



Equality Bodies protecting the rights of rainbow families on the move

by Equinet's Cluster on Rainbow Families on the Move

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Introduction

This report identifies the obstacles that so-called rainbow families face daily when they move across borders of EU Member States, in exercise of EU free movement rights. By providing details about the relevant legal standards and case-law developed within both the European Union (EU) and the Council of Europe (CoE), this publication aims to introduce a comprehensive understanding of the legal framework ensuring the protection of rights and freedoms of same-sex couples and their children on the move – particularly their fundamental right to non-discrimination and equality – with special attention to the role that Equality Bodies can play.

EU standards concerning mutual recognition of partnerships and parenthood are presented first, by making reference to relevant provisions of the Treaty on the Functioning of the European Union (TFEU), the EU Charter of Fundamental Rights, the relevant Directives and cases decided by the Court of Justice of the EU (CJEU), as well as the most recent policy developments, such as the LGBTIQ+ Equality Strategy 2020-2025 which includes the ambitious proposal of a Regulation on Mutual Parenthood Recognition.

Standards developed by CoE Member States are also presented, including the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity and relevant case-law of the European Court of Human Rights (ECtHR).

Nevertheless, despite the above-mentioned progressive supra-national legal frameworks, levels of protection between different European States may still starkly vary. As data from the [LGBTIQ Rainbow Index 2023](#) shows, some countries, i.e. Malta, Sweden and Belgium, provide adequate legal safeguards in the area of family rights for the LGBTIQ community with full 100 % score, whereas others, i.e. Slovakia, Romania, Lithuania and Poland, are among the EU Member States with the lowest level of protection of family rights of LGBTIQ people and level of equality with 0 % achieved in 2021. In some EU Member States, the legal recognition of same-sex partners and their children as a family is still very controversial.

Accordingly, this scenario is reflected at the level of Equality Bodies, whose role is investigated by the authors. Indeed, a survey shows that only few Equality Bodies across Europe have reported carrying out work in cases linked to the establishment or recognition of partnership and parenthood. However – despite the scarcity of involvement of Equality

Bodies due to a number of factors such as barriers related to their mandate, national legal frameworks, lack of awareness or underreporting – this report notably introduces some good practices of cases addressed by Equality Bodies in Croatia, Poland, Romania and Slovenia, including with regard to the establishment or recognition of parenthood in cases involving surrogacy, domestic adoptions and assisted reproduction techniques.

The issue of cross-border recognition of parenthood is clearly an equality issue as it directly concerns the fundamental right of individuals and families to non-discrimination. Data clearly shows that the lack of legal possibility to have their partnerships and parenthood recognized under the national law mostly and disproportionately affects parents identified by (the same) sex/non-heteronormative orientation and subsequently disregards their children's best interests by violating their rights to personal identity, inheritance, health care, freedom of movement and beyond.



I. Rainbow families on the move – Council of Europe and European Union standards

EU Level

Free movement of EU citizens and mutual recognition of partnerships

Free movement of persons is one of the freedoms guaranteed in the EU. Its main regulation is provided by Articles 21 (citizens), 45 (workers), 49 (establishment) and 56 (services) of the Treaty on the Functioning of the European Union (TFEU). The core provision of free movement of EU citizens within the EU is Article 21 (1) TFEU which states that: “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

Freedom of movement and residence of EU citizens is also guaranteed under Article 45 of the Charter of Fundamental Rights of the European Union (EU Charter). Accordingly, all EU citizens have “the right to move and reside freely within the territory of the Member States”. Article 45 (2) of the EU Charter states that nationals of third countries legally residing in the territory of an EU Member State may also be granted freedom of movement.

Conditions governing the exercise of the right of free movement and residence within the territory of the Member States by EU citizens and their family members are further governed by the Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. In its preamble, the Directive states that it should be implemented without discrimination between the beneficiaries of this Directive 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. The provisions of the Family Reunification Directive¹ have been the point of reference² of CJEU decisions giving grounds

¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

² “In that regard, as the Court has held on a number of occasions, it follows from a literal, contextual and teleological interpretation of Directive 2004/38 that the directive governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and

for mutual recognition of same-sex partnerships and same-sex parenthood established in one EU Member State by other Member States when exercising the free movement rights. For the purposes of this Directive, the term family member enjoying automatic family reunification rights includes, among others, “the spouse”³ and “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”.⁴ The term spouse has been defined by the CJEU in case *Coman* as gender-neutral, applying also to a same-sex spouse of an EU citizen to whom he or she is married.⁵ This case involved a same-sex married couple, Mr. Coman, who was both Romanian and American citizen, and his husband, Mr. Hamilton, an American citizen, who married in Belgium and later on in their life wished to settle permanently in Romania together, relying on the family reunification rights that Mr. Coman enjoyed under the EU free movement law. The CJEU argued that allowing Member States the freedom to grant or refuse entry into and residence in their territory to a third-country national married to an EU citizen in another EU Member State in accordance with its national law based on whether or not national laws of the host Member State allow same-sex marriages, would cause that the freedom of movement of EU citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist.⁶ The CJEU also noted that the obligation for a Member State to recognise a same-sex marriage entered into in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national and to enable such persons to exercise the rights they enjoy under EU law, does not undermine the competence of Member States to define the instrument of marriage by national law. “Accordingly, an obligation to recognise such marriages for the

does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 37; of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 53; and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 33)”, CJEU Judgement of 5 June 2018, *Coman e.a.*, paragraph 20, C-673/16

³ Article 2 (2) b, Directive 2004/38/EC

⁴ Article 2 (2) b, Directive 2004/38/EC.

⁵ Case C-673/16 *Coman*, ECLI:EU:C:2018:385, para. 35.

⁶ Therein, para. 39.

sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.”⁷

Furthermore, under the Directive 2004/38/EC, discretionary family reunification rights are granted to persons who have a certain relationship with an EU citizen, including “any other family members, irrespective of their nationality, not falling under the definition [a family member], in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence....” and “the partner with whom the Union citizen has a durable relationship, duly attested”.⁸ With regards to these groups of persons, the host Member States have the duty to facilitate their entry and residence.

In order to promote the free movement of persons within the EU, the EU has adopted the Regulation 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. It sets out a system for further simplification of administrative formalities for the circulation of certain public documents and their certified copies issued by a Member State authority for presentation in another Member State. It applies to public documents concerning various issues of personal status, including inter alia registered partnerships, i.e., the capacity to enter into a registered partnership and the registered partnership status.

