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LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES

AND THE FREE
MOVEMENT DIRECTIVE

IMPLEMENTATION
GUIDELINES

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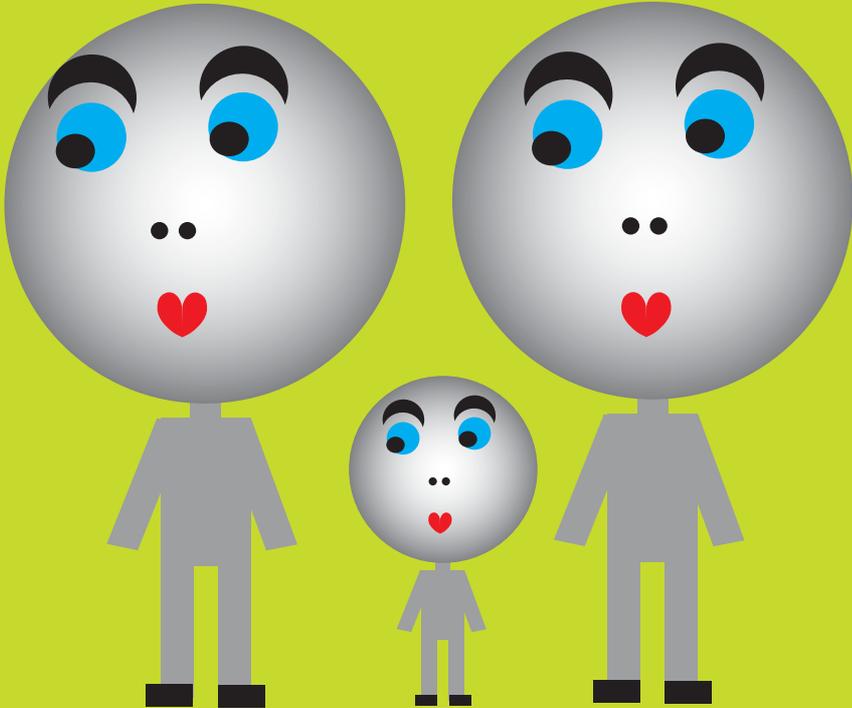
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LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES AND THE FREE MOVEMENT DIRECTIVE - IMPLEMENTATION GUIDELINES



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1. Introduction

In 2004, the European Union adopted a new Directive on the right to free movement.¹ This Directive sets out the rules applying to EU citizens and their family members who wish to move to another Member State. This can be for various purposes: to take up a new job, to undertake studies or even for retirement. It is particularly important for lesbian, gay, bisexual and transgender (LGBT) families who want to exercise their right to free movement.

The Directive entered into force on 30 April 2006. All 25 Member States, plus Bulgaria and Romania which joined the Union in 2007, should have taken steps to ensure that domestic immigration laws comply with the Directive. These guidelines provide an introduction to the Directive, an explanation of those provisions most relevant to LGBT families, an overview of the transposition process, and an analysis of the impact of the Directive when applied to LGBT families. They are designed to assist organisations in monitoring national law in order to ensure that LGBT families enjoy the fullest protection in accordance with the Directive.

¹Directive 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, [2004] OJ L229/35. N.B. The full text is available at: http://extranjeros.mtas.es/NormativaJurisprudencia/UnionEuropea/Directivas/documentos/Directiva_2004-38_libre_circulacion_ingles.pdf

2. Background to the Directive and subsequent developments

EU law originally limited the right to free movement to those moving for the purposes of work or self-employment. In the early 1990s, free movement rights were extended to other categories: students, retired persons and economically self-sufficient persons. Since then, the Court of Justice has emphasized that free movement is a fundamental right of EU citizens, regardless of the reason why an individual decides to live in another Member State. Consequently, in 2001, the European Commission proposed replacing the various laws covering workers, students, etc with a single Directive on the free movement rights of all EU citizens.

The Directive took more than two years to negotiate and a central issue was the definition of the ‘family’ of an EU citizen. The original rules on the free movement of workers primarily limited this to the worker’s ‘spouse’ and their children.² In *Reed v Netherlands*³, the unmarried opposite-sex partner of a British man working in the Netherlands argued that she was entitled to a residence permit because she should be treated as his ‘spouse’. The Court of Justice rejected this argument, finding that spouse only covered married partners. ILGA-Europe, together with national LGBT organisations, campaigned vigorously for an inclusive definition of family within the new EU Citizens Directive. Although this received strong support in the European Parliament, the final text of the Directive is a compromise with the Member States, some of whom resisted the inclusion of same-sex and unmarried couples.

² Art. 10(1), Regulation 1612/68 on freedom of movement for workers within the Community, [1968] OJ Special Edition (II) L257/475.

³ Case 59/85 [1986] ECR 1283.

⁴ See the Commission document COM(2008) 373 final, 12. The list of countries was not published.

⁵ COM(2008) 85 final, Fifth Report on Citizenship of the Union (1 May 2004 – 30 June 2007).

As already mentioned, the deadline for transposition was 30 April 2006. In a report of 2 July 2008, the Commission claims that a number of Member States have not communicated the full transposition of the Directive or have transposed it wrongly. As a result, some of them are facing or will face proceeding before the Court of Justice.⁴ The Commission has informed that between June 2006 and February 2007, 19 procedures were opened for lack of communication of national implementing measures (4 of which were referred to the Court of Justice), and around 80 procedures for wrong transposition were ongoing.⁵

The European Parliament (EP), in a Resolution of 15 November 2007 urging the Commission to submit a detailed assessment of the steps taken by Member States to implement Directive 2004/38/EC and of the correctness of its transposition, instructed its appropriate committee to complete an assessment by 1 June 2008 of the problems entailed in transposition of the Directive, highlighting best practices and those measures that might lead to forms of discrimination among European citizens.⁶ Furthermore, the Committee on Civil Liberties, Justice and Home Affairs drafted a questionnaire to be sent to national Parliaments, to Ministries of Interior, and to Immigration national offices.⁷ The Commission has issued its Report on the EU Citizens Directive on 10 December 2008, where it concludes that “the overall transposition of the Directive is rather disappointing”⁸. The European Parliament, pending the specific inquiries of both the LIBE and JURI Committees, addressed the issue of free movement and same-sex couples in its Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008.⁹ This resolution places great emphasis on the need to guarantee that same-sex couples can exercise the right of free movement “under conditions equal to those applicable to heterosexual couples” (para. 75), eventually by developing the principle of mutual recognition in the field of civil status.

