

Obstacles to the Free Movement of Rainbow Families in the EU¹

ABSTRACT

The study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, examines: (i) the obstacles that rainbow families (same-sex couples, with or without children) face when they attempt to exercise their free movement rights within the EU, including examples in petitions presented to the PETI committee; (ii) how EU Member States treat same-sex married couples, registered partners, unregistered partners, and their children in cross-border situations; and (iii) action that EU institutions could take to remove these obstacles.

Findings

The study - authored by Alina Tryfonidou, Professor of Law, University of Reading (UK), and Robert Wintemute, Professor of Human Rights Law, King's College London (UK) - examines the **obstacles that rainbow families** (same-sex couples, with or without children) face when they attempt to exercise their **free movement** rights within the EU, including examples from **petitions** presented to the Petitions Committee of the European Parliament. These obstacles consist of **failure in a minority of Member States to recognise same-sex couples** (whether married, registered, or unregistered) who have come to their territory from another Member State as couples, and to recognise that both members of the couple are the **legal parents of their child or children**, even when they have been recognised as such in the Member State from which they are moving, or from which they are returning. In many cases, when a border between EU Member States is crossed, **the couple ceases to be legally a couple, becoming instead two unrelated individuals, and their child or children go from having two legal parents to only one legal parent or (in a few cases involving surrogacy) no legal parents.** Apart from the emotional significance of the continued recognition of legal relationships when a couple or family moves between Member States, it is important from a practical and legal perspective as well, since it is only in this way that persons can have legal obligations towards each other and can claim rights arising from these obligations.

The authors found that the size of the non-recognising minority of Member States depends on the legal situation of the rainbow family, and the kind of recognition they are seeking. In theory, all Member States should accept that they **must grant a residence permit to the same-sex spouse of an EU citizen** coming from another Member State, but in practice, **this might not be the case**, even in Romania, to which the CJEU's 2018 *Coman & Hamilton* judgment² was addressed (and because the EU legal order has failed to enforce their

¹ Full study in English:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU\(2021\)671505_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf)

² Case C-673/16, *Coman & Hamilton* ECLI:EU:C:2018:385.



right to a residence permit, the couple have been obliged to take their case to the ECtHR.)³ Six Member States do not recognise a same-sex spouse from another Member State for purposes of national law other than a residence permit.⁴ Nine Member States might not recognise a same-sex **registered partner** in some situations.⁵ In some Member States, same-sex **unregistered partners**, who move to their territory from another Member State where they may have no access to marriage or registered partnership, receive very little recognition.

In eleven Member States, a child cannot have two women or two men as his or her legal parents - **same-sex couples are excluded from joint adoption or second-parent adoption**⁶ - and this means that they will **not recognise, also, the parent-child relationship** with respect to families coming to their territory from other Member States. The question of whether Bulgaria must recognise a Spanish birth certificate listing two women as the legal parents of a child is currently pending before the CJEU.⁷

The **study** examines "The Social Problem: Rainbow Families and the Obstacles They Face When Moving Within The EU" (Chapter 2) and analyses "The Relevant Legal Framework" (Chapter 3), while the following chapters examine the situation of on "Same-Sex Married Couples" (Chapter 4), "Same-Sex Registered Partners" (Chapter 5), "Same-Sex Unregistered Partners" (Chapter 6) and "Children of Same-Sex Couples" (Chapter 7). "A Selection of Real Cases Illustrating the Obstacles Faced by Rainbow Families" is provided (Annex 1), as well as the "Case Law of the CJEU [Court of Justice of the EU] and the ECtHR [European Court of Human Rights] Relevant To Rainbow Families" (Annex 2), while "Marriage and Registered Partnership Laws Open to Same-Sex Couples in the EU" and the "Questionnaire Sent to the European Centre for Parliamentary Research and Documentation" are also annexed (Annexes 3 and 4).

Finally, the Study makes a series of **recommendations** for policy and legislative action to EU institutions to ensure the obstacles that Rainbow Families face when they move across the EU are overcome and that they can enjoy their right to free movement, on the basis of the principle of equality and without discriminations based on their sexual orientation.

