

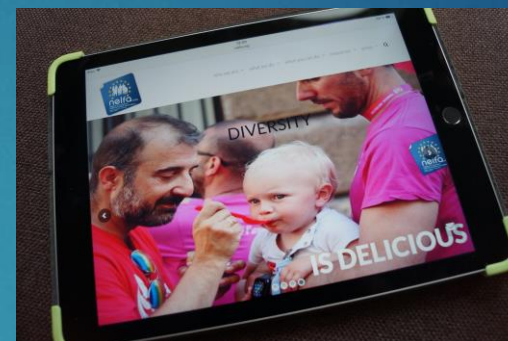
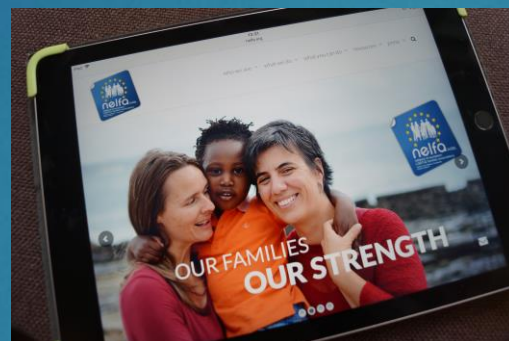
Rainbow Families in Europe

CROSS-BORDER PROBLEMS
OF LGBTIQ* PARENTS AND
THEIR CHILDREN IN THE EU...



nelfa AISBL

network of european LGBTIQ* families associations



CURRENT STATUS OF RAINBOW FAMILIES IN EUROPE

Lesbian, gay, bisexual, trans*, intersex, queer couples and parents (to-be)



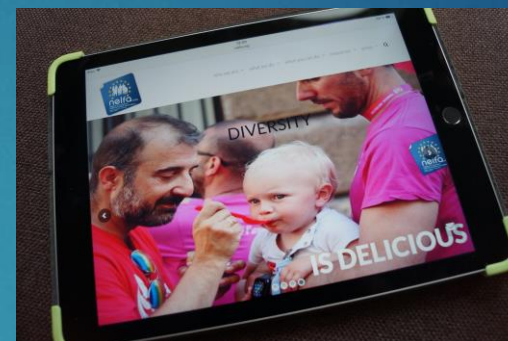
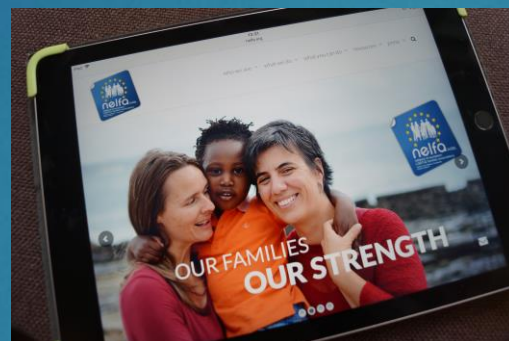
Discrimination

In many EU Member States, LGBTIQ* parents and their children are deprived of their (fundamental) rights. This means less benefits, less protection: **tax credits, inheritance, access to health care, parental leave etc.**

Children can't get a common **family name**, sometimes they even remain stateless (no **passport**, no nationality). They may even face problems as adults to get a marriage licence with a non-recognised birth certificate stating same-sex parents...

LGBTIQ* parents face difficulties to travel or to sign docs for the school or other activities. They have problems to get **reduction** for zoo, theatre or public pools



