when possible) is ILGA-Europe's preferred option, as it provides citizens with legal certainty and the least bureaucratic solution towards the recognition of their civil status.

### **1. Marriage**

Currently, many Member States discriminate against same-sex spouses by stripping them of their status the moment that they enter their respective national territory on the premise that 'such an institution' does not have an equivalent in their country. This, however, is nothing but blatant direct discrimination on the grounds of sexual orientation. No European country has a separate 'same-sex marriage' institution. Same-sex spouses marry under the same acts of laws as heterosexual spouses, and they should therefore

equally benefit from automatic recognition of their civil status and enjoy their rights and duties as domestic spouses in the country of residence.

In addition to the above, marriages of different-sex and same-sex couples celebrated in third countries should be treated equally.

## **2. Registered Partnerships**

Registered partnerships should also be automatically recognised within those Member States that have domestically introduced the institution of registered partnership. They should also be able to enjoy the same rights and duties as domestic registered partners in the country of residence without distinction.

Where the institution of registered partnership does not exist, but same-sex partners are able to marry, all resident registered partners should be treated like domestic spouses.

In Member States where no registered partnership exists, and same-sex partners are not able to marry, resident registered partners should as a minimum be able to maintain recognition of their nominal status. Same-sex registered partners should enjoy hospital visitation rights and other similar rights as well as all that is domestically afforded to *de facto* couples.

Registered partnerships of different-sex and same-sex couples celebrated in third countries should be treated equally.

## **3. Paternity/Maternity, Filiation, Adoption**

Parental links established in one Member State should be valid throughout the whole of the European Union without exception. Children should not see their parental ties and important relations of care stripped away from them simply on the basis of their birth status, or their parents' sexual orientation or gender identity.

## **4. Change of (sur)name and gender, and surname**

A change of name (and surname in case of a gendered surname) and gender in one Member State should be recognised in all Member States. Trans and intersex people should also have their privacy protected at all times.

Same-sex partners who change their surname following a marriage, a registered partnership or divorce should have their changed surname automatically recognised as well.

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**Question 9:** *What do you think of recognition based on the harmonisation of conflict-of-law rules? To which civil status situations might this solution be applied?*

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Harmonisation of conflict-of-law rules will surely be very useful in resolving the various disputes that currently exist with regards to the different registered partnership regimes that have been introduced in various Member States.

Various problems persist as a result of the diversity of the institution. For example, in the United Kingdom civil partnerships are equal to marriage in all respects but the name. In France and Luxembourg, however, PACS is an alternative institution to marriage which has intentionally been kept distinct from marriage. This difference in the philosophy of the institution has given rise to various problems in the past, whereby UK civil partners lost their civil status upon entry in France and were considered as two unrelated individuals. On its part, however, France did not allow civil partners to enter into a PACS in France on the basis that they were still in a valid UK civil partnership. The paradoxical situation in France has now significantly changed for the better since the change of law in 2009 (even though some problems still persist).

The situation in other Member States is less known. Yet it is clear that the problems that were recorded in France are not unique to it. ILGA-Europe has received reports of unequal treatment from several other countries as illustrated by the case of Kaisa and Claire and their children (see Section 4.2.2. above).

The harmonisation of conflict-of-laws in such circumstances as illustrated above is much needed. Yet, harmonisation of conflict-of-laws should not be applied to situations where a conflict exists only with regard to same-sex partners and their children, while no such conflict-of-laws situation exists for different-sex partners and their children (e.g. problems of civil status recognition experienced by same-sex spouses which have no parallel for different-sex spouses). In those cases automatic recognition should apply.

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**Question 10:** *What do you think of the possibility of citizens choosing the applicable law? In which civil status situations might such a choice be applied?*

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ILGA-Europe agrees with this proposal.

The Commission has already proposed this possibility in previous regulations. The Commission should now follow its previous examples and explore analogous ways of extending citizens the right to choose the applicable law with regard to the various issues that have been elaborated in this submission.

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**Question 11:** *In addition to automatic recognition and recognition based on the harmonisation of conflict-of-law rules, do you think that there are other solutions which could provide a response to the crossborder effects of legal situations linked to civil status?*

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ILGA-Europe does not believe that there are better solutions to automatic recognition and when necessary recognition based on the harmonisation of conflict-of law rules.

## ANNEX A EXTRACTS FROM EUROPEAN LAW

### A.1 Council of Europe

#### European Convention for the Protection of Human Rights and Fundamental Freedoms

##### Article 8 – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

##### Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### **Schalk and Kopf v. Austria (Application no. 30141/04) Judgement of 25 June 2010**

##### B. Comparative law

###### 1. European Union law

24. Article 9 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and entered into force on 1 December 2009, reads as follows:

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

25. The relevant part of the Commentary of the Charter states as follows:

“Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal

consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name 'registered partnership' has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage. (...)

