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Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition

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1. Introduction

The EU's highest court – the European Court of Justice (hereinafter 'ECJ' or 'the Court') – has often been called to depart from its traditional readings of EU law provisions, when they seem no longer to reflect social reality. Early in the new millennium, in his thorough and enlightening Opinion in *Baumbast and R*,[1] Advocate General Geelhoed pointed out that the EU rules governing the family reunification rights of migrant Union citizens should be redefined in the light of the social and legal developments which had occurred since the adoption of Regulation 1612/68[2] – the piece of secondary legislation which, at the time, governed these rights.[3] Similarly, in his Opinion in *P. v. S and Cornwall County Council*, Advocate General Tesauro stressed that 'the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise, it risks imposing outdated views and taking a static role.'[4] Hence, just like the Council of Europe's European Convention of Human Rights and Fundamental Freedoms ('ECHR'), which is a 'living instrument' and, as such, 'must be interpreted in the light of present-day conditions',[5] the meaning attributed to EU law provisions must be constantly reassessed in order to come to grips with modern times and to be brought into line with the changing European social landscape.

This paper will be another call addressed to the Court of Justice to interpret EU law in a way which reflects the modern social and legal reality in the EU. It will, however, also, and mainly, be a call to the EU legislature to amend certain provisions of EU secondary legislation, with the same aim in mind. The focus of this piece is the cross-border legal recognition of same-sex relationships, and, in particular, the treatment of such relationships in situations which involve the

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1 Case C-413/99, *Baumbast and R*, [2002] ECR I-7091.

2 Regulation 1612/68 on freedom of movement for workers within the Community, [1968] OJ L257/2.

3 Paragraphs 22-36 of the Opinion of Advocate General Geelhoed in *Baumbast*, *supra* note 1. See, also, more recently, paragraphs 62 and 63 of the Opinion of Advocate General Szpunar in Case C-202/13, *McCarthy* (pending).

4 Paragraph 9 of the Opinion of Advocate General Tesauro in Case C-13/94, *P. v. S and Cornwall County Council*, [1996] ECR I-2143.

5 *Tyrer v. United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, para. 31. For comments on the living instrument doctrine see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014), at pp. 84-88.

free movement of Union citizens between Member States.[6] A quick perusal of the daily press immediately reveals that the question of the legal recognition of same-sex relationships tops the list of socio-political issues that are now most widely discussed on a global scale. It is beyond the remit of this piece to analyse the emerging trends with regards to this issue, however, it would not be an oversimplification to take it as a given that, despite a number of recent backward steps,[7] there is, especially in (northern and western[8]) Europe, an increasing move towards the legal recognition of same-sex relationships.

The main argument of the paper will, therefore, be that the increased societal acceptance of same-sex relationships, coupled with the constant growth of the group of countries - both worldwide and in Europe - which provide some form of legal recognition for such relationships, points to the need for the EU to adopt a more hands-on approach towards this issue, in situations which fall within the scope of application of EU law. As will be explained in more detail below, Member States still have the competence to regulate family law and, therefore, it is still up to them to determine whether their national laws will make provision for the legal recognition of same-sex relationships *within their territory* and whether they will open marriage or registered partnerships to same-sex couples. What happens, however, when Union citizens who are in a relationship with a person of the same sex, or who have entered into a same-sex marriage or registered partnership, move to another Member State in exercise of their EU free movement rights? In case the host Member State does not legally recognise such relationships within its territory, can it refuse to recognise them and, where applicable, the legal status attached to them, also when they involve (at least

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6 The paper will, therefore, not examine the treatment of same-sex couples entirely comprised of third-country nationals (this is covered by the Family Reunification Directive (Directive 2003/86 on the right to family reunification, [2003] OJ L251/12)). For more details on this see J. Rijpma and N. Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), at pp. 484-487.

7 See, for instance, the amendment of the Slovak constitution in June 2014, to (re-)define marriage as 'the unique bond between a man and a woman', in this way 'banning' same-sex marriage; the decision of the Supreme Court of India in December 2013 (available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070) to overturn the Delhi High Court's 2009 decision in *Naz Foundation v. Government of NCT of Delhi* which had held to be unconstitutional – when applicable to sex between *consenting adults* - the provision of the Indian Penal Code 1860 which criminalised, *inter alia*, sex between persons of the same sex; the rejection, in June 2014, by the Legal Affairs committee of the Finnish Parliament of a Bill for the introduction of same-sex marriage in Finland – however, the Bill will go to a full Parliamentary vote in Autumn 2014.

8 As noted by Scherpe, in Europe it is particularly in Eastern European countries and in Greece and Italy that there is strong opposition to the legal recognition of same-sex relationships – J. M. Scherpe, 'The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights', (2013) 10 The Equal Rights Review 83, p. 84. This is, also, evident from the results in a recent Eurobarometer survey (Special Eurobarometer 393: Discrimination in the EU in 2012, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf). On page 41 of the Report, it is concluded that 'acceptance of gay, lesbian and bisexual people is greatest in Northern and Western EU Member States, and least common in a number of Eastern European countries'.

one) Union citizen who has moved there in exercise of his/her EU free movement rights? Or *can* and, perhaps, *should* the EU in such situations require the host State to recognise them?

This paper will be devoted to a discussion of these issues, starting with an explanation of the *status quo* – i.e. that EU law, as currently interpreted, appears to permit the host State to refuse to recognise the same-sex relationships of incoming Union citizens – and moving on to argue that this is problematic because it can amount to a violation of EU law. The analysis will then proceed to illustrate that the EU *can* and *should* interfere in this area, by requiring the host Member State to fully recognise the same-sex relationships of incoming Union citizens and the legal status attached to them. The exact way that this can best be done will be analysed in the penultimate section of the paper.

2. Competence Issues: Who's Got the Power?

Are same-sex relationships legally recognised in the EU? The answer is 'it depends', this being due to the fact that each Member State is free to regulate this matter in accordance with its own laws and traditions.[9] Moreover, even among the States that do provide legal recognition to same-sex relationships, 'there is considerable diversity between the types of legal status being afforded'.[10] At the moment of writing, out of the 28 Member States, only 8 offer to same-sex couples the option of marriage;[11] 12 offer some form of registered partnership;[12] whereas 12 Member States do not provide any legal status to same-sex couples.[13]

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9 Paragraph 76 of the Opinion of Advocate General Jääskinen in Case C-147/08, *Römer*, [2011] ECR I-3591. This is, also, reflected in Recital 22 in the preamble to Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, which states that the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon'. See, also, the 'Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50', CHARTE 4473/00 CONVENT 49, Brussels, 11 October 2000, p. 12, where, referring to Article 9 of the EU Charter of Fundamental Rights (the right to marry and the right to found a family), the Praesidium noted that 'this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex'. See, also, K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2011) 33 Fordham Int LJ 1338, at p. 1355.

10 M. Bell, 'Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union', (2004) 12 ERPL 613.

11 In chronological order, starting from the Member State which first introduced same-sex marriage, these are: the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, United Kingdom (England and Wales only). At the time of writing, Luxembourg is in the process of opening marriage to same-sex couples as, by an overwhelming majority, it has recently adopted a Bill providing for this. It is expected that the law will come into force in 2015, this making Luxembourg the ninth EU Member State to offer marriage to same-sex couples.

12 In chronological order, starting from the Member State which first introduced this, these are: the Netherlands, France, Belgium, Germany, Finland, Luxembourg, United Kingdom, Czech Republic, Slovenia, Hungary, Austria, Ireland. At the time of writing, Malta and Croatia are in the process of making available registered partnerships to same-sex

One thing should be made clear from the outset. In this paper, it is not proposed that the EU can – or, even, must – require the Member States to legally recognise same-sex relationships and to make available any particular legal status to same-sex couples that seek to formalise their relationship *within their own territory*. As the Court of Justice has recently confirmed, 'as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States'.[14] Accordingly, family law issues such as who can marry whom, formalities of marriage, adoption, divorce, and, naturally, whether same-sex couples can marry or enter into a registered partnerships, are matters that fall within national competence and hence the EU does not – and cannot – require the Member States to adopt any particular stance on them.[15] These are all sensitive issues deeply influenced by local public sentiment and, for which, unavoidably, there is a lack of consensus among the Member States. Therefore, each Member State should remain free to regulate them as it considers best, provided that when it does so it complies with EU law.[16]

Member States are, thus, free to regulate family law issues in purely internal situations, i.e. situations which involve their own nationals who have never made use of EU free movement rights. Hence, whether a British national will be able to marry her female partner in the UK is a question that falls entirely within the competence of the UK and the EU cannot question that State's choices in this field. Conversely, when a Member State seeks to apply its family law provisions in situations that involve migrant Union citizens who fall within the scope of EU law, it is necessary to ensure that the application of national family law does not breach any EU law provisions. The main argument of the paper will, therefore, be that although Member States are free to refuse to provide any legal recognition to same-sex relationships in purely internal situations, they are not free to do so, also, with regards to the same-sex relationships of migrant Union citizens – especially when the latter have formalised their relationship in another State – because, as will be illustrated, this can amount to a violation of a number of EU law provisions and principles.

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couples. It is expected that the said laws will come into force in 2015, this making Malta and Croatia the thirteenth and fourteenth EU Member State to offer a form of registered partnership to same-sex couples. As can be seen, there is some overlap between this list and the list in the previous footnote: 5 Member States (France, United Kingdom, the Netherlands, Belgium, Luxembourg) offer to same sex-couples the option of both a marriage and a registered partnership. Note that some Member States which initially offered registered partnerships specifically to same-sex couples have abolished this status and have opened marriage to all couples (e.g. Denmark).

13 These are Bulgaria, Croatia, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta (until 2015), Poland, Romania, Slovakia.

14 *Römer*, *supra* note 9, para. 38.

15 For an examination of the law applicable to the *formation* of same-sex partnerships and marriages in situations which involve a foreign element (e.g. where one of the partners is neither a national nor a resident of the State where the marriage or partnership will be contracted) see R. Virzo, 'The Law Applicable to the Formation of Same-Sex Partnerships and Marriages' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014).

16 Case C-267/06, *Maruko*, [2008] ECR I-1757, para. 59. See K. Lenaerts, *supra* note 9, at p. 1355.

In this paper I shall focus on the position of same-sex couples comprised of at least one Union citizen, when they wish to leave their State of origin and settle in the territory of another Member State. As in all situations involving EU free movement law, the State of origin must not act in a way which impedes the freedom of Union citizens to leave its territory.[17] This, nonetheless, does not particularly affect same-sex couples[18] – i.e. there is no evidence that Member States wish to prevent same-sex couples, in particular, from leaving their territory – and, hence, will not be discussed here any further. Conversely, the treatment afforded by the host Member State to the incoming same-sex couple is much more important for our purposes, since some receiving States that do not recognise same-sex relationships within their territory, may refuse to do so also when it comes to same-sex couples who, having made use of EU free movement rights, enter their territory.[19] And this can happen even if the couple has entered into a marriage or a registered partnership in its home State, though, in certain cases, the host Member State may recognise the couple as a 'couple', but it may 'downgrade' its legal status (e.g. a same-sex marriage may be converted into a registered partnership or, even, be simply considered a *de factor* partnership).

As will be explained in more detail below, the host State's refusal to recognise the same-sex relationships (and the legal status attached to them) of incoming Union citizens, can negatively affect same-sex couples in two ways: a) when they seek to *be admitted into* the host State *as a couple*, this being, in essence, an immigration issue and b) once *within the territory of the host State*, when they seek to claim benefits or tax advantages or, simply, a certain kind of beneficial treatment, available only to couples (or, in some cases, 'married couples').

It should be noted that when it comes to the difficulties that the same-sex couple may face under the immigration laws of the host State, the arguments made in this paper will, mostly, be relevant to couples that are comprised of a migrant Union citizen (i.e. the person making use of EU free movement rights) and a third-country national who will seek to claim the right to move and reside in the host State via the former. This is because, if the second member of the couple is, also, a Union citizen, (s)he will be entitled on his or her own right under EU law to move to the host State (provided that the limitations and conditions imposed

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17 See Article 4 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, [2004] OJ L158/77. See, *inter alia*, Case C-33/07, *Jipa*, [2008] ECR I-5157, para. 18; Case C-430/10, *Gaydarov*, [2011] ECR I-11637, para. 25.

