

Advancing LGBTI Equality in the EU: from 2020 and beyond

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LGBTI people and their families in cross-border situations

For LGBTI families, crossing borders in the European Union is not without hurdles. The ability for a same-sex couple to have one's relationship recognised varies significantly between the Member States. At present, 14 Member States recognise same-sex marriage¹, eight Member States provide for registered partnerships² only – which do not necessarily guarantee rights equal to marriage – and six Member States provide no legal recognition of same-sex couples whatsoever³. Some Member States do not recognise same-sex relationships already legally established abroad, and LGBTI individuals and couples may be precluded from becoming parents or from having their child-parent relationships legally recognised depending on the Member State in which they find themselves⁴.

The non-recognition of family ties between members of LGBTI families has emotional, practical and legal implications. As the free movement and residence rights of family members of mobile EU citizens are based on the existence of a recognised family link, LGBTI families may be denied their right to move to and reside in certain Member States, if national authorities fail to interpret and apply the EU free movement *acquis* in a gender-neutral manner. Even if an LGBTI family is treated as a family for the purpose of the right to reside in another Member State, this recognition may be denied for other legal purposes. The non-recognition of a family relationship also constitutes a serious impediment to enforcing one's rights in disputes concerning the custody of children and visitation rights, maintenance, property and inheritance. Children of same-sex parents may be refused recognition of their personal names already established in another Member State. Moreover, non-recognised parents may be unable to travel alone with their child, enrol them in schools, provide health insurance, open a bank account or consent to medical interventions.

For trans and intersex persons and their families, freedom of movement may also be inhibited by the variations in requirements and procedures for legal gender recognition across Member States, and the potential difficulties in having one's gender recognised in one Member State after being legally established in another. This incoherence in legal gender recognition across borders may increase the likelihood of being discriminated against in the areas of employment, education, healthcare and

¹ Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, Sweden, United Kingdom.

² Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Slovenia.

³ Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia.

⁴ <https://rainbow-europe.org/>

access to goods and services, and may also have serious repercussions for the rights and obligations of trans and intersex people *vis-à-vis* their family members⁵.

Family law remains within the competence of Member States. Each Member State thus decides whether or not to allow same-sex marriages and same-sex registered partnerships. However, in *Oliari and Others v Italy*⁶, the European Court of Human Rights established a positive obligation upon Member States to provide legal recognition for same-sex couples. When moving to another Member State, LGBTI families in the European Union are protected by several EU legal instruments. LGBTI families benefit from the EU's fundamental rights framework, including the Charter of Fundamental Rights ('the Charter') and the case-law of the Court of Justice of the European Union (CJEU). Directive 2000/78/EC prohibits discrimination on the grounds of, *inter alia*, sexual orientation in the area of employment. A proposal for a Directive to extend protection against discrimination based on sexual orientation beyond employment was also issued by the European Commission in 2008⁷, but has not yet been adopted.

Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) furthermore guarantees the right for all Union citizens to move and reside freely within the territory of the Member States. Directive 2004/38/EC extends this right to family members of EU citizens, such as their spouses and children, even if they are not themselves EU citizens. The Directive must be applied in a gender-neutral manner, in accordance with the non-discrimination principle enshrined in Article 21 of the Charter. This is supported by the *Coman* case⁸, in which the CJEU confirmed that the term 'spouse' within the meaning of EU free movement law is gender-neutral and therefore does not differentiate between same-sex and different-sex couples. To facilitate free movement, Regulation (EU) 2016/1191 was adopted, abolishing the authentication formalities when presenting certain public documents in another Member State, such as a marriage or registered partnership certificate. The Regulation does not, however, oblige Member States to recognise the effects of such documents.

Moreover, in accordance with Article 81 TFEU, the Union has taken measures which aim to ensure the recognition in one Member State of judgments delivered in another Member State on family law matters such as divorce, parental responsibility – including custody and visiting rights for children – maintenance for ex-spouses or children, the property regimes of marriages and registered partnerships and inheritance matters. All these measures are gender-neutral.

In line with the List of actions to advance LGBTI equality and the annual reports on its implementation⁹, the European Commission is monitoring the application of the *Coman* judgment by Member States, and is mapping studies of the difficulties experienced by LGBTI families crossing borders in the EU.

⁵ https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf

⁶ [https://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-156265"\]}](https://hudoc.echr.coe.int/eng#{)

⁷ COM(2008) 426 final.

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9883932>

⁹ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/list-actions-advance-lgbti-equality_en

Questions for the workshop

- LGBTI families continue to face hurdles when moving between Member States, for instance when moving from a Member State with strong legal recognition of same-sex relationship to a Member State without such recognition.
 - What are the main issues experienced by same-sex female couples and their families in cross-border situations?
 - What are the main issues experienced by same-sex male couples and their families in cross-border situations?
 - What are the main issues encountered by transgender and intersex people crossing borders?
- What issues still exist for LGBTI people and their families who move between Member States that provide strong forms of legal recognition?
- What research is needed to gain more insights into all the above issues?
- What actions should be considered by all relevant actors, including the European Commission, the Member States, the European Parliament and civil society, to resolve these issues?