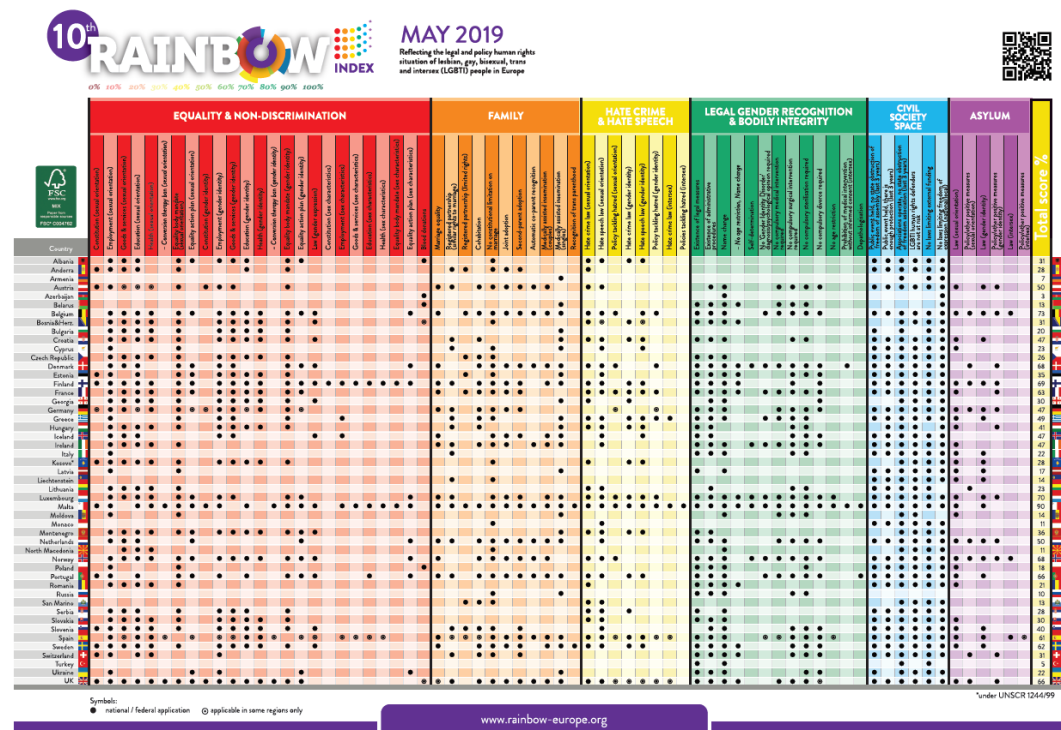
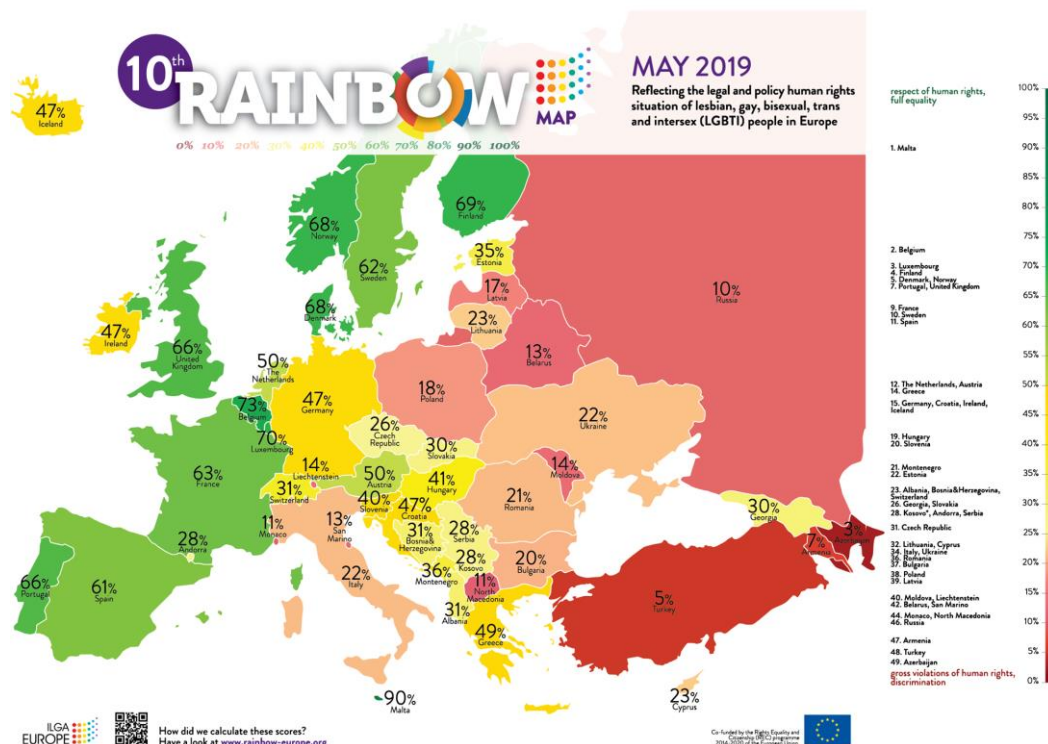


LEGAL SITUATION OF RAINBOW FAMILIES IN EUROPE

Lesbian, gay, bisexual, trans*, intersex, queer couples and parents (to-be)



The rights: ILGA's Rainbow Europe 2019



LGBTIQ* family rights

Registered Partnership: 24 European countries

(**20 EU**) recently: SAN MARINO (2018), Montenegro?