18 D. Kochenov, 'On options of citizens and moral choices of states: gays and European federalism', (2009) 33 Fordham Int'l LJ 156, at p, 189.

19 Note that a problem does not arise in situations when same-sex couples move to a Member State which recognises same-sex relationships since the application of the principle of non-discrimination on the grounds of nationality will require the host State to treat them in the same way as its own nationals and, hence, it will recognise their relationships - E. Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC' in R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001), p. 688.

by secondary legislation are complied with[20]) and, hence, in order to gain access to, and reside, in the host State, there will be no need to claim such (derivative) rights under EU law, *as a family member of their partner*. Accordingly, the host State's refusal to recognise the same-sex relationship in this instance, will not have any bearing on its decision to admit both members of the couple into its territory, though they will be admitted as single persons. Conversely, the difficulties that may be faced by same-sex couples after they have gained access to the host State and when they seek to claim various benefits or tax advantages *as a couple*, can affect all (migrating) same-sex couples – whether they are comprised of two Union citizens or a Union citizen and a third-country national – in the same way.

3. EU Law and Same-Sex Relationships: The Current Legal Regime

In this section, I shall analyse the EU legal regime which currently governs the position of migrant same-sex couples, which are comprised of at least one Union citizen. The section shall be divided into two subsections: subsection 3.1 will explain how EU secondary legislation treats such couples for the purposes of family reunification, whilst subsection 3.2 will examine EU anti-discrimination legislation and its interpretation by the ECJ in situations which involve treatment which is discriminatory against same-sex couples.

To date, the ECJ has never been directly confronted with the question of the legal recognition of a *migrant* same-sex couple in the territory of the host State. Accordingly, the Court has never had to clarify its stance on the question of whether EU law requires the host Member State to recognise the same-sex marriage/registered partnership/durable relationship of migrant Union citizens, for family reunification purposes, and, hence, the explanation of the current legal regime governing this matter will solely rely on an analysis of the provisions of secondary legislation and, where appropriate, on the reports of, or discussions before, EU institutions. In its anti-discrimination case-law, however, the Court 'came close to confronting the recognition of same-sex relationships',[21] albeit not in a cross-border context, given that the EU anti-discrimination regime – unlike EU free movement law – does not merely apply to cross-border situations. As will be seen, none of the cases that reached the ECJ involved the question of the legal recognition by the receiving Member State of a same-sex couple that arrived in its territory after making use of EU free movement rights: the cases involved either a couple that was 'stagnant' and, hence, was subjected to discriminatory treatment *in its home State* (*Grant*, *Maruko*, *Römer*, and *Hay*[22]), or

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20 In essence, he/she must be economically active or, if not, economically self-sufficient and be covered by medical insurance in the host State. See Article 7 of Directive 2004/38, *supra* note 17.

21 A. R. O'Neill, 'Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy', (2004) 37 Cornell Int'l L. J. 199, at p. 203.

22 Case C-249/96, *Grant v. South West Trains*, [1998] ECR I-621; *Maruko*, *supra* note 16; *Römer*, *supra* note 9; Case C-267/12, *Hay*, Judgment of 12 December 2013, not yet reported .

the application of the EU's Staff Regulations to the EU's employees (*D. and Sweden v. Council* and *W v. Commission*[23]).[24] Hence, in order to determine how EU anti-discrimination law can help *migrant* same-sex couples, this paper will consider how this case-law can be transposed to a cross-border context.

This paper will be focusing on the negative impact that the exercise of free movement rights under EU law can have on a same-sex couple, examining the situation when such a couple moves from a State which recognises same-sex relationships to one that does not or does not offer an equivalent legal status. However, it should by no means be thought that the exercise of free movement rights will, always, disadvantage same-sex couples. As Weiss has explained, 'federalism can be the source of greater rights, in that "state-by-state" variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction'.[25] Hence, as the same commentator has noted, '[i]n the EU, there has already been significant migration of LGBT people from East to West. Anecdotal evidence suggests an exodus of gay people from Poland, where homophobia remains common, to the United Kingdom, where gay people enjoy substantive equality in terms of discrimination, partnerships, and adoption'.[26]

Moreover, given that it has recently been clarified by the Court that the right to family reunification under EU law entails a right to be joined by existing family members *and* the right to family formation in the host State,[27] same-sex couples who migrate to a Member State which legally recognises same-sex relationships from a Member State which does not (and, hence, do not have a legal status as a couple under the laws of any Member State), will clearly be able to rely on the family reunification rights granted by the 2004 Directive if they can prove that they have 'formed a family' with their same-sex partner in that State. Also, should they decide to subsequently return to their home State (which does not legally recognise same-sex relationships), they will clearly be able to rely on EU law to claim family reunification rights, although whether they will be able – *under the current regime* – to require that State to recognise their same-sex relationship and the legal status attached to it (in case they have formalised their relationship in the host State) remains unclear, as will be explained below.[28]

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23 Joined Cases C-122/99 P and C-125/99 P, *D and Sweden v. Council*, [2001] ECR I-4319; Case C-86/09, *W v. Commission*, Judgment of 14 October 2010 (unpublished).

24 For an analysis of this case-law see M. F. Orzan, 'Employment Benefits for Same-Sex Couples: The Case-Law of the CJEU' in D. Gallo, L. Paladini and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014).

25 A. Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union', (2007-2008) 41 Colum. J. L. & Soc. Probs. 81, at p. 89. See, also, D. Kochenov, *supra* note 18, pp. 165-172.

26 A. Weiss, *supra* note 25, p. 89.

27 Case C-127/08, *Metock*, [2008] ECR I-6241, paras. 87-90. See, also, Case C-456/12, *O & B*, Judgment of 12 March 2014, not yet reported.

28 The Court has established that although returnees are not covered by secondary legislation, they can rely directly on the EU free movement provisions to claim family reunification rights on their return to their home State – Case C-370/90, *Singh*, [1992]

3.1 The EU legal regime governing the family reunification rights of migrant same-sex couples

3.1.1 The old (pre-2004) regime[29]

Neither the current EU and FEU Treaties, nor their predecessors, make provision for the grant of family reunification rights to migrant Union citizens. Nonetheless, even when the freedom of movement of persons was merely linked to the pursuit of an economic activity in a cross-border context, it was recognised that, in order for Member State nationals to be able to move between Member States in furtherance of this economic aim, they should be given the right to be accompanied in the host State by their family members: it was thought that Member State nationals confronted with the dilemma of a better job in another Member State or a less satisfactory working life in their State of nationality where they would, however, be surrounded by their loved ones, would probably choose the latter. Accordingly, under Regulation 1612/68[30] and Directive 73/148,[31] migrant workers and the self-employed, respectively, were given the *automatic* right to be accompanied in the host State by close family members, which meant, in practice, that the host State would not be able in such situations to apply its immigration laws, even if the accompanying family members were third-country nationals.[32]

Since the original pieces of legislation that granted family reunification rights to migrant economic actors were promulgated back in the late 1960s and early 1970s, it is not surprising that they made no provision for same-sex relationships. The persons who were recognised as 'family members' of the migrant and who could, therefore, *automatically* accompany him/her in the host State were: a) the spouse;[33] b) the descendants (under 21 or dependents) of the migrant and the spouse,[34] and c) dependent relatives in the ascending line of the migrant and the spouse.[35] Apart from these three categories of 'family members', it was provided that Member States should 'facilitate' or 'favour' the

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ECR I-4265; Case C-60/00, *Carpenter*, [2002] ECR I-6279; Case C-291/05, *Eind*, [2007] ECR I-10791.

29 2004 is considered to be the 'reference year' since it is the year that Directive 2004/38 (*supra* note 17), which provides the current legal regime governing the family reunification rights of migrant Union citizens, came into force.

30 *Supra* note 2.

31 Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14.

32 For a more detailed explanation of this see A. Tryfonidou, 'The impact of EU Law on Nationality Laws and Migration Control in the EU's Member States', (2011) 25 JIANL 358, pp. 366-378. See, also, C. McGlynn, 'The Europeanisation of family law', (2001) 13 CFLQ 35, at p. 37.

33 Article 10(1)(a) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(1)(c) of Directive 73/148, *supra* note 31 (for the self-employed).

34 Article 10(1)(a) of Regulation 1612/68, *supra* note 2 (for workers); Articles 1(1)(c) and 1(1)(d) of Directive 73/148, *supra* note 31 (for the self-employed).

35 Article 10(1)(b) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(1)(d) of Directive 73/148, *supra* note 31 (for the self-employed).

admission of any other member of the family, who was dependent on the migrant (or his spouse) or living under his roof in the Member State of origin.[36] Similar, albeit somewhat more restrictive, family reunification rights were subsequently granted to economically inactive Member States nationals who, since the early 1990s, have been given the right to move and reside in another Member State, first via secondary legislation,[37] and subsequently by what is now Article 21 TFEU.

Since same-sex marriage was only instituted for the first time in 2001 (in the Netherlands), and given that all of the above instruments were repealed and replaced in 2004 by Directive 2004/38, it is not surprising that the question of whether the term 'spouse' included the same-sex spouse of the migrant, had not emerged. Of course, the fact that there was and there is no provision of EU law which defines the term 'spouse' for the purposes of free movement law,[38] means that this possibility has never been entirely excluded legislatively, although the Court in its judgment in the staff case of *D and Sweden v. Council*,[39] which was delivered in 2001, pointed out that 'the term "marriage" means a union between two persons of the opposite sex'.[40] Moreover, the lack of a reference to registered partnerships under the old regime, meant that the question of whether *same-sex* registered partners could *automatically* join the migrant Union citizen in the host State, did not come up, despite the fact that registered partnerships were opened to same-sex couples in some Member States as early as 1989.[41] Some commentators, however, had argued that given that same-sex registered partnerships had important similarities with marriage, and given that the old regime did not make provision for registered partners, (same-sex) registered partners should be brought within the concept of 'spouse' under the above regime[42] - an argument which was rejected by the Court in *D and Sweden v. Council*.[43]

As regards (non-registered) *de facto* partners – who were equally absent from the old regime – the ECJ ruled in *Reed*,[44] which involved non-registered *opposite-sex* partners, that the latter could not be equated to 'spouses' and, hence, could not automatically join the migrant in the host State; however, the Court went on to note that 'the possibility for a migrant worker of obtaining permission for his

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36 Article 10(2) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(2) of Directive 73/148, *supra* note 31 (for the self-employed).

37 Directive 90/364 on the right of residence, [1990] OJ L180/26; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Directive 93/96 on the right of residence for students [1993] OJ L317/59.

38 Case 59/85, *Reed*, [1986] ECR 1283, paras. 11-12.

39 *Supra* note 23.

40 *Ibid*, para. 34.

41 The first Member State that made registered partnerships available to same-sex couples was Denmark in 1989.

42 See, for instance, K. Waaldijk, 'Free Movement of Same-Sex Partners', (1996) 3 MJ 271, at pp. 278-280.

43 *Supra* note 23.

44 *Supra* note 38.

unmarried companion to reside with him […] can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers', and, therefore, amounts to a social advantage within the meaning of Article 7(2) of Regulation 1612/68.[45] This meant that a migrant worker could rely on this provision in order to require the host Member State to admit within its territory and grant a residence permit to his unmarried (opposite-sex) partner, *if this right was granted to its own nationals*. However, the Court was never faced with the question of whether the same principle would apply to the *same-sex* partner of a migrant Member State national and, hence, the question remained unanswered, though, agreeing with Guild, it is clear that it should.[46]

Writing in 2001 and, thus, commenting on the pre-2004 regime, McGlynn very rightly noted that 'rights are only granted to the families of migrant workers where they conform to a dominant norm of "the family", that is, a heterosexual married partnership, based on a "male breadwinner" model'.[47] A similar argument was soon after made by Caracciolo di Torella and Masselot, who stressed that the 'model family' traditionally conceived in EU law is based on (heterosexual) marriage and, hence, excludes cohabitees, and same-sex couples.[48] Yet, since it is only recently that there has been an avalanche of national laws offering a legal status to same-sex couples which has, correspondingly, given rise to the question of what happens when same-sex couples migrate, the rather narrow-minded definition of 'the family' under the old regime and the sexual orientation blindness of the EU institutions had gone, mostly, unchallenged. As will be seen in the next subsection, however, despite the fact that the majority of Member States now offer some form of legal status to same-sex couples, and despite the increased societal acceptance of same-sex relationships, migrant same-sex couples continue to be ignored under the current EU regime.

