THE CROSS-BORDER LEGAL RECOGNITION OF RAINBOW FAMILIES UNDER EU LAW

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[1] For a detailed, academic, analysis of the arguments made in this Report see A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38 *Yearbook of European Law* (forthcoming).

SAME-SEX COUPLES AND PARENTHOOD: THE MEDICAL REALITY

Despite impressive advances in medicine and technology, same-sex couples are still incapable of having children who will be genetically related to both members of the couple. Same-sex couples can, however, become *de facto* joint parents in a number of ways, such as through donor sperm insemination (known or anonymous), assisted reproductive technologies, surrogacy, step-child adoption, or adoption. In some situations, therefore, one of the members of the couple will be biologically connected to the child (e.g. when one of the female partners in a same-sex couple undergoes medically assisted procreation using her own egg or the egg of her partner), whilst in others (e.g. adoption) the child will be genetically linked to neither member of the couple.[2]

THE LEGAL REGULATION OF PARENTING BY SAME-SEX COUPLES IN INDIVIDUAL EU MEMBER STATES

The fact that same-sex couples are, in some legal systems, not legally recognised as 'couples' together with the fact that it is impossible for the members of a same-sex couple to be the joint *genetic* parents of a child, means that in many EU Member States same-sex couples are neither allowed *de facto* to become the joint parents of a child nor can they be legally recognised as the joint *legal* parents of a child. Hence, in these legal systems same-sex couples and their children are not allowed to legally *establish* their familial links.

To date, there has not been a comprehensive study regarding the national legislations regulating the parental rights of same-sex couples in EU Member States. However, information provided by ILGA Europe[3] demonstrates that, currently, there is a legal patchwork regarding the parental status of same-sex couples in EU Member States, with only a minority of EU Member States providing full parental rights to same-sex couples. Joint adoption by same-sex couples is only allowed in 13 out of 27 EU Member States,[4] whilst second-parent adoption is only allowed in 14 EU Member States.[5] Surrogacy is largely prohibited across EU Member States. The law allows medically assisted procreation by (female) same-sex couples (as a couple) in only 11 EU Member States,[6] whilst it is only in 8 EU Member States that same-sex couples enjoy automatic recognition as co-parents.[7] In

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[2] For an explanation of the parenting options for same-sex couples see T. Amos and J. Rainer, 'Parenthood for Same-Sex Couples in the European Union: Key Challenges' in K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Intersentia, 2017).

[3] ILGA Europe Rainbow Europe Package: Annual Review and Rainbow Europe Map 2019 available at <https://rainbow-europe.org> last accessed 1 February 2020.

[4] Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, and Sweden.

[5] Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain, and Sweden. If Croatia's partner guardianship is considered a form of second-parent adoption, then this form of joint parenting is allowed in 15 EU Member States – see NELFA 'The Legal Situation Within the EU in 2019' available at <http://nelfa.org/inprogress/wp-content/uploads/2019/10/NELFA-Presentation-ChildrensRights2019.pdf> last accessed 1 February 2020.

[6] Austria, Belgium, Denmark, Finland, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, and Sweden.

[7] Austria, Belgium, Denmark, Ireland, Malta, Netherlands, Portugal, and Spain. Although these are not mentioned in ILGA's Rainbow Map, Finland, Sweden, and Slovenia also provide for automatic recognition, whilst it is expected that France and Ireland will soon introduce laws providing for this – see NELFA 'The Legal Situation Within the EU in 2019' (n. 5).

many EU Member States, therefore, the children of same-sex couples have only one legal parent and, in some cases (mainly, when they were born through surrogacy) they are orphans under the law as their intended parents are not recognised as their *legal* parents.

THE PROBLEM

The inability of same-sex couples to become and/or be recognised as the joint legal parents of their children in individual EU Member States is clearly problematic. However, this Report does not have as its aim to argue that the law in individual EU Member States should be amended in order to provide full parental rights to same-sex couples by enabling them to become the joint parents of their children and to legally *establish* (ab initio) the familial links among the members of the family. Rather, the Report shall have a different – less ambitious – focus which will be the maintenance of the *existing* legal links among the members of rainbow families, when such families exercise EU free movement rights and move from one EU Member State to another.

