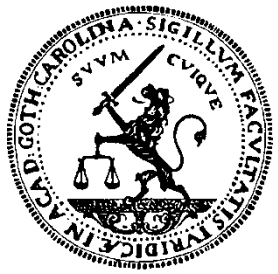

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The EU law and Discrimination based on Sexual Orientation: The Evolution of The EU's Legal Approach

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Table of Contents

Preface:

I would like to express my gratitude to my supervisor, Professor Groussot, for his support and comments throughout this research, his patience and great sense of responsibility.

I am grateful for the continuous support I received from my family throughout my studies.

Especially, I would like to thank my mother for her wonderful sense of humor and her ability to see always the positive side.

Abbreviations:

LGB (Lesbian, Gay, Bisexual)

TEU (Treaty on European Union)

TFEU (Treaty on the Functioning of The European Union)

CFREU (Charter of fundamental rights of The European Union)

ECHR/ EConHR (European Convention on Human Rights)

ECtHR (The European Court of Human Rights)

CJEU (Court of Justice of The European Union)

1-Introduction:

The very nature of what is today The European Union, has intrinsic interaction with the concept of equality and non-discrimination. The Union is basically based on a Single Market, where goods, workers, services, establishments and capital can **Move** freely, designed and destined to be so entangled to render conflicts 'not merely unthinkable, but materially impossible'[1], even though the current day European Union has far less concerns regarding a war between its member states. After those post-war days, and all the efforts that was made in order to prevent another mayhem, the modern European Union:

'…is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'[2] and its '…aim is to promote peace, its values and the well-being of its peoples.'[3]

As inspiring as the idea of 'Ever-closing Union'[4], might be, not every member state, citizen, political actor, etc, of The Union would agree with what amounts to **Human Rights**, or what is **Discriminatory**, or if they could agree to what is a matter of **National identity**, **culture**, or **tradition**.

To continue the process of European integration, there of course shall be measures, legislations, instruments and institutions to further implement The Union's norms and values. From legal point of view, The Union has its own boundaries, designed to maintain Member state's independence, and can only act within its conferred competences, outlined by the treaties. The Principles of conferral, limits the EU's competence to whatever has been conferred to it to do, while its exercise of its

[1] The Schuman Declaration – 9 May 1950, Last published 07/05/2020, available at: <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>
[2] Article 2 TEU.
[3] Article 3 TEU.
[4] Mentioned in Article 1 TEU.

competences is governed by principles of subsidiarity and proportionality, as mentioned by Article 5 TEU.

Therefore, considering the intra-union diversity, there can be some frictions between The Union and its MSs, when it comes to some decisions or views, as there is, in case of a highly controversial and of high importance; The LGB Community of the Union. The EU needs to protect its founding values, enshrined in Article 2 TEU as mentioned above, in order to maintain its position as a global power on one hand, and to avoid losing its momentum as the key player of European peace and well-being.

1-A. Purpose and Research Question

This paper zooms in on a fraction of those values; The principle of Non-Discrimination, and only one of its multiple grounds; The grounds of Sexual Orientation.

But how can The EU protect its citizens from being discriminated against based on their sexual orientation? And what legal instruments are available in its disposal for that purpose? What are The EU's limits and/or areas of dominance regarding this issue? Can the EU further extend its protective measures for its non-heterosexual citizens? This paper, aims to answer these questions within the limited range of EU law of non-discrimination based of sexual orientation, through reporting of related facts, scrutinizing legal material, and trying to discern what is the approach of The EU in safeguarding its values, and further integrates the member states in itself.

1-B. Methodology and Approach

To understand the approach that The EU has taken in combating discrimination based on sexual orientation, it is necessary to report on history of its past, the historical events that shaped the current approach, and limits and abilities of The Union. The course of this paper is based on time and era; from complete lack of EU-wide protection from discrimination on grounds of sexual discrimination, to what it is today, and what might be the prospect of future.

Following a legal dogmatic approach, I tried to introduce relevant legal materials, from articles of The Treaties and The Charter of Fundamental rights, to interpretations and case-laws of the CJEU, and examine their legal, and actual

effects on combating discrimination based on sexual orientation, while trying to remain expressive regarding my own opinion. This paper shed light on the interaction of legal provisions of The EU law, with regard to their scope, and their position in the hierarchy of norms of the EU law, along with the interpretations of The CJEU and its Advocate Generals of the related EU laws, within the limits of the discussed issue.

Considering the numerous ways that LGB citizens of The Union can experience discrimination, while pointing toward issues such as pensions and pays, or harassment in employment and role of anti-discrimination bodies in a concise manner, that are in a rather more acceptable situation. Considering the fact that the extra-sensitive area of Family Law is deep within the competence of member states, far from the border of competence of the Union, The EU and The CJEU have to overcome numerous obstacles, through various legal challenges, to protect the fundamental rights of LGB citizens of The Union, as much as possible, mainly through the gateway of **Cross-border implications, EU Citizenship Rights,** and the concept of **Freedom of Movement**, which brings matters into the Scope of EU law, and allows The CJEU to interpret the law of The Union in a fair an unbiased way.

With that in mind, I tried to focus on topics that are more controversial such as recognition of same-sex marriages, and parent-child relationships of same-sex families, within the context of The Union's law, that are unfortunately facing challenges, due to some member state's resisting to respect the fundamental rights of LGB citizens.

1-C. Delimitation

Although there are various abbreviations to address **Queer** community, Usually the one that appears on media or in public, is **LGBT** (Lesbian, Gay, Bisexual, Transgender). However, for the purpose of this paper, which is about Sexual Orientation, the abbreviation will be **LGB**. The reason behind excluding Transgenders from the popular abbreviation in this paper, just to clarify, is the fact that being Transgender has nothing to with sexual orientation. A transgender person can be homosexual, heterosexual, or Bisexual (using umbrella terms). Being a Transgender, is a matter of Gender, while being Lesbian, Gay or Bisexual is a matter of Sexual Orientation.

Considering the current unacceptable situation of LGB legal recognition, I preferred not to bring up the issue of complete non-recognition of Polyamory, which in my humble opinion, is a discrimination against Bisexuals. Beside some concise point-outs, this paper does not zoom in on member states compliance with the EU law, and will not enter the area of Rule of Law, as the purpose of it is mainly to explain the evolution of the EU law in the field of non-discrimination based on sexual orientation.