EU anti-discrimination framework and mutual recognition of partnerships

In its LGBTIQ Equality Strategy 2020-2025, the European Commission expressed its intention to keep ensuring the correct application of free movement law, including the Coman judgement, in order to address specific difficulties preventing LGBTIQ people and their families from enjoying their rights. Among the key actions in this area, the European

⁷ Therein, paras. 45 – 46.

⁸ Article 3 (2) (a) and Article 3 (2) (b), Directive 2004/38/EC.

Commission committed to review the 2009 guidelines on free movement⁹ to reflect the diversity of families and contribute to facilitating the exercise of free movement rights for all families, including rainbow families as well as to explore possible measures to support the mutual recognition of same-gender partnership between Member States.¹⁰

General EU framework for the protection from discrimination on the ground of sexual orientation is based on in Article 19 TFEU granting the Council with the consent of the European Parliament the power to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

According to Article 21 (1) of the EU Charter “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Discrimination on the ground of sexual orientation is also prohibited in the area of employment and occupation by the Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

The interpretation of Directive 2000/78/EC by CJEU involved also cases concerning the level of rights granted to persons in same-sex partnerships. CJEU has ruled in several cases that in situations where a Member State provides in its national legislation for same-sex registered partnerships equivalent to marriage, while not allowing same-sex marriages, for certain purposes (such as pensions, special leave, salary bonuses etc.), employers must extend the treatment they afford to married couples also to registered partners. Otherwise, the employers would be directly discriminating persons in registered partnerships based on

⁹ Guidelines on free movement and residence rights of EU citizens and their families (MEMO/09/311), available at: <https://www.bing.com/ck/a?!&&p=8fa6ec9679debd41jmltdHM9MTY3ODU3OTIwMCZpZ3VpZD0wNDhiOWVmOC02ZGE2LTZjMjctMDhlZC04Yzk1NmM5MTZkZDImaW5zaWQ9NTE2NA&ptn=3&hsh=3&fclid=048b9ef8-6da6-6c27-08ed-8c956c916dd2&psq=eu+guidelines+on+free+movement+2009&u=a1aHR0cHM6Ly9lYy5ldXJvcGEuZXUvY29tbWlzc2lvbi9wcmVzc2Nvcn5lci9hcGkvZmlsZXMvZG9jdW1lbnQvcHJpbmQvZW4vbWVtb18wOV8zMTEvTUVNT18wOV8zMTEvRU4ucGRm&ntb=1>

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: Union of Equality: LGBTIQ Equality Strategy 2020-2025, (COM(2020)0698), p. 14 - 17.

their sexual orientation.¹¹ Hence, in terms of free movement rights, when the host Member State treats registered same-sex couples differently than married or registered opposite-sex couples in relation to employment-related issues and benefits, such treatment is discriminatory and in breach of the Directive 2000/78/EC.

Free movement and mutual recognition of parenthood

In terms of rainbow families composed of same-sex parents and a child, the main issue is not only whether they will be able to exercise their freedom of movement rights, but also whether they will be recognized as a family for all legal purposes in the host Member State and whether the legal ties between the child and both same-sex parents established in one Member State would be recognized in the host Member State.

Commitment of the European Commission to propose a horizontal legislative initiative on the mutual recognition of parenthood between Member States has been explicitly based in the LGBTIQ Equality Strategy 2020-2025 underlying that “if one is parent in one country, one is parent in every country”.¹² In line with the interpretation of the CJEU, it refers to such situations faced by same-sex parents when they travel or move to another Member State.

In December 2022, the European Commission adopted a proposal for a Council Regulation on jurisdiction, applicable Law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood¹³, which harmonises the rules of private international law in the field of parenthood across the EU Member States. The aim is to provide legal clarity for all types of families, who find themselves in a cross-border situation within the EU. The proposal is based on the best interest of the child¹⁴ requiring that all children have the same rights,

¹¹ See: Case C-267/06 Maruko, ECLI:EU:C:2008:179, para. 72-73 (up to a national court to decide whether a surviving life partner is in a situation comparable to that of a spouse); Case C-147/08 Römer, ECLI:EU:C:2011/286, para. 52; Case C-267/12 Hay, ECLI:EU:C:2013:823, para. 44 - 47.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: Union of Equality: LGBTIQ Equality Strategy 2020-2025, (COM(2020)0698), p. 17.

¹³ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final), available at: [EUR-Lex - 52022PC0695 - EN - EUR-Lex \(europa.eu\)](#)

¹⁴ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final), Explanatory Memorandum, p. 1, available at: [EUR-Lex - 52022PC0695 - EN - EUR-Lex \(europa.eu\)](#)

including with respect to the recognition of the parenthood, irrespective of how children were conceived or born, and irrespective of the type of family they are from¹⁵. The regulation aims to strengthen the protection of the rights of children in cross-border situations within the EU, including their right to an identity, to non-discrimination, and to respect for a private and family life, as well as their right to succession and maintenance in another Member State. By establishing the rules on recognition of parenthood across the EU, it provides legal certainty and continuity of the parenthood of children and aims to reduce the costs borne by families and national judicial systems in connection with proceedings for the recognition of parenthood in another Member State¹⁶. The proposal provides for the recognition of court decisions and authentic instruments establishing or providing evidence of the establishment of parenthood. It also proposes to create a European Certificate of Parenthood. The case-law of the CJEU on mutual recognition of parenthood is quite recent but already establishing a clear obligation for Member States to recognise parenthood of same-sex couples established in line with national laws of another Member State when this recognition is necessary for the purposes of exercising the free movement rights. Together with free movement rights, the CJEU's argumentation is based on protection of the right to respect for private and family life under Article 7 of the EU Charter, the right to marry and right to found a family under Article 9 of the EU Charter and the rights of the child. In particular, Article 24 (2) of the EU Charter guarantees that "in all actions relating to children, whether taken by public authorities or public institutions, the child's best interest must be a primary consideration".

In the case *V.M.A. v. Stolichna obshtina*¹⁷, the CJEU decided on a request for preliminary ruling addressed by the Administrative Court of the City of Sofia, Bulgaria that EU Member States are required to recognize the familial ties established in another EU Member State between a child and his/her parents who are a same-sex couple, for the purposes of EU free movement law. The case concerned a married same-sex couple, a Bulgarian woman and a British woman, who are married and have been living in Spain, where their daughter was born in 2019. Her birth certificate was issued by the Spanish authorities, referring to both women as "mother". When applying to Bulgarian authorities for a birth certificate of the

¹⁵ Ibid, p. 3.

¹⁶ Ibid, p. 1.