The lack of clarity in the terms used in Directive 2004/38[8] when describing family members (which governs the right to free movement of residence of Union citizens and their family members between EU Member States) and the judge-made category of 'primary carer',[9] in addition to the absence of any clarification offered by the CJEU as regards the children of rainbow families in particular, has given cause to EU Member States which do not make provision for rainbow families within their own legal system, to believe that they are free to refuse to recognise the familial links (as already legally established elsewhere) between the members of such families when they move to their territory.[10] This is problematic because it means that when rainbow families move between EU Member States, the children and their parents may face losing legal ties to each other, something which will undoubtedly lead to a number of legal, psychological, and practical disadvantages.[11]

The question that this Report aims to answer, therefore, is **can EU law require EU Member States to recognise the legal ties between the children and both of their (same-sex) parents** *as these have already been legally established elsewhere* **in situations where the family in exercise of EU free movement rights moves to their territory?**

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[8] Council and Parliament 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 [2004] OJ L 158/77.

[9] Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639.

[10] See, for instance, 'Petition No 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union' (European Parliament, 2016) <https://petiport.secure.europarl.europa.eu/petitions/en/petition/content/0513%252F2016/html/Petition-No-0513%252F2016-by-Eleni-Maravelia-%2528Greek%2529-on-the-non-recognition-of-LGBT-families-in-the-European-Union> accessed 1 February 2020. For additional examples see NELFA Public Petition to EU Commissioner Viviane Reding: NELFA, 'Same-Sex Parents and their Children demand True Freedom of Movement in the European Union' (24 September 2013) <http://lgbt-families.eu/wp-content/uploads/2013/05/NELFAPetitiontoCommissionerRedingFINAL.pdf> accessed 1 February 2020.

[11] For real life examples of such practical disadvantages faced by rainbow families in the EU see http://nelfa.org/inprogress/wp-content/uploads/2020/01/NELFA-AllOut-presentationSHOURTCUT.pdf .

WHY THE EU CAN AND SHOULD REQUIRE EU MEMBER STATES TO RECOGNISE THE LEGAL TIES BETWEEN CHILDREN AND BOTH OF THEIR (SAME-SEX) PARENTS AS THESE HAVE ALREADY BEEN LEGALLY ESTABLISHED ELSEWHERE

Does the EU have the competence to act?

Family law and the regulation of civil status still fall broadly within Member State competence.[12] Thus, the EU does not have competence in the family law field, except when measures concerning family law 'having cross-border implications' are concerned.[13] Therefore, Member States have largely been left to decide what legal recognition, if any, will be given to same-sex couples in their territory (i.e. whether same-sex couples can formalise their relationship in their territory and, if yes, what status can be attached to it). Similarly, EU Member States are left to decide whether they will allow same-sex couples to become *de facto* parents in their territory and whether legal ties between same-sex couples and their children can be established in their territory.

However, Member States must act in a way that respects their obligations under EU law even in areas that fall within their exclusive competence, such as family law.[14] For the purposes of this Report, the EU obligations that are relevant are the obligation to respect a) the free movement rights of rainbow families and b) the fundamental human rights of the members of rainbow families who have exercised their free movement rights, as they derive from the EU Charter of Fundamental Rights (EUCFR)[15] and the general principles of EU law. Accordingly, in the remaining of this Report, it will be demonstrated why EU free movement law and EU fundamental human rights protection requires EU Member States to legally recognise the familial ties – as these have been established in another country – among the members of rainbow families who move to their territory.

EU Free Movement Law

The EU free movement of persons provisions prohibit national measures that obstruct the free movement of Union citizens between Member States.[16] The refusal of the host Member State to legally recognise the familial links among the members of rainbow families can create restrictions to free movement in two ways: when this results in the refusal of family reunification rights (i.e. when some members of the family are not allowed to enter the Member State) and when it leads to the denial of a number of rights or entitlements (such as social and tax advantages) to which the family would have been entitled, if the legal ties among its members would be recognised.

Union citizens have been given the right to be accompanied or joined by their close family members in the host Member State, because the refusal to allow them to do so would deter them from exercising their free movement rights, thus creating an obstacle to free

[12] Case C-267/06 *Maruko* ECLI:EU:C:2008:179, para. 59.