3.1.2 The current legal regime

Early in the new millennium, the Commission realised that the sector-by-sector, piecemeal, approach to the development of secondary legislation governing the free movement of persons had resulted in an unsatisfactory situation. Moreover, given that the majority of the legal instruments were promulgated back in the 1960s and 1970s, they appeared outdated. Accordingly, it was decided that it

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45 *Ibid*, para. 28. Article 7(2) of Regulation 1612/68 (*supra* note 2) provided that the migrant worker 'shall enjoy the same social and tax advantages as national workers'. Regulation 1612/68 has now been repealed and replaced by Regulation 492/2011 (on the free movement of workers within the Community, [2011] OJ L141/1) and the text of the above provision has now been copied and pasted into Article 7(2) of the latter.

46 E. Guild, *supra* note 19, p. 684. See, also, H. U. Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy* (Martinus Nijhoff, 1993), p. 314.

47 C. McGlynn, *supra* note 32, at p. 36. See, also, pp. 46-48 of the same article. On the 'male breadwinner' model see B. Moebious and E. Szyszczak, 'Of raising pigs and children', (1998) 18 YEL 126.

48 E. Caracciolo di Torella and A. Masselot, 'Under construction: EU family law', (2004) 29 ELRev. 32, at p. 39.

was necessary to codify and review the existing legislation.[49] For this purpose, the Commission drafted a proposal for a new Directive which would cover the rights to free movement and residence of all Union citizens *and* their family members.[50]

Although it was admitted in the proposal that '[t]he definition of family member must be widened and standardised for all persons entitled to the right of residence',[51] same-sex couples continued to be invisible under the proposed regime. Despite the suggestions for amendment of the proposal that were put forward by the EU Parliament (the most LGB-friendly institution), and which would have the effect that the terms of the proposed Directive would state explicitly that members of same-sex couples *are* included in the terms 'spouse' 'registered partner' and 'partner', the final text was disappointing, given that it perpetuated the uncertainty created by the previous legal regime: the terms used for defining the family members that could accompany or join the migrant remained both gender- and sexual orientation-neutral, in this way allowing some leeway to the Member States to interpret them as covering only opposite-sex couples. It is obvious that the Commission was wary of the danger of being accused of an unwarranted intrusion into the powers of the Member States in the family law field,[52] and, hence, preferred to maintain the EU's hands-off approach towards the question of whether the host Member State is obliged by EU law to recognise the same-sex relationship (and the legal status attached to it) of a national of another Member State entering its territory.

The Directive that ensued – Directive 2004/38[53] – came into force in its final form in April 2004 and Member States had to implement it by the end of April 2006. The Directive is, still, the instrument that governs the family reunification rights of migrant Union citizens.

Article 2(2) provides the following definition for 'family member': '(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)'. These family members – irrespective of whether they are Member State nationals or third-country nationals – have the *automatic*

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49 This is reflected in Recitals 3 and 4 of Directive 2004/38, *supra* note 17, which is the instrument that resulted from this review process.

50 Commission, 'Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM (2001) 257 final [2001] OJ C270 E/151.

51 *Ibid*, Recital 6.

52 Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM (2003) 199.

53 *Supra* note 17.

right to accompany or join the Union citizen in the host State. In addition, like under the previous regime, the 2004 Directive contains a provision – Article 3(2) – which provides that the host Member State shall facilitate entry and residence for any other family members, and these, now, include 'the partner with whom the Union citizen has a durable relationship, duly attested'. Accordingly, unmarried partners are now expressly recognised as having the right to require the host State to 'facilitate' their entry and residence into the host State – but nothing more than that.

I would now like to summarise the position with regards to each of the three categories in which same-sex couples can fall under the current regime.

Married same-sex couples

Just like the pre-2004 regime, Directive 2004/38 considers the 'spouse' of the migrant to be a close family member and, hence, (s)he can rely on EU law to require the host State to automatically admit him or her within its territory. Since marriage is in some of the Member States available to same-sex couples, the word 'spouse' is, at least, open to an interpretation which includes same-sex spouses. Costello has actually pointed out that 'a literal interpretation would suggest that a marriage is a marriage, and legally married migrant EU citizens should be recognized as "spouses' under the meaning of Article 2(2)(a)' of the Directive.[54]

The practical reality, however, is not as clear. The 2004 Directive does not define the term 'spouse' and, despite its efforts, the European Parliament was unable to mobilise the Council to make it clear in the text of the Directive that this term also covers persons who are in a same-sex marriage.[55] Moreover, contrary to well-established practice with respect to key economic concepts such as the term 'worker',[56] where the ECJ has insisted that a uniform EU meaning should be attributed to them,[57] there is a clear 'jurisprudential reticence to interpret autonomously concepts of [EU] law which lie in the sphere of family law',[58] and, hence, it is not surprising that the Court has been reluctant to provide its own independent definition of this term.[59] This is, nonetheless, problematic, given that differences in the meaning attributed to the term 'spouse' through national laws will clearly undermine the uniform and effective protection of rights

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54 C. Costello, '*Metock*: free movement and "normal family life" in the Union', (2009) 46 CMLRev. 587, pp. 615-616.

55 K. Lenaerts, *supra* note 9, p. 1355.

56 Case 75/63, *Hoekstra*, [1964] ECR 177.

57 Case 327/82, *Ekro*, [1984] ECR 107, para. 11.

58 C. Denys, 'Homosexuality: a non-issue in Community law?', (1999) 24 ELRev. 419, at p. 420.

59 Though, as explained by Orzan, when applying the Staff Regulations the Civil Service Tribunal and the ECG did adopt an autonomous interpretation of terms that lie in the field of family law and did not for this purpose make reference to national law – M. F. Orzan, *supra* note 24, at pp. 499-500. See Case F-122/06, *Roodhuijzen*, Judgment of 27 November 2007, para. 35 (confirmed by the EGC in T-58/08 P, *Roodhuijzen,* [2009] ECR II-3797, para.).

granted by the Treaty and secondary legislation.[60] Furthermore, if the Court refuses to consider – or, even, does not require to be considered – as 'spouses' for the purposes of EU free movement law, a same-sex couple that has married in accordance with the law of one Member State, it is 'showing little respect for the national family law of that Member State',[61] and 'this would create two statuses: marriages valid throughout EU and national law; and marriages only valid within the national sphere'.[62]

Accordingly, although same-sex spouses have not been explicitly excluded from the term 'spouse' for the purposes of Directive 2004/38, it has not been made clear either that they should be covered by this term and, hence, it is still not certain that EU law *requires* the host State to automatically admit within its territory the same-sex spouse of the nationals of other Member States who move to its territory. This means that (some) Member States consider that they are free to refuse to recognise the same-sex spouse of a migrant Union citizen as a 'spouse', and, hence that they can either downgrade them to the status of 'registered partner' or 'partner', with the difficulties that this entails and which we shall see below, or simply not recognise the couple as a 'couple' for the purposes of the 2004 Directive and national law. Hence, the EU legislator's failure to clarify that same-sex spouses should be recognised as such by the host State amounts to a tacit adoption of the host State principle in this context.

Registered same-sex partners

Same-sex registered partners are in an even more disadvantageous position. Apart from the fact that, like with 'spouses', it has not made it clear that the term covers, also, *same-sex* registered partners, the Directive provides that registered partners are considered to be 'family members' and, hence, entitled to automatically accompany or join the migrant Union citizen in the host State, *only* if the latter treats registered partnerships as equivalent to marriage. In other words, the EU legislator *explicitly* rejected the application of the mutual recognition principle, preferring, instead, to adopt the host State principle and to leave it entirely up to the host State to decide whether it will consider registered partners (including, same-sex registered partners) 'family members' of the migrant Union citizen and, as such, as automatically entitled to accompany the latter in its territory. After *Maruko*[63] and *Römer*[64] (to be seen below), one would conclude that '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"',[65] though this may no longer be the case following *Hay*[66] (again, to be seen below).

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60 For a similar argument see K. Armstrong, 'Tales of the Community: sexual orientation discrimination and EC law', (1998) 20 JSWFL 455, at p. 463.

61 K. Waaldijk, *supra* note 42, p. 280.

62 M. Bell, *supra* note 10, p. 621.

63 *Supra* note 16.

64 *Supra* note 9.

65 M. Bell and M. Bonini Baraldi, 'Lesbian, gay, bisexual and transgender families and the Free Movement Directive: Implementation Guidelines' (2008) ILGA Europe, at p. 15.

66 *Supra* note 22.

The current legal regime therefore creates a situation whereby same-sex couples who have entered into a registered partnership in one Member State (e.g. a civil partnership in the UK), will not be recognised as 'registered partners' in a Member State which does not make provision for same-sex registered partnerships or which it does but does not treat them as equivalent to marriage. According to Bell, as a result of the current regime, 'registered partners moving in the Union will find themselves in the strange situation of passing between states of recognition and states where they are rendered unmarried'.[67]

This means that the same-sex registered partner of the migrant Union citizen will not be *automatically* admitted into the territory of the host Member State, since (s)he will not be considered a 'family member' within the meaning of Directive 2004/38. The couple will, then, be downgraded to the Article 3(2) 'status', and hence the host Member State will merely have to *facilitate entry and residence* of 'the partner with whom the Union citizen has a durable relationship'. Unlike persons who fall within the term 'family member', persons who only qualify for the protection offered by this provision are not guaranteed admission into the host State. As Waaldijk explained, this 'does not produce a genuine right. It only triggers an obligation of the Member State to "facilitate" admission'.[68] In particular, Article 3(2) merely requires the host Member State to undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence to the partner of the migrant Union citizen. Recital 6 of the Directive further elaborates on this requirement, noting that the situation of those persons 'should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'. This is, however, by no means a sufficient guarantee for same-sex couples who may be in danger of being prejudiced when the above assessment is undertaken, especially since they will need to be assessed only by Member States which do not recognise same-sex registered partnerships as equivalent to marriage or which do not offer the option to same-sex couples of forming a registered partnership.

De facto same-sex partners

Unregistered partners – whether opposite-sex or same-sex – are governed by Article 3(2) of the Directive and can, therefore, merely expect the host State to 'facilitate' their entry and residence in its territory; the – rather 'soft' – requirements imposed by EU law on the host State when assessing the position of the couple referred to above will, therefore, apply.

One hurdle that only unregistered partners will have to overcome is the need to prove that they are in a durable relationship with the migrant Union citizen – same-sex spouses and registered same-sex partners will, at least, probably be considered as satisfying this requirement, using their marriage or registered

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67 M. Bell, *supra* note 10, p. 624.

68 K. Waaldijk, *supra* note 42, p. 280. See, also, M. Bell, *supra* note 10, p. 625.

partnership, respectively, as evidence of that.[69] The only real protection that unregistered same-sex partners can, therefore, derive from the Directive is that, given that the host State has to assess the position of the migrant couple and examine it as an individual case, it cannot adopt a block refusal to admit the same-sex partners of migrant Union citizens who enter their territory. Moreover, given that – as will be seen in the next section – the Directive requires that Member States must not discriminate on the ground of *inter alia* sexual orientation, this means that when the host State conducts its assessment of individual cases to determine whether there is, indeed, a durable relationship which should be recognised for the purposes of EU free movement law, it needs to make sure that this assessment is free from any bias against same-sex couples.[70]

3.2 The EU legal regime prohibiting discrimination on the ground of sexual orientation

Until the late 1990s, a prohibition of discrimination on the ground of sexual orientation was conspicuous by its absence in EU law. In fact, apart from discrimination on the ground of nationality which has always been a central aspect of EU free movement law, the only other form of discrimination that was prohibited under EU law since the birth of (what is now) the EU, was discrimination on the ground of sex, and this had begun as a mere requirement that women and men should be paid equally for work of equal value.[71] The long list of secondary legislation measures regulating different aspects of sex equality that followed,[72] and the introduction of a sex equality mainstreaming provision in the Treaty,[73] meant that the protection of equality between the sexes is one of the success stories of the EU: the prohibition of discrimination on the ground of sex now applies in a long list of areas – not just work-related ones – and is interpreted broadly.

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69 For a similar argument see A. Weiss, *supra* note 25, p. 104; J. Rijpma and N. Koffeman, *supra* note 6, p. 475. For a different view see D. Kochenov, *supra* note 18, p. 200.