¹⁷ Case C-490/20 *V.M.A.*, ECLI:EU:C:2021:296

child as a precondition to be issued a Bulgarian identity document, the national authorities requested V.M.A. (one of the mothers) to provide evidence of the parentage of the child with respect to the identity of her biological mother. CJEU's ruling in this case confirmed that the principle of mutual recognition applies to birth certificates issued by EU Member States, including those that in accordance with the national law identify two persons of the same sex as the parents of a child. The European Court of Justice argued that when the Spanish authorities lawfully established a parentship, biological or legal, and attested this in the birth certificate of a child – an EU citizen - in line with Article 21 TFEU and Directive 2004/38 they must be “recognized by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised”¹⁸. To be able to exercise the free movement rights with each of her two parents, the child “must have a document with mentions them as being persons entitled to travel with that child”¹⁹. When such document is issued by one Member State, other Member States are obliged to recognise it. In this breakthrough judgement on **mutual recognition of parenthood**, the CJEU confirmed that the Member States are free to decide whether or not they allow marriage and parenthood of same-sex couples under their national law, however, they are bound to recognise the civil status established in another Member State for the purposes of exercising freedom of EU citizens to move and reside within the territory of the Member States. When interpreting Article 24 (2) of the EU Charter concerning the best interest of the child, CJEU applied also **Article 2 of the Convention on the Rights of the Child** on non-discrimination in conjunction with **Article 7 of the Convention on the Rights of the Child** according to which a child has the right to be registered immediately after birth, the right to a name and the right to acquire a nationality without discrimination including based on sexual orientation of the child's parents (discrimination by association).²⁰

In a similar case **Rzecznik Praw Obywatelskich**²¹ referred for a preliminary ruling by a Polish voivodship administrative court, the CJEU argued that it would be contrary to the fundamental rights of the child guaranteed under Articles 7 and 24 of the EU Charter to

¹⁸ Therein, para. 48.

¹⁹ Therein, para. 50.

²⁰ Therein, paras. 63 – 65.

²¹ Case C-2/21 Rzecznik Praw Obywatelskich, ECLI:EU:C:2022:502

deprive a child of his/her “relationship with one of [the] parents when exercising the right to move and reside freely within the territory of the Member States” or to make this right impossible or exclusively difficult in practice on the ground that his/her parent are of the same sex.²² Referring also to its ruling in *V.M.A.*, CJEU ordered that in the case of a minor who is an EU citizen with birth certificate issued by authorities of a Member State establishing two persons of the same sex as parents “the Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States”.²³

Council of Europe level

Recognition of same-sex partnerships established abroad

The catalogue of commitments of Council of Europe Member States in various areas, including the right to respect for private and family life, is included in the [Recommendation CM/Rec\(2010\)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity](#). The measures include non-discrimination between same-sex and different-sex couples when national legislation confers rights and obligations on unmarried couples or equivalent legal status, rights and obligations to registered same-sex partnerships with those of heterosexual couples in a comparable situation in countries that recognise same-sex partnerships. If national legislation does not recognise nor confer rights and obligations on registered same-sex partnerships and unmarried couples, Member States are invited to consider the possibility of providing same-sex couples with legal or other means to address practical problems they face in everyday life and do that without any discrimination. Considering the rights of the child, the best interest of the child should be the primary consideration in decisions concerning the parental responsibility or guardianship and such decisions should be

²² Therein, para. 51

²³ Therein, para. 53

delivered without discrimination based on sexual orientation or gender identity²⁴. In its evaluation of implementation of this recommendation from 2020, the Council of Europe Steering Committee for Human Rights concluded that despite “multiple countries indicated that partners of citizens in same-sex couples can apply for residence permits for family reasons...some countries have restricted the ability of refugees to reunite with their partners, which results in hardship and discrimination for LGBT refugees whose country of origin does not allow same-sex marriage/partnership.”²⁵

Key guarantees for protecting rights of rainbow families have been interpreted by the European Court of Human Rights (ECtHR) as arising mainly from Article 8 (right to respect for private and family life, home and correspondence) and Article 12 (the right to marry and to found a family) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), either alone or in conjunction with Article 14 ECHR (non-discrimination). Moreover, ECtHR has also recognized in its case-law the movement towards legal recognition of same-sex couples both at the level of Council of Europe as well as globally, which it took into consideration in deciding cases involving same-sex couples^{26,27}.

From the perspective of same-sex partnerships recognition, the key decision of the ECtHR, referred to also in cases before CJEU, was given in the cases *Oliari and Others v. Italy*. In this case, ECtHR held that states have a positive obligation under Article 8 ECHR to ensure that same-sex couples in stable unions or same-sex couples married in a foreign State, have available a specific legal framework providing for the recognition and protection of their same-sex unions.²⁸

²⁴ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, Appendix, paras. 23 – 26. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf40a

²⁵ Steering Committee for Human Rights (CDDH): Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, 2020, para. 70. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809f9ba0#_Toc27649606

²⁶ *Oliari and Others v. Italy*, No. 18766/11 and 36030/11, para. 178. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-156265%22%5D%7D>

²⁷ The emerging trend was already acknowledged by ECtHR in 2010, however at that time claiming that “the area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”. See: *Schalk and Kopf v. Austria*, No. 30141/04, para. 105.

²⁸ “...in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants’ momentous interests as identified above, and in the light of domestic courts’

The same conclusion was reached in *Orlandi and Others v. Italy*, where ECtHR concluded that Italy “failed to strike a fair balance between any competing interests” as it “failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same sex unions.”²⁹ However, ECtHR also concluded that if the national law allows for such safeguards while it does not allow for the same-sex marriage, there is no obligation to have the marriage contracted abroad registered as marriage.³⁰

The ECtHR has also addressed the issue of recognition of same-sex partnerships for the purposes of immigration rights under the protection of the right to family life. In *Taddeucci and McCall v. Italy*, ECtHR observed that “both the European Parliament and the Parliamentary Assembly of the Council of Europe have found a restrictive interpretation, by the Member States, of the concept of “family member” in immigration matters to be problematical”.³¹ The case concerned a situation when the national legislation treated unregistered same-sex partners for family reunification purposes the same way as unregistered opposite-sex partners, but worse than spouses, while the national legislation did not allow same-sex marriages. While the ECtHR observed that all unmarried couples were treated in the same way, unmarried opposite-sex couples were not in a comparable situation to unmarried same-sex couples as the latter did not have a possibility of contracting marriage in Italy and be regarded spouses under Italian law.³² It concluded that “by deciding to treat homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as heterosexual couples who had not regularised their situation the State infringed the applicants’ right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention”.³³

conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.” See: Therein, para. 185.

²⁹ *Orlandi and Others v. Italy*, No. 26431/12, 26742/12, 44057/12 and 60088/12, para. 210. Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-179547%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179547%22]})

³⁰ Therein, paras. 205 - 211.