[13] Article 81(3) TFEU.

[14] Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para. 25.

[15] Charter of Fundamental Rights of the European Union [2016] OJ C202/2 (consolidated version).

[16] These are Articles 21, 45, 49, and 56 TFEU.

movement.[17] Hence, the refusal of the host Member State to admit all members of a rainbow family within its territory, on the ground that it does not legally recognise the familial ties among them, can, clearly, amount to an obstacle to free movement. Practically speaking, such a situation can only arise when only some of the family members hold EU citizenship and, as a result of that, enjoy free movement rights.[18] If all family members hold Union citizenship, then they will be able to enter and reside in the host EU Member State on their own right and they will not need to derive free movement and residence rights from a Union citizenship 'sponsor'. Hence, if the only 'sponsor' of family reunification rights in the family is the child (because only him/her holds EU citizenship), the parent who is not legally recognised as a 'parent' will most likely not be allowed to join the family in the host Member State. Similarly, if the only sponsor of family reunification rights in the family is the parent who is not legally recognised as the child's parent (because only him/her holds EU citizenship), then the family may simply not be able to move together to the host Member State (because they will not wish to leave the child behind) unless that State admits the other parent as the same-sex spouse or registered partner of the parent who is not recognised, in which case the child will be able to join the couple as 'the child of the spouse or partner' of the Union citizen.[19]

Even if all members of the family are allowed to enter into and reside in the host Member State (e.g. because they all hold Union citizenship), the non-recognition of the legal ties among the members of the family, will create a host of other difficulties: if one of the parents is not legally recognised as the parent of the child, (s)he will be unable to give consent for the child's medical treatment, open a bank account for the child, travel (alone) with the child, or place the child in school, whilst the child will not have any inheritance rights on intestacy in case the parent who is not legally recognised a parent dies, and will not be able to take the nationality of that parent. This is just a small 'sample' of the practical difficulties that rainbow families who exercise their EU free movement rights may encounter, in EU Member States that refuse to recognise their familial ties as these have been established elsewhere. These difficulties will cause great inconvenience to the family, thereby impeding the exercise of their free movement rights, à la *Garcia Avello*.[20] In addition, this argument is further bolstered by the CJEU's recent emphasis on the need to ensure that Union citizens can continue a way of family life that may have come into being in the Member State from which they come, in order not to be deterred from exercising their free movement rights. [21]

Member States will be unable to justify such obstacles. In order to do so, they would probably rely on the ground of public policy and particularly their interest in preserving their national identity, as was done in the recent case of *Coman* which concerned the cross-border legal recognition of same-sex marriages.[22] However, like an obligation to recognise same-sex

[17] For an analysis of the family reunification rights that Union citizens derive from EU law see C. Berneri, *Family Reunification in the EU: The Movement and Residence of Third Country National Family Members of EU Citizens* (Hart, 2017).

[18] Given that the EU free movement of persons provisions grant the right to free movement only to Union citizens.

[19] Article 2(2)(c) of Directive 2004/38 (n. 8).

[20] (n. 14).

[21] Case C-456/12, *O and B* ECLI:EU:C:2014:135, paras. 54-55; Case C-291/05 *Eind* ECLI:EU:C:2007:771, para. 36; Case C-40/11 *Iida* ECLI:EU:C:2012:691, para. 70.

[22] Case C-673/16 *Coman & Ors v Inspectoratul General pentru Imigrări* ECLI:EU:C:2018:385.

marriages lawfully contracted in other EU Member States, in the same way, an obligation to recognise the parental linkage (as established in another Member State) between one or both of the parents and their child (in a rainbow family) for the sole purpose of granting family reunification rights under EU law, 'does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[23] In any event, even if the contested refusal was considered suitable for achieving the said objectives it would fail to satisfy the requirement laid down in Article 27(2) of Directive 2004/38, according to which measures taken by the host State relying on public policy 'shall be based exclusively on the personal conduct of the individual concerned': this will not be satisfied when Member States engage in a *blanket* refusal to admit within their territory, and/or to recognise, the existing legal ties of all members of a rainbow family. Finally, as the CJEU pointed out in its judgment in *Coman*, 'a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter'.[24] As will be seen below, the refusal of the host Member State to recognise the legal links between a child and his/her parent in a rainbow family is capable of breaching specific fundamental human rights that the child and parents derive from the EUCFR and which are also protected as general principles of EU law.