70 M. Bell, *supra* note 10, p. 625; A. Weiss, *supra* note 25, at p. 105.

71 This is currently found in Article 157 TFEU.

72 The ones currently in force are Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1979] OJ L6/24; Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. [1992] OJ L348/1; Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ 373/37; Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L204/23; Directive 2010/18 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), [2010] L68/13; Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L180/1.

73 This can now be found in Article 8 TFEU.

In view of the fact that until the late 1990s, the Treaties did not include a provision prohibiting discrimination against LGBT individuals, there was an effort to bring such instances of discrimination within the ambit of discrimination on the ground of sex. A clear example of this is the case of *P. v. S. and Cornwall County Council*,[74] where a transsexual who was dismissed by her employer because of her decision to transition from male to female, was found to have been discriminated against on the ground of sex: '[w]here a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.[75] The Court held that this amounted to a violation of EU law and, in particular, of the Equal Treatment Directive.[76]

However, soon after, in the case of *Grant*,[77] the Court of Justice refused to consider discrimination on the ground of sexual orientation as a form of discrimination on the ground of sex. There, the Court noted that the refusal of Ms Grant's employer (South West Trains) to provide travel concessions for her same-sex partner, whereas such an advantage would be granted had Ms Grant been a man,[78] did not amount to discrimination on the ground of sex, given that a gay male employee who wished to claim the travel advantage for his same-sex partner would be treated in exactly the same way.[79] The Court found that this amounted to discrimination on the ground of sexual orientation which, at the time, was not prohibited by EU law.[80]

Soon after *Grant*, however, a new provision was inserted into, what is now, the FEU Treaty – Article 19 TFEU – which gave the EU the competence to make

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74 *Supra* note 4.

75 *Ibid*, para. 21.

76 Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] OJ L39/40 (now repealed).

77 *Supra* note 22.

78 On the facts it was stated that Ms Grant's predecessor in post, Mr Potter, had in his time obtained travel concessions for his female partner with whom he was not married.

79 A number of commentators have convincingly argued that discrimination on the grounds of sexual orientation is (also) a form of discrimination on the grounds of sex. See A. Koppelman, 'Why discrimination against lesbians and gay men is sex discrimination', (1994) 69 N.Y.U.L.Rev. 197; K. Waaldijk, *supra* note 42, p. 281; R. Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes', (1997) 60 MLR 334, pp. 344-353; J. McInnes, 'Annotation of *Grant*', (1999) 36 CMLRev. 1043, at pp. 1050-1053; D. Kochenov, *supra* note 18, pp. 172-180. This view was, also, shared by the Advocate General in *Grant*, *supra* note 22; and was the view adopted by the Human Rights Committee when interpreting the International Covenant on Civil and Political Rights in *Toonen v. Australia*, 31 March 1994, CCPR/C/50/D/488/1992, para. 8.7.

80 For an analysis of early (soft) measures relating to discrimination on the grounds of sexual orientation see F. Russell, 'Sexual orientation discrimination and Europe', (1995) 145 NLJ 374; L. Flynn, 'The implications of Article 13 EC – After Amsterdam, will some forms of discrimination be more equal than others?', (1999) 36 CMLRev. 1127, pp. 1147-1148.

legislation to prohibit, *inter alia*, discrimination on the ground of sexual orientation.[81] Using this as a legal basis, the EU legislature promulgated Directive 2000/78,[82] which prohibits discrimination on a number of grounds, including sexual orientation, but only in employment, occupation and vocational training.

It was only in 2008 that the Court for the first time had to interpret this Directive in a case where it was relied upon to challenge an instance of alleged discrimination on the ground of sexual orientation. This was the case of *Maruko*,[83] where the reference emerged from proceedings between Mr Maruko and the German Theatre Pension Institution (VddB), relating to the refusal by the latter to recognise the former's entitlement to a widower's pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased registered life partner had been a member. The VddB's refusal was based on the ground that its regulations only provided for such an entitlement for spouses, excluding surviving registered life partners. When considering whether the contested refusal amounted to discrimination on the ground of sexual orientation contrary to Directive 2000/78, the Court pointed out that 'from 2001 […] the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage'.[84] The Court, then, summarised the views of the referring court and, without providing its own conclusion as to whether registered partnerships are treated as equivalent to marriage under German law, it pointed out that '[i]f the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78'.[85] In other words, the Court left it to the referring court to determine whether, for the purposes of the claimed benefit, life partnerships and marriages were in a comparable situation.

Accordingly, what the Court stated in *Maruko* is that if a Member State considers – for a certain purpose (e.g. the grant of a survivor's pension) – same-sex registered partnerships as equivalent to marriage, it must treat them in the same way. However, it left it to the national court to determine whether a German life partnership is considered equivalent to a marriage for the purposes of the widower's pension claimed by Mr Maruko. The same approach was followed

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81 For an early article assessing the implications of this new provision see L. Flynn, *supra* note 80.

82 *Supra* note 9.

83 *Supra* note 16.

84 *Ibid*, para. 67.

85 *Ibid*, para. 72.

three years later in the *Römer* case,[86] which involved a refusal of a German municipality to grant Mr Römer, who was in a life partnership with another man, a supplementary retirement pension of an amount as high as he requested, since the method of calculation of the pension used was more favourable to married pensioners than to pensioners who had contracted a registered life partnership.

As Toggenburg rightly pointed out commenting on *Maruko* (but, clearly, the same criticism can be made for *Römer*), '[t]he Court's approach in *Maruko* has two major weaknesses. Firstly, it provides no protection against discrimination where it is most needed, namely in national systems where homosexual relationships find no legal recognition. Secondly, the definition and identification of the point at which EU law steps in is entirely left to the Member States'.[87] More important for our purposes, however, is the point made by Möschel who, when commenting on this case, noted that the Court's approach 'may entail some negative consequences for the freedom of movement of life partners: Life partners moving from Member State X, where marriage and life partnerships are deemed to be similar situations by national courts and therefore must be treated equally, to Member State Y where courts have, on the contrary, held that this is not the case, might find themselves deprived of certain rights'.[88]

Despite the Court's rather disappointing approach in the cases of *Maruko* and *Römer*, the drafters of the Lisbon Treaty – which came into force in 2009 – gave an important boost to the prohibition of discrimination on the grounds of sexual orientation, by including a new mainstreaming provision in the FEU Treaty: Article 10 TFEU provides that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on […] sexual orientation'. According to ILGA Europe, '[e]quality mainstreaming opens the promise of greater consideration of LGBT issues by decision-makers. It presumes that in all decisions the impact these will have on LGBT people is assessed'.[89] Moreover, the coming into force of the Lisbon Treaty also gave binding force to the EU Charter of Fundamental Rights ('EUCFR' or 'the Charter'), Article 21(1) of which provides that '[a]ny discrimination based on any ground such as […] sexual orientation shall be prohibited'.

Accordingly, despite the rather restrictive approach in *Maruko* in 2008 (which was confirmed in 2011 in *Römer*), it is not surprising that a more LGB-friendly approach has been demonstrated by the Court in a number of other recent cases. Starting with the 2008 staff case of *W*,[90] the EU Civil Service Tribunal took a broad and pragmatic approach when interpreting the Staff Regulations, holding

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86 *Supra* note 9.

87 G. N. Toggenburg, '"LGBT" go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', (2008) 5 *European law Reporter* 174.

88 M. Möschel, 'Germany's life partnerships: separate and unequal?', (2009-2010) 16 CJEL 37, at p. 44.

89 ILGA Europe, 'Equality Mainstreaming' (2007) available at http://www.ilga-europe.org/content/download/9365/55889/version/2/file/fact_sheet_sept-07.pdf.

90 *Supra* note 23.

that the requirement that an official who is in a registered partnership can only claim a household allowance if the couple has no access to legal marriage in a Member State, was satisfied in the case of a dual Belgian and Moroccan national who – although legally had access to same-sex marriage in Belgium – argued that 'because homosexual acts are a criminal offence under Moroccan legislation, his Moroccan nationality and the legal and emotional ties he had with Morocco "make it impossible [for him] to marry" a person of the same sex'.[91]

More recently, the Court extended this LGB-friendly approach to situations where it was the compatibility of Member State laws with Directive 2000/78, that was – again – at issue. *Hay*,[92] emerged from proceedings between Mr Hay and his employer – a French bank – concerning the latter's refusal to award him days of special leave and a bonus granted to staff who marry, following the conclusion by Mr Hay of a civil solidarity pact (PACS). At the time, in France only opposite-sex couples could marry, whereas both same-sex and opposite-sex couples could enter into a PACS. In its judgment, after comparing PACS with marriage, the Court concluded that 'as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry'.[93] It then held that 'a Member State's rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation'.[94] The Court pointed out that '[t]he difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed'.[95]

Although a detailed analysis of this case is not necessary for the purposes of this paper, two points should be highlighted. The first is that the Court (correctly) followed *Maruko* and *Römer* when holding that a difference in treatment which disadvantages registered partners in a Member State where marriage is not open to same-sex couples, amounts to direct discrimination on the grounds of sexual orientation, if the situation of registered partners is for a particular purpose comparable with that of married couples. Therefore, this, now, appears to be a well-established principle. The second point is that the Court has, nonetheless, departed from its *Maruko* and *Römer* reticence when it comes to the equivalence assessment, and instead of leaving the determination of comparability of the situations between married couples and couples who had concluded a PACS to

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91 *Ibid*, para. 15.

92 *Supra* note 22.

93 *Ibid*, paras. 36-37.

94 *Ibid*, para. 41.

95 *Ibid*, para. 44.

the national court, it decided to conduct the comparability assessment itself. This means that Member States are no longer given a carte blanche to discriminate against same-sex couples who have decided to formalise their relationship, simply by pointing out that *according to their own assessment* the situation of married couples and registered partners is not the same under national law, for a particular purpose. If the ECJ finds that (opposite-sex) married couples are in a comparable situation with (same-sex) registered partners for a certain purpose, this means that the latter cannot be treated worse than the former, simply because they have a different legal status, *if* under national law marriage is only available to opposite-sex couples.

Moreover, *Hay* comes to illustrate the Court's changed attitude towards same-sex relationships, given that the result reached in this judgment appears to reverse the Court's judgment in *D. and Sweden v. Council*, where it was held that the interpretation of the version of the Staff Regulations that was applicable at the time and which only granted the claimed household allowance to married couples, to the effect that (same-sex) registered partners were excluded from that benefit, did not amount to either discrimination on the grounds of sex or sexual orientation.[96] Adopting a limited view of the coverage of the prohibition of sex discrimination – in line with its judgment in *Grant*, seen above – the Court had pointed out that 'it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman'.[97] Moreover, as regards sexual orientation discrimination, the Court had noted that 'it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner'[98] – a statement which is, clearly, the opposite to the Court's approach in *Hay*, where it was pointed out that a difference in treatment based on the employee's marital status and not, on its face, on his or her sexual orientation amounts to direct discrimination on the latter ground.

Accordingly, *Hay* appears to illustrate that in recent years, there has been some progress in the Court's approach towards sexual orientation issues. The fact that an equally LGB-friendly approach has been followed in cases involving LGB individuals (as opposed to couples) in *Asociația Accept*[99] and *the X, Y and Z* judgment,[100] both of which were delivered shortly before *Hay*,[101] illustrates that

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96 *Ibid*, paras. 46-47.

97 *Ibid*, para. 46.

98 *Ibid*, para. 47.

99 Case C-81/12, *Asociația Accept*, Judgment of 25 April 2013, not yet reported. For an excellent analysis of this case see U. Belavusau, 'A penalty card for homophobia from EU Non-Discrimination Law: Comment on *Asociația Accept* (C-81/12)', presented at the 44th UACES Annual Conference, Cork, Ireland (1-3 September 2014).

100 Joined Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X* and *Y and Z v. Minister voor Immigratie en Asiel*, Judgment of 7 November 2013, not yet reported.