While the EU law is not the only tool in inventory of The Union in order to protect its values or even in stricter sense, combat discrimination based on sexual orientation, this paper only looks on the obligatory and binding legal measures of the Union. Therefore, the role of NGOs and activists, media, etc. has been excluded.

2- Legal Instruments Available to The Union and Their Interpretation:

Even though there were some steps toward taking The LGB Community's rights seriously as early as 1980's, it was with the Amsterdam Treaty, and what is now Article 19 TFEU, that provided The Union with a rather reliable legal instrument to help The Community in their voyage for non-discriminatory rights and treatment, and allowed issuing Directives about non-discrimination on grounds of *Inter alia* Sexual Orientation. Although it still does not reach into backyard of MS's competence and for instance, to harmonize issues like Marriage or Adoption, it does allow The Union to exercise its competence in issues that fall within The Scope of EU Law such as discrimination in employment or when it comes to free movement.

With coming into force of Lisbon Treaty in 2009, The Charter of Fundamental Right of The European Union is now binding on Member states, with the same legal value as The Treaties. Although as we will see, as much as it sets the bar further above in comparison with European Convention on Human Rights (ECHR), it still operates within the current area of competence of the Union and

considering its provisions, does not confer new areas of competence to the Union, and is only binding on MSs when they operate as the executive branch of The Union. In fact, even its wording has been selected carefully:

e.g. Article 9 CFREU:

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws[5] *governing the exercise of these rights.*

Although the Article is Gender-Free (unlike Art. 12 ECHR), it still recognizes the sphere and scope of National Laws (which may be well Homo/Transphobic) and tries not to peek out of the competences The Union has been conferred upon. As we will see, The CFREU is not a Federal Document and it won't be one, unless Treaties are amended. Therefore, we shall look into what are the main legal resources of the EU, and what falls into the scope of EU law for the purpose of this paper: Non-discrimination on ground of sexual orientation, in aspects such as employment/occupation, healthcare, or equal rights with heterosexual citizens of The EU in exercising their EU-Citizenship derived rights, such as free movement. After the Amsterdam Treaty, the ground of sexual orientation was added to what was back then article 13 TEC and is now article 19 TFEU[6]:

'1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[7].

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States[8], to support action taken by the

[5] Emphasis added.

[6] Linas Juozulynas, Krzysztof Śmiszek, The Equal Jus Legal Handbook to LGBT Rights in Europe, page 19 available at: <https://www.ilga-europe.org/sites/default/files/Attachments/equal_jus_legal_handbook_to_lgbt_rights_in_europe_0.pdf>

[7] Emphasis added.

[8] Emphasis added.

Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.'

In other words, it appears that article 19 TFEU, considering its strict conditions for special legislative procedure, and its inability to **harmonize** laws and regulations of member states, can only work when **all member states** agree upon the content of the proposed legislation.

Many other articles of TFEU, like Article 21 below, although in appearance a bit irrelative, must be mentioned with regard to the purpose of this paper, since they play a major law in interpretation of the EU law in cases of discrimination based on Sexual Orientation:

'1. 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.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.'

Article 21 TFEU, along with article 45 (Free movement of Workers), article 49(Freedom of Establishment), article 56 (Freedom to Provide Services), article 4(2) (Shared competence) of The Treaty on the Functioning of the European Union, are some key elements in further pushing forward toward equality and non-discrimination for the LGBT community in the Union. Another Treaty provision, that is somehow a trouble maker and an obstacle in the way of the progress toward a LGB-friendly EU, is Article 4(2) of Treaty on the European Union (TEU):

'The Union shall respect the equality of Member States before the Treaties as well as their national identities[9], inherent in their fundamental structures, political

[9] Emphasis added.

and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

In cases of discrimination based on Sexual Orientation that involves non-recognition of Same-sex marriage (or partnership) or child-parent relationships of such families, **National Identity** is at the core of heteronormative member state's argument[10].

Fortunately, it is immediately followed by article 4(3) TEU:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

The Principle of sincere cooperation stemmed from this article, plays a positive role in confining the potential undesirable tyranny of its previous provision. [11]

According to Article 6 TEU: 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union… which shall have the same legal value as the Treaties' and explains that The Charter does not extend the competences of the union in anyway. It also refers to Title VII of The Charter as how its provisions must be interpreted, and recognizes 'fundamental rights', as guaranteed by ECHR and resulted from 'the constitutional traditions common to the Member States', as **General principles of The EU Law**.

Another major development in further combating discrimination, as I mentioned, happened after The Lisbon Treaty of 2009 came into effect, which provided The Charter of Fundamental Rights of European Union (CFREU) with binding legal effect (the Charter were drafted in 2000, but its legal value was left for later consideration with the constitutional processes that were ongoing back then[12]) , and gave it an equal legal status with the Treaties (TEU & TFEU). Having the same legal status with Treaties basically means that the provisions of

[10] C-673/16 *Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne* ECLI:EU:C:2018:385, and C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'*.

[11] See footnote 56 and the text it marks.

[12] Craig and de Búrca, EU law – Text, Cases and Materials, Oxford University Press, Sixth Edition, 2015, page 394.

the charter enjoy the principle of supremacy and are directly effective[13], but **does not extend the competence of the Union or the scope of EU law**, as the charter itself express in its provisions of its final chapter (Chapter VII). The official website of European Commission, answers the question 'Why do we need the Charter?' as so:

'The rights of every individual in the EU were established at different times, in different ways and in different forms.

For this reason, the EU decided to include them all in a single document, which has been updated in the light of changes in society, social progress and scientific and technological developments.

The Charter of Fundamental Rights brings together all the personal, civic, political, economic and social rights enjoyed by people within the EU in a single text.'[14]

In fact, The Charter of Fundamental Right, in my opinion, serves as a further advanced version of ECHR in terms of its standards, as it is inspired by it, fashioned in a single document that is legally binding, can be directly relied in courts, and can be interpreted and upheld by the CJEU (although article 52(3) clearly states that in so far as the rights in the charter, 'correspond' to those in the ECHR, 'the meaning and scope' of them is the same as in the ECHR, interpreted by the ECtHR).In lights of this particular development, Article 21 of the Charter, which almost shares the goal with article 19 TFEU, is now binding on member states, when implementing EU law.