Accordingly, the failure of the host Member State to legally recognise the familial ties already enjoyed by the members of a rainbow family moving to its territory from another Member State, can amount to a breach of the free movement of persons provisions and Directive 2004/38. This is the case when the above failure leads to the refusal of family reunification rights or of other entitlements which the family seeks to claim once it has been admitted into the territory of the host Member State. Such an obstacle to free movement is unlikely to be justified (on the grounds of public policy or the need to preserve their national identity) as the measure is not based on the *personal conduct* of the individual(s) concerned, as required by art 27(2) of Directive 2004/38, and is in breach of fundamental human rights, as can be seen below. In addition, such a refusal seems to be going against recital 31 of Directive 2004/38, which provides that Member States must implement the Directive without discrimination between its beneficiaries on, inter alia, sexual orientation.

EU Fundamental Human Rights Protection

Fundamental human rights are protected as general principles of EU law and under the EUCFR and bind EU Member States in situations which fall within the scope of EU law. Although the European Convention on Human Rights (ECHR) is not an EU instrument, it has nonetheless always had an important impact on the development of fundamental human rights protection in the EU: it has been recognised as a source of 'guidelines' for the CJEU when determining which fundamental human rights form part of the general principles of EU law and how these should be interpreted.[25] In addition, according to Article 52(3) EUCFR 'In 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

[23] *Ibid*, para. 46.

[24] *Coman* (n. 22), para. 47.

[25] Case 4/73 *Nold* ECLI:EU:C:1974:51.

law providing more extensive protection'. Since there has been no CJEU case-law to date which can provide any guidance as to how a claim for the non-recognition of the familial ties in rainbow families can be supported, the jurisprudence of the European Court of Human Rights (ECtHR) will be used for this purpose.

Breach of the Right to Private and Family Life

The right to private and family life is protected as a general principle of EU law,[26] as well as under Article 7 EUCFR. In *Gas and Dubois v. France*,[27] the ECtHR held that a same-sex couple and their child can together enjoy 'family life' within the meaning of Article 8 ECHR. Accordingly, a rainbow family can enjoy 'family life' for the purposes of the right to family life as protected under EU law.

In *Marckx v. Belgium*,[28] the ECtHR noted that Article 8 ECHR does not merely impose a negative obligation on signatory states to abstain from arbitrary interference with the exercise of the right to family life; it also imposes positive obligations on it, such as when it determines in its domestic legal system the regime applicable to certain family ties 'it must act in a manner calculated to allow those concerned to lead a normal family life.'[29] Most importantly, in *Wagner v. Luxembourg*,[30] which involved the refusal by Luxembourg to recognise a Peruvian court decision pronouncing a full adoption of a child by an unmarried person, the ECtHR held that this amounted to an unjustified interference with the right to respect for the adoptive mother's and the child's family life: 'bearing in mind that the best interests of the child are paramount in such a case … the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention'. More recently, in *Mennesson v. France* and *Labassee v. France* which involved surrogacy arrangements,[31] the ECtHR, following the principles established in *Wagner v. Luxembourg*, found that the refusal of France to recognise the legal parent-child relationship lawfully established abroad as the result of a surrogacy agreement amounted to a breach of Article 8 ECHR, albeit of the 'private life' aspect of this provision. This was in view of the fact that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship': legal uncertainty caused as a result of non-recognition in the host State is liable to have negative repercussions on the children's definition of their personal identity.[32]

Hence, the ECtHR has clarified in numerous judgments that Article 8 ECHR is breached where there is *de facto* family life and the host State refuses to recognise the legal status of those family ties as formally recognised in the country of origin. Transposing this into the EU context, the failure of the host Member State to legally recognise the family ties between

[26] Case C-60/00 *Carpenter* ECLI:EU:C:2002:434.

[27] *Gas and Dubois v. France* App no. 25952/07 (ECtHR, 15 March 2012), para 37.