101 At the moment of writing, two more cases involving the rights of LGB individuals are currently pending before the ECJ: Case C-528/13, *Léger* (pending) – Advocate General Mengozzi delivered his Opinion on 17 July 2014; and Joined Cases C-148-150/13, *A. B and C* (pending) – Advocate General Sharpston delivered her Opinion on 17 July 2014.

through its recent case-law in the area of anti-discrimination law, the Court may now be in the process of eluding its characterisation of a 'homophobic bench'.[102]

4. Is the current legal regime compliant with EU law?

As we saw in the previous section, EU law currently offers no protection to same-sex couples that migrate to another Member State - it 'fails to provide same-sex couples legal certainty as regards their right of free movement under the EU Treaties'.[103] More specifically, the EU legislature either explicitly (for registered and unmarried partners) or implicitly (for spouses) has adopted the host State principle, in this way leaving it entirely up to the host Member State to decide whether and, if yes, to what extent, it will recognise the same-sex relationships of migrant Union citizens. Accordingly, the host State is free to determine whether a) it will recognise the exact legal status attributed to the couple in another Member State (whether this is as a married couple or as registered partners); b) it will recognise the same-sex couple as a couple but will attribute to them a legal status different from that bestowed on them in their home State (e.g. if they were married in their home State but the host State only offers registered partnership to same-sex couples, they will be considered as registered partners); c) it will recognise the same-sex couple as a couple (as 'unmarried partners in a durable relationship') without, however, a formal legal status (and this may be so even if they married or entered into a registered partnership in their home State); d) it will refuse to recognise the same-sex couple as a couple (and this may be so even if they married or entered into a registered partnership in their home State).

This section aims to show that the EU's current hands-off approach *allows* Member States to breach a) the free movement rights that Union citizens derive from the Treaties, b) the prohibition of discrimination on the grounds of sexual orientation, provided in the Charter and in secondary legislation (Directive 2000/78), c) fundamental (human) rights protected under the Charter, namely, the right to human dignity.

4.1 Restrictions on free movement

The first problem with the current regime is that it permits the host State to create restrictions on the free movement of Union citizens, which are in contravention of the free movement provisions of the Treaty.

Before analysing this argument, I will provide a practical example in order to enable the reader to comprehend the position better. Let's assume that a Spanish man and a Moroccan man were married in Spain and are contemplating moving to Cyprus where the Spanish spouse has been offered a very well-paid job. If they are informed that in Cyprus they will not be considered a couple (and, clearly, not a married couple) and, hence, they will be treated as single

102 D. Kochenov, *supra* note 18, at p. 175.

103 J. Rijpma and N. Koffeman, *supra* note 6, p. 455.

persons (and, thus, less beneficially) for purposes of taxation and social benefits and so on, they may have second thoughts regarding the contemplated move. This will, probably, be even more so when they will find out that, given that Cyprus does not consider the same-sex spouse of a Union citizen as a 'spouse', within the meaning of the 2004 Directive, it does not consider that it is obliged by EU law to admit him within its territory. In such a scenario, the Spanish spouse will have to choose between moving to Cyprus alone or staying in Spain together with his spouse. Although the example refers to same-sex spouses, the same scenario can be transposed into a situation involving same-sex registered partners,[104] and same-sex *de facto* partners.[105]

The right to free movement of Union citizens who are in a same-sex relationship can be restricted in three different ways – and a single case may involve one or more of these three scenarios.

The first scenario involves the application of the conflict-of-law rules of the host State and, in particular, the question whether the host State shall recognise the specific legal status attached to the same-sex couple by another State. As noted by Lenaerts, 'a change in the civil status of incoming same-sex couples may be seen as an obstacle to free movement'.[106] Hence, the conversion of a certain legal status into another – often 'lesser' – status (e.g. from married couple to registered partners) may, *in itself*, be considered to amount to a restriction on free movement. *A fortiori* the denial to recognise at all the legal status that was attached to a same-sex relationship by another Member State can constitute an obstacle to free movement.

Biagioni drew a parallelism between situations where the host State does not recognise the marital/partnership status of migrant Union citizens (there has been no ECJ case-law to date on this) with the situations in the citizenship cases of *Garcia Avello*[107] and *Grunkin-Paul*,[108] which involved the denial of the host State to recognise the surnames registered in another Member State of Union citizens whose situation involved a cross-border element. In the above cases, the Court held that the contested denial would create an obstacle to free movement since the discrepancy in surnames that would be created as a result could cause serious inconvenience to the persons concerned. On the basis of this, Biagioni pointed out that 'there is no doubt that a limping *status* as to marriage is likely to cause even greater inconveniences to the parties and to deter them from exercising the freedom of circulation' and, also, noted that it is unlikely that the

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104 For the position of registered same-sex partners where the host State principle is applied see M. Bell, 'We are Family? Same-sex Partners and EU Migration Law', (2004) 9 MJ 335, at pp. 345-346.

105 L. Papadopoulou, 'In(di)visible Citizens(hip): Same-sex Partners in European Union Immigration Law', (2002) YEL 229, at p. 247.

106 K. Lenaerts, *supra* note 9, pp. 1359-1360.

107 Case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

108 Case C-353/06, *Grunkin-Paul*, [2008] ECR I-7639.

host State will be able to justify such an obstacle.[109] Given that the EU seems to permit under the current regime each State to determine whether or not it will recognise a same-sex marriage contracted in another Member State, this means that a married same-sex couple will be considered as married in some Member States, as registered or *de facto* partners in others, while in some Member States it will not be considered a couple at all! This will no doubt, cause a serious inconvenience to the couple whenever it shall wish to exercise its free movement rights between States of recognition and non-recognition. Not only is the change or complete non-recognition of the legal status attached to a same-sex relationship inconvenient in itself, but it, also, has negative practical consequences in a host of issues which will, in their turn, constitute obstacles to free movement, as we shall see when analysing the second and third scenarios below.

The second scenario involves same-sex couples which, after having been admitted into the host State, realise that they are unable to claim tax benefits, social security benefits, or social advantages that are granted to couples (or which are granted, only, to married couples). Two different possible situations may be envisaged here.

The first one is where the same-sex couple is not entitled to certain social or tax benefits, social security advantages and so on, *because of the refusal of the host State to recognise the legal status attached to it by another Member State* – the issue noted in the previous paragraph. An example of this could be a same-sex married couple which – because it is not recognised as a married couple by the host State – cannot claim social and tax advantages that are only available to married couples. Using Biagioni's argument above, there is no doubt that the discrepancy in statuses that will be created as a result of the host State's denial to recognise the legal status attached to a same-sex relationship, will create a significant inconvenience to the couple if – despite the fact that the parties to it have formalised their relationship and have made the commitment which normally leads to beneficial treatment under social security, tax, property and social assistance legislation in all Member States – it will be deemed not entitled to any of the benefits and allowances granted to other – opposite-sex – couples that have made the same commitment by formalising their relationship in the same manner. This will, clearly, amount to an obstacle to the free movement rights of the couple and thus, unless justified, will be contrary to the free movement provisions of the Treaty (and to Article 45 of the Charter).[110]

The second possible situation is where the refusal of the said advantages, benefits etc, is not due to the non-recognition of a legal status bestowed by another Member State, but is simply a result of the tax and social assistance benefits legislation of the host State and the choices that the host State has made in that field. If, for instance, a same-sex couple that has entered into a registered partnership has moved from Member State A (which grants to registered

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109 G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), pp. 376-377.

110 For a similar view see M. Bell, *supra* note 104, pp. 339 and 350.

partners the same rights it grants to married couples when it comes to tax advantages) to Member State B (which does not grant to registered partners the same rights it grants to married couples), the 'loss' of certain benefits that would be enjoyed in Member State A is not due to the exercise of free movement rights and/or to the fact that the host State refuses to recognise the legal status attached to the couple, but is, simply, a result of the application of the legislation of the host State. As has been made clear by the Court of Justice, freedom of movement does not require that a Union citizen be entitled in the host State to benefits identical to those to which he was entitled in his home State. The Court has held that 'adverse consequences' with regards to taxation assessment which are suffered by a Union citizen who has moved to another Member State, do not amount to a violation of EU free movement law if they 'result from the exercise in parallel by two Member States of their fiscal sovereignty'.[111] Similarly, the host State is only required to grant social assistance benefits to migrant Union citizens, under the same conditions as these are granted to its own nationals; it is not required to provide to nationals of other Member States social advantages which they enjoyed in their home State, if it does not grant such advantages to its own nationals.[112] Accordingly, if the host Member State treats its own nationals who are in a same-sex relationship as badly as same-sex couples who come from another Member State, if the loss of the claimed benefits/advantages is not due to the denial to recognise a certain legal status, and the same-sex couple is treated less beneficially than it would be treated in its State of origin simply because of the application of a different taxation and social assistance system in the host State, there will be no restriction which amounts to a violation of the free movement provisions of the Treaty. However, as will be seen in the next subsection, a refusal by the host State to legally recognise a migrant same-sex couple for the purposes of taxation assessment or the grant of social assistance benefits, may amount to a violation of EU anti-discrimination law in certain cases.

The third scenario concerns the admission into the territory of the host State of the family members of the migrant. As noted in the previous section, it has always been considered that Member State nationals would only be willing to move to another Member State if they were guaranteed that they would be able to be accompanied or joined there by their close family members. Accordingly, the EU legislature has always 'recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty'.[113] Similarly, the Court has held in a long line of case-law that the unjustified refusal of the host State to admit within its territory the close family members of the migrant, amounts to a restriction on free movement which is contrary to the free movement provisions of the Treaty.[114] Hence, the complete

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111 Case C-513/04, *Kerckhaert and Morres*, [2006] ECR I-10967, para. 20.

112 See Article 24(1) of Directive 2004/38, *supra* note 17; Article 7(2) of Regulation 492/2011, *supra* note 45; Case 197/84, *Steinhauser*, [1985] ECR 1819.

113 *Metock*, *supra* note 27, para. 56.

114 See, for instance, *Singh*, *supra* note 28, paras. 18-20; *Carpenter*, *supra* note 28, para. 39; *Eind*, *supra* note 28, paras. 35-37; *Metock*, *ibid*, paras. 56-57.

refusal of the host State to admit within its territory the same-sex spouse/registered partner/partner of the migrant Union citizen amounts to a clear obstacle to free movement. If a migrant Union citizen cannot be accompanied in the host State by his or her spouse or registered/*de facto* same-sex partner, this can clearly dissuade him or her from actually moving to the host State and will, thus, amount to a restriction on free movement.[115] Accordingly, it can amount to a, *prima facie*, violation of the free movement of persons provisions.[116] As the Court noted, '[e]stablishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.'[117] Consequently, and paraphrasing the Court, the freedom of movement of Union citizens in a Member State whose nationality they do not possess should not vary from one Member State to another, according to the provisions of national law concerning immigration and family law, with some Member States permitting entry and residence of same-sex spouses/registered partners/*de facto* partners of a Union citizen and other Member States refusing them.[118]

However, as is well known, measures which lead to a restriction on free movement rights are not, always, prohibited by EU law: the recalcitrant Member State can continue applying the offending measures if it can prove that it is justified in doing so by a Treaty derogation and, in case the measure is not discriminatory on the grounds of nationality and does not have to do with the entry or expulsion of Union citizens and/or their family members, it can be justified by an objective justification.

In the context of the above three scenarios (i.e. when Member States refuse to recognise or change the legal status attached to a same-sex relationship, or when they refuse to admit within their territory the same-sex spouse/registered partner/*de facto* partner of the migrant Union citizen), it is most likely that Member States would try to rely on the ground of public policy, arguing that their actions are justified by the need to protect public morality and 'the family' or – in cases involving same-sex marriages – the need to protect the traditional notion of marriage in their territory. Yet, the fact that in all three scenarios the Member State is engaging in discrimination on the ground of sexual orientation – as will be seen in the next subsection – will prove problematic. As Advocate

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115 A. Clapham and J. H. H. Weiler, 'Lesbians and Gay Men in the European Community Legal order' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy* (Martinus Nijhoff, 1993), p. 41; K. Waaldijk, *supra* note 42, p. 279; E. Deards, 'Discrimination on grounds of sexual orientation: the role of Community law', (1999) 10 KCLJ 12, at p. 19; E. Guild, *supra* note 19, pp. 685-686; J. Rijpma and N. Koffeman, *supra* note 6, pp. 476-477.

116 Article 21 TFEU (for economically inactive Union citizens), Article 45 TFEU (for workers), Article 49 TFEU (for the self-employed who exercise their freedom of establishment), Article 56 TFEU (for service-providers). Which provision will be applicable will depend on the 'status' of the migrant Union citizen. For instance, if he is a 'worker', Article 45 TFEU will apply whereas if he is economically inactive, the applicable provisions will be Article 21 TFEU.