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples. (...)"

26. A number of Directives are also of interest in the present case:

European Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, deals with the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

Its Article 4, which carries the heading "family members", provides:

"(3) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), ..."

Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Its Article 2 contains the following definition:

"(2) 'Family member' means:

(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 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)

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b)."

## 2. *The state of relevant legislation in Council of Europe member States*

27. Currently six out of forty-seven member States grant same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden.

28. In addition there are thirteen member States, which do not grant same-sex couples access to marriage, but have passed some kind of legislation permitting same-sex couples to register their relationships: Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom. In sum, there are nineteen member States in which same sex couples either have the possibility to marry or to enter into a registered partnership (see also the overview in *Burden v. the United Kingdom* [GC], no. 13378/05, § 26, ECHR 2008).

29. In two States, namely in Ireland and Liechtenstein reforms intending to give same-sex couples access to some form of registered partnership are pending or planned. In addition Croatia has a Law on Same-Sex Civil Unions which recognises cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration.

30. According to the information available to the Court, the vast majority of the States concerned have introduced the relevant legislation in the last decade.

31. The legal consequences of registered partnership vary from almost equivalent to marriage to giving relatively limited rights. Among the legal consequences of registered partnerships, three main categories can be distinguished: material consequences, parental consequences and other consequences.

32. Material consequences cover the impact of registered partnership on different kinds of tax, health insurance, social security payments and pensions. In most of the States concerned registered partners obtain a status similar to marriage. This also applies to other material consequences, such as regulations on joint property and debt, application of rules of alimony upon break-up, entitlement to compensation on wrongful death of partner and inheritance rights.

### **B. Merits**

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate.

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).



94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of “private life” as well as “family life” within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 applies.

#### **Recommendation CM/Rec(2010)5**

#### **of the Committee of Ministers to member states**

#### **on measures to combat discrimination on grounds of sexual orientation or gender identity**

#### **IV. Right to respect for private and family life**

20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.

21. Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.

22. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed.

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

26. Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.

28. Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation.

## A.2 European Union

### The Treaty on the Functioning of the European Union

#### Part Two Non-Discrimination and Citizenship of the Union

##### Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

##### Article 19 (1)

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

##### Article 20

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

### Charter of Fundamental Rights of the European Union

#### Article 21 (1) Non-discrimination

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

#### **Article 45 Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

#### **Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers**

##### **Article 2**

##### **Definitions**

For the purposes of this Directive:

- (d) 'family members' shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:
- (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
  - (ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

#### **Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.**

##### **Article 2**

For the purposes of this Regulation:

- (i) "family members" means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:
- (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned

treats unmarried couples in a way comparable to married couples under its law relating to aliens;

- (ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
- (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;

## **Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification**

### **CHAPTER II Family members**

#### **Article 4 (3)**

The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.

Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

## **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**

### **Article 2 Definitions**

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:
  - (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);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

**Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted**

**Article 2**

**Definitions**

For the purposes of this Directive:

(h) «family members» means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,

the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

**ANNEX B PARLIAMENTARY ASSEMBLY AND EUROPEAN PARLIAMENT RESOLUTIONS**

**B.1 Parliamentary Assembly of the Council of Europe**

**Resolution 1728 (2010)**

**Discrimination on the basis of sexual orientation and gender identity**

10. The denial of rights to de facto "LGBT families" in many member states must also be addressed, including through the legal recognition and protection of these families.

16.9. ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000, by providing for:

16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

16.9.2. "next of kin" status;

16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

16.9.4. recognition of provisions with similar effects adopted by other member states;

16.10. provide the possibility for joint parental responsibility of each partner's children, bearing in mind the interests of the children;

16.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:

16.11.1. safety;

16.11.2. official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy;

16.11.3. access to gender reassignment treatment and equal treatment in health care areas;

16.11.4. equal access to work, goods, services, housing and other facilities, without prejudice;

16.11.5. relationship recognition, in accordance with the case law of the European Court of Human Rights;

## **B.2 Extracts from European Parliament resolutions demanding freedom of movement and mutual recognition of same-sex couples**

### **P6\_TA-PROV(2009)0019**

#### **Situation of fundamental rights in the European Union 2004-2008**

#### **European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI))**

75. Calls on those Member States who have adopted legislation on same-sex partnerships to recognise provisions with similar effects adopted by other Member States; calls on those Member States to propose guidelines for mutual recognition of existing legislation between Member States in order to guarantee that the right of free movement within the European Union for same-sex couples applies under conditions equal to those applicable to heterosexual couples;