Article 21(1) of the Charter states:

'Any discrimination based on any ground such as sex, race, color, 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[15] shall be prohibited.'

As obvious as it is that the Union measures shall be compatible with the general principles of EU law, and post-Lisbon treaty, The Charter of Fundamental Rights, 'Any national measure falling within the scope of EU law ought to be

[13] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105*,* paras [45]-[48].

[14] Available at:<https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en>

[15] Emphasis added.

compatible with EU fundamental rights standards'[16] too. However, as Article 6(1) TEU and Article 51 of the charter itself clarified, The Charter of Fundamental Right is only binding within the competence of the Union, and the scope of EU law, as is not a 'Federal' document with the same functioning of US Bill of Rights, and it cannot 'in itself' be a legal basis for legislation by the union.[17] It should be mentioned, that the charter is still a valuable source of fundamental right, that is binding and enforceable on member states on The Union level, is interpretable by the CJEU, is unambiguous at least about its protected values, and is codified and easy to refer to for legal purposes, that along with other sources of EU law such as Treaties, General Principles and legislations (regulations, directives, etc), helps improving the situation of fundamental rights, and combating discrimination, as the examples of it will be seen in below cases.

2-A. Pre-Amsterdam

The first adoption and usage of The General principles of EU law goes all the way back to 1969[18] to The case 29/69 *Stauder v City of Ulm* paragraph 3: 'When a single decision is addressed to all the member states the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, and in the light in particular of the versions in all ... languages. ... Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law[19] and protected by the Court.'

The General Principles of EU law has been developed and extended since then through the case-laws of the CJEU, employing legal traditions of member states, international human rights instruments, and European Convention on Human Rights.[20]Among these General Principles, are the principle of protection

[16] Groussot, Xavier and Pech, Laurent and Petursson, Gunnar Thor, The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication (July 1, 2011). Available at SSRN: <https://ssrn.com/abstract=1936473 or http://dx.doi.org/10.2139/ssrn.1936473> page 12.

[17] Ibid, pages 16 -17.

[18] Craig and de Búrca, EU law – Text, Cases and Materials, Oxford University Press, Sixth Edition, 2015, page 383.

[19] Emphasis added.

[20] Craig and de Búrca, EU law – Text, Cases and Materials, Oxford University Press, Sixth Edition, 2015,pages 384-385.

for fundamental human rights[21], and Principle of Non-Discrimination, which can be based on various grounds, such as Gender, race or ethnicity, age, disability, religion or belief, and Sexual orientation. The Ground of Sexual Orientation was added to the article 13 EC treaty (now article 19 TFEU) (along with other grounds for discrimination such as race, disability, age, etc) with amendments in Amsterdam Treaty in 1999, as I mentioned above, which allowed the EU to bring this ground into its legislations such as Directive 2000/78/EC (Known as the Framework Directive).

Before the Amsterdam treaty, even though the issue of equal treatment and non-discrimination was relied on by the court of justice as a General Principle of EU Law, it was confined to Gender Equality and nationality. Before Amsterdam treaty, Discrimination on the ground of sexual orientation had unfortunately no legal basis in the EU law, as the ruling of the court in the case *Grant*[22] clearly illustrated.

Ms. Grant, an employee of South-West Trains, Ltd, which allowed its employees an entitlement to free or reduced rate travel concession to themselves and their spouse, dependents, or 'one common law opposite sex spouse of staff...subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more'[23] . Ms. Grant had a same-sex partner that would fit in all of the company's criteria, except being a **Same-sex** partner, and the company 'refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex'[24]. In a lack of provisions to outlaw discrimination on the ground of sexual orientation, Ms. Grant sought to defend her right under the scope of discrimination based on gender, submitting that 'her employer's decision would have been different if the benefits in issue in the main proceedings had been claimed by a man living with a woman, and not by a woman living with a woman.'[25]

The court explained that since 'the worker must live in a stable relationship with a person of the opposite sex' and for that reason 'travel concessions are refused to a male worker if he is living with a person of the same sex, just as they

[21] Case 29/69 Stauder v City of Ulm ECLI:EU:C:1969:57 Para [3], mentioned above in text.
[22] C-249/96 *Grant v South-West Trains* ECLI:EU:C:1998:63.
[23] Ibid, para 5.
[24] Ibid, para 8.
[25] Ibid, para 16.

are to a female worker if she is living with a person of the same sex' [26], the condition is not discriminatory on ground of gender, and 'in the present state of the law within the Community,…relationships between two persons of the same sex are not regarded as equivalent to marriages or… relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a … relationship with a partner of the same sex as equivalent to that of a person who is married to or has a … relationship outside marriage with a partner of the opposite sex.' [27]

The court thus ruled that the action of the employer 'does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.'[28] As it is clear in the above example, before Amsterdam Treaty, the LGB community was far from being protected from discrimination by the EU law, since there was no binding legal provision, or general principle available for this purpose.

2-B. Post-Amsterdam, Pre-Lisbon

Fortunately, the situation became better after Amsterdam and the resulting directives from it, namely Directive 2000/78/EC and Directive 2004/38/EC for the purpose of this paper, regarding cases such as *Romer* C-147/08, *Maruko* C-267/06 and other cases. Even though the Charter of Fundamental right was still not binding in this era, recital 31 of the Directive 2004/38/EC clearly states:

'This Directive respects the fundamental rights and freedoms and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property,

[26] Ibid, para [27].
[27] Ibid para [35].
[28] Ibid, final paragraph.

birth, disability, age or sexual orientation, As we will see in next chapter, after Lisbon Treaty, the Charter started to play its role in the judgments of the court.

Directive (2000/78/EC) laid down 'The General Framework for equal treatment in employment and occupation' to combat discrimination on basis of, *Inter alia*, 'Sexual Orientation'. Article 2(2) of the directive defined 'Direct' and 'Indirect' discriminations, and article 2(3) considers 'Harassment' within the meaning in accordance of national laws and practice to be a form of discrimination:

'Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

Article 3 defines the 'Scope' of the directive 'Within the limits of the areas of competence conferred on the Community' to 'all persons, as regards both the public and private sectors, including public bodies' with some exceptions regarding disabilities and/or age, and through article 9(2) it allows that 'associations, organizations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.' Article 9(1) and 9(3) obliges MSs to ensure the enforcement of the directive's provisions and that the administrative procedures for enforcement are available to 'all persons who consider themselves wronged by failure to apply the principle of equal treatment to them'.