The Petitions Committee of the European Parliament, in response to an enquiry made by an EU citizen, addressed the issue of free movement rights of ‘gay couples’ under the Directive. In its answer to the petition, the Committee stated that:

‘during the negotiations for this directive, the extension of the right of family reunification to same-sex spouses and partners (whether registered or not), under the law of the Member State of origin, was discussed at length, in particular at first reading in the European Parliament, and the current text reflects a hard-won compromise, achieved after two years of negotiations.’¹⁰

Finally, the Resolution of the European Parliament of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU was concerned solely with the transposition of the 2000 equal treatment directives and did not draw any explicit parallel (concerning non-discrimination) between the social policy and the free movement field.¹¹

⁶ European Parliament resolution of 15 November 2007 on application of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, P6_TA(2007)0534.

⁷ See working documents of the Committee on Civil Liberties, Justice and Home Affairs no. DT\729174 of 13 June 2008 and DT\730630 of 23 June 2008.

⁸ See press release IP/08/1922 of 10 December 2008. The report is published as COM(2008) 840/3.

⁹ Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)), P6_TA-PROV(2009)0019.

¹⁰ Response of 3 July 2006 to petition no. 0724/2005 http://www.europarl.europa.eu/meetdocs/2004_2009/documents/cm/623/623407/623407en.pdf

¹¹ European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC) (2007/2202(INI)), P6_TA(2008)0212.

3. The main contents of the Directive

Although not all parts of the Directive have a special relevance to LGBT persons, it is useful to have an overview of its contents. The Directive sets out the conditions under which *EU citizens* can move to another Member State and take up residence there. An EU citizen is any person holding nationality of a Member State. This Directive does not cover families where no-one is an EU citizen. For example, it would not apply to a Brazilian woman working in France who wished to be joined there by her same-sex partner, also of Brazilian nationality. The rules governing family reunification of third country nationals (non-EU nationals) are found in a different Directive.¹² The EU Citizens Directive does, however, apply to situations where one member of the family possesses nationality of an EU Member State. For example, a Swedish man who wanted to be joined in the UK by his same-sex Chinese partner would be able to rely on the rules in the EU Citizens Directive. It should be noted that under transitional arrangements some movement restrictions continue to apply to nationals of the EU States that joined on 1 May 2004 and on 1 January 2007.¹³

EU citizens and their family members can move within the Union for 3 months without any formalities, other than needing to produce identity documents. EU citizens can stay for longer than 3 months in order to work or study, or if they have sufficient resources to support themselves and their family members. After 5 years, EU citizens and their family members acquire the right of permanent residence in the Member State. EU citizens and their family members can only be expelled from the Member State in narrow circumstances where there are serious reasons relating to public policy or public security.¹⁴

EU citizens and their family members who moved to an EU Member State enjoy the right to equal treatment with respect to nationals of that Member States in matters falling within the scope of the Treaty.

The most important provisions for LGBT families are Articles 2 and 3, which define the 'members

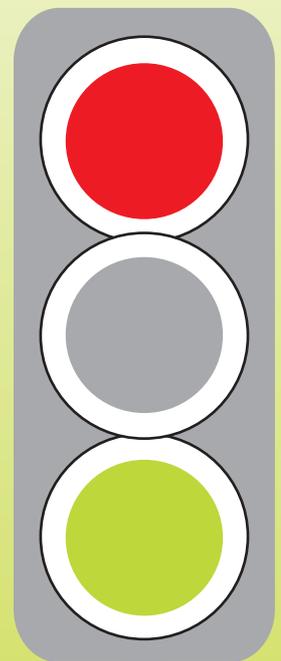
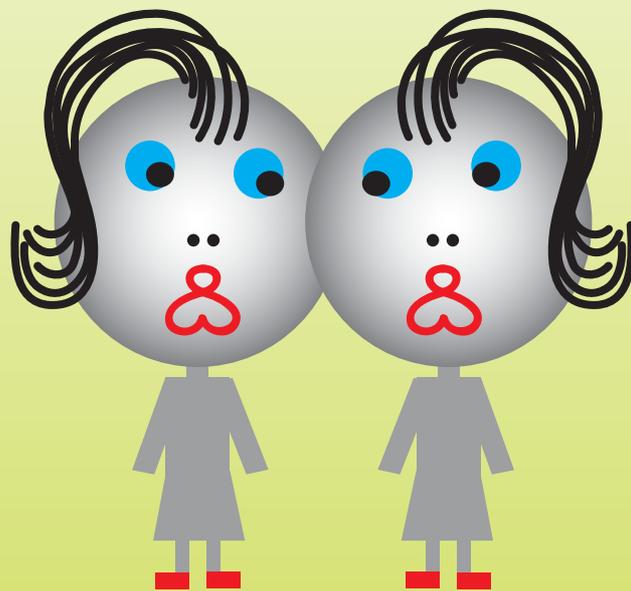
¹² Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12. Full text available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>

¹³ For the latest update on transitional arrangements see Commission **Memo/08/718 of 18 November 2008, online at <http://www.lex.unict.it/eurolabor/documentazione/comunicati/2008/rapid181108.pdf>**

¹⁴ Some Member States required the family member of an EU citizen, who is a national of a third country, to have been legally resident in the Member States from which he or she is arriving. However, the European Court of Justice has ruled that Directive 2004/38/EC precludes legislation by an EU Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State (see case C-127/08, *Metock and others v. Minister for Justice, Equality and Law Reform*, Judgment of 25/07/2008, not yet reported.

of the family' entitled to accompany an EU citizen to another Member State. These shall be considered in detail in the next sections.