76. Urges the Commission to submit proposals ensuring that Member States apply the principle of mutual recognition for homosexual couples, whether they are married or

living in a registered civil partnership, in particular when they are exercising their right to free movement under EU law;

77. Calls on those Member States who have not yet done so, and in application of the principle of equality, to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation;

#### **P6\_TA(2009)0203**

##### **Right of EU citizens and their family members to move and reside freely within the territory of the Member States**

##### **European Parliament resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI))**

– having regard to the report by the European Union Agency for Fundamental Rights entitled "Homophobia and Discrimination on Grounds of Sexual Orientation in the Member States",

S. whereas, on the basis of the information gathered, notably through national parliaments' answers to Parliament's questionnaire, which is unfortunately not exhaustive and does not cover all the Member States, and in addition to the Commission Report, the following main issues were identified as problematic:

- restrictive interpretation by Member States of the notion of "family member" (Article 2), of "any other family member" and of "partner" (Article 3), particularly in relation to same sex partners, and their right to free movement under Directive 2004/38/EC<sup>(14)</sup>,

2. Calls on Member States to fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life; calls on Member States to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages; in this regard, calls on the Commission to issue strict guidelines, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report and to monitor these issues;

<sup>(14)</sup> CY, IT, PL and SK do not recognise same sex marriages as a reason to grant free movement rights, PL and SK do not recognise registered partnerships, even if certified in another Member States; information in this regard provided by the Commission, the FRA and NGOs further proves legal uncertainty on this issue.

#### **P7\_TA(2009)0090**

##### **Multi-annual programme 2010-2014 regarding the area of freedom, security and justice (Stockholm programme)**

**European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme**

37. Calls on Member States, without prejudice to national legislation on family law, to ensure freedom of movement for EU citizens and their families, including both registered partnerships and marriages, in accordance with Articles 2 and 3 of 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, and to avoid all kinds of discrimination on any ground, including sexual orientation;

**P7\_TA-PROV(2010)0426**

**European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI))**

N. whereas Union law must be at the service of citizens, notably in the areas of family law and civil status,

40. Stresses the need to ensure mutual recognition of official documents issued by national administrations; welcomes the Commission's efforts to empower citizens to exercise their free movement rights and strongly supports plans to enable the mutual recognition of the effects of civil status documents; calls for further efforts to reduce barriers for citizens who exercise their rights of free movement, particularly with regard to access to the social benefits to which they are entitled and their right to vote in municipal elections;

**ANNEX C RECOMMENDATIONS AND OPINIONS BY EUROPEAN HUMAN RIGHTS INSTITUTIONS**

**C.1 Recommendations by the Commissioner for Human Rights**

**Commissioner for Human Rights. (2009). *Human Rights and Gender Identity*. Strasbourg: Council of Europe.**

**Recommendations to Council of Europe member states**

**Member states of the Council of Europe should:**

1. Implement international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity should be used to provide guidance for national implementation in this field;



3. Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents;
6. Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender;

**Commissioner for Human Rights. (2011). *Adoption and Children: A Human Rights Perspective*. Strasbourg: Council of Europe.**

#### **IV. Necessary procedural safeguards**

##### **b. Adoption by same-sex couples, or by single gay or lesbian persons individually**

As noted previously, the protection of private and family life under Article 8 of the European Convention on Human Rights does not include a right to adopt children. All prospective adopters must be assessed for their suitability, and then matched with a child according to the child's best interests, on a case-by-case basis. Assessment and matching for homosexual applicants, however, frequently gives rise to allegations of prima facie discrimination against such applicants.

In the case of *E.B. v. France*<sup>45</sup>, the applicant, a woman living in a relationship with another woman, had applied for adoption as a single parent. The Court noted that she was rejected with reference to, inter alia, her "lifestyle" as a homosexual, even though her "undoubted personal qualities and an aptitude for bringing up children" had been acknowledged. Since "French law allows for single persons to adopt, thereby opening up the possibility of adoption by a single homosexual", the Court held that the domestic authorities had made a distinction regarding her sexual orientation that violated the principle of non-discrimination in conjunction with the right to family life.<sup>46</sup>

The Committee of Ministers recommended in 2010 that Council of Europe member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.<sup>47</sup> A number of member states already enable gay and lesbian persons, individually or jointly, to adopt a child. Second-parent adoption<sup>48</sup> and joint adoption by these persons are both currently possible in Belgium, Denmark, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom; second-parent adoption is possible in Finland and Germany.

<sup>45</sup> European Court of Human Rights, *E.B. v. France*, Application no. 43546/02, Judgement of 2 January 2008 paragraphs 70-98.