Marriage Equality: 16 European countries (**14 EU**)

THE NETHERLANDS, BELGIUM, SPAIN, NORWAY, SWEDEN, PORTUGAL, ICELAND, DENMARK, FRANCE, UK (Northern Ireland 2020), LUXEMBOURG, IRELAND, FINLAND, GERMANY, MALTA, AUSTRIA

Joint Adoption: 17 European countries (**14 EU**)

COUNTRIES above + ANDORRA

Second-Parent Adoption: 19 (21) countries (**14 EU**)

i.e. SWITZERLAND, SLOVENIA, SAN MARINO, ITALY, ESTONIA

Co-Parent Recognition: 11 countries

(**10 EU**) most recently: FINLAND (soon Ireland?)

MAR: 14 (**12 EU**) [couples] / 26 (**18 EU**) [singles]

Trans parenthood: BELGIUM, MALTA, SLOVENIA, SWEDEN

Marriage equality	FAMILY
Registered partnership (similar rights to marriage)	
Registered partnership (limited rights)	
Cohabitation	
No constitutional limitation on marriage	
Joint adoption	
Second-parent adoption	
Automatic co-parent recognition	
Medically assisted insemination (couples)	
Medically assisted insemination (singles)	
Recognition of trans parenthood	

LGBTIQ* families rights

- No recognition at all (0 %)
- Low recognition (0-13 %)
- Some recognition (13-50 %)
- Good recognition (50-90 %)
- "Full" recognition (90-100 %)



CONCLUSIONS

A legal patchwork situation in Europe

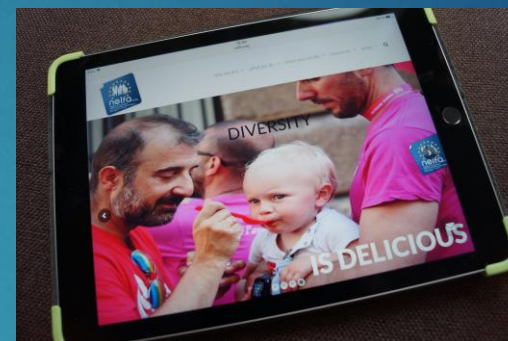
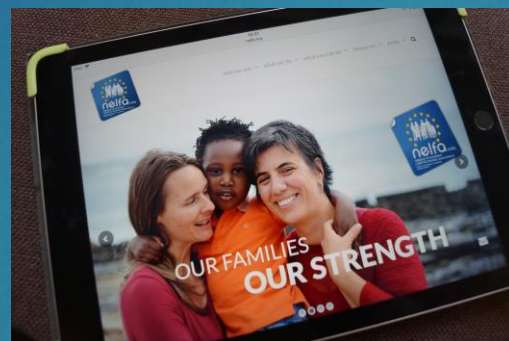
Rainbow families have sometimes (nearly) full rights, limited rights or no rights at all. **Hardly any recognition i.e.** in Lithuania, Poland, Slovakia, Romania/ Latvia and Bulgaria (EU)

The legal systems are quite varying and the national regulations and restrictions for the recognition of LGBTIQ* parents (i.e. rules for medically assisted insemination and the co-recognition of same-sex parents) are often mismatching even in countries with a high-level of equality. **Families are put in jeopardy.**

In addition, many rainbow families report on hostile attitudes, ignorance and inexperience in

And it's getting worse in cross-border situations...





FREE MOVEMENT FOR RAINBOW FAMILIES IN EUROPE?

Lesbian, gay, bisexual, trans*, intersex, queer couples and parents (to-be)



Freedom of movement...