Why is this definition important and problematic at the same time? The Directive provides for both entry and residence rights, and the right to equal treatment with respect to nationals of the Member State. Several real-life cases provide some useful examples of the importance of both situations for LGBT couples and families.



4. Entry and Residence Rights

As far as entry and residence rights are concerned, several informal petitions around Europe highlighted the following difficulties.

I am a Danish citizen and I live in Copenhagen with my American same-sex partner, with whom I contracted a registered partnership five years ago. I have been offered a job by a multinational firm based in Warsaw. I wonder if I will be able to relocate to Poland with my partner or if I will have to give up this job opportunity.

I am a Latvian citizen living in Latvia. I plan to marry my Uruguayan same-sex partner in Belgium, where he currently legally resides. For the time being, she lives in Brussels and I live in Riga, and we see each other every weekend. After the marriage ceremony, we plan to come to live together in Riga. I wonder if our marriage will be recognised by the Latvian authorities and if my partner of third country nationality will get a residence permit.

I am a Greek citizen and for some time I lived in Greece with my same-sex partner from Brazil. Since two years we share a house in Brazil, where we also registered our stable partnership. We would like to return to Greece and we were informed that we could have our partnership recognised by Spain. I wonder if Greece will be able to deny entry rights to my partner once our partnership has been already recognised by another EU country should this come true.

The following table, which appears in the 2008 EU Agency for Fundamental Rights (FRA) publication entitled *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, indicates clearly the obligations of Member States with regard to same-sex partners and their family.

MEMBER STATE OF ORIGIN ...

	...allows same sex marriage	... provides registered partnership	... provides no status for same sex couples
...allows same sex marriage	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as giving rise to family reunification rights	Host MS examines if a 'durable' relationship duly attested' obliges it to 'facilitate entry and residence' of the partner
... provides registered partnership or other institution equivalent to marriage	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as giving rise to family reunification rights	Host MS examines if 'durable relationship duly attested' obliging it to 'facilitate entry and residence' of the partner
... provides no status for same sex couples	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as 'durable relationship duly attested' and therefore must 'facilitate entry and residence' of the partner	Host MS examines if 'durable relationship duly attested' obliging it to 'facilitate entry and residence' of the partner

HOST MEMBER STATE...

Table 1: Obligation of host Member State under the Free Movement Directive¹⁵

¹⁵ EU Agency for Fundamental Rights, Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis, 2008, p.62, online at http://fra.europa.eu/fra-Website/products/publications_reports/comparative_reports/pub_cr_homophobia_0608_en.htm

5. Equal Treatment with the Nationals of the host Member State

Apart from entry and residence rights, the Directive also stipulates that all Union citizens and their family members residing on the basis of the Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State 'within the scope of the Treaty' (article 24). The following questions provide some clear examples as to the importance of this provision.

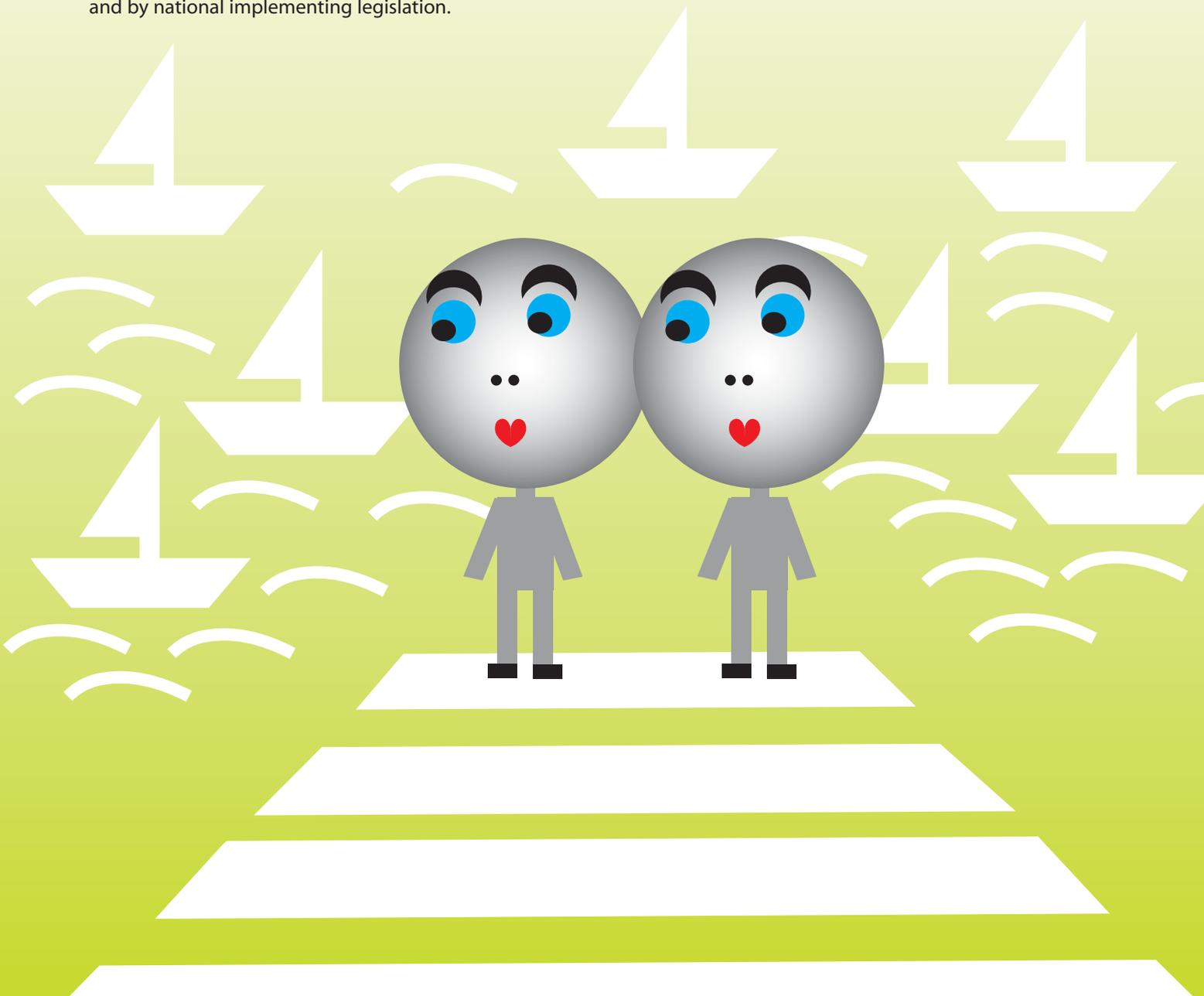
We are a bi-national same-sex couple: Christian is German and Marco is Italian. We live together in Verona. We have registered our partnership in Hamburg. We would like to know how German law will be able to protect us now that we live in Italy, for instance in such fields as: civil status, choice of surname, social security, succession, decisions in case of sickness or death of one of us.