<sup>46</sup> A recent application, in which a same-sex couple complained they had been subjected to discrimination in relation to their right to family life due to a refusal of a child's adoption by the non-biological parent, was declared admissible by the Court. The case is *Gas and Dubois v France*, Application No. 25951/07, decision of 31 August 2010.

<sup>47</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, paragraph 27.

<sup>48</sup> Second-parent adoption is when a person adopts the biological child of his/her partner. Joint adoption is when a couple, together, adopt a child of whom they are not biological parents. Where there is no possibility of second-parent adoption, this may have significant consequences for the parents and the child involved. The main implications include the lack of rights of the child and the non-biological parent in the event of divorce, separation, death of the biological parent, or other circumstances that would prohibit the parent from carrying out parental responsibilities.

## C.2 Opinions of the European Agency for Fundamental Rights

**European Union Agency for Fundamental Rights. (2009). *Homophobia and Discrimination on the grounds of Sexual Orientation in the EU Member States: Part 1 - Legal Analysis*. Luxembourg: Publications Office of the European Union. p.165-166**

### **11.2. Same sex couples are not always treated equally with opposite sex couples**

Rights and advantages reserved for married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership in the absence of a possibility to marry, or when, in the absence of a registered partnership, the de facto relationship presents a sufficient degree of permanency in order to ensure equal treatment of LGBT persons. International human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the de facto durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate choice not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows a contrario that advantages recognised to married couples should be extended to unmarried same-sex couples either when, in the absence of such an institution, the de facto relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

This is also relevant for rights and benefits provided for spouses and partners under the EU's Free Movement Directive, the Family Reunification Directive and the Qualification Directive. The treatment of same sex couples in conformity with international human rights law needs to be ensured and clarified for all these directives.

**European Union Agency for Fundamental Rights. (2010). *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*. Luxembourg: Publications Office of the European Union. p. 9-10**

**'Family member' and mutual recognition of civil status in EU law**

In relevant areas of EU law, in particular employment related partner benefits, free movement of EU citizens, and family reunification of refugees and third country nationals, EU institutions and Member States should consider explicitly incorporating same-sex partners, whether married, registered, or in a de facto union, within the definitions of 'family member'. In particular in the context of free movement, this could be achieved by explicitly adopting the 'country of origin' principle already firmly established in other areas of EU law.

In relevant areas of EU action concerning mutual recognition of the effects of certain civil status documents and on dispensing with the formalities for the legalisation of documents between the Member States, EU institutions and Member States should ensure that practical problems faced by same-sex couples are addressed, for instance, by considering the conflicts of laws principle of the law of the place where the act was formed, in combination with the prohibition of 'double regulation'.

In addition, with respect to the initiatives foreseen in the European Commission's Action Plan implementing the Stockholm Programme on matrimonial property regimes and patrimonial aspects of registered partnerships, it is important that: legal certainty for same-sex registered partners and unmarried couples is enhanced; citizens' practical needs are addressed; and that the family life of those individuals involved in such unions is acknowledged and recognised.

## **The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda**

### **1. A Europe of rights**

- *Broadening the fight against discrimination in Europe*

[...] Appropriate steps should be taken to extend the right of EU citizens and their family members to move and reside freely within the Union to also cover same-sex couples recognised by any Member State.<sup>14</sup> [...]

- *Enabling minorities to move freely*

[...] What should be addressed in this context are those vulnerable groups whose right to free movement is most at risk such as Roma, and homosexual couples<sup>21</sup>. [...]

<sup>14</sup> European Parliament, Resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)).

<sup>21</sup> See on this the Agency's legal report on homophobia.

## ANNEX D EXTRACTS FROM EUROPEAN COMMISSION REPORTS RECOGNISING THE NEED TO ENFORCE EXISTING FREEDOM OF MOVEMENT LEGISLATION AND ADDRESS THE GAP IN MUTUAL RECOGNITION

European Commission, (2011), *2010 Report on the Application of the EU Charter of Fundamental Rights*, Luxembourg: Publications Office of the European Union, p. 44

The Commission is keen to see the principle of non-discrimination on the basis of sexual orientation, as enshrined in the Charter, applied systematically in the preparation, adoption and implementation of EU law.

What does the prohibition of discrimination on ground of sexual orientation mean in practice?

EU citizens have the right to move and reside freely in another Member State, together with their families. The benefits of EU rules guaranteeing **free movement and residence apply also to same-sex couples**.

In its judgment *Schalk and Kopf v. Austria*<sup>37</sup>, the European Court of Human Rights (which is not an institution of the European Union) made **a reference to the Charter and to provisions of two EU Directives (on family reunification and free movement) to strengthen the right to respect for private and family life** under the European Convention on Human Rights by extending the notion of “family life” to same-sex couples. The European Court of Human Rights considered it “artificial” to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8 of the European Convention.