EU citizens **and their family members** have the right to move freely and live in another EU country, subject to any conditions set out in the EU's treaties. **DIRECTIVE 2004/38/EC**

Family members? Gender-neutral...

This covers the **spouse**, a **partner** in a registered partnership with an EU citizen and **direct descendants** under the age of 21 ...

In June 2018: a clarification through the **Coman case** (recognition for the cross-border recognition of same-sex marriage). But besides this, **the Directive doesn't clarify if rainbow families are included or not!**



The Coman Case

Analysis by Alina Tryfonidou (University of Reading/UK) for NELFA in 2019:

- Term „spouse“ includes same-sex couples
- Same-sex marriages are equal to different-sex marriages for the purposes of EU law
- A Member State cannot rely on national law
- Term „spouse“ must comply with the right to „family life“, „family reunification“

Limitations:

- Independent of the place where the marriage has been contracted?
- Genuine residence for more than three months
- Marriage status in host countries during visits?
- Third-country national residing lawfully in the EU?



NELFA case collection...

Rejected transcription of a BIRTH CERTIFICATE:

i.e. **UK-IRELAND, UK-GREECE, UK-FRANCE, UK-POLAND, SPAIN-GREECE, SPAIN-ITALY, NETHERLANDS-FRANCE, DENMARK-BULGARIA, SPAIN-IRELAND-POLAND, ...** => loss of legal familial ties (even forced by authorities [France] or courts [Bulgaria] – “lesbian moms against the public”)

Problems with (converted) MARRIAGE documents:

i.e. **UK-FRANCE, FINLAND-FRANCE** => incompatible regulations, families (with children) remain in legal limbo: an adoption isn't recognised when it was established before the conversion date (...)

In **AUSTRIA**, same-sex marriages that were contracted before 2019 abroad (i.e. Portugal) are not accepted, couples have to remarry. Officials in **HUNGARY** didn't accept a German same-sex marriage. At the same time, they denied access to a civil union because the couple concerned could not proof that they are not yet in a registered relationship (...). No recognition of same-sex marriages contracted abroad in **POLAND** (examples: from Germany/Portugal)



Christopher (name changed)

Leandro: British, Francois: French Residence: UK

2008: Parents in a civil partnership

2010: Birth of Christopher, 2012: Adoption

2016: Parents converted their union into a marriage

Chris' parents considered moving to France, but Embassy officials told them that they need to get (fraudulently) divorced. In 2014, same-sex couples (England + Wales) were offered to 'convert' their civil unions into a marriage. Their certificates were backdated without a ceremony. In France, marriages must have a wedding ceremony with witnesses and the certificate must reflect the date of the wedding – so the marriage is „fundamentally incompatible“ with French law. Many other families have similar problems.

After two years of fighting, the French authorities finally accepted the conversion of the marriage in 2018. But the status of Christopher is still unclear, because he was adopted before the marriage date 2016. But in France, you can only adopt AFTER the marriage...



Victor (name changed)

Janet: Danish, **Delina (name changed):** Bulgarian

Residence: formerly Denmark, now Bulgaria

2016: Birth of Victor by Delina (the birth certificate recognised both mothers)

2016: Victor's mothers got divorced

The Bulgarian mother tried to get a Bulgarian birth certificate, but the Municipality of Pazardzhik refused to do it (law). After a complaint, the Administrative court ruled, that a birth certificate will be issued, blank case „father“. The Danish mother should submit a new court case for proving an origin of the „father“. Victor lost his Danish mother, because the Bulgarian mother never allowed the other one to see the child anymore...

In 2018, Victor's Danish mother lost a two instance court procedure because her „parenthood rights“ would contradict the main principles of Bulgarian law and public order. The boy can't visit his mother.

The ECHR refused to look into the case (formal reasons)



Sofia

Her parents are **Kashka**: Polish, **Sinead**: Irish

Residence: normally Ireland

2018 (summer): Birth of Sofia via MAR in Granada/Spain

Spain: birth certificates recognise both mothers. To obtain Spanish citizenship, a child with foreign parents needs to be registered abroad.