We are two UK citizens who contracted a civil partnership in the UK. We live in the UK but bought a holiday house in France. Our British civil partnership is not recognised in France, therefore we have no legal rights as a couple over in France. Couples in a PACS in France have 0% inheritance tax whilst we are still subject to 60% inheritance tax on all our worldwide assets, not only our French assets. Obviously this would be a huge bill for us and would mean that we would have to sell our home to pay the tax bill. We thought the solution would be to do a French PACS but we were refused from doing this because we were already in a civil partnership in the UK, thus we were not single in our own country. French same-sex couples living in the UK have been able to benefit from the UK tax and legal systems and are treated in exactly the same way as British married or civil partners are in the UK. French PACSed couples have no difficulty in leaving their estate to their partners and paying 0% inheritance tax in the UK.

I am a Dutch citizen and I live in the Netherlands with my Dutch same-sex spouse and our children. We plan to spend our holidays in Cyprus next summer, but we are worried that should some accident happen to us or our children, Cyprus will not recognise both of us as their legal parents, for instance in case some medical decision is needed.

All of these cases, notwithstanding their great diversity, testify to the ongoing difficulties and burdens that same-sex couples face when moving around Europe with their partner. At first glance, while entry and residence rights are the most immediate concern for couples where one partner is a third country national, the right to equal treatment is the central preoccupation for couples where both partners are EU citizens. This is because each EU citizen enjoys a self-standing right to free movement within the EU. However, entry as an individual, and not as a family member, could pose problems in terms of equal treatment when the same-sex partner (and/or children) will not be considered as a family member by the host Member State.

The next sections illustrate what are the answers provided by the Directive as it currently stands, and by national implementing legislation.



6. Implementation of the directive in national law: the position of married partners

When the EU Citizens Directive was under discussion, ILGA-Europe pressed for a clear indication that same-sex married partners were included. However, the final text of the Directive does not clearly resolve the issue of same-sex married couples. On one hand, Article 2(2) simply states: “‘family member’ means ... the spouse’. On the other hand, the preamble of the Directive includes the following statement: ‘Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as... sexual orientation.’¹⁶ Although the preamble is not legally binding, it will be used by the Court of Justice to guide interpretation of the Directive. To date, no case has reached the Court on this particular point.

Arguably, the reference to ‘spouse’ cannot be restricted to opposite-sex spouses, because this would discriminate on grounds of sexual orientation. Marriage is a status granted by national law; therefore, the EU should not distinguish between legally contracted marriages within the Member States. This is particularly relevant for same-sex couples who got married in one of the three Member States which provide marriage equality, i.e. the Netherlands, Belgium and Spain.¹⁷

¹⁶ Recital 31

¹⁷ The following countries have instituted marriage equality: the Netherlands, Belgium, Spain, Canada, South Africa, Norway (not yet in force), and some states of the United States of America

Earlier judgments from the Court of Justice raise some doubts as to the viability of this argument. In *D and Sweden v Council*,¹⁸ the Court stated: ‘according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex’. However, this decision was based on facts from a period in which no State had instituted marriage equality legislation. The legal situation has since changed and this may encourage the Court to adopt a different approach when interpreting the EU Citizens Directive.

¹⁸ Case C-122/99P and 125/99P *D and Sweden v. Council* [2001] ECR I-4319, para. 34.

With respect to the Directive, Member States have taken different positions. According to a recent report of the Fundamental Rights Agency,¹⁹ at least 12 Member States would (certainly or probably) recognise entry and residence rights to the same-sex married spouse of an EU citizen.

¹⁹ See footnote 13 above

These are: Belgium, Spain, and the Netherlands (which already instituted marriage equality), the Czech Republic, Denmark, Germany, France, Luxembourg, Romania, Finland, Sweden and the United Kingdom.

On a less positive note, at least 11 other Member States are likely to attach no legal significance to marriages of same-sex partners contracted elsewhere in the Union, therefore granting no entry and residence right to the married spouse of an EU citizen. These are: Estonia, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovenia, and Slovakia. As reported, the situation is unclear in 4 Member States: Austria, Bulgaria, Cyprus, and Hungary.

Ultimately, the national courts and the European Court of Justice will play an important role in determining whether same-sex married partners are included under the definition of spouse. As far as the European Court is concerned, it appears that the benchmark hypothetically able to tilt the balance in favour of an EU-wide recognition of same-sex married spouses will be the right to non-discrimination now entrenched in the EU Charter of Fundamental Rights (article 21).