³¹ *Taddeucci and McCall v. Italy*, No. 51362/09, para. 97, available at: [https://hudoc.echr.coe.int/eng#{%22languageisocode%22:\[%22ENG%22\],%22respondent%22:\[%22ITA%22\],%22article%22:\[%228%22,%2214%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-164715%22\]}](https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22respondent%22:[%22ITA%22],%22article%22:[%228%22,%2214%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-164715%22]})

³² Therein, paras. 83 - 84.

³³ Therein, para. 98.

In *Pajić v. Croatia*, the ECtHR considered a national legislation that reserved the possibility to apply for a residence permit for family reunification to different-sex couples, both married and not. According to ECtHR, such legislation causes discrimination based on sexual orientation (Article 14 ECHR), as it excludes same-sex couples from its scope, in their enjoyment of the right to respect for private and family life (Article 8 ECHR). ECtHR also emphasized that the applicants were “discriminated against on account of the fact that the domestic authorities considered that such a possibility was in any case legally impossible.”³⁴

Recognition of parenthood legally established abroad

The issue of cross-border continuity of family ties has been addressed by the ECtHR in the case *Wagner v. Luxembourg*. The case concerned the refusal of the Luxembourg authorities to recognise the decision of the Peruvian court pronouncing the full adoption by Ms. Wagner, a Luxembourg national, of her child, a Peruvian national, since the national legislation did not allow full adoption of a child by an individual - an unmarried person. Despite the fact that the case did not consider a situation of a rainbow family, it laid down an *important precedence* that should, in line with the principle of non-discrimination, apply also in cases considering the parenthood recognition by Council of Europe Member States established in relation to same-sex couples abroad. ECtHR stated that in line with the best interests of the child, the national 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”.³⁵

In *Mennesson v. France*, the ECtHR also considered a situation of cross-border legal recognition of parenthood legally established abroad, this time in a case concerning *surrogacy*. In this case ECtHR found that the refusal of French authorities to recognise as a legal parent the genetic father of a child born through a surrogacy agreement in the United States violated the right to respect for private life of the children concerned, U.S. nationals. However, it did not establish violation of Article 8 ECHR in case of parents, French citizens.

³⁴ *Pajić v. Croatia*, No. 68453/13, para. 85, available at: <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22respondent%22:%5B%22HRV%22%5D,%22article%22:%5B%228%22,%2214%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-161061%22%5D%7D>

³⁵ *Wagner v. Luxembourg*, No. 76240/01, para. 133, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-81328%22%5D%7D>

ECtHR observed 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” and that the national law place the children concerned in a position of legal uncertainty. Despite their legal parent-child relationship established under the Californian law has been acknowledged by the national courts, it was not given effect due to refusal to record the details of their birth certificates accordingly. The legal uncertainty caused by the non-recognition of parent-child relationship is liable to undermine children’s definition of their personal identity.³⁶

While *Mennesson v. France* concerned a situation of a genetical father, in *D v. France* ECtHR concluded that the right to respect for private life under Article 8 ECHR of a child born abroad through gestational surrogacy requires that the national law provides for a possibility of recognition of a legal parent-child relationship also with the intended non-biologically related mother recognized in the birth certificate legally issued abroad as the legal mother. Such recognition does not need to be automatic but can be provided by national law through other means including adoption of the child by the intended mother in accordance with the child’s best interest^{37, 38}

In line with the above-mentioned case-law of the ECtHR, Article 8 ECHR protects family relationships legally established in another country in certain cross-border situations. This protection included recognition of the parent-child relationship, both in cases of biological and legal parents. ECtHR has yet not answered whether the protection applies also to rainbow families. However, a case concerning the recognition of same-sex parenthood legally established abroad is currently a pending case before it. The application in case *A.D.-K. and Others v. Poland* concerns a Polish woman and a British woman who live together in a civil partnership registered in the United Kingdom. The second applicant to this case, a British national, gave birth to a child in the United Kingdom in 2011. The child’s birth

³⁶ *Mennesson v. France*, No. 65192/11, para. 96, available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22mennesson%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-145389%22%5D%7D>

³⁷ *D v. France*, No. 11288/18, available in French at: <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22FRE%22%5D%2C%22appno%22:%5B%2211288/18%22%5D%2C%22documentcollectionid%22:%5B%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-203565%22%5D%7D>

³⁸ See also ECtHR Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, No. P16-2018-001, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-6380464-8364383%22%5D%7D>

certificate lists her as mother and her same-sex registered partner as parent. When the same-sex parents applied to Polish authorities to have the birth certificate of the child recorded in Poland, the application was refused as the birth certificate issued in the United Kingdom contravened the basic principles of the Polish legal system and the conservative family model endorsed therein not allowing for registered civil partnerships. The administrative and judicial appeals against this decision were rejected upholding the public policy exception contrary to the applicants' claim that the refusal to issue a Polish birth certificate to their daughter constituted discrimination on the ground of their sexual orientation and that their daughter's legal situation was different in the UK where she lived in a full family with two legal parents and in Poland where she had a mother and an unknown father. The complaint before ECtHR concerns alleged violation of Article 8 ECHR and Article 14 in conjunction with Article 8 ECHR by the refusal of Polish authorities to register the child's birth certificate and consider both women as parents.³⁹

Effect of gender transition on marriage and parental rights of transgender parents

Although cases concerning effects of gender transition on marriage concluded before transition and on parental rights of transgender persons that have been brought before ECtHR have not considered cross-border situations, standards set in these cases for the protection of rights of transgender parents are detrimental for recognition of transgender partnerships and parenthood, and could be applicable also in cross-border situations.

ECtHR has ruled on family ties in case *X, Y and Z v. the United Kingdom*. The case considered a female to male transsexual who has undergone gender reassignment surgery, lived as a male partner to a female who had given birth to a child by Artificial Insemination by Donor. The application of Artificial Insemination by Donor was applied jointly by the couple, and upon the birth of the child, the applicant acted as her father. In these circumstances, ECtHR

³⁹ A.D.-K. and Others v. Poland, No. 30806/15, communicated on 26 February 2019, available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%2230806/15%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22COMMUNICATEDCASES%22%2C%22itemid%22:%5B%22001-192049%22%5D%7D>

ruled that the relationship among the three applicants enjoyed protection of Article 8 ECHR as they were linked by *de facto family ties*.⁴⁰

In *A.M. and Others v. Russia*, a transwoman contested restriction of her parental rights over her children, which according to the domestic courts was reasonable given the social and individual circumstances of gender transition and the findings of the experts. ECtHR stated that by restricting the applicant's parental rights and contact with her *children without doing a proper evaluation of the possible harm to the applicant's children*, the domestic courts relied on her gender transition, singled her out on the ground of her status as a transgender person,⁴¹ consequently violating the applicant's right to private and family life under Article 8 ECHR.⁴²

A question whether states may require divorce of a marriage concluded before transition as a precondition of legal gender recognition was assessed in *Hämäläinen v. Finland*. In this case, ECtHR stated that it was not disproportionate to require that the applicant's marriage be converted into a registered partnership as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage.⁴³ It must be highlighted that ECtHR has yet not decided a similar case concerning a member state that does not provide for legal recognition of same-sex partnerships.⁴⁴

⁴⁰ *X, Y and Z v. the United Kingdom*, No. 21830/93, paras. 33 – 37.