Recommendations

The **Commission** should:

- 1) launch an **infringement** procedure on the basis of Article 258 TFEU and take enforcement action against **Romania**, because of Romania's ongoing failure to comply with **Coman & Hamilton**. The Commission should also examine whether the other 26 **Member States** comply with Coman & Hamilton and take enforcement action against any that do not comply.
- 2) bring Article 263 TFEU proceedings seeking the annulment of the phrase 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' (Article 2(2)(b), **Directive 2004/38** on free movement) as **contrary to Article 21 of the Charter** of Fundamental Rights of the EU.
- 3) support **civil-society strategic litigation** to extend the scope of the *Coman & Hamilton* jurisprudence from covering only a residence permit to other rights or benefits, and the ECtHR's 2015 *Oliari & Others*⁸ and 2016 *Taddeucci & McCall*⁹ judgments from Italy to other EU Member States.

³ *Coman & Others v. Romania*, Application no. 2663/21 (communicated on 9 February 2021), <http://hudoc.echr.coe.int/eng?i=001-208508>.

⁴ Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia.

⁵ Bulgaria, France, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia.

⁶ Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia.

⁷ Case C-490/20, *V.M.A. v. Stolichna Obsthina (Sofia Municipality)*, heard on 9 February 2021, Advocate General opinion of 15 April 2021.

⁸ See <http://hudoc.echr.coe.int/fre?i=001-156265>.

⁹ See <http://hudoc.echr.coe.int/eng?i=001-164715>.

4) insist on the adoption by the Council of the EU of its 2008 'Proposal for a Council Directive on implementing the principle of **equal treatment** between persons irrespective of religion or belief, disability, age or sexual orientation',¹⁰ and the **Council** should adopt it.

5) propose free movement and ordinary-procedure legislation (with **Article 21(2) TFEU** as the main legal basis) requiring all Member States to **recognise same-sex spouses and registered partners** from another Member State with regard to matters in relation to which they would have a right to equal treatment under the case law of the ECtHR.

6) propose free movement and ordinary-procedure legislation (with **Article 21(2) TFEU** as the main legal basis) requiring all Member States to **recognise the adults listed in a child's birth certificate as the legal parents of the child, regardless of the adults' sexes or marital status.**

7) issue a Communication clarifying that the term '**partner**', as used in Article 3(2)(b) of Directive 2004/38 and in the CJEU's Reed judgment, must be read as including both the opposite-sex and the same-sex partner of the Union citizen. It should, also, clarify that when EU Member States undertake an examination of the personal circumstances of the couple for the purpose of 'facilitating' the admission of the **unregistered cohabiting partner** of the Union citizen into their territory, under Article 3(2)(b) of Directive 2004/38, their assessment must be free **from discrimination on the ground of sexual orientation.**

8) issue a Communication clarifying that all references in Directive 2004/38 to a '**parent**', a '**child**', a '**direct descendant**', or a '**direct relative in the ascending line**', as well as the principles established in the CJEU's *Zhu and Chen* and *Baumbast* judgments, are **inclusive of rainbow families**, to ensure that, when they exercise their EU free movement rights, they enjoy the same family reunification rights under EU law as families founded by opposite-sex couples.

9) issue a Communication clarifying that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families that move to their territory from another EU Member State, at least in all the circumstances that this is required under the European Convention on Human Rights.

Finally, if the **CJEU** is given the opportunity to rule on any of the above matters, it should take into account the Recommendations in this study.¹¹

¹⁰ COM(2008) 426 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426>.

¹¹ The study was presented at the **Workshop on LGBTI+ rights in the EU** organised by the Policy Department for Citizens' Rights and Constitutional Affairs for the PETI Committee in the presence of Commissioner Helena Dalli, NELFA, ILGA-Europe, FRA and petitioners, see <https://www.europarl.europa.eu/committees/en/workshop-on-lgbti-and-rights-in-the-eu/product-details/20210303WKS03281>

Disclaimer and copyright. The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy. © European Union, 2021.

External Authors:

Alina TRYFONIDOU, Professor of Law, University of Reading (UK)

Robert WINTEMUTE, Professor of Human Rights Law, King's College London (UK)

Research Administrator responsible: Ottavio MARZOCCHI

Editorial assistant: Sybille PECSTEEN de BUYTSWERVE

Contact: poldep-citizens@europarl.europa.eu

This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

PE 671.505

IP/C/PETI/2020-013

Print ISBN 978-92-846-8202-7 | doi: 10.2861/005704 | QA-02-21-737-EN-C

PDF ISBN 978-92-846-8187-7 | doi: 10.2861/949558 | QA-02-21-737-EN-N