Guideline:

- *National legislation which excludes same-sex married couples from the right to enter and reside should be considered inconsistent with the Directive read in accordance with Recital 31 and art. 21 of the EU Charter of Fundamental Rights, because it generates direct discrimination on grounds of sexual orientation.*



7. Implementation of the directive in national law: the position of registered partners

The Directive recognises a limited right to free movement for registered partners. Article 2(2)(b) extends the definition of ‘family member’ to include:

‘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 national legislation of the host Member State’.

In other words, registered partners can enjoy their right to free movement subject to the ‘State of destination’ and the ‘equivalence’ principles. This means that a host Member State is required to grant entry and residence rights to the registered partner of an EU citizen only if:

- (1) They formed their registered partnership in a Member State of the EU;**
- (2) The country to which they want to move (State of destination) already foresees a ‘registered partnership’ scheme, and**
- (3) The scheme adopted in the State of destination treats registered partnerships ‘as equivalent’ to marriage.**

With regard to the first issue, the obvious question that arises is what constitutes a registered partnership? This is important because national laws on same-sex partnerships vary considerably. Registered partnership laws in Denmark, the Netherlands, Sweden, Finland and the UK provide a legal status which is very similar to that of marriage. There are also laws in Germany, France and Luxembourg that provide many of the rights of marriage, but which also contain important legal differences between partnership and marriage²⁰. In other countries, such as Slovenia or Portugal, same-sex couples’ legal status is recognised, but with very limited rights compared to marriage. It is difficult to predict how the court will approach this issue. The Directive could be read as indicating that registered partnership is a status ‘equivalent’ to marriage in some cases. However, where a partnership does not fall within the Directive’s concept of ‘registered partnership’, it is very

²⁰ In Hungary, on 15 December 2008 the Constitutional Court struck down the 2007 Act on registered partnership, expected to come into force as of 1st January 2009, holding that making available to different sex couples the possibility to enter into an alternative legally recognised scheme duplicates the institution of marriage, thus undermines its supremacy entrenched in the Constitution. The Court did not question the right of same sex couples to legal recognition and protection.

likely that the rules on unmarried partners will apply (duty to 'facilitate' entry, see below). The European Parliament Petitions Committee considered that 'in practice, EU citizens who are married or in a partnership with a national of a third country, may rely on this facilitation requirement, subject to the application of the principle of non-discrimination'.²¹

The second question is to which countries are registered partners entitled to move? This depends on which countries will decide that their internal regulation on registered partnerships is equivalent to marriage. After the European Court's decision in *Maruko*,²² it is unlikely that the Court will impose its own views as to when a Member State is treating registered partnerships 'as equivalent to marriage'. Given the variations in national law discussed above, this reluctance of the Court is likely to favour even more fragmentation across the EU, with Member States being able to assess, relatively free of common criteria, if and when their registered partnership law is 'equivalent to marriage'. It is, thus, desirable that the Court be soon given the chance to clarify the exact meaning of art. 2(2)(b) of the Directive.

According to the FRA's 2008 Report, 7 Member States have established a form of registered partnership which should be considered equivalent to marriage: the Czech Republic, Denmark, Finland, Romania,²³ Sweden, the UK, and Hungary. If Belgium, the Netherlands and Spain are added to these, a total of 10 Member States should be required by the Directive to allow entry and residence to the same-sex registered partner of a EU citizen. Their laws implementing the directive must treat the registered partner as a family member entitled to automatic admission.

Four other Member States, namely Germany, France, Luxembourg and Slovenia have established weaker forms of registrations or contracts, and are therefore not required by the Directive to grant automatic rights of entry and residence.

The remaining 13 Member States provide no legal scheme for same-sex partners in their own legal system, therefore the question of 'equivalence' with marriage does not arise. The consequence is that Bulgaria, Estonia, Greece, Ireland, Italy, Cyprus, Latvia, Lithuania, Malta, Austria, Poland, Portugal and Slovakia are not required by the Directive to grant automatic entry and residence rights to the registered partner of a EU citizen wishing to move into their territory, but only to 'facilitate' admission.

²¹ Response of 3 July 2006 to petition no. 0724/2005, cit., p. 4.

²² Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, not yet reported.

²³ Romania does not foresee registered partnership in its domestic law, but it acknowledged the existence of such schemes in its law relating to freedom of movement and of residence of EU citizens.

The information provided by the European Commission is slightly different. According to the answer of the Commission to the written question of a Member of the European Parliament of 4 June 2007:

‘the Czech Republic, Denmark, Estonia, Finland, Lithuania, the Netherlands, Portugal, Spain, Sweden and the United Kingdom have informed the Commission that they recognise registered partnerships as equivalent to marriage for the purposes of free movement under the directive. Belgium and Luxembourg have not yet transposed the directive but national law of the former provides for same-sex marriages and that of the latter for registered partnerships. No information is available at the moment for Bulgaria and Romania. The remaining Member States do not recognise registered partnerships as equivalent to marriage for the purposes of free movement under the directive.’²⁴

The recent Commission report of December 2008 claims that “same-sex couples enjoy full rights of free movement and residence in thirteen Member States which consider registered partners as family members”.²⁵



Guideline:

- **Where national law already includes registered partnership, national legislation must extend the right to enter and reside to individuals who formed a registered partnership in other EU Member States. The issue of ‘equivalence’ with marriage is likely to decide the outcome of a case and should be closely monitored, in the absence of common EU-wide standards.**
- **In countries where registered partnership is under discussion, draft national legislation should include appropriate measures to amend immigration legislation to extend the right to enter and reside to individuals who formed a registered partnership in other EU Member States.**

²⁴ Answer given by Mr Frattini on behalf of the Commission, 16 July 2007.

²⁵ According to COM(2008) 840/3, 4, these States are Belgium, Bulgaria, Czech Republic, Denmark, Finland, Italy, Lithuania, Luxemburg, Portugal, Netherlands, Spain, Sweden and the UK.