⁴¹ *A.M. and Others v. Russia*, No. 47220/19, paras. 74 – 80, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-210878%22%5D%7D>

⁴² On the contrary, in *P.V. v. Spain* ECtHR found no violation of Article 14 in conjunction with Article 8 ECHR as in the domestic courts, based on the best interest of the child, choose a more restrictive contact arrangement that would allow a child to become gradually accustomed to his father's gender reassignment. The contact arrangements had been ordered on a gradual and reviewable basis, in accordance with the recommendations made by experts, and the applicant's transsexuality had not been the decisive factor of those decisions. See: *P.V. v. Spain*, No. 35159/09, paras. 34 – 37, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-101943%22%5D%7D>

⁴³ *Hämäläinen v. Finland*, No. 37359/09, para. 84, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-145768%22%5D%7D>

⁴⁴ When considering the requirement of divorce upon gender transition in matters of social security, CJEU ruled that the requirement for transgendered persons to be unmarried in order to qualify for a State pension at the retirement age of their current gender violated EU law as it constituted direct discrimination on the ground of sex. See: *Case C-451/16 MB v. Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492

National regulations⁴⁵

In terms of recognition of parenthood established in one of the EU Member States, the Member States apply different standards. While some do not have any national regulation concerning recognition of parenthood established in one of the EU Member States (e.g. Slovakia, Poland or Romania), others have adopted national rules in this regard (e.g. Belgium, Malta, Lithuania, Slovenia or Czechia).

Among the Member States that have adopted specific national legislation on the recognition of parenthood established abroad, this is provided under the civil law (e.g. Malta), the private international law (e.g. Belgium, Slovenia) or through regulation on citizenship (e.g. Lithuania). Usually, if a Member State regulates recognition of parenthood established in one of the EU Member States, it requires a procedure before judicial authorities (e.g. in Czechia, Slovenia) or before administrative authorities such as civil registries (e.g. Belgium, Lithuania).

Among the most common arguments that national authorities raise for not recognizing the parenthood established in another Member States include protection of public order or fundamental principles of legal order (e.g. Belgium, Poland) and non-recognition of same-sex partnerships and same-sex marriage (e.g. Slovakia, Lithuania, Romania). Arguments such as protection from sham parenthoods are also used. In Romania, the national law explicitly stipulates that same-sex marriages or civil partnerships (either same-sex or opposite-sex) concluded or contracted abroad either by Romanian citizens or by foreign nationals are not recognized in Romania.

Examples of national laws regulating recognition of parenthood established in another EU Member State

In Czechia, for example, a national legislation establishes that foreign decisions regarding parenthood are recognised in a special court procedure when one of the parties is a Czech citizen. In case none of the individuals concerned is a citizen of Czechia and the parenthood is recognised in the countries they are citizens to, such decision is automatically regarded recognised also in Czechia.

⁴⁵ Information provided by Equality Bodies responding to the survey.

In Malta, the recognition of parenthood established in any country (not just EU Member States) is regulated by the Civil Code. Any civil status of a citizen of Malta drawn up or registered in a foreign country by a competent authority in that country may, at the request of any person interested and upon the Director of the Public Registry being satisfied on the authenticity of such act, be registered in Malta as if such act were drawn up by the Public Registry in Malta. Moreover, as adoptions by same-sex couples are permitted and fully recognised under Maltese law, the Civil Code consequently provides for the recognition of intercountry adoptions whereby, subject to certain conditions, such adoption shall have effect as if it were an adoption decree made by the competent court in Malta and regulates also intercountry adoptions regulated by the provisions of an international treaty to which Malta is a party.

Rainbow Index 2022 and 2023

The level of protection and promotion of LGBTIQ rights and equality across Europe is annually assessed by the Rainbow Index issued by ILGA Europe. The Rainbow Index is based on annual review of the human rights situation of LGBTIQ people and brings about an overview of the social climate for LGBTIQ people in 49 European countries. The ranking of countries is on a scale between 0% (gross violations of human rights, discrimination) and 100% (respect of human rights, full equality) and takes into consideration laws and policies that have a direct impact on the rights of LGBTIQ people in 7 categories: equality and non-discrimination, family, hate crime and hate speech, legal gender recognition, bodily integrity, civil society space and asylum.⁴⁶

The criteria considered under the category “Family” include:

- marriage equality;
- registered partnership with similar rights to marriage;
- registered partnership with limited rights;
- cohabitation;
- no constitutional limitation on marriage;

⁴⁶ ILGA-Europe: Rainbow Index- About, available at: <http://rainbow-europe.org/about>

- joint adoption by same-sex couples;
- second parent adoption;
- automatic co-parent recognition;
- medically assisted insemination for couples regardless the partners' sexual orientation and/or gender identity;
- medically assisted insemination available for individuals regardless their sexual orientation and/or gender identity;
- recognition of trans parenthood.⁴⁷

Considering these criteria, the best ranking countries for the year 2021 in the area of family rights for LGBTIQ people with full 100 % score are Malta, Sweden and Belgium. On the contrary, Slovakia, Romania, Lithuania and Poland⁴⁸ are among the EU Member States with the lowest level of protection of family rights of LGBTIQ communities and level of equality in this area with 0 % achieved.⁴⁹

Assessing the development at the EU level, the 2022 Rainbow Index underlined the CJEU ruling in the [V.M.A. case](#) concerning mutual recognition of parenthood and preparation of legislation regarding parenthood recognition across the EU by the European Commission. It recognizes the EU Child Rights Strategy adopted in March 2021 for being inclusive of LGBTIQ rights and linked to the EU LGBTIQ Equality Strategy.⁵⁰

Concerning the developments in the EU, [the 2023 Rainbow Index](#) acknowledged publication of the proposal for a Council Regulation on mutual recognition of parenthood across the EU and the CJEU's reasoned order in [Rzecznik Praw Obywatelskich case](#) confirming landmark judgement in the case of [V.M.A. v. Stolichna obshtina](#). CJEU established that when an EU Member State has recognised two persons of the same sex as parents of a child, then the EU Member State of which that child is a national, should issue identity documents to that child with both parents on them, and that all EU Member States should protect the right to

⁴⁷ ILGA-Europe: Rainbow Index- About, available at: <http://rainbow-europe.org/about>

⁴⁸ Together with Azerbaijan, Turkey and Serbia from non-EU countries.