117 *Metock*, *supra* note 27, para. 68.

118 *Ibid*, para. 67.

General Jääskinen has rightly pointed out, 'the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it'.[119] Similarly, Kochenov has stressed that 'public policy cannot possibly consist in discriminating on the basis of sex',[120] or, I would add, on the basis of sexual orientation.

In any event, and leaving aside the question of whether such arguments do have any substance and are capable of justifying a restriction on free movement rights, Member States will still face an – insurmountable – obstacle when trying to justify their measures. This is that Article 27(2) of Directive 2004/38 requires that measures taken by the host State relying on public policy 'shall be based exclusively on the personal conduct of the individual concerned'.[121] This will, clearly, not be satisfied where Member States engage in a blanket refusal to recognise and/or admit within their territory the same-sex spouse/registered partner/unmarried partner of a migrant Union citizen, since they exclude a *whole category* of persons (i.e. LGB individuals who are in a same-sex relationship) *simply* because those individuals fall within that category, and, hence, their exclusion is not based on their personal conduct.

Accordingly, it appears highly unlikely that Member States will be able to justify their refusal to recognise the legal status of migrant same-sex couples and the resultant refusal to admit them within their territory. Agreeing with Kochenov, '[t]he main right of EU citizenship, which is free movement, cannot be made dependent on the sex or, for that matter, the sexual preferences of citizens',[122] and, therefore, Member States will be found to be in violation of the free movement of persons provisions of the FEU Treaty when engaging in the above conduct. Accordingly, EU free movement law (i.e. the free movement of persons provisions) requires Member States to (mutually) recognise the legal status attached to the same-sex relationships of migrant Union citizens. This will not only enable same-sex couples to be recognised as such once they are admitted into the territory of the host State (for the purposes of taxation, social benefits etc) but it will, also, enable LGB Union citizens to rely on Article 2 of Directive 2004/38 in order to claim *automatic* family reunification rights with their same-sex spouse or registered partner in the host State, just as heterosexual Union citizens are under all circumstances entitled to do. Moreover, when the host State conducts its assessment under Article 3(2) of the Directive as to whether it should facilitate the entry into its territory of the (same-sex unmarried) partner of the migrant Union citizen, this should be free from any discrimination on the ground of sexual orientation. After all, the impediment to free movement is exactly the same, whether an LGB Union citizen cannot be accompanied in the

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119 Paragraph 175 of the Opinion of Advocate General Jääskinen in *Römer*, *supra* note 9. See, also, the Judgment of the ECtHR in *Karner* v. Austria, Application No. 40016/98, 27 July 2003.

120 D. Kochenov, *supra* note 18, p. 203.

121 For a similar view see L. Papadopoulou, *supra* note 105, pp. 235-236.

122 D. Kochenov, *supra* note 18, p. 184.

host State by his same-sex partner or whether a heterosexual Union citizen cannot be accompanied by his opposite-sex partner.

4.2 Violation of the principle of discrimination on the ground of sexual orientation

Having analysed the functional, free movement, argument in building a case against the current failure of the EU to protect migrant same-sex couples when they seek to be admitted into, and reside in, the territory of another Member State, we move, now, to an equality-based argument.

As Bell has stressed, 'it is difficult to see how any exclusion of same-sex married couples […] from free movement rights could be reconciled with' the principle of equal treatment irrespective of sexual orientation.[123] If any of the EU institutions – including the Court of Justice – expressly interprets the terms 'spouse', 'registered partner' or 'partner' in Directive 2004/38 as excluding same-sex spouses/partners, this will clearly amount to direct discrimination on the ground of sexual orientation,[124] and will, thus, amount to a violation of Article 21 of the Charter of Fundamental Rights.

Similarly, if any Member States decide to explicitly exclude same-sex spouses/registered partners/*de facto* partners from the terms 'spouse', 'registered partner', and 'partner', in their legislation implementing Directive 2004/38, they will be in violation of Article 21 of the Charter: this will amount to direct discrimination on the ground of sexual orientation;[125] and the case against them will be further bolstered by the fact that Recital 31 of the 2004 Directive provides that Member States should implement the Directive without discrimination between its beneficiaries on the ground of, *inter alia*, sexual orientation. Of course, even if national implementing legislation appears entirely neutral – using the gender-neutral terms employed by the EU legislature – there will, obviously, be a violation of the above provisions if in practice the host State excludes the same-sex spouse/partner of the migrant from the scope of these terms.[126] [127]

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123 M. Bell, *supra* note 104, p. 349.

124 M. Bell, 'EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process', ILGA Europe, October 2005, p. 5.

125 Fundamental Rights Agency Report 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009), pp. 16, 66, 69 and 70.

126 For a table describing the approach towards the legal recognition of migrant same-sex couples by each Member State (albeit somewhat outdated given that the Report was compiled back in 2010) see Fundamental Rights Agency Report 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity' 2010 Update' (2010).

127 In the European Parliament's Report on the application of Directive 2004/38 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)), p. 7, it was stated that one of the problematic issues with Member State implementation of Directive 2004/38 (*supra* note

If a Member State, in violation of Article 21 of the Charter, is found to be discriminating on the grounds of sexual orientation when implementing and applying Directive 2004/38 with regards to the admission of the third-country family members of incoming Union citizens, it will only be able to continue doing so if it can justify the contested differential treatment. Yet, given that, as the Strasbourg Court has held,[128] only 'particularly serious reasons' can justify differential treatment based on sexual orientation,[129] the Member State responsible for such discriminatory practices will be faced with an uphill struggle. As that court pointed out in its judgment in *Vallianatos*, '[i]n cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue. […] the burden of proof in this regard is on the respondent Government'.[130] It, therefore, appears that it will be very difficult, if not impossible, for a Member State to justify measures or practices which discriminate against (migrant) same-sex couples when it comes to the grant of family reunification rights.

We should now turn to the position of same-sex couples *once* they are within the territory of the host Member State. As Bell has pointed out, '[h]aving admitted a

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17) is the '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'. The Parliament has, therefore, called '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 principle of mutual recognition, equality, non-discrimination, dignity, 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 regards, 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' – pp. 8-9 of the Report.

128 It should be noted that Article 52(3) of the EU Charter of Fundamental Rights provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'. Accordingly, the ECJ must adopt the interpretation and principles laid down by the Strasbourg Court unless it wishes to offer higher protection. In this context, this means that Member States will have to *at least* rely on particularly serious reasons to justify discrimination on the grounds of sexual orientation.

129 Application No. 7525/76, *Dudgeon v. United Kingdom*, 22 October 1981, (1982) 4 EHRR, para. 52; *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, (1999) 29 EHRR 493; *Karner*, *supra* note 119, para. 37.

130 Application Nos. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, Judgment of 7 November 2013.

couple in a same-sex marriage or registered partnership, questions would undoubtedly arise concerning the extent to which that marriage or registered partnership has effects within the host state. For example, if the host state provides special tax advantages to married couples, would these be extended to same-sex married or registered partners from other EU states?'.[131]

Article 24 of Directive 2004/38 requires that EU citizens (and their family members) are treated equally with the nationals of the host State. From this it follows that if there is any discrimination on the grounds of nationality against a (same-sex) couple in the host State, this will, obviously, be contrary to the Directive. There are no signs, however, that Member States wish to treat same-sex couples from other Member States worse than national same-sex couples – in Member States which refuse to legally recognise same-sex relationships, migrant and national same-sex couples are treated equally badly.

Accordingly, what interests us more is whether the failure of the host State to recognise the legal status conferred on a same-sex couple in another State amounts to a violation of EU anti-discrimination law. For instance, if the host State refuses to treat a married same-sex couple from another Member State as married and treats the parties to the marriage as registered or unmarried partners or even does not treat them as a couple at all, and this has as a result that they are not entitled to receive preferential tax treatment that is afforded to (opposite-sex) married couples, is this contrary to EU anti-discrimination law (in addition to being contrary to EU free movement law as we saw in the previous subsection)?

Before attempting to provide an answer to this question, it should be explained that the problem here, from the point of EU law, is not that the couple loses benefits and entitlements to which it is entitled in its State of origin: as noted in the previous subsection, EU law does not require the host State to provide to migrant Union citizens the same social and tax benefits they enjoy in their home State. Rather, the problem is that the failure of the host State to recognise the legal status conferred on a couple in its State of origin, may put the couple in a position where it is discriminated against on the ground of its sexual orientation. Accordingly the main question here is whether the same-sex couple is treated worse than opposite-sex couples who are in a comparable situation, and this difference in treatment is based on the ground of sexual orientation.

Drawing on the Court's case-law to date (*Maruko*,[132] *Römer*,[133] and *Hay*[134]) it is clear that if a same-sex married couple moves to a Member State which has not opened marriage to same-sex couples and, hence, the marriage is converted into a registered partnership, which, in the host State, is a status that is *for the relevant purpose* (e.g. taxation, a specific pension benefit, and so on) comparable

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131 M. Bell, *supra* note 10, p. 623.

132 *Supra* note 16.

133 *Supra* note 9.

134 *Supra* note 22.

to that of (opposite-sex) marriage, the host State is obliged under EU law to treat the couple in exactly the same way as a married couple *for that purpose*. Hence, same-sex married couples will not suffer any *practical* disadvantage when it comes to beneficial tax treatment etc, if they move to a Member State which does not recognise same-sex marriage, *but* treats registered partnerships (to which the marriage has been converted) as equivalent to marriage when it comes to taxation. The same will, of course, be the case for registered partners who move to a Member State which treats registered partnerships as equivalent to marriage in a particular area – apart from not 'losing' their status or being 'downgraded', they will also be able to require the host State to treat them in the same manner as (opposite-sex) married couples, if the conditions noted above are satisfied.

Moreover, following *Hay*, the assessment of the comparability of married and registered partners will no longer be entirely left to the national courts, but the ECJ may decide to conduct the comparability assessment itself and this may yield a result which is different from what is argued by the national authorities.

Accordingly, in case it is found by the ECJ that there is, indeed, comparability (despite the opposite being argued by the national authorities), the host Member State will be obliged to treat the same-sex registered partners in the same way as (opposite-sex) married couples, otherwise there will be discrimination on the grounds of sexual orientation which – if it is in the areas of employment, occupation and vocational training – will be contrary to Directive 2000/78. As regards any situations not falling within the scope of Directive 2000/78, Article 21 of the Charter may come to the rescue, but this will depend on whether the situation falls within the scope of the Charter. Further clarification from the Court is, clearly, required here.

As regards same-sex *de facto* partnerships, on the other hand, these must merely be treated in the same way as opposite-sex *de facto* partnerships with regards to taxation, social assistance benefits and so on; if they are not, this will amount to a breach of Directive 2000/78 if the discrimination is in the areas of employment, occupation or vocational training, and/or a breach of Article 21 of the Charter, in situations which fall within the scope of the Charter.

4.3 Violation of the right to human dignity under Article 1 EUCFR

Apart from the functional and equality-based arguments made so far, a number of human rights arguments can be used to challenge the host State's denial to recognise the legal status attached by another State to a certain same-sex relationship, its refusal to admit within its territory same-sex couples, and its discriminatory treatment against them once they are within its territory.

The first such argument is that (all) the above practices may amount to a violation of the right to human dignity provided under Article 1 EUCFR, and which is, also, a general principle of EU law.[135]

Although neither the Court nor the 'Explanations Relating to the Charter of Fundamental Rights' have provided much by way of clarification of this right, and although 'there is hardly any legal principle more difficult to fathom in law than that of human dignity',[136] the words of Advocate General Poiares Maduro in his Opinion in *Coleman* shed some light on its meaning: '[a]t its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. As Ronald Dworkin has recently reminded us, even when we disagree deeply about issues of political morality, the structure of political institutions and the functioning of our democratic states we nevertheless continue to share a commitment to this fundamental principle. Therefore, individuals and political institutions must not act in a way that denies the intrinsic succession of choices among different valuable options. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose'.[137]

The ability to form a stable intimate relationship with another individual is of fundamental importance for every human being, irrespective of his or her sexual orientation. As Baroness Hale very rightly put it in the English case of *Ghaidan v. Godin Mendoza*, '[s]ome people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation'.[138]

Accordingly, every human being should be free to form an intimate relationship with another human being, and should be able to (legally) formalise such a relationship and through this to require everyone else to recognise and respect it. As Poiares Maduro notes above, other individuals and political (or, I would add, judicial and legal) institutions should not act in a way that denies 'the intrinsic succession' of such choices. The fact that a person chooses to form such relationships with a person of the same- or the opposite-sex should not make any difference: these are different – albeit morally equal - choices.