8. Implementation of the directive in national law: the position of unmarried partners

The rules applying to unmarried partners are highly relevant to LGBT families. They will cover the following situations:

- **Where a same-sex couple have formed a registered partnership, but wish to move to another State which does not have registered partnership provisions in its domestic law (e.g. a Finnish couple in a registered partnership moving to Lithuania);**
- **Where a same-sex couple enjoy a legally-recognised status in their home state, but this does not confer sufficient rights to be treated as a 'registered partnership' under the Directive (e.g. a Portuguese couple in a de facto union moving to Estonia);**
- **Where a couple are neither married, nor registered, but wish to move to any other State in the EU (e.g. an Austrian unmarried couple moving to Malta).**

The Directive does not confer an absolute right for people in the above situations to bring their partners when exercising free movement rights. Article 3(2) states:

'... the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: [...]

... the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

There are three main elements to this provision. First, the State has a duty to *facilitate* the entry and residence of unmarried partners. This implies that States cannot have a total ban on the admission of unmarried partners. Secondly, this duty applies in respect of partners with a 'durable' and 'attested' relationship. Partners will need to demonstrate that their relationship has existed for some time. For example, a couple that has been living together for several years and has shared family responsibilities (e.g. children) would appear to satisfy this test. Alternatively, a couple might

not be living together, but they could supply other evidence (such as letters, photos, etc.) to demonstrate that they have a durable relationship. Finally, the State receiving the couple's application is obliged to undertake an 'extensive examination' and to provide justification for any refusal. Consequently, States must have a mechanism in domestic law that allows unmarried partners to request admission. In order to ensure consistency and fairness, States should identify which criteria they will take into account when exercising their discretion on such applications. The Directive requires clear reasons explaining a refusal.

According to the FRA's 2008 Report, the implementing legislation of Estonia and Poland might be incompatible with the Directive because it does not make any reference to the possibility for cohabiting partners 'to have their case examined'. Furthermore, Luxembourg and Portugal require the cohabiting couple to submit a certificate from the authorities of the State of origin, a circumstance which might create an insurmountable burden. Some other Member States impose a certain duration requirement (one year in Hungary, two years in Finland), but it is unclear whether this is acceptable under the Directive. What is rather clear is that 'the criteria relied upon by the administration may be arbitrarily applied and lead to discrimination against same-sex partners.'²⁶

²⁶ EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, 2008, p. 67.

As mentioned earlier, Recital 31 of the preamble prohibits sexual orientation discrimination in the implementation of the Directive. In relation to unmarried partners, this means that a State could not have a policy of preferring to admit unmarried opposite-sex partners, whilst excluding unmarried same-sex partners.



Guideline:

- **National legislation must provide a mechanism through which unmarried partners can request admission. National legislation must also include provisions to ensure that any refusal of entry or residence is duly justified.**
- **States should have defined transparent and non-discriminatory criteria: 1) to determine what evidence is required to demonstrate the existence of a 'durable relationship'; 2) to evaluate the basis on which states will make decisions to grant or deny admission to a country.**

9. Children and other family members

The Directive provides a right to be joined in another Member State by:

'the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner ...'²⁷

Although there is no definition in the Directive of 'descendant', it is reasonable to assume that this includes: children where there is a biological link with the parent; adopted children; and any other children for which the person is a legal guardian. However, the situation is less clear in relation to social parenting. For example, where a same-sex couple raise a child, the non-biological parent might not acquire legal recognition if this is not permitted by domestic family law.

In the context of the Directive, an individual will be entitled to be joined by his or her children where this is based on a legally-recognised parental relationship. Difficulties may arise where the children only have a legally-recognised relationship to the person's partner. As discussed above, registered partners are only partially included within the right to free movement. Where registered partners are not covered, or where the partners are unmarried and unregistered, then the partner's children will have to seek admission on the basis of Article 3(2):

'... the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, ... who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen.'

As mentioned previously in the case of unmarried partners, Article 3(2) does not recognise a right to enter and reside for "other family members", but it does include a duty for Member States to facilitate entry and residence. The Member State is likewise required to undertake an extensive examination of such requests for admission and to justify any refusal.

For example, consider the case of a Slovak woman seeking to move to Ireland together with her

²⁷ Art. 2(2)(c).

Russian same-sex partner and their daughter. Even if the daughter only has a legally-recognised relationship with her Russian mother, Ireland would still be under an obligation to facilitate her admission as a member of the household of her Slovak mother. In this regard, it is important to note that the preamble of the Directive makes reference to respect for the EU Charter of Fundamental Rights which includes the following principle: 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'²⁸

The duty to facilitate entry and residence will also apply in relation to any other family members who are dependent upon or were members of the household of the person moving to another Member State.



Guideline:

- *Based on the duty to facilitate admission, national legislation must provide a mechanism through which requests for the admission of children (and other family members) will be considered.*
- *Where there is a legally-recognised relationship between the child and the EU citizen, Member States must grant admission.*
- *The consideration of requests for admission should be based on transparent, non-discriminatory criteria.*
- *National legislation should be based on the principle of the best interests of the child.*

²⁸ Art. 24(2). Full text available at:

http://www.europarl.eu.int/charter/pdf/text_en.pdf

10. Transgender persons and their families

The discussion above has mostly focused on the situation of same-sex couples and their families. What are the implications of the Directive for transgender persons and their family members? Following the decision of the European Court of Human Rights in *Goodwin v UK*²⁹ there should not be legal restrictions in the Member States on transgender persons marrying a person of the opposite-sex. The judgment also implies that there are no grounds for other EU States to refuse to recognize such marriages. There are, however, situations where transgender persons cannot marry their partners. This is clearly the case for transgender persons with a gay or lesbian sexual orientation. Another situation is where gender identity is not yet fully recognized within national law. For example, some States make gender recognition conditional on undergoing gender reassignment surgery. Where transgender persons consequently find themselves within unmarried partnerships, then the rules on unmarried partners will apply (as described above).