⁴⁹ ILGA-Europe: 2022 Rainbow Index – Country ranking - Family, available at: <http://rainbow-europe.org/country-ranking>

⁵⁰ ILGA-Europe: Annual review of the human rights situation of lesbian, gay, bisexual, trans and intersex people in Europe and Central Asia 2022, p. 13, available at: <http://rainbow-europe.org/annual-review>

freedom of movement of the child and its family. This is a confirmation of a previous landmark judgement in the case of *V.M.A. v. Stolichna obshtina*.

At the Council of Europe level, the 2022 Rainbow Index highlights mainly the recent case-law of the ECtHR establishing violations of Article 8 ECHR and/or Article 14 in connection with Article 8 ECHR in cases concerning same-sex partnerships or parental rights of LGBTIQ people, in particular in cases *A.M. v. Russia* (restriction of parental rights and deprivation of contact with children on gender identity grounds)⁵¹, *Fedotova and Others v. Russia* (no legal framework capable of protecting relationships of same-sex couples under domestic law)⁵² and *X v. Poland* (refusal to grant full parental rights and custody rights over a child based on sexual orientation of the applicant)^{53,54}. In the area of family rights, the [2023 Rainbow Index](#) acknowledges that the European Commission against Racism and Intolerance called on Monaco to eliminate unjustified differences in rights and protections between same- and different-sex couples and that the Council of Europe Commissioner for Human Rights welcomed the adoption of a same-sex marriage law in the Slovenian parliament.

⁵¹ *A.M. v. Russia*, No. 47220/19, paras. 79-80, available at:

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-210878%22%5D%7D>

⁵² *Fedotova and Others v. Russia*, Nos. 40792/10, 30538/14 and 43439/14, , paras. 178, 189 and 190, available at:

<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%5B%22%5C%22CASE%20OF%20FEDOTOVA%20AND%20OTHERS%20V.%20RUSSIA%22%22%2C%22documentcollectionid%22%3A%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%22%5D%7D%22%3A%5B%22001-222750%22%5D%7D%7D>. Please note that the case was still pending Grand Chamber decision at the time when 2022 Rainbow Index was completed.

⁵³ *X v. Poland*, No. 20741/10, para. 92, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-211799%22%5D%7D>

⁵⁴ ILGA-Europe: Annual review of the human rights situation of lesbian, gay, bisexual, trans and intersex people in Europe and Central Asia 2022, p. 22, available at: <http://rainbow-europe.org/annual-review>



II. Recognition of parenthood established in another Member State - the role of National Equality Bodies

In some EU Member States, the legal recognition of same-sex parents and a child as a family and their legal ties established in one Member State is still controversial. In 11 of 27 (40%) of EU Member States, same-sex couples with children may be refused to be legally recognised as the joint parents of their children⁵⁵. This lack of legal recognition might hinder the protection of the rights of children in cross-border situations within the EU, including their right to an identity, to non-discrimination, and to respect for private and family life, as well as their right to succession and maintenance in another Member State.

According to the survey, only few Equality Bodies reported carrying out work in cases linked to the establishment or recognition of parenthood. This chapter shares some examples of the work Equality Bodies do, mainly relying on the practice of the Office of the Commissioner for Human Rights of the Republic of Poland, in different types of cases dealing with the establishment or recognition of parenthood. Despite some examples of the work of Equality Bodies on this matter, according to the survey, the lack of involvement of Equality Bodies on issues linked to the establishment or recognition of parenthood is prominent.

Equality Bodies involved in cases concerning the recognition of parenthood established in another Member State

Equality Bodies in Croatia, Poland, Romania and Slovenia reported their involvement in cases to a different degree.

Example: Commissioner for Human Rights, Poland

The Office of the Commissioner for Human Rights of the Republic of Poland intervened in administrative and judicial proceedings, in which authorities issue a decision to refuse to transcribe a birth certificate, issue a passport, an identity card or assigning a PESEL number (Polish acronym for “Universal Electronic System for Registration of the Population”). Some of these cases are the following:

⁵⁵ [Obstacles to the Free Movement of Rainbow Families in the EU \(europa.eu\)](#)

- Resolution of 7 judges of the Supreme Administrative Court, ref. II OPS 1/19 according to which the transcription of a foreign birth certificate of a child, in which persons of the same sex are indicated as parents, is inadmissible in light of the “public policy clause”.
- The judgment of the Provincial Administrative Court in Warsaw of November 20, 2020, ref. no. IV SAMa 1618/20 - in which the court stated that a minor's ID card can only include the biological mother, excluding the social mother, who is recognized as the mother under British law.
- The judgment of the Supreme Administrative Court of June 20, 2018, ref. II OSK 1808/16 - in which the court upheld the judgment of the Court of first instance ruling that it is not possible to transcribe into the Polish legal order a birth certificate in which two women are listed as parents. In this case a complaint was filed with the European Court of Human Rights (A.P. and R.P. v. Poland, application no. 1298/19) on the violation of Article 8 in conjunction with Article 14 of the European Convention on Human Rights in connection with the refusal to transcribe a child's birth certificate as a manifestation of discrimination based on the sexual orientation of the child's parents. The case was communicated to the Polish government. The Ombudsman has filed written comments pursuant to Rule 44 of the Rules of the European Court of Human Rights in support of the complaint.
- Proceedings before the Provincial Administrative Court in Krakow in the case ref. III SA/Kr 1217/19, in which by order of December 9, 2020 the Court asked the CJEU to consider the question for a preliminary ruling: “Must the combined provisions of [Article 20(2)(a) and Article 21(1) TFEU], read in conjunction with Article 7, Article 21(1) and Article 24(2) of [the Charter], be interpreted as precluding the authorities of a Member State of which a minor child is a national from refusing to transcribe that child’s birth certificate, issued by another Member State, that transcription being necessary to enable the child to obtain an identity document for the Member State of which that child is a national, on the ground that that birth certificate designates as parents persons who are of the same sex and the national law of that Member State does not provide for the parenthood of same sex couples?”. In

case C-2/21 the CJUE ordered that Articles 20 and 21 TFEU, read in conjunction with Articles 7 and 24 of the Charter of Fundamental Rights of the European Union and Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States.