Nicholas Bamforth has, also, viewed the need to protect human dignity as a deeper, underpinning, justification for protecting same-sex partnerships rights

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135 Case C-36/02, *Omega*, [2004] ECR I-9609, para. 34.

136 Paragraph 74 of the Opinion of Advocate General Stix-Hackl in *Omega*, *ibid*.

137 Paragraph 9 of the Advocate General's Opinion in Case C-303/06, *Coleman*, [2008] ECR I-5603.

138 *Ghaidan v. Godin Mendoza*, [2004] UKHL 30; [2004] 2 A.C. 557, para. 142.

and for requiring equality of treatment between same-sex and opposite-sex relationships: '[a]utonomy or dignity arguments suggest that sexual and emotional desires […] feelings, aspirations, and behaviour, are of central importance for human beings. For most people, participation in a happy sexual and emotional relationship is a central aspect of their well-being, or something which they aspire to have as such an aspect. Provided that a relationship is based on consent, it is – from this perspective – highly unjust for the law to penalise it or to refuse to provide it with an adequate level of support. It is at this stage in the dignity argument that equality becomes relevant. For we can clearly say that, in circumstances of existing inequality, one sensible way to measure the level of protection that should be offered is by comparison with already protected heterosexual relationships'.[139]

From the above, the following argument can be constructed. Forming intimate relationships with other individuals and choosing to formalise these relationships and, consequently, attaching to them a legal status, is an exercise of personal autonomy, which is an aspect of the dignity of every human being. All human beings are equal in dignity.[140] The EU, by prohibiting discrimination on the grounds of sexual orientation in situations that fall within the scope of EU law,[141] (tacitly) admits the equal worth of all individuals *irrespective of their sexual orientation*, and, with it, the equal moral worth of opposite-sex and same-sex relationships. When the EU institutions and/or the Member States refuse to give effect to the choices of individuals as regards their same-sex relationships and (where applicable) to the legal status attached to them, by either not recognising them or downgrading them in some way,[142] they treat such relationships differently from opposite-sex relationships and they seem to be considering the relationship choices of LGB individuals who are in a same-sex relationship as inferior to opposite-sex relationships and, hence, as not having the same moral worth as the latter. Treating LGB Union citizens as second-class citizens in the above manner by failing to recognise and respect their choices in forming intimate relationships and formalising them can, clearly, amount to a violation of the their right to human dignity and, as such, of Article 1 of the Charter; given that the right to human dignity is a general principle of EU law, it can also simultaneously be found to amount to a breach of that principle. Since situations involving migrant same-sex couples do clearly fall within the scope of EU law and since what is mainly contested is the way in which Member States have implemented Directive 2004/38 (and the EU's (tacit) acceptance of this), there is no doubt that such situations fall within the scope of the Charter and,

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139 N. Bamforth, 'Same-sex Partnerships: Some Comparative Constitutional Lessons', (2007) EHRLR 47, p. 55.

140 Paragraph 31 of the Opinion of Advocate General Cruz Villalón in Case C-447/09, *Prigge*, [2011] ECR I-8003.

141 Despite the suggestions of two Advocates General, the ECJ has yet to recognise the prohibition of discrimination on the ground of sexual orientation as a general principle of EU law. See the Opinion of Advocate General Jääskinen in *Römer*, *supra* note 9, paras. 126-131 and the Opinion of Advocate General Mengozzi in *Léger*, *supra* note 101, footnote 53.

142 For a similar view see J. Rijpma and N. Koffeman, *supra* note 6, p. 465.

more broadly, within the ambit of EU law, for the purposes of application of the general principle of human dignity.

Accordingly, the right to human dignity is, clearly, an important weapon in the arsenal of migrant same-sex couples.

4.4 Violation of the right to private and family life under Article 7 EUCFR?

The final basis on which someone might try to challenge the current legal regime and, in particular, its application by the Member States, is, again, human rights law and, in particular, Article 7 of the Charter which protects the right to private and family life. Here, two separate 'claims' can be made.

Firstly, relying on ECHR case-law,[143] since, to date, there is no ECJ case-law on this,[144] it could be argued that the refusal of the host State to recognise a family status – which could clearly be interpreted to include a same-sex *marriage* or *registered partnership* – amounts to a violation of the right to private and family life protected under Article 7 of the Charter, unless the host State will be able to justify this.[145]

Secondly, same-sex couples that encounter difficulties in their effort to be admitted into the host State may try to rely on Article 7 ECHR to require that State to admit both of the partners/spouses within its territory. Since there is no ECJ case-law to date – interpreting Article 7 of the Charter – which deals with same-sex couples, I will rely on case-law of the European Court of Human Rights where Article 8 ECHR was interpreted. However, it should be noted that Article 52(3) of the Charter provides that although when the Charter contains rights which correspond to rights guaranteed by the ECHR the meaning and scope of these rights shall be the same, it also notes that this shall not prevent EU law providing more extensive protection, which means that the ECJ may read additional obligations into certain rights, including into the right to private and family life examined here.

Until relatively recently, 'homosexual relationships' did not fall within the ambit of 'family life' for the purposes of Article 8 ECHR,[146] though they did fall within the scope of 'private life' under the same provision.[147] According to Johnson, 'by siphoning issues relating to homosexuality into the "private life" limb of Article 8, the Court can be seen to have maintained a strongly heteronormative conception of family life'.[148] However, in 2010 the Strasbourg Court, in the 'historic'[149]

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143 *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, judgment of 28 June 2007; *Negrepontis-Giannisis v. Greece*, no. 56759/08, judgment of 3 May 2011.

144 This is in line with Article 52(3) of the Charter, *supra* note 128.

145 See G. Biagioni, *supra* note 109, p. 361.

146 Application No. 14753/89, *C. and L.M. v. UK*, Commission decision, 9 October 1989; Application No. 56501/00, *Mata Estevez v. Spain*, 10 May 2001, (2001) ECHR-VI. This was noted, also, by the ECJ in *Grant*, *supra* note 22, para. 33.

147 K. Waaldijk, *supra* note 42, pp. 282-284.

148 P. Johnson, *supra* note 5, p. 113.

decision in *Schalk*,[150] decided to depart from this deeply heterosexist and homophobic approach, by holding that a same-sex couple can enjoy 'family life' together, within the meaning of Article 8 ECHR. In line with this, the right to family life under Article 7 of the latter can, therefore, also, be interpreted as protecting the family life of a same-sex couple.

The important question for our purposes is whether the refusal of the host State to admit within its territory the same-sex spouse/registered partner/*de facto* partner of the migrant Union citizen, can amount to a violation of their right to private life and/or their right to family life and can, thus, be found to be in violation of Article 7 of the Charter. The Strasbourg court's case-law points to a negative reply to this question. This is because it is well-established that Article 8 ECHR does not imply a general obligation on the Contracting States 'to accept the non-national spouses for settlement'.[151]

Nonetheless, as the Court established in *Carpenter*, drawing on the case-law of the Strasbourg court interpreting Article 8 ECHR, '[e]ven though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article'.[152] This means that the exclusion or deportation of a same-sex spouse/registered partner/*de facto* partner who (already) enjoys 'family life' with the migrant Union citizen in the host State may amount to a violation of Article 7 of the Charter unless it can be justified.[153] Similarly, it will be able to amount to a violation of the 'private life' bit of that provision, however, it should be noted that the European Commission on Human Rights in *W. J. and D. P. v. UK*[154] and *C. and L. M. v. UK*,[155] held that the disruption of private life by deportation only amounts to an 'interference' when there are 'exceptional circumstances'.

Accordingly, based on the Strasbourg Court's case-law interpreting Article 8 ECHR, it seems that Article 7 of the Charter will only be capable of helping same-sex couples who are *already settled* in the host State (after being admitted there)

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149 J. M. Scherpe, *supra* note 8, p. 92.

150 Application No. 30141/04, *Schalk and Kopf v. Austria*, 24 June 2010, (2011) 53 EHRR 20. See, also, Application No. 18984/02, *P. B. and J. S. v. Austria*, Judgment of 22 July 2010.

151 *Abdulaziz*, 28 May 1985, Series A, Volume 94, para. 68.

152 *Carpenter*, *supra* note 28, para. 42; confirmed in, *inter alia*, Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769, para. 53. For the same principles established in an ECtHR case see Application No. 50963/99, *Al-Nashif v. Bulgaria*, 20 June 2002, (2003) 36 EHRR 655, para. 114.

153 See, for instance, Application 54273/00, *Boultif v. Switzerland*, 2 August 2001, (2001) 33 EHRR 1179; Application No. 1365/07, *CG and Others v. Bulgaria*, 24 April 2008. For an explanation of the principles see R. C. A. White and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP, 2010), at pp. 344-351.

154 No. 12513/86, 13 July 1987, not reported.

155 No. 14753/89, 9 October 1989, not reported.

and are recognised as enjoying family (or private) life within the meaning of Article 7 ECHR. Only in case the host State (unjustifiably) deports one of the same-sex spouses/registered partners/*de facto* partners may there be a violation of Article 7. Conversely, same-sex couples that wish to be admitted for the first time to the territory of the host State are likely to be found to be unable to rely on this provision, unless, of course, the ECJ decides to interpret Article 7 of the EU Charter more broadly than the ECtHR has interpreted Article 8 ECHR.

5. Solutions

In this final main section of the paper, I shall seek to summarise my suggestions as to how EU law – or the interpretation of EU law – should be amended or clarified, in order to ensure that the (actual or potential) violations of EU law identified in the previous section are prevented or remedied.

It is clearly no longer acceptable, or legally permissible, for the EU to permit 'ambiguities in the law governing'[156] the status of migrant same-sex couples to persist, since the EU in this manner gives leeway to the Member States to violate the free movement and fundamental rights that a certain group of Union citizens – migrant LGB Union citizens who are in a same-sex relationship – enjoy.

Unlike most commentators,[157] I believe that the best solution will require action, primarily, on the part of the EU legislature.

Since it is most likely that the Court will only be given the opportunity to make it clear that the terms used in the 2004 Directive are inclusive of same-sex couples, via a reference for a preliminary ruling, and given that, as is well-known, there is always an element of randomness involved in this procedure, due to the fact that the questions that are referred to the ECJ depend on the cases that come before national courts and on whether the national court will eventually decide to make a reference to the ECJ, there is no guarantee that the Court will, any time soon, be called to provide an interpretation of these terms. Accordingly, in order to provide an immediate and wholesome solution to the problems identified in this paper, it will be necessary for the EU legislature to amend Directive 2004/38 to make explicit reference to same-sex couples and to incorporate the principle of mutual recognition when it comes to the legal status afforded to same-sex couples in their State of origin. Given that in the last few years more than half of the Member States (at the moment of writing 16, the number rising to 18 in 2015) have amended their laws to provide legal recognition to same-sex relationships, it is not too optimistic to suppose that a qualified majority approving such amendments – as is required under the ordinary legislative procedure –will now be able to be achieved; something which was, clearly, not feasible back in the early 2000s, when the proposal for the 2004 Directive was

156 The phrase has been taken from A. Weiss, *supra* note 25, p. 83.

157 For a view that the problems faced by migrant same-sex couples require action by the Court of Justice, instead of action by the EU legislature, see J. Rijpma and N. Koffeman, *supra* note 6.

negotiated and when only a handful of Member States legally recognised same-sex relationships.