Ireland and Poland didn't accept the transcription of Sofia's birth certificate (The Polish embassy employee first promised a temporary passport, but this was denied after months of non-communication. Last statement: „Search for a lawyer!“, the City Council of Krakow then issues an official rejection after permanent delays. The Irish Passport Office immediately sent a rejection)

Current status: Sofia remains stateless, without ID, without insurance. The family doesn't reside in Spain, but can't get back to Ireland. They went by car to the relatives in Poland (illegally), but will come back to Spain hoping that the authorities will grant an extraordinary citizenship for Sofia (can take one year...)



Francesca and Alexandra

Eleni: Greek, Kate: British

Residence: Spain (Barcelona)

2014: Birth of Francesca via MAR in Spain by Eleni

2016: Birth of Alexandra via MAR in Spain by Eleni

Spain: birth certificates recognise both mothers. To obtain Spanish citizenship, a child with foreign parents needs to be registered abroad.

UK and Greece didn't accept the transcription of Francesca's birth certificate (UK: fertility treatment in Spain and not married at this time, Greece: same-sex couples not recognised, „**against the moral code**“). Francesca didn't receive a passport. After three months, Francesca was diagnosed with cancer.

The responsible person for the transcription turned a blind eye and made a partial registration of the birth.

The case was discussed by the Committee on Petitions in July 2018 and April 2019. Currently, Eleni's family tries to find advice for a complaint in Greece!





WHAT CAN WE EXPECT FROM COURTS AND INSTITUTIONS IN THE EUROPEAN FRAMEWORK?



Recent court decisions...

10 April 2019: ECtHR with advisory opinion: legal ties of children born through surrogacy with intended parents. But CoE Member States should decide which legal way they provide (from birth, second-parent adoption)

24 April 2019: The German Federal Court decided that a surrogate (here: Ukraine) is the legal mother, even if the intended mother gave her ovum

07 May 2019: The Administrative Court in Vienna decided on the necessity to transcribe common birth certificates which were established abroad. It was about a Mexican-Austrian couple and their twins

09 May 2019: Couples who seek surrogacy abroad won't be able to register themselves as co-parents to their children in Italy (stepchild adoption possible)

28 May 2019: A French court accepted a foreign birth certificate (Canada) stating two dads. Their twins, born through surrogacy in 2014, obtain French nationality



After Coman...

EXAMPLE LITHUANIA: In January 2019, the Constitutional Court ruled that **provisions regarding freedom of movement of family members also apply for same-sex couples**. A refusal to issue a temporary residence permit to a spouse/partner can't be based solely on the gender identity and/or sexual orientation.

EXAMPLE BULGARIA: The marriage of a French-Australian couple (contracted in France) was finally accepted by the Sofia City Administration Court in June 2018 (residency), but the Migration Department blocked the decision. **The Supreme Court finally decided positively for the couple** (in July 2019)



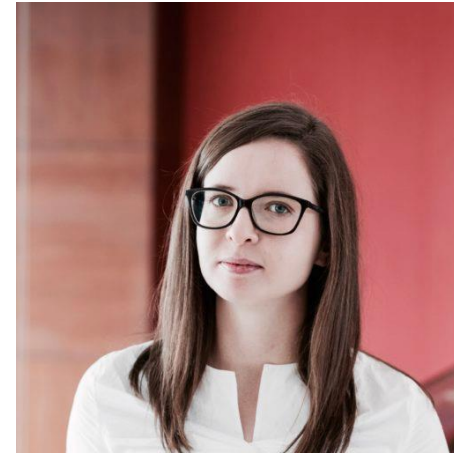
After Coman...

EXAMPLE POLAND: In October 2018, the Supreme Administrative Court (SAC) in Warsaw ruled in favour of a Polish lesbian couple (living in UK) concerning the transcription of their son's British birth certificate (with both mothers recognised) to enter the Polish birth register.

It is the first time, that a child with Polish citizenship has now officially two mothers.

Lawyer A. Mazurczak: “The best interest of a child and the principle of non-discrimination were the key elements in the SAC’s line of argumentation.”