Example: The National Council for Combating Discrimination, Romania

The National Council for Combating Discrimination in Romania intervened in a case concerning the recognition of parenthood established in another Member State. The Equality Body provided a point of view in a national court case where the recognition of the marriage and birth certificate issued in Spain is requested. The Equality Body considered that the refusal to transcribe the birth certificate of a child who is a citizen of the Union, who was born in a host Member State other than the one of which he is a citizen and was issued a birth certificate in the host Member State in which he appears as the child of two married persons, of the same sex, represents an act of discrimination. However, this case is suspended due to an unconstitutional motion against the provisions of the law regarding civil status documents.

Some Equality Bodies reported their engagement in cases where families dealt with issues linked to the establishment or recognition of parenthood in **cases involving surrogacy**.

Example: Commissioner for Human Rights, Poland

With a view to protecting the rights of a minor Polish citizen and her parents, the Commissioner for Human Rights of the Republic of Poland joined a case concerning the refusal to confirm the citizenship of a girl born in Canada under a surrogacy procedure, whose birth certificate revealed two fathers - the biological father and his husband - as parents. Both the administrative authorities and the Provincial Administrative Court in Warsaw refused to confirm citizenship on the grounds of the public policy clause, understood to mean that the Polish legal system does not know of a surrogacy agreement and same-sex parenthood. The Supreme Administrative Court overturned both the judgment of the court of first instance and the preceding decisions of the administrative bodies and ordered the Mazovian voivode to issue a decision on confirmation of the child's Polish citizenship within 30 days of the announcement of the ruling. The court pointed out that the state cannot make clemency out of the confirmation of citizenship in a situation where a provision of substantive law clearly stipulates an obligation to do so. It was also stressed out that the evidentiary proceedings carried out by the authorities, in particular the need to provide genetic tests that confirmed the biological bond between the child and the father was a disproportionate hardship to which the girl was subjected, and the public policy clause should be applied carefully and interpreted narrowly in each case (judgement of February 16, 2022, case file no. II OSK 128/19).

In Belgium, Myria, the independent National Rapporteur that analyses migration and combats trafficking and smuggling of human beings in Belgium, provides legal advice and does get involved in administrative proceedings in cases where families deal with issues linked to the establishment or recognition of parenthood in **cases involving domestic adoptions**.

Also salient was the lack of involvement of Equality Bodies in cases involving assisted reproduction techniques (i.e., in vitro fertilization). The Equality Body in Poland reported that while in vitro fertilization is legal in Poland, it is only available to married couples (heterosexual, as in Poland same-sex marriages are not recognized nor possible). In the case of Slovenia, the Equality Body is aware of cases at the national level, however, they have not been involved in such.

Equality Bodies noted cooperation with CSOs in cases concerning recognition of parenthood established in another Member State. For instance, the National Council for Combating Discrimination in Romania cooperates with ACCEPT Association regarding LGBTIQ's rights through campaigns and capacity building initiatives. This is also the case of the Office of the Commissioner for Human Rights of the Republic of Poland, whose cooperation with CSOs includes: entering into legal proceedings in which they are involved in; providing opinions of legal experts; participating in meetings organized by CSOs; exchanging process strategy and collected data; and intervening in cases reported to their office.

Barriers to the involvement of Equality Bodies

In spite of the studies and reports identifying the obstacles that rainbow families face when they move between EU Member States in exercise of EU free movement rights, Equality Bodies reported low levels of activity in this matter. This might be the consequence of a number of barriers, mostly related to Equality Bodies' mandate, their countries' legal framework and lack of awareness or underreporting.

These are some of the answers Equality Bodies provided when asked about their lack of involvement with issues linked to the establishment or recognition of parenthood:

- **National Commission for the Promotion of Equality (Malta):** The Equality Body did not receive any cases despite having the legal mandate and competence to deal with such issues and having a close link with the LGBTIQ+ community.
- **Equal Opportunities Ombudsperson (Lithuania):** The Equality Body has a mandate on sexual orientation but limitations when it comes to the field of life. Theoretically there could be some cases connected to rainbow families on the

move that fall under their mandate, but they have not received cases.

Furthermore, in Lithuania same-sex partnerships are not legally recognized.

— **Commission for the Protection of Equality (Serbia):** the Commission has not received any complaints. In Serbia, same-sex partnerships are not recognized.

— **Ombudsperson Institution of Kosovo:** has not received cases yet.

— **National Council for Combating Discrimination (Romania):** They have the mandate and received complaints but not for families. In Romania, there is no recognition of same-sex partnerships and marriages.

— **Commission for Protection against Discrimination (Bulgaria):** They have the mandate to examine such cases, however, it is not specifically for families.

Bulgarian's constitution only recognizes marriage between men and women.

They had only a few such cases through the years.



III. Cross-border recognition of parenthood and right to equal treatment and other fundamental rights

The issue of (lack of) cross-border recognition of parenthood is strongly interconnected with the protection of fundamental rights, particularly – right to non-discrimination and equality.

The survey proved that the lack of legal possibility to have their parenthood recognized under the national law affects parents identified by (the same) sex/non-heteronormative orientation the most. Responding Equality Bodies indicated that the negative implications of such a legal situation affect same-sex parents (Slovak National Center for Human Rights, Polish Commissioner for Human Rights, Equal Opportunities Ombudsperson of the Republic of Lithuania), particularly – homosexual men (Belgian Federal Migration Centre) – also in a situation resulting from transsexuality of one of the parents (Slovak National Center for Human Rights). Homosexual parents as the most affected group were pointed to even if the responding Equality Body has no experience in cases concerning recognition of parenthood (Lithuanian Equality Body).

When it comes to the causes of the identified situation, lack of legal recognition of different types of relationships of same-sex persons by the Member States leading to the legal impossibility of recognition of their parenthood was indicated.

As it might be presumed against the above-mentioned, the group of children that experience to the widest extent the negative consequences of such a lack of recognition are children of same-sex parents (as indicated by Slovak National Centre for Human Rights and Polish Commissioner for Human Rights). The reason behind it, as explained by the responding bodies, is again the impossibility of recognising two persons of the same gender as parents of a child under relevant national laws. If – under national laws – a child had a mother (a female exclusively) and a father (a male exclusively) there would be no legal obstacles to confirm the parental relationship between the parents and the child.

Unsurprisingly, in the Member States where same-sex parenthood is not allowed the ‘traditional’ legal notion of “marriage” and – consequently – “parents” (understood as a mother and a father) and “parenthood”, allegedly reflecting the social norms and moral values prevailing in the society is the main reason among the public policy grounds invoked by the public authorities as a justification of refusal to recognise the parenthood (Slovakia, Poland).