[28] *Marckx v. Belgium* App no. 6833/74 (ECtHR, 13 June 1979).

[29] *Ibid,* para. 31

[30] *Wagner v. Luxembourg*, App no. 76240/01 (ECtHR, 28 September 2007).

[31] *Mennesson v. France* App no 65192/11 (ECtHR, 26 June 2014); *Labassee v. France* App no 65941/11 (ECtHR, 26 June 2014).

[32] *Mennesson v.* F*rance*, ibid, para. 96.

children (in a rainbow family) and one or both of their parents, places those children and the parents in a legal vacuum; this can breach the child's right to private life and the child's and the parents' right to family life, which are protected as a general principle of EU law as well as under Article 7 EUCFR.

Supporting and encouraging the traditional family would fail as justification, since – as noted by the ECtHR – 'in the achievement of this end recourse must not be had to measures whose object or result is … to prejudice the' rainbow family, given that the members of the rainbow family can – as established in *Gas and Dubois v France* – enjoy family life. Accordingly, the members of rainbow families who enjoy family life must 'enjoy the guarantees of art 8 on an equal footing with the members of the traditional family'.[33] In any event, this argument does not wash in terms of logic given that the non-recognition of rainbow families under the law will not make LGB persons heterosexual and will not convince them to enter into an opposite-sex marriage – it merely (and unreasonably) impedes the enjoyment of family life by LGB persons and their children. Similarly, relying on the need to protect the rights of others, namely of the child, is similarly bound to fail as an alternative justification. There has been considerable social, scientific, and psychological research which argues that the successful raising of a child is not dependent upon the sexual orientation of his or her parents.[34] Moreover, the ECtHR has pointed out in its case-law that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount' and has made a reference to art 24 EUCFR and to the importance of the right of the child to maintain a personal relationship and direct contact with both his/her parents.[35] The same court has also noted that 'family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations'.[36] Accordingly, the best interests of the child seem to require that the familial ties they have legally established with their parents in another country, should be maintained when the family moves to another Member State. Same-sex couples should, therefore, continue to be legally recognised as the joint parents of their children in the host State, not *despite* the children's best interests, but exactly *because* this is required, if the children's best interests are taken into account.[37]

Accordingly, the failure of the host EU Member State to legally recognise the familial ties already enjoyed by the members of a rainbow family moving to its territory from another Member State, can amount to a breach of the right to private and family life, which is protected under Article 7 EUCFR and as a general principle of EU law.

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[33] *Marckx* (n. 28), para. 40.

[34] See, most fundamentally, S. Golombok, *Modern Families: Parents and Children in New Family Forms* (CUP 2015) esp chapters 2 and 7; American Psychological Association, 'Sexual Orientation, Parents, & Children' (2004) <www.apa.org/about/policy/parenting.aspx> accessed 1 February 2020; N. Gartrell, H. Bos and A. Koh, 'National Longitudinal Lesbian Family Study – Mental Health of Adult Offspring' (2018) 379 *The New England Journal of Medicine* 297.

[35] *Neulinger and Shuruk v Switzerland* App no 41615/07 (6 July 2010), para. 135.

[36] *ibid* para. 136.

[37] C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (CUP 2006) 108.

Breach of the Prohibition of Discrimination on the Ground of Sexual Orientation

In situations where the host Member State refuses to recognise the parental ties between a child of a same-sex couple and both of their parents, as these have been legally established elsewhere, this is clearly done because the parents of the child are of the same sex. If the parents of the child were an opposite-sex couple, in the vast majority of cases they would both be legally recognised as the parents of the child, even if the child was adopted or was conceived via assisted procreation methods and was thus not genetically linked with one or both of the parents.

Discrimination against rainbow families is discrimination based on the fact that the LGB parents in a rainbow family have acted on their sexual orientation by entering into a long-term couple relationship with a partner of the same sex and is, thus, a form of discrimination on the ground of sexual orientation. In addition, the children of same-sex couples face discrimination because of the sexual orientation of their parents and, thus, they face discrimination on the ground of sexual orientation *by association* with their LGB parents, which has already been held to be prohibited under EU anti-discrimination law.[38]

The next question, of course, is whether the host Member State may, nonetheless, be justified in drawing a distinction between rainbow families and families built by opposite-sex couples, in situations where there has been an exercise of EU free movement rights.