Preliminary ruling at the ECJ (CJEU)? “*The SAC pointed out that there is no need to refer for a preliminary ruling to the CJEU, given that it had already ruled in Coman and Others that same-sex marriages need to be recognized [...]*”





COUNCIL OF EUROPE



Council of Europe

- international organisation to uphold human rights, democracy and the rule of law in Europe. Founded in 1949, 47 Member States
- Parliamentary Assembly: resolutions have no legal force, no compliance obligations (**toothless tiger?**)– but (important) guidance
- European Convention of Human Rights (1953) – and the creation of the **European Court of Human Rights** (judgements are binding, but no executive powers: indemnities => states might pay legal costs, repeating prohibition)



Convention (ECHR)

- **Article 8:** respect for one's private and family life => not to separate a family, enforce access for a divorced parent to his/her child
- **Article 12:** right to marry and to establish a family => same-sex marriage NOT yet included, but positive obligation to ensure a specific legal framework for the recognition and protection of same-sex couples (Oliari and Others vs. Italy)
- **Article 14:** prohibition of discrimination => settled case law implies "sexual orientation" ("or based on other status")



EHCR - interventions

NELFA is involved in several interventions at the European Court of Human Rights about custody rights of LGBTIQ* parents or the recognition of familial ties which were established elsewhere. All current cases are related to Poland.

We contributed to **written comments** by ILGA-Europe, Professor Robert Wintemute (King's College London) and the Helsinki Foundation for Human Rights (HFHR), seated in Warsaw/Poland.

Our goal is to do this on a regular basis with the backing of our **legal support group** (with LGBTIQ* family lawyers and other experts). Our aim are trendsetting judgments for all rainbow families in Europe, in particular in the EU.

More about NELFA's legal service: www.nelfa.org



“ [...] rainbow families exist throughout Europe, whether or not legislation provides for them. These families have the same needs as any other family, yet many are deprived of their rights on the grounds of the sexual orientation or gender identity of the partners or parents. It is crucial and urgent that our legal systems acknowledge this reality and that States work to overcome the discrimination experienced by both adults and children [...] ”

JONAS GUNNARSSON (PACE-RAPPORTEUR, COMMITTEE ON EQUALITY AND NON-DISCRIMINATION)

Council of Europe, Resolution 2239 (October 2018). Private and family life: achieving equality regardless of sexual orientation.

Resolution : <https://bit.ly/2FpaqqR>. Report: <https://bit.ly/2NuRdmD>.





EU INSTITUTIONS



2009: Charter of Fundamental Rights

- **Article 7:** Respect for private and family life
- **Article 9:** Right to marry and to found a family
- **Article 21:** Any discrimination shall be prohibited (explicitly: sexual orientation)
- **Article 24:** Rights of the child => protection and care, they may express their views freely, primary consideration of the child's best interest, maintain a personal relationship and direct contact to both of its parents
- **Article 33:** Family and professional life => legal, social and economic protection, paid maternity leave and paternal leave
- **Article 44:** Right to petition
- **Article 45:** Freedom of movement/residence



EU Parliament

- Ordinary legislative procedure (co-decisions with the Council of the European Union)
 - Debate and adoption of resolutions (i.e. legislative initiatives (freedom of movement: **mutual recognition of civil documents**)
- ⇒ **NELFA** maintains a steady contact to the (in general very active and successful) **EP's Intergroup on LGBTI Rights**, provides its expertise in different committees: PETI, JURI, LIBE
- ⇒ NELFA has contributed to hearings and discussions about rainbow families (AllofUs-campaign, Coman-consequences etc.)



Council of the EU

- Defines the general direction of the Union and priorities, co-decisions with the EU Parliament) – proposals must be adopted in unanimity
- Currently, Hungary and Poland block a lot of legislative initiatives because of LGBTIQ related content => downgraded to an informal status
- => **enhanced cooperation?** Enables groups of States to establish measures between themselves
- **NELFA** has contacts to the General Secretariat of the Council. In 2018, the Network was invited to hold the keynote at the IDAHOT-event.