Example: Poland

As explained by the resolution of a panel of 7 judges of the Polish Supreme Administrative Court of 02/12/2019, case file no. II OPS 1/19, given that under Polish family law a child may not be considered to have same-sex parents, it would be a violation of the Polish legal order to introduce, for the purpose of legal transactions, a Polish birth certificate containing such data on the parents. The transcription of a birth certificate indicating same-sex persons as the parents would threaten the cohesion of the Polish legal system, as there would be Polish birth certificates containing data that may not be entered in a birth certificate of a child in Poland.

Example: Slovakia

Under national law in Slovakia, the refusal of recognition of same-sex parenthood is considered also as an action taken in the best interests of the child. In general policy discussions, an argument for this is also that same-sex parenthood is not beneficial for mental well-being of a child concerned. This argument is strongly opposed by the LGBTIQ community, human rights experts as well as experts on psychology and psychiatry. Nevertheless, as there has not yet been a case concerning same-sex parenthood argued before Slovak courts, it is hard to predict which arguments would be used in handling the problem, notwithstanding the recent legislative initiative undertaken in the Slovak Parliament to reflect the traditional concept of a family composed of a mother, a father and a child/children in the legal norms to the widest extent.

The lack of recognition of parenthood has multiple and diversified consequences for the child and his/her parents.

When it comes to the child's rights, the best interest of the child is not protected in the situation at stake as – in the responding Equality Bodies' opinion – it is in his/her best interest to have ties to both parents legally recognised. By non-recognising both parents, the child is deprived of his or her right to personal identity. What's more, the child's rights

derived from a parent's obligation to contribute to a child's upbringing, care duties and the duty to pay alimonies as well as the child's inheritance rights might be affected in case one parent is not legally recognised as a parent. As explained by the responding Equality Bodies, a legal situation at stake leads also to the discrimination by association of these children caused by the sexual orientation of the parents (as compared to minor Polish citizens who are children of parents of different sexes, in which case receiving the travel document with two parents indicated would be possible) and interferes with their freedom of movement under EU law to the extent the impossibility to enter same-sex parents in civil status documents makes it impossible for such a minor Union citizen to have issued documents required for travel containing data of both same-sex parents. Without a personal identity card or national registration number, also a child's right to public and/or private health care and other social services is threatened. The lack of a national personal identity card, being a result of refusal of recognition of parenthood, may cause problems with proving the legality of stay in the given Member State and constitutes a disproportionate interference with the right to have a personal identity card and the right to respect for private and family life of the minor and his/her parents.

When it comes to parents' rights, failure to enter a non-biological parent in the identity document of a child as a manifestation of lack of recognition of same-sex parenthood leads to questioning the parental relationship in many situations. This might affect negatively parents' right to obtain information about health status of a child when hospitalised or when provided healthcare. The obtained answers also drew attention to the fact that the only reason to refuse to recognise the parental relationship between both parents and the child indicated by the foreign birth certificate in the situation at stake is the fact the parents are of the same sex, indicating its discriminatory nature.

Far-reaching negative consequences of refusal of recognition of same-sex parenthood described above are amplified by the lack of legal remedies available for the individuals at stake. In this context, only the Polish Commissioner indicated that the relevant authorities may still issue a personal identity card in those cases where the State refuse to transcribe a foreign birth certificate recognising same-sex parenthood.

Example: Poland

According to the resolution of the Supreme Administrative Court, case file no. act II OPS 1/19 the fact that the child's foreign birth certificate contains data of same-sex parents (specifically: instead of the father's data, there were the data of the woman living in a partnership with the child's mother, a Polish citizen, which partnership is not known to Polish law) may not lead to impossibility to obtain i.a. a personal identity card. It was emphasized that due to the need to protect children's rights, administrative bodies should apply the relevant Polish law in such a manner so as to issue a Polish document to a citizen based only on a foreign birth certificate, if persons of the same sex are entered therein as parents, which, in the opinion of the court, makes the transcription of the certificate impossible. A Polish citizen with a foreign birth certificate may therefore use such a certificate in administrative and court proceedings (decision of the administrative bodies may be appealed against to the Voivodeship Administrative Court) as well as exercise the rights the acquisition of which is dependent on presenting a civil status document, even if it has not been transcribed.

Similarly, the Minister of the Interior stated that in the event transcription has been refused due to the parenthood of same-sex persons indicated in the foreign birth certificate, the basis for issuing a personal identity card shall be the foreign birth certificate itself. If the child's foreign birth certificate indicates two same-sex parents, the personal identity card shall contain the details of – respectively – the woman who is the child's biological mother or the man who is the child's biological father and the box for the second parent's data should be left blank.

It is worth noting that the inadmissibility of refusal to issue a personal identity card by the relevant authorities dependent on the transcription of a document, confirmed by the Supreme Administrative Court's resolution, is consistent with findings of the CJEU in [Rzecznik Praw Obywatelskich](#). Nevertheless, entering the name only of one parent results in partial protection of the parental relationship, namely only those between the child and of his/her parent indicated in the identity card giving rise to negative consequences described above.



Conclusion

The past years have highlighted some significant European legal breakthrough regarding the protection of rainbow families on the move in the EU, including the Coman and V.M.A cases, as well as the introduction of a proposed EC regulation on mutual parenthood recognition. However, reality on the ground and national practices show that rainbow families are still facing significant administrative and legal obstacles within the EU, to ensure equal and fair recognition in the framework of EU freedom of movement laws. In some countries, Equality Bodies are already active for a stronger recognition of rainbow families. When tackling under-reporting and if given a proper mandate to act, Equality Bodies could be key allies to ensure rainbow families in the EU are given adequate legal and administrative tools for protection.

Equinet Member Equality Bodies

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GEORGIA

Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*

Ombudsperson Institution
www.oik-rks.org

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

MALTA

Commission for the Rights of Persons with Disability
www.crpdp.org.mt

MALTA

National Commission for the Promotion of Equality
ncpe.gov.mt

MOLDOVA

Equality Council
www.egalitate.md

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA

Commission for Prevention and Protection against Discrimination
www.kszd.mk

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
bip.brpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
cite.gov.pt/web/pt

PORTUGAL

High Commission for Migration
www.acm.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

Slovak National Centre for Human Rights
www.snspl.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.si

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.igualdad.gob.es

SPAIN

Institute of Women
www.inmujeres.gob.es

SWEDEN

Equality Ombudsman
www.do.se

UKRAINE

Ukrainian Parliament Commissioner for Human Rights
www.ombudsman.gov.ua

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

** This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*



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