The Burden of Proof is on the defendant, in accordance with article 10 of the directive, except in case of a criminal procedure.

Regarding what amounts to discrimination, The CJEU, found in *Maruko C-267/06*[29] and later in *Romer C-147/08*[30], both German cases, that in a member state that allows registered same-sex partnership comparable to marriage, it would be directly discriminatory to treat people who are in such partnership, less favorably than those who are in a heterosexual marriage, for the purpose of "Payment"(A survivor's benefit under an occupational pension scheme in *Maruko* & a supplementary retirement pension under an occupational pension scheme in *Romer*), is directly discriminatory on ground of sexual orientation, since the status of marriage is reserved for different-sex couples, and the legal status of same-sex partnership given the obligations and duties are comparable to married couples.

In both cases, the issue of indirect discrimination was brought up. In *Maruko* the AG Ruiz-Jarabo Colomer concluded that:

'The refusal to grant such a pension because the partners had not married, where marriage is restricted to persons of the opposite sex, even though the partners had entered into a same-sex union the effects of which are substantially the same as those of marriage, **amounts to indirect discrimination**(emphasis added) based on sexual orientation contrary to Directive 2000/78, and it is for the national court to determine whether the legal situation of spouses is similar to that of persons in a registered civil partnership.'[31]

In a same manner, in *Romer*, AG Jääskinen concluded that: '…if the analysis of comparability excludes the existence of direct discrimination based on sexual orientation, there is at the very least indirect discrimination within the meaning of Article 2(2)(b)(i) of Directive 2000/78…'[32] and suggested that 'suggested that a failure by a state to make spousal benefits available to same-sex couples in long-term relationships might also constitute indirect discrimination, even in a situation where no life partnership scheme equivalent to marriage had been established in that country. In his view, making benefits conditional on married status will inevitably disadvantage same-sex couples when compared to opposite-sex couples, as same-sex couples have no way of satisfying this condition. He went on to suggest that it might be difficult to show that restricting access to benefits to

[29] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* ECLI:EU:C:2008:179
[30] Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* EU:C:2011:286
[31] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 6 September 2007. Para. 111(2)
[32] Opinion of Mr Advocate General Jääskinen delivered on 15 July 2010. Para. 180(2)

married couples was objectively justified. However, the Court in *Römer* left this issue open for determination in a future case'[33]but 'implied-without actually saying so-that the principle of non-discrimination on grounds of sexual orientation may be a general principle of EU law'[34].

2-C. Post-Amsterdam, Post-Lisbon

Later, in *Hay* C-267/12, a case from France, where civil unions is provided by national law to both same-sex and different-sex couples, about a bonus leave from work for newly-wed employee of which was being withheld from the litigant because he was not considered married by his employer, the court clarified that: 'The fact that the PACS[French civil union], unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.[35]'

"The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed"[36] and that the discrimination is 'Direct'.[37]

In Case C-81/12 (*Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*), from Romania, regarding some homophobic rants in an interview from a George Becali, a Romanian businessman and politician (in)famous for his rather outlandish behaviors and statements, during which he, among various degrading remarks stated that:

[33] Colm O'Cinneide, 'The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC', European Network of Legal Experts in the non-discrimination field, 2012.

[34] Craig and de Búrca, EU law – Text, Cases and Materials, Oxford University Press, Sixth Edition, 2015, page 195.

[35] C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* ECLI:EU:C:2013:823 para. [43].

[36] Ibid, Para. [44].

[37] Ibid. Para [45].

'Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Rather than having a homosexual on the side, it would be better to have a junior player. This is not discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose. Even if God told me in a dream that it was 100 percent certain that X was not a homosexual I still would not take him. Even if [player X's current club] gave him to me for free I would not have him! He could be the biggest troublemaker, the biggest drinker … but if he's a homosexual I don't want to know about him.'[38]

Mr. Becali was not legally in charge of recruiting, albeit he was seen in public eye as the Patron of the club, and the club never rejected his statements or distanced itself from his views, and the player X was a hypothetical figure, not a real person.

However, the court explained that 'It is apparent from the case-law of the Court that direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 does not mean that there must be an identifiable complainant who claims to have been the victim of such discrimination…'[39] with a reference to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and its own case-law of C-54/07 *Feryn*[40], and pointed out to article 9(2) of directive, *inter alia*, to reiterate that Asociaţia Accept, a Romanian NGO advocating for LGBTI community, can be regarded as a 'concerned person'[41] who can litigate for its legitimate interests.

Athough in *Hay* and *Asociaţia Accept* the court did not refer directly to the Charter of Fundamental Rights, and the reference in the judgment of the court is usually to its settled case-laws(in Case of *Hay* the court does refer to *Romer* and *Maruko*), national measures and Directive 2000/78 provisions, there is, among them article 1 of the said Directive which states: 'The purpose of this Directive is

[38] Marco Cellini, The right to non-discrimination on the ground of sexual orientation: An Analysis of the ECJ's jurisprudence as it stands today, Page 7.

[39] C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* ECLI:EU:C:2013:275,Para[36].

[40] C-54/07 *entrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397.

[41] C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* ECLI:EU:C:2013:275, Para [39].

to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation[42] as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' which enshrines those grounds that were added in Amsterdam Treaty to enable the Union to take them into its legislations, and were included in the Charter of fundamental rights, although the Charter was not of binding status initially. In fact, given the facts of the case, the reference to the Charter would have been redundant and unnecessary, but both judgements are in line with the provisions of the Charter, even though it's not referred to in those judgments. However, as we will see below, The Charter started to appear in the court's references.

Perhaps one of the most important steps forward has been taken by the court in another case from Romania: The famous *Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne* C-673/16.