EU Commission

- Executive branch of the EU, responsible for proposing legislation, implementing decisions, upholding the EU treaties (**Fundamental Rights Charter**: opt-out possibilities for UK and Poland), Fundamental Rights Agency collects and analyses data: **LGBTIQ* surveys 2013/19, freedom of movement report 2018**)
- **BUT**: “substantive **family law falls within the exclusive competence of Member States. Shared competence** [...] however exists in the Area of Freedom, Security and Justice, **where the Union is tasked** [...] to develop judicial cooperation [...] **in civil matters having cross-border implications.**”
 - ⇒ List of actions for LGBT rights (incl. rainbow families, possibilities for direct complaints, funding of projects to advance rights)
- **NELFA** gives specific input at meetings



“

European family law resembles a mosaic, being composed of several individual, fragmented, instruments covering discrete aspects of law. This mosaic is still incomplete: a number of areas are not covered, e.g. [...] property consequences of registered partnerships, capacity, existence, validity, effects and recognition of registered partnerships and marriages, names, filiation, adoption, emancipation.

”

AUDE FIORINI (UNIVERSITY OF DUNDEE), AUTHOR (REQUESTED BY EP'S JURI COMMITTEE)



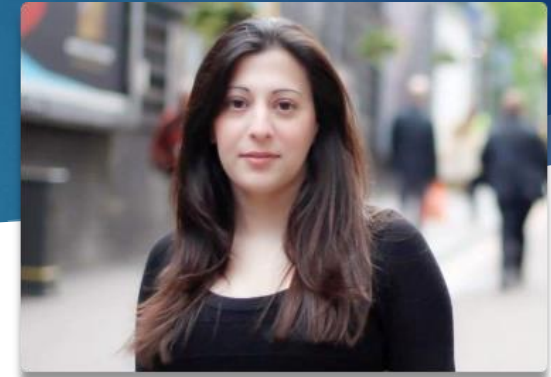
Directorate-General For Internal Policies: Which legal basis for family law? The way forward. Manuscript completed in November 2012

“

[...] What is needed, therefore, is for the EU to take a clear stance on the matter and to inform the Member States that EU law requires them to recognise, for all legal purposes, the familial ties among the members of a rainbow family coming from another Member State, as these have been established elsewhere [...]

”

PROF. ALINA TRYFONIDOU (UNIVERSITY OF READING/UK), INDIVIDUAL NELFA MEMBER



WORKING PAPER: “EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?” (Yearbook of European Law, May 2019)

“

The recognition of civil status is currently governed by Member States' law and the Commission cannot therefore intervene in the petitioner's case. However, when Member States apply their national law, they must respect Union law – as interpreted by the Court of Justice of the European Union –, including on the free movement of citizens within the European Union.

”

EU COMMISSION (CONCLUSION IN THE PETITION 0513/2016 BY ELENI MARAVELIA [GREEK])



Committee on Petitions: Notice for Members (Petition on the non-recognition of LGBT families in the European Union), June 2019

What's next?

- CoE and EU should continue to claim on the Member States to respect the fundamental rights of all citizens (regardless of their sexual orientation and/or gender identity) = **EQUALITY**
- Clarification of the wording in EU-Directive 2004/38/EC (i.e. direct descendants). Are familial ties of rainbow families included?
- **EU: The mutual recognition of the CONTENT of civil documents (VERY IMPORTANT!!)**
- Endeavours to strengthen children's rights, (their opinions taken into account...)
- **FOR RAINBOW FAMILIES: LITIGATION...** (ILGA-blog on Coman, court interventions, legal group, Rainbow Shield, Family Map)



Thank you for your attention!

NELFA

... IS THE EUROPEAN PLATFORM OF LGBTIQ* FAMILIES ASSOCIATIONS, BRINGING TOGETHER LGBTIQ* PARENTS AND PARENTS-TO-BE FROM ALL OVER EUROPE. NELFA CURRENTLY REPRESENTS 38 ORGANISATIONS IN 31 EUROPEAN COUNTRIES WITH MORE THAN 20,000 MEMBERS. NELFA IS A MEMBER OF ILGA-EUROPE, TRANSGENDER EUROPE AND COFACE FAMILIES EUROPE. WEBSITE: [HTTP://WWW.NELFA.ORG](http://www.nelfa.org). LEAFLET: [HTTP://BIT.LY/2RJW0US](http://bit.ly/2RJW0US). NEWSLETTER: [HTTP://BIT.LY/2FCN5C5](http://bit.ly/2FCN5C5).

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