5.1. Proposed legislative amendments

In order to ensure that the Member States do not violate the rights to free movement of Unions citizens and/or that they do not discriminate against them on the grounds of sexual orientation or violate their right to human dignity, Directive 2004/38 should be amended as follows:

a) Article 2(2)(a) should be amended to make it clear that same-sex spouses are also covered by the term 'spouses' and that a couple that has married in accordance with the laws of its home State should be recognised as such everywhere in the EU. Accordingly, Article 2(2)(a) should be amended to read: 'the spouse, irrespective of sex, according to the relevant legislation of the home State'.

b) Article 2(2)(b) should be amended to make it clear that same-sex registered partners are also covered by the term 'the partner' and that a couple that has formed a registered partnership in accordance with the laws of its home State should be recognised as such everywhere in the EU, in this way abolishing the host State principle and replacing it with the home State and mutual recognition principles. Accordingly, Article 2(2)(b) should be amended to read: 'the partner, irrespective of sex, with whom the Union citizen has contracted a registered partnership, according to the relevant legislation of the home State'.

c) A new paragraph should be added to Article 2 of the Directive (Article 2(4)) which will provide: '"Home Member State" means the Member State from which a Union citizen moves in order to exercise his/her right of free movement and residence'.

d) A new paragraph should be added to Article 3(1) of the Directive which shall provide: 'The right of Union citizens and their family members to move to or reside in a Member State other than that of which they are a national, shall be exercised without any discrimination on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation'. In this way, there will be a binding provision in the main text of the Directive reflecting what is stated in Recital 31.

e) Article 3(2)(b) should be amended to provide as follows: 'the partner, irrespective of sex, 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. When conducting this examination, the host Member State shall ensure that its assessment is free from discrimination on any of the grounds referred to in paragraph 1'.

Apart from the fact that the current lack of clarity in the law permits Member States to violate EU law, as seen above, the above changes appear, also, to be

required by the mainstreaming requirement inserted into the FEU Treaty by the Treaty of Lisbon, and which is now found in Article 10 TFEU. As noted by ILGA-Europe, writing before the introduction of this provision, equality mainstreaming requires, *inter alia*, that '[p]olicy in relation to partnerships and family should be adapted to include same-sex couples and rainbow families'.[158]

The main changes proposed above consist, in essence, of a) a clarification that any terms used referring to family members should in all circumstances be interpreted to include the same-sex spouses/registered partner/*de facto* partner of the migrant Union citizen; b) a clarification that when – like, for instance, in Article 2(2)(a) – it is not clear whether it is the home or the host State principle that applies when it comes to the legal status attached to same-sex relationships (which, of course, applies equally to opposite-sex relationships), the home State principle applies, whilst where – like, for instance, in Article 2(2)(b) – the host State principle has been adopted, this should now be abolished and replaced by the home State principle; in this way it is ensured that the legal status attached to a same-sex relationship is valid everywhere in the EU and is not downgraded or, simply, lost, when a same-sex couple moves. In other words, the principle of mutual recognition is transplanted into this context.

Mutual recognition is a principle which has been applied in a number of different EU policies, including, of course, the internal market. The principle provides that in areas where the Member States maintain legislative competence and, hence, there is regulatory diversity which will unavoidably lead to obstacles to free movement, products and economic actors that have complied with the rules of their home State should be admitted into the host State, without having, in addition, to comply with the requirements of the latter. Mark Bell has spoken of an 'increasing acceptance in the EU institutions of the applicability of this approach to managing obstacles to free movement arising from differences in national family laws', and suggested that 'it seems logical that this approach could also be applied as a first step to dealing with the variety of national laws on partnerships'.[159] The application of mutual recognition in the context of same-sex relationships would, in particular, mean that same-sex couples would have to be recognised as such and as having the legal status acquired in their home State, regardless of the position of same-sex couples in the domestic law of the host State. The legal status granted to same-sex couples in their home State would have to be recognised for the purposes of *both* the right to enter and reside in another Member State as well as their treatment under national law, once they have been admitted into the host State (e.g. for purposes of taxation assessment or the grant of benefits).

The question, however, is whether the EU does have the competence to impose the principle of mutual recognition in this context, given that, as noted at the beginning of this paper, the Member States still have exclusive competence in the area of family law. The answer, however, is clear, if we consider the Court's

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158 http://www.ilga-europe.org/content/download/9365/55889/version/2/file/fact_sheet_sept-07.pdf.

159 M. Bell, *supra* note 104, p. 352.

approach in other areas where Member States maintain exclusive competence. In particular, as explained by Kochenov, just as the question of the nationality of a Member State is a matter exclusively for national law and, yet, the EU can require the host State to recognise for all purposes the decision of the home State to grant its nationality to a Union citizen,[160] in the same way, the legal status granted to certain relationships – including same-sex relationships – by a Member State should be mutually recognised by other Member States.[161] Accordingly, the fact that Member States still have the exclusive competence to regulate family law and to determine which couples can be granted a legal status *within their territory*, does not mean that the home State principle and the principle of mutual recognition cannot be applied in this context. In fact, as explained in this paper, this is required if Member States shall exercise their competence in this field *in accordance with EU law*, which is always a necessary requirement in areas that fall within the exclusive competence of the Member States.[162]

Accordingly, it is my contention that irrespective of how difficult and sensitive the issue of the legal recognition of same-sex couples in cross-border situations is, it should clearly be placed firmly on the EU's legislative agenda. As was explained in the previous section, the current regime and the uncertainty that ensues from it permits Member States to act in ways which violate a number of important principles of EU law and infringe some of the fundamental rights enjoyed by Union citizens. Therefore, making the suggested amendments is not simply a matter of improving the rights of a group of Union citizens who are currently disadvantaged, but is required in order for the 2004 Directive to be compatible with higher – i.e. primary – EU law.[163]

5.2 Suggested clarifications to be made by the Court in the interpretation of EU law

If the EU legislature does not take action in the manner suggested above, the full burden will fall on the Court of Justice to ensure that – as far as this is possible – it ensures that the host State respects the free movement rights of migrant Union citizens who are in a same-sex relationship and does not violate their rights under the Charter and EU anti-discrimination law. In fact, given that more and more same-sex couples can now formalise their relationship in view of the fact that the number of Member States offering a legal status to same-sex couples continuously increases, it appears to actually be a matter of time before a same-

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160 See, for instance, Case C-369/90, *Micheletti*, [1992] ECR I- 4239; Case C-200/02, *Chen*, [2004] ECR I-9925.

161 D. Kochenov, *supra* note 18, p. 192.

162 See, for instance, Case C-279/93 *Schumacker* [1995] ECR I-225, para 21 (taxation); Case C-348/96, *Calfa*, [1999] ECR I-11, para. 17 (criminal law); *Garcia Avello*, *supra* note 107, para. 25 (surnames).

163 In my view, although legally possible, it is unlikely, in practice, that a judicial review action would be brought challenging the validity of the Directive on the ground that it violates EU free movement law and/or the Charter.

sex couple brings a case before a national court arguing that the contested refusal of the host State to recognise their relationship amounts to a violation of their rights under EU law.[164] In such a case, and given the lack of clarity that persists in this area, the national court will have to make a reference for a preliminary ruling requesting the ECJ to clarify matters.

The ECJ will, therefore, have to a) clarify that the terms 'spouse' and 'partner' for the purposes of Articles 2 and 3 of the 2004 Directive, include same-sex spouses and partners; that when the Member States implement the Directive – and when they apply the implementing legislation – they have to ensure that they do not directly or indirectly discriminate on the grounds of sexual orientation; and that a same-sex marriage lawfully contracted in accordance with the law of the host State should be mutually recognised in any other Member State (i.e. introduction of the home State/mutual recognition principle with regards to married couples).[165]

However, as regards registered partners, given that the Directive expressly provides for the application of the host State principle, and this is not capable of being interpreted in any other manner, the Court will not be able to remedy this and, hence, whether same-sex registered partners will be recognised in the host State as such, will depend on the law of that State.

Practically speaking, however, when and how much of these issues will, in the end, be clarified by the Court, is entirely unpredictable given that this will depend entirely on the cases that reach the ECJ and the particular questions referred to it.

6. Conclusion

In this paper we saw that there is, in essence, a triple argument on which to base a claim that the current reticence of the EU to intervene and require the host State to recognise the same-sex relationships – either *de facto* or *de jure* – of migrant Union citizens, is entirely unsatisfactory, and permits the violation of a number of Treaty provisions by the Member States. The first is a functional, free movement, argument that should such relationships (and, where applicable, the status attached to them) not be recognised by the host State, this will impede the free movement of Union citizens who are in such relationships and will, therefore, restrict their fundamental right to move and reside in the territory of another Member State. The second is an equality argument, according to which the failure by the host State to recognise the same-sex relationships of migrant Union citizens may amount to a violation of the principle of non-discrimination on the grounds of sexual orientation. Moreover, if, once such couples are

164 A. R. O'Neill, *supra* note 21, p. 200.

165 A call for such clarification has already been made by the Fundamental Rights Agency – see Fundamental Rights Agency Report 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009), *supra* note 125, p. 16.

admitted into the host State's territory, they are treated worse than opposite-sex couples, with regards to matters in the sphere of employment, occupation, and vocational training, this may amount to a violation of Directive 2000/78. And the third is a human rights argument, claiming that the refusal of the host State to recognise the same-sex relationships of Union citizens and the legal status attached to them, amounts to a violation of their right to human dignity protected under the Charter (which is, also, a general principle of EU law).

Although the Member States maintain an exclusive competence in the field of family law and, thus, it is up to them to determine whether they will provide a legal status to same-sex couples within their territory, they need to exercise their powers in that field in a way which does not violate EU law. And, this, as has been suggested, requires that Member States mutually recognise the legal status of same-sex couples (i.e. they recognise same-sex spouses as 'spouses' and same-sex registered partners as 'registered partners') and do not treat same-sex couples worse than opposite-sex couples, if the basis of the differentiation is, merely, the sexual orientation of the couple. Accordingly, this paper has suggested that the EU legislature must make a number of amendments to Directive 2004/38, which will, in essence, make it clear that Member States must treat same-sex migrant couples in the same way as opposite-sex migrant couples. Moreover, the Court should make it clear – if and when it is given the opportunity – that the principle of mutual recognition is applicable in this context as well, and it should ensure that it interprets Directive 2004/38 in a way which does not lead to discrimination on the ground of sexual orientation.

Moreover, should the EU legislature and/or the Court act in the way suggested in this paper, this will most likely have as a side-effect the improvement of the position of 'stagnant' same-sex couples i.e. same-sex couples who are in a purely internal situation for the purposes of EU free movement law. This is because, the application of the mutual recognition and home State principles will mean that the host State will need to grant rights to same-sex couples that come from other Member States which are not, under national law, granted to its own nationals – a form of reverse discrimination.[166] Since Member States do not, usually, wish to discriminate against their own nationals, it is likely that States will decide – as a matter of national law – to extend the rights they afford to same-sex couples that arrive from other Member States to their national same-sex couples.[167] Hence, if, for instance, a Member State admits within its territory – because it is obliged by EU law – the same-sex spouses of nationals of other Member States who have moved to its territory in exercise of their free movement rights, it is very likely that it will decide to do the same – even though it is not required by EU law – with respect to the same-sex spouses of its own nationals in situations where there is no EU cross-border element.[168] In this way, same-sex couples will,

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166 L. Papadopoulou, *supra* note 105, p. 258; D. Kochenov, *supra* note 18, pp. 196-197. For a detailed study of reverse discrimination in EU free movement law see A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009).

167 A. Weiss, *supra* note 25, p. 105. For a similar argument see D. Kochenov, *supra* note 18, p. 197.

168 This is now possible since in *Metock*, *supra* note 27, para. 99, the Court held that (opposite-sex) spouses qualify as family members under the 2004 Directive, irrespective

eventually, be treated equally with opposite-sex ones, not only in situations where they decide to migrate but even in purely internal situations and, hence, the problems currently created by the legal patchwork that exists in the EU with regard to the legal recognition of same-sex relationships, will be solved through a process of voluntary harmonisation, which will absolve the EU from any criticism that it wished to impose its own views on the matter on the Member States.

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of when and where the marriage took place, which means that same-sex marriages formed outside the EU would qualify for mutual recognition, *should the EU legislature or the Court decide to employ this principle for same-sex marriages or registered partnerships*. This would mean that a Member State national who was born and has always lived only in his State of nationality and was married to, say, a Canadian national in Canada where they lived for some time, will be able to return to his State of nationality and require the latter to recognise his Canadian marriage for the purposes of family reunification, *if his State of nationality decides to extend – on its own volition – the family reunification rights granted by EU law to its own nationals in purely internal situations*. Yet, the situation will be more difficult for registered partnerships since the wording of the Directive appears to be requiring that these are formed in an EU Member State, in order to be covered by it.