The case involved Mr. Coman, a Romanian-American and his American partner, Mr. Hamilton, whom he was in years long relationship in United States, and finally married in Belgium. However, in an effort to settle in Romania, when they applied for Mr. Hamilton's residence permit, The Romanian Migration authority denied to issue a residence permit because under Romanian Civil Code, marriage between same-sex persons is not recognized[43], is prohibited, and such marriage of natives or foreigners, contracted abroad, should not be recognized in Romania.[44] Mr. Coman and his husband brought an action against this decision to the national court of first instance and sought, a declaration of discrimination on ground of sexual orientation regarding their right of free movement in the EU and argued that the homophobic provisions of Romanian Civil Code is Unconstitutional(In Romanian constitution, the wording of provisions regarding family are gender-neutral.) The court of first instance referred the case to the constitutional court of Romania, and the latter decided to refer some questions to the CJEU, regarding the meaning of the word **Spouse** in Article 2(2)(a) of Directive 2004/38(The citizenship directive) and various scenarios that could arise

[42] Emphasis added.
[43] Articles 259(1) and (2) of the Romanian Civil Code.
[44] Article 227(1), (2) and (4) of the Civil Code of Romania.

from the pending interpretation of the CJEU regarding the term, in light of The Charter of Fundamental Rights.

Mr. Coman and his husband, along with the government of the Netherlands and The Commission, argued that the article 2(2)(a) of the citizenship directive 'must be given a uniform autonomous interpretation. According to that interpretation, the national of a third country of the same sex as the Union citizen to whom he or she is lawfully married in accordance with the law of a Member State is covered by the term 'spouse'. In contrast, the Romanian, Latvian, Hungarian and Polish Governments contend that that term does not fall within the scope of EU law but must be defined in the light of the law of the host Member State.'[45]

AG Wathelet agreed with the first approach in his opinion[46]. In his opinion, AG Wathelet argued that:

1-the directive did not make a '*renvoi* to the law of the Member States for the purpose of determining the status of 'spouse''[47],

2- According to the settled case-laws of the court, 'it is required by both the uniform application of EU law and the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. That interpretation must have regard not only to the wording of the provision but also to its context and the objective pursued by the legislation in question.'[48] and expressed that 'That methodology has been expressly used in the context of Directive 2004/38…'[49],

3-While the 'legislation on civil status falls within the competence of the Member States and that EU law does not detract from that competence'[50], 'the Court has consistently held in various areas of law that, when exercising their competences, Member States must observe EU law. Matters relating to the marital

[45] Opinion of AG Melchior Wathelet on C-673/16 *Coman*, ECLI:EU:C:2018:2 Para. [31].
[46] Ibid, Para.[32].
[47] Ibid, Para.[33].
[48] Ibid, Para [34].
[49] Ibid, Para [35].
[50] Ibid, Para [36].

status of persons do not derogate from that rule, and the Court has expressly held that the provisions relating to the principle of non-discrimination must be observed in the exercise of those competences.'[51], and explained that the issue at hand is not about 'legalization of marriage between persons of the same sex but that of the freedom of movement of a Union citizen.'[52], along with a reminder that in order to protect the right of free movement, "the Court has held that a situation governed by rules falling *a priori* within the competence of the Member States may have 'an intrinsic connection with the freedom of movement of a Union citizen which prevents nationals [of third countries] being refused the right of entry and residence in the Member State of residence of that citizen…'[53], and this approach will not be undermined by a restrictive attitude of some member states constitutional definition of marriage,[54] and since the case '…relate exclusively to the application of Directive 2004/38… [The] interpretation of the term 'spouse', restricted to the ambit of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, will not adversely affect the current freedom of Member States as regards the legalization of marriage between persons of the same sex'[55].

4- 'The AG further examined the Latvian government's argument regarding the justification by 'national identity' on behalf of Romania regarding the supposedly sensitive status of marriage. In relation to this, the learned AG considered that, if the concept of marriage were to be related to the national identity of certain Member States, the obligation to respect that identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU'[56]. Moreover, referring to the case '*Metock and Others* C-127/08'[57], The AG clearly stated that '…the word 'spouse'

[51] Ibid, Para [37].
[52] Ibid, Para [38].
[53] Ibid, Para [38].
[54] Ibid, Para [39].
[55] Ibid, Para [41].
[56] "-Kochenov, Dimitry and Belavusau, Uladzislau, After the Celebration: Marriage Equality in EU Law post-Coman in Eight Questions and Some Further Thoughts (July 6, 2020). Maastricht Journal of European and Comparative Law, 27-5, 2020. 549-572. , Available at SSRN: https://ssrn.com/abstract=3644188, regarding Para. [40] of AG opinion on *Coman* case.
[57] Opinion of AG Melchior Wathelet on C-673/16 Coman, ECLI:EU:C:2018:2, para [48].

used in Article 2(2)(a) of Directive 2004/38 relates to marriage, it is gender-neutral and independent of the place where the marriage was contracted'[58]

5- With the drafting history of the citizenship directive in mind, when parliament wished to include expressly stated irrelevance of the sex of the persons regarding the word 'spouse', and the council's reluctant approach toward it, since back then only two member states had laws allowing same-sex marriage, 'the Commission preferred to 'restrict [its] proposal to the concept of spouse as meaning in principle spouse of a different sex, unless there are subsequent developments'[59], which implies that 'The Commission's reservation in that regard is crucial. It makes it impossible for the term 'spouse' to be definitively fixed and sealed off from developments in society.'[60] The AG then points out to other AGs opinions about 'Modern reality'[61], keeping the pace with current day needs in legal interpretation, the fact that 11 more member states have renewed their laws to legalize same-sex partnership, that the same-sex marriage/civil union is present in all continents now and is not a matter of particular culture, and that it is a part of a '*general movement*'.[62]

6- 'Furthermore, …the fundamental rights linked with the term 'spouse' also preclude[63] an interpretation liable to prevent a homosexual Union citizen being accompanied by the person to whom he or she is married or to make it more difficult for him or her to be accompanied by that person.'

7- with having due regard for provisions of CFREU and ECHR, and case-laws of European Court of Human Right relative to the issue in hand, even with an outdated view of not recognizing same-sex partnerships as a **family** which rejected by the ECtHR 2010's onward, refusal of granting a residence permit for a homosexual partner on ground of 'protection of family life' cannot justify a discrimination based on sexual orientation in this case.[64]

[58] Ibid, Para [49].
[59] Ibid, Para [51], emphasis added.
[60] Ibid, Para [52], emphasis added.
[61] Ibid, Para [56].
[62] Ibid, Para [58], emphasis added.
[63] Emphasis added.
[64] Ibid. Paras. [59]-[65].