The ECtHR has made it clear that it considers discrimination based on sexual orientation to be as serious as discrimination on the grounds of 'race, origin or colour',[39] and it has also repeatedly held that 'differences based on sexual orientation require particularly serious reasons by way of justification'.[40] This means that where a difference in treatment is based on sexual orientation, the State's margin of appreciation is narrow and this strict test will rarely – if ever – be satisfied.

The EU Member States would – most probably – rely on the same arguments as they would, when justifying an interference with the rights to private and family life: the need to protect and encourage the traditional family and the need to protect the rights of the child. The arguments made earlier for rejecting these aims as sufficient justifications are, naturally, applicable in this context as well.

It can, therefore, be argued that the failure of the host EU Member State to recognise the legal links between the child in a rainbow family and both of his/her parents – as these have been legally established elsewhere – can clearly amount to an unjustified breach of the prohibition of discrimination on the ground of sexual orientation, as this is laid down under Article 21 EUCFR.

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[38] Case C-303/06 *Coleman* ECLI:EU:C:2008:415.

[39] *Vejdeland and Others v. Sweden* App no 1813/07 (ECtHR, 9 February 2012), para. 55.

[40] See, for instance, *Gas and Dubois* (n. 27), para. 59; *Smith and Grady v. UK* App nos 33985/96 and 33986/96 (ECtHR 27 September 1999), para. 90; *Kozak v. Poland* App no 13102/02 (ECtHR 2 March 2010), para. 92.

CONCLUSIONS

Despite the fact that same-sex couples have often succeeded in creating and sustaining meaningful family relationships, in some EU Member States the law does not protect relationships between same-sex couples and their children. EU law cannot require those Member States to make provision in their laws for rainbow families *to be legally established* as families in their territory, as this is a matter that falls squarely within the regulatory purview of the Member States. Nonetheless, families which are recognised as families under one legal system, cannot have their status as a family and the rights attached to that status, challenged or ignored in the EU Member State to which they move. This creates gross inconsistencies across State lines and great uncertainties for rainbow families. In addition, as shown in this Report, it gives rise to a breach of the EU free movement rights to which Union citizens are entitled, as well as to fundamental human rights which are protected under EU law.

In particular, **the refusal of the host Member State to legally recognise the familial ties among the members of rainbow families that move to its territory, breaches**:

- The EU free movement provisions and Directive 2004/38 (esp. recital 31) because it creates an unjustified obstacle to free movement between EU Member States
- Article 7 EUCFR and the right to private and family life which is protected as a general principle of EU law
- Article 21 EUCFR which prohibits discrimination on the ground of sexual orientation.

Therefore, it is suggested here that – **as an ideal solution** – EU judges (e.g. in response to a reference for a preliminary ruling) and/or the EU legislature should fashion rules and principles that require all EU Member States to legally recognize the familial ties among the members of rainbow families that move between EU Member States, as these have been established elsewhere.

Nonetheless, and **in order to be pragmatic**, it is recognised that it will be very difficult (if not impossible) for EU legislation to this effect to be passed, as it needs to have at least the support of the majority (if not all – depending on the legal base that is used) of EU Member States in the Council. Given that it is only in a minority of EU Member States that there is currently full legal recognition of the parental rights of same-sex couples it is highly unlikely that the necessary majority will be achieved. Accordingly, the following steps can be taken as an alternative EU response to this matter:

- The European Commission can bring an Article 258 TFEU infringement action against the defaulting EU Member States and, if they continue to breach the rights that rainbow families enjoy under EU law, an action should be brought before the CJEU asking it to declare that their refusal to legally recognise the familial ties between a child and both of his (same-sex) parents when they move to their territory, amounts to a breach of EU law.
- The European Commission should issue a Communication clarifying that the terms used in free movement case-law and secondary legislation which governs the rights of families to move freely between EU Member States (e.g. 'primary carer', 'direct descendants', and 'ascendants in the direct line') are inclusive of rainbow families.