²⁹ Application No 28957/95, 11 July 2002

11. Equal treatment within the host State

As seen, where all family members are EU citizens, the obstacles to movement are reduced in practice. Even if the couple's partnership is not recognised, they both possess autonomous rights to enter and reside in any other EU State. The principal barriers to entry and residence are likely to be experienced by multinational families, where at least one family member holds nationality of a non-EU State.

Nevertheless, problems can still be encountered after entry and residence is granted. For example, two married men from Spain decide to move to Greece. They both find jobs there and exercise their *individual* rights to free movement. Having established themselves in Greece, what is the status of their marriage? If they find, for instance, that married couples receive preferential taxation treatment to unmarried couples, can they insist that Greece treats them as married? These are complex legal questions that partially depend on national rules about the recognition of partnerships legally contracted in other countries.

The principle established by the Directive is *equal treatment* of EU citizens (and their family members) with nationals of the host State (Article 24 (1))³⁰. Therefore, it could be argued that benefits for married couples in domestic legislation should be extended to all married couples from other EU States within the scope of the Treaty. An important application of this equal treatment principle is in relation to immigration rights. Domestic law might go further than the requirements of the Directive. For example, it might permit domestic nationals to be joined in the State by an unmarried partner of different nationality. If such rights are extended to domestic nationals, then they must also be available on the same basis to EU citizens.

³⁰ Article 24 (1): "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."



Guideline:

- ***The principle of equal treatment of EU citizens and their family members in relation to nationals of the State should be included in national legislation.***

12. Strategic litigation and further progress through legislation

What if there are doubts as to the conformity of national legislation implementing the Directive? What if the Directive's provisions themselves appear to address only insufficiently the needs of LGBT families?

As far as the possibility of bringing judicial proceedings is concerned, in theory there seem to be at least two possible avenues for action. The first one is directed towards Member States and aims at ensuring that their national implementing legislation fully complies with the requirements of the Directive. In this respect, it is important to challenge in court:

- **National definitions or practices of Member States which do not recognise as a 'spouse' the spouse of the same-sex of the EU citizen exercising his or her rights under the Directive. This is likely to constitute direct discrimination on grounds of sexual orientation forbidden by art. 21 of the EU Charter and by the general principle of non-discrimination.**
- **National definitions or practices of Member States which, while providing for registered partnership in their own legal system, do not grant entry, residence, and equal treatment rights to the registered partner of an EU citizen. Some Member States may be inclined to rely on the argument of 'lack of equivalence' with marriage.**
- **National definitions or practices which do not provide adequate procedures in the implementation of the duty to facilitate entry and residence of the unmarried de facto partner with whom the Union citizen has a durable relationship.**
- **National definitions or practices which do not allow entry and residence to the child of an EU citizen, where there is a legally-recognised relationship between the two.**
- **National definitions or practices which do not provide a mechanism to facilitate admission of children (and other family members) even in the absence of a legally-recognised relationship.**

Monitoring closely national legislation according to these guidelines will at least ensure that it adheres to the minimum requirements of the directive.

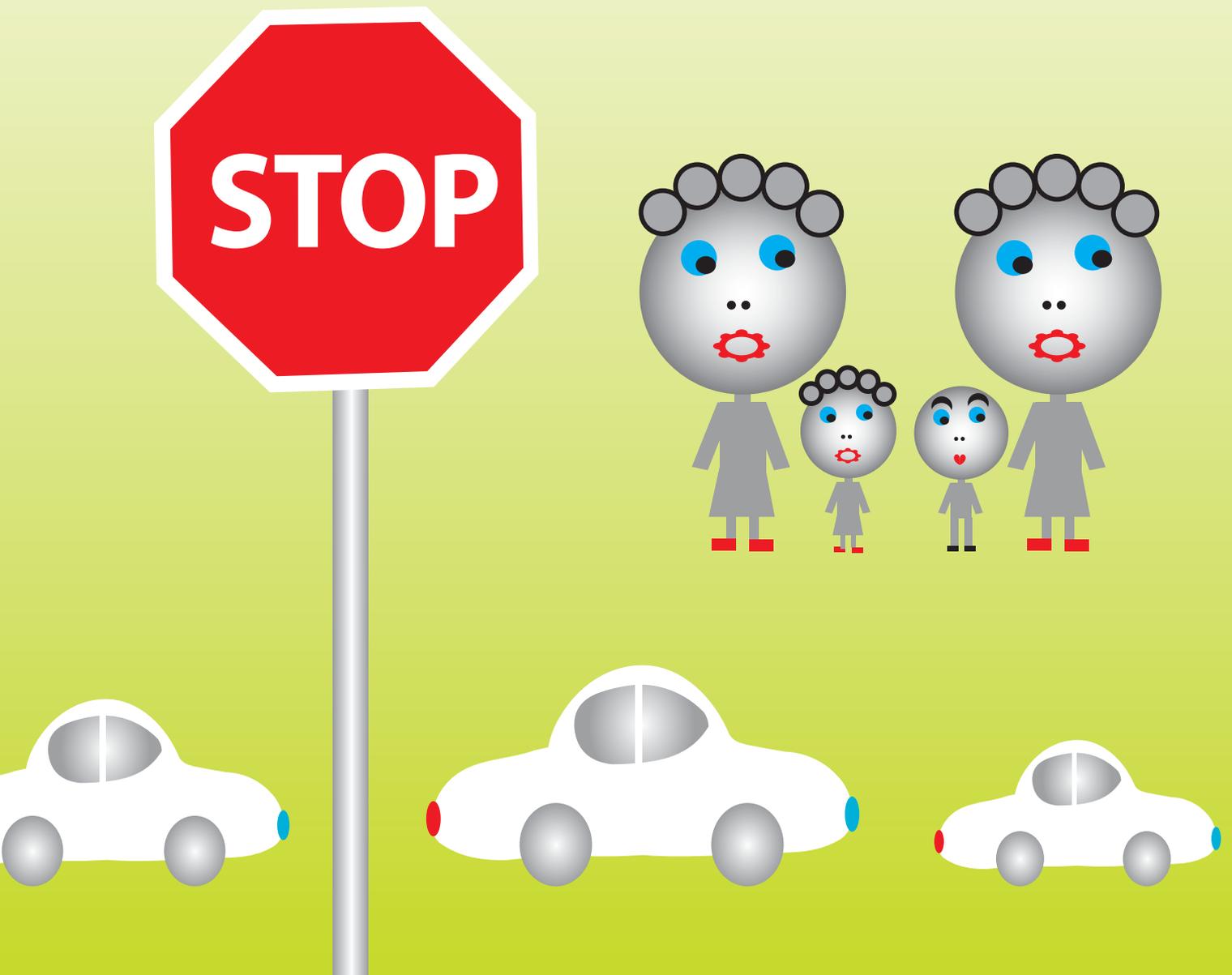
On a rather different note, it is also important to continue a reflection on whether the requirements of the Directive are compatible with 'higher' EU and international law. From this perspective, the basic claim would consist in challenging the 'constitutionality' of the definitions adopted in the Directive by arguing that they conflict with the right to non-discrimination on grounds of sexual orientation, which is a general principle of EC law and is codified in art. 21 of the EU Charter of Fundamental Rights.