It should be noted, that regarding the role of the Charter in this case, the referring court in Romania, pointed out to four different articles of the Charter in its questions (articles 7[Respect for private and family life],9[Right to marry and right to found a family],21[Non-discrimination],45[Freedom of movement and of residence]) and AG Wathelet, in note 43 of his opinion stated:

'Article 9 of the Charter does not strike me as relevant. On the one hand, the developments of the explanations on the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) devoted to Article 9 stated that although '[its] wording … has been modernized [by comparison with Article 12 of the ECHR] to cover cases in which national legislation recognizes arrangements other than marriage for founding a family, [that] article neither prohibits nor imposes the granting of the status of marriage to[65] unions between people of the same sex' (emphasis added[in original text]). Member States' freedom in that regard is confirmed by the case-law of this Court (see, to that effect, judgment of 24 November 2016, Parris, C-443/15, EU:C:2016:897, paragraph 59) and of the ECtHR (see, in particular, ECtHR, 9 June 2016, *Chapin and Charpentier v. France*, CE:ECHR:2016:0609JUD004018307, paragraphs 38 and 39). On the one hand, in the present case Mr. Coman and Mr. Hamilton were able to exercise that right in Belgium. The freedom of movement enshrined in Article 45 of the Charter is specifically mentioned in Directive 2004/38.' Which practically enlightens as an example and is in line with the Scope and meanings of The Charter provisions as stated in Article 51 and 52(1)(3)(5)(6) of the Charter.

As regard the examination of the term **Spouse**, AG Wathelet again resorted to the Charter and its provisions corresponding to ECHR of which shall be interpreted by ECtHR: 'The term 'spouse' used in Article 2(2)(a) of Directive 2004/38 is necessarily associated with family life and, consequently, the protection conferred on the latter by Article 7 of the Charter. The scope of that article must therefore be taken into account in a contextual interpretation. In that regard, the development of the case-law of the ECtHR must not be overlooked.'[66](the above-mentioned note under AG opinion is regarding this paragraph.) He explains that according to case-laws of ECtHR, although member states are free as to whether legally provide for same-sex partners to marry, it is 'artificial to continue to take the view that, unlike

[65] Emphasis added.
[66] Ibid, para [59].

a heterosexual couple, a homosexual couple could not have a 'family life' for the purposes of Article 8 [of the ECHR]'[67], and 'the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR. The former therefore have the same meaning and the same scope as the latter', in light of article 52(3) of the charter.[68] This view was confirmed by the court in its judgement (paragraph 49 therein).

The court agreed with AG Wathelet in its ruling, That the word *spouse* is gender-neutral[69]. The court also ruled that even though the Directive's aim to facilitate the exercise of rights of the EU Citizens outside of their home country, '…where, during the genuine residence of a Union citizen in a Member State other than that of which he is a national, pursuant to and in conformity with the conditions set out in Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member State of which he is a national'[70], 'through the grant of a derived right of residence to the third-country national family member concerned. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State…'[71]. The court also pointed out that although regarding the areas of competence, whether the member states provide legal marriage for same-sex people or not, and/or recognize the status of a person in such marriage, is within the competence of member states, they must comply with the EU law in exercising that competence.[72]

The court also clarified that the refusal of granting a residence permit to an EU citizen's third-country national same-sex spouse, who has married in another

[67] Ibid, para [62] with reference to ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*, CE:ECHR:2010:0624JUD003014104, paragraph [94].

[68] Ibid, para [60].

[69] C-673/*16 Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne* ECLI:EU:C:2018:385, Paras. [34] & [35].

[70] Emphasis added.

[71] Ibid, Para [24].

[72] Ibid, Paras [37] & [38].

member state in accordance of the other member state's law, because the national law does not recognize same-sex marriage would cause the effect of the right of free movement to vary among member states, thus hampers its effectiveness, and is also at odds with the case-laws of the court and the provisions of the citizenship directive.[73]

The court also rejected the so-called 'national/constitutional identity' and 'Public Policy' argument that Latvian government put forth: '…the Court has repeatedly held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society…'[74]' The Court finds, in that regard, that the obligation for a Member State to recognize a marriage between persons of the same sex concluded 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, does not undermine the institution of marriage in the first Member State... Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognize such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.'[75] It is argued that the court, so 'refused to extend public policy derogations available in EU primary law to moralistic concerns of the Member States.'[76]

The outcome of *Coman* is significant, in the way that at least, with all the complexity of the Union's functioning, and all the political considerations that rendered a directive issued in 2004, eventually becomes, at least on paper, operational and enforced in 2018: homosexual EU citizens finally can enjoy the freedom of movement *de jure*, after it became clear that they cannot be

[73] Ibid Para [39] & [40].

[74] Ibid Para [44].

[75] Ibid Para [45].

[76] "Kochenov, Dimitry and Belavusau, Uladzislau, After the Celebration: Marriage Equality in EU Law post-Coman in Eight Questions and Some Further Thoughts (July 6, 2020). Maastricht Journal of European and Comparative Law, 27-5, 2020. 549-572. , Available at SSRN: https://ssrn.com/abstract=3644188

discriminated against by harassment, or getting paid less than others, Thanks to Amsterdam Treaty and Directives 2000/78 & 2004/38, Even though as of 22 March 2021, Mr. Coman's husband, Mr. Hamilton is **still** to receive his residence permit[77] and 'Because the EU legal order has failed to enforce their right to a residence permit, the couple have been obliged to take their case to the ECtHR'[78]. The constitutional court of Romania **applied** the ECJ ruling, but 'No Romanian court has ordered a member of the executive or the administration to issue the permit to him, and no member of the executive or the administration has invited him to complete any necessary formalities prior to the issuance of his residence permit. The Inspectoratul General pentru Imigrări, which has not changed its policy, continues to deny residence permits to the same-sex spouses of EU citizens (and returning nationals). **This is a shocking failure of a Member State to comply with EU law, which would justify enforcement action by the European Commission under Article 258 TFEU**. In the absence of such action, Mr. Coman and Mr. Hamilton have taken their case to the ECtHR (Application no. 2663/21 against Romania, lodged on 23 December 2020, communicated on 9 February 2021)'[79].

Even with extremely careful approach of the court such as: bringing up article 21 TFEU, a treaty article, to reinforce the directive that the applicants could not directly rely on, explaining and reiterating the "sole purpose" approach multiple times, treating the situation as a matter of free movement, not a matter of discrimination '(the word 'discrimination' does not appear in the CJEU's reasoning. It appears only in references to Recital 31 of Directive 2004/38, and to the proceedings in the Romanian courts. Article 21 of the Charter 'Any discrimination based on any ground such as ... sexual orientation shall be prohibited.' is not cited, even though it was cited by the Constitutional Court of

[77] Robert Wintemute,Text of presentation at the Workshop on LGBTI+ Rights in the EU, organised by the Policy Department for Citizens' Rights and Constitutional Affairs for the Committee of Petitions of the European Parliament (22 March 2021),available at : https://www.europarl.europa.eu/cmsdata/231394/Workshop%20(EuroParl%20PETI%20Wintemute%20presentation)%202021-03-22%20(revised).pdf

[78] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page 9.

Available at : https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065),

[79] Ibid, Page 42.

Romania in its first two questions, and should influence the interpretation of the term 'spouse' in Directive 2004/38.[80])', and finally , even with AG Wathelet's befitting remarks in paragraphs 59-65 of his opinion, summarized in number 7 above, avoiding to re-cite ECtHR case laws such as '*Oliari & Others v. Italy*' and '*Taddeucci & McCall v. Italy*' "to avoid appearing to suggest that Romania is also obliged under Article 8 (respect for family life) of the EConHR to introduce 'a specific legal framework' for same-sex couples. The obligation in *Oliari & Others* to create a 'specific legal framework' applies equally to same-sex couples who have married in another country under *Orlandi & Others*'[81], Romania, unfortunately, has **still** not comply with the law.

Taking a look at Article 2 of the Directive 2004/38 that states:

"Family member" means

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;[82]

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)'.

That underlined criteria is a bit of a problem as it leads to different legal status of the same-sex couples, as we saw above, for the purpose of directive and thus creating barriers for their right of free movement.

Recalling the fact that even though the 2004/38 directive does not cover the situation of the so-called **returnees** and doesn't infer a derived right of residence to

[80] Ibid, Page 41.

[81] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. page 41.

Available at : https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065,

[82] Emphasis added.

"family members" of a national in her/his national member state[83] , "**the Treaty free movement of persons provisions do apply** in such situations and, thus, **family reunification rights can be derived directly from them**[84]. For this purpose, **Directive 2004/38 applies 'by analogy'**, and, thus 'returnees' enjoy the same family reunification rights as Union citizens who move to a Member State other than that of their nationality (to whom the Directive applies directly)."[85]

The only thing would have been remained to be clarified, was what would amount to "family member", which as far as it concerns the freedom of movement (in terms of derived right of residence), falls into competence of the Union, and in case of same-sex married people, as clarified by the competent CJEU in *Coman*, **includes** same-sex **spouse**, as a '**Spouse'**.

Therefore, the troublesome criteria in article 2(2)b of directive 2004/38, even though the court clarified for the potential future instances that a member state like Romania which has no domestic legal provision about either same-sex marriage, or registered partnership in the first place, in order to have different legal status regarding those two, cannot rely on, is not even related:

Mr. Hamilton, is a **spouse**.

The directive might not confer a derived right of residency upon him but primary sources of EU law, as interpreted by the competent CJEU, do.

Mr. Hamilton should have **automatically** received a residence permit.

Yet Romania is still to comply with the Law.

Let's take a look at Union-wide impacts of the *Coman*:

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[83] *C-673/16 Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne ECLI:EU:C:2018:385* paras [20]-[21] – C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. ECLI:EU:C:2014:135 para [37].

[84] *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. ECLI:EU:C:2014:135 para [49] - *C-673/16 Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne ECLI:EU:C:2018:385* para [24].

[85] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page 29

Available at : https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065), and C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. ECLI:EU:C:2014:135 para. [50].

Aside from 13 member states that have already legalized ‘marriage’ for same-sex couples (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, and Sweden), 8 member states allow ‘registered partnership’ (Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy, and Slovenia), and 6 member states still do not abandon their heteronormative attitude regarding the issue and do not allow neither marriage nor registered partnership(Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia).

In a study, a questionnaire was sent to national parliaments of member states by European Centre for Parliamentary Research and Documentation (ECPRD), asking in particular:

‘1) When a same-sex married couple moves to your country, does your country recognize their marriage:

(a) for free movement purposes (family reunification), by automatically granting entry and residence also to the third-country national spouse of the EU citizen exercising free movement rights, as required by the 2018 *Coman & Hamilton* judgment of the CJEU? …’[86]

In case of the latter group, ‘All six Member States **appear to be willing, in theory, to comply** with *Coman & Hamiton* by granting a residence permit to the same-sex spouse of an EU citizen (or a returning national). This is an assumption in the case of Latvia (the reply is silent on this question). What is **not clear** in any of these Member States is **whether or not the residence permit would state that the spouse is the ‘spouse’, ‘registered partner’, or ‘partner in a durable relationship’ of the EU citizen (or returning national)**.’[87]

Among other member states, Denmark, Belgium, Luxembourg and Malta did not replied but since they recognize ‘marriage’, it’s clear that the answer is ‘yes’. Greece and Cyprus cleared that they do not recognize ‘marriage’ and the status of such marriage is ‘civil partnership’ in their national legal view, not answering the

[86] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. page 44.

Available at :< https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065>

[87] Ibid, same.

question of granting residence permit[88], 'Among the eight Member States that offer registered partnership but not marriage to same-sex couples**, the only Member States that appear to recognize a same-sex marriage from another Member State as a marriage are Estonia and Croatia**'[89] and 'It appears (although it is not entirely clear in each case) that **Cyprus, Czechia, Greece, Hungary, Italy, and Slovenia treat the same-sex spouse as a registered partner** for the purpose of a residence permit.'[90]

Although the court's decision in *Coman* did not demand that the spouse as per issue, **must** be described as spouse in national language or documents, "there is [also] nothing in *Coman & Hamilton* to suggest that this form of **'downgrading'** of a same-sex marriage from another Member State, from marriage to registered partnership or durable relationship, would demonstrate sufficient respect for the marriage, and be acceptable under EU law, especially in view of the prohibition of **discrimination** based on sexual orientation in Article 21 of the Charter"[91].