The specific approach which would need to be challenged is the 'State of destination' principle. This poses undue obstacles to free movement and subjects same-sex couples to a 'double regulation' requirement: an LGBT family would have to comply with marriage or partnership laws of two Member States, the State of origin and the State of destination to which they are moving to. This situation, albeit acceptable under the directive, could be deemed to be incompatible with EC principles established in the area of free movement of persons, goods and services.

A more favourable approach would be that based on the principle of the 'State of origin'. The European Parliament, during the adoption process, has tried to persuade the Council that the 'State of origin' principle would work better. This principle entails that once a couple or family is established according, say, to the law of England, and this family wishes to move to Bulgaria, then Bulgaria will be required to accept the family situation as it results from English law. It will not be allowed to re-examine the matter and to, say, attach additional conditions.

The 'State of origin' principle, thus, would be more consistent with established EC law in other domains, and would ensure the 'portability' of one's own civil status in any EU Member State. Although it would be likely to cause reverse discrimination on grounds of nationality (for instance, the English family cited above will be treated more favourably than Bulgarian LGBT families living in Bulgaria), this approach is to be preferred because Member States remain free to provide more rights to their own citizens, in order to equate them with the entitlements deriving from EU law to non-nationals.

It is difficult to predict how the Court of Justice would respond if it were asked to review the definitions of the directive in light of 'higher' EU law. It is fair to anticipate that the possibility that the Court will strike down the provisions of the directive appears to be a very narrow one, especially in light of the long negotiations which led to the compromise accepted in the directive. Thus, support to any preparatory action to an eventual legislative amendment should be secured, at least alongside a tentative strategy based on litigation, for instance by requesting an EU-wide study on the mutual recognition of civil status.





IMPLEMENTATION PROCESS - THE NEXT STEPS

By 30 April 2006, Member States had to ensure that their domestic legislation complied with the Free Movement Directive. To assist organisations in monitoring implementation of and full compliance of national legislation with the Directive, you will find below a compliance checklist and a list of steps that may be taken if national legislation does not meet the minimum requirements of the Directive.

1/ Does the national legislation comply with the Directive?

- Using these guidelines, national legislation or proposed national legislation should be checked for compliance. Administrative practices should also be reviewed to ensure that they do not contravene the provisions of the Directive.

COMPLIANCE CHECKLIST - National legislation should by now:

- NOT exclude same-sex married couples
- Include registered partners, where national law permits registered partnership. (Close monitoring of the 'equivalence' requirement is needed).
- Include a procedure for unmarried partners and their families to request the right to enter and reside in the State, and provisions to ensure that refusal of admission is justified
- Include children who have a legally-recognised relationship with an EU citizen
- Ensure that the Directive is implemented without discrimination on grounds of sexual orientation
- Ensure that decisions relating to the admission of children are based on the best interests' principle and without discrimination

2/ What if national legislation does not meet this checklist?

- Identify strategies to initiate a change in national legislation where it is necessary (e.g. lobby parliamentarians, rally support from other NGOs and other civil society organisations, launch a public-awareness campaign, etc.)
- Publicise any individual cases where families are negatively affected by the non-compliance and seek legal advice on possible remedies with reference to the Directive.
- Bring non-compliance to the attention of the Ministry responsible for immigration.
- Make specific reference to the Directive in any document, public statement and letters to government and elected officials you send regarding the issue of freedom of movement.
- Raise the issue with other NGOs working on immigration law issues.
- Bring your concerns to the attention of the Commission (The relevant office is Unit D2 'Citizenship', Directorate D 'Fundamental Rights and Citizenship', DG Justice, Freedom and Security, European Commission.)

Director of Directorate D: Francisco Fonseca Morillo

(Francisco.fonseca-morillo@ec.europa.eu)

Director of Unit D2 (acting): Ernesto Bianchi (Ernesto.bianchi@ec.europa.eu)

- Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions.

Further information is available:

ILGA-Europe – an overview of partnership laws in Europe:
www.ilga-europe.org/Europe/Issues/LGBT-Families

Directorate-General for Justice and Home Affairs – overview of the free movement laws:
http://europa.eu.int/comm/justice_home/fsj/citizenship/movement/fsj_citizenship_movement_en.htm

'Your Europe – Citizens' – practical guidance on exercising free movement rights:
<http://europa.eu.int/youreurope/nav/en/citizens/home.html>