In the aftermath of *Coman*, Article 2(2)a(mentioning spouse) of the Directive 2004/38 is now reliable in all member states, while 'Article 2(2)b can be relied on in no more than 21 Member States, the 13 with marriage and the 8 with registered partnership, but … not necessarily all of those Member States'[92] (France doesn't recognize **foreign civil pact,** but 'durable relationship' which doesn't provide automatic family reunification rights , Portugal never had a registered partnership, only de facto unions and marriage is available, Ireland considers registered partner as durable partnership, since the national doesn't allow a registered partnership like before as they replaced it with a right to marriage)[93]

The other 6 member states continue to not provide any form of family founding rights to same-sex couples (although Lithuanian Constitutional court ruled in favor of a '**temporary residence permit for an alien who is not a citizen of [an EU] Member State may be issued in case of family reunification … when a family member of the same sex family resides in the Republic of Lithuania and their**

[88] Ibid, same.
[89] Ibid, same.
[90] Ibid, page 45.
[91] Ibid, same.
[92] Ibid, Page [55].
[93] Ibid, Page [52].

marriage or a registered partnership is lawfully concluded in the other state')[94].

'Given that 21 of 27 (77.8%) of Member States should have no objection to complying with Article 2(2)(b), and that the 6 Member States likely to object will probably be found to be violating Article 8 (respect for family life) of the EConHR by not passing a registered partnership law for same-sex couples (under the reasoning of the ECtHR *in Oliari & Others v. Italy*), it can be argued that, in a suitable case, **the CJEU should reconcile Article 2(2)(a) and Article 2(2)(b) by annulling the condition in Article 2(2)(b), as discrimination based on sexual orientation that is no longer permitted by Article 21 of the Charter**. This would resemble the outcome in *Association Belge des Consommateurs Test-Achats*,[95] in which the CJEU annulled an exception in a Directive that had permitted direct sex discrimination in setting insurance premiums. Other relevant case law would include *Maruko*, *Römer*, and *Hay*…, in which the CJEU concluded that failures to treat a same-sex registered partner in the same way as an opposite-sex spouse (with regard to matters for which registered partnership under national law 'places persons of the same sex in a situation comparable to that of spouses') were direct discrimination based on sexual orientation in relation to employment benefits, contrary to Directive 2000/78/EC.'[96]

3- Future Efforts:

Even within the limited competence of the Union, with **Internal Market** approach, and the **Freedom of Movement** necessary for it to take place, and turning a blind eye when it comes to the discriminatory practice of non-recognition of a **fundamental human right to found a family** enshrined in CFREU and ECHR (in case of ECHR, the case law of ECtHR in mind), there's still a lot that the EU can

[94] Ibid, Page [51].

[95] C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres.*ECLI:EU:C:2011:100 (1 March 2011)

[96] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page [55].

Available at : https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065),

do, in addressing the situation of the community, from discovering new interpretations under current legislation, to provide more legal basis through further legislations.

3-A. Under Existing Legislation

Another issue, and an even more controversial one than recognizing marriages or partnerships, resulting from the discriminatory non-recognition of same-sex marriage or partnership, that is causing much unnecessary drama, is the parental rights of the LGBTI community and their children.

In a recent case, pending ruling, from Bulgaria, called 'C-490/20, *V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo' (Sofia municipality, 'Pancharevo' district)',* involving a lesbian couple; V.M.A from Bulgaria, and K.D.K from The United Kingdom whom are married in Gibraltar, United Kingdom, residing together in Spain, giving birth to their child in Spain, with Spanish government issuing a birth certificate for their kid mentioning both ladies as 'mother' of the child, The Bulgarian authorities in Sofia municipality, 'Pancharevo' district, refused to 'issue a Bulgarian birth certificate on the grounds that there is lack of sufficient information regarding its biological mother, and that the registration of two female parents on a child's birth certificate is inadmissible, as same-sex parentage (as well as same-sex marriages) is currently not permitted in the Republic of Bulgaria and such a registration was contrary to public policy'[97] after Madam V.M.A requested from above-mentioned authorities to issue a Bulgarian birth certificate for her child.

'The authorities requested evidence of the child's parentage with respect to the biological mother. V.M.A. responded she was not required to do so in accordance with Bulgarian law'.[98]Their Child, nicknamed Sara[99], was at risk of being **State-**

[97] Nadia Rusinova, Recognition and Registration of Same-sex Parentage Established Abroad as Mission Impossible for the Bulgarian Authorities, 14 APRIL 2021, available at :<https://eapil.org/2021/04/14/recognition-and-registration-of-same-sex-parentage-established-abroad-as-mission-impossible-for-the-bulgarian-authorities/> of Applied Sciences. Available at : https://eapil.org/2021/04/14/recognition-and-registration-of-same-sex-parentage-established-abroad-as-mission-impossible-for-the-bulgarian-authorities/

[98] Ibid.

[99] Names in press reports are changed to protect the ID of people involved

less, since she's not Spanish (neither of her parents are Spanish)[100], one of her mothers was born in Gibraltar, who under British Nationality Act of 1981 cannot transfer her British nationality to her kid, and now the Bulgarian authorities are refusing her the Bulgarian and therefore the Union's citizenship.[101]

'Sara has been deprived of Bulgarian, and therefore European citizenship, and is at risk of statelessness. At the moment, the child has no personal documents and cannot leave Spain, the country of the family's habitual residence. The lack of documents will restrict Sara's access to education, healthcare, and social security.'[102]

The Bulgarian referring court, like the Romanian court in *Coman*, pointed out to various articles of the Charter of fundamental rights (articles 7[Respect for private and family life] ,9[Right to marry and right to found a family] ,24[The rights of the child] ,45[Freedom of movement and of residence], and asks: 'Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, … If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?'[103]

We will see further in the Opinion of Advocate General Kokott that considering various scenarios that can be unfolded and the amount of harm they pose toward the interests of the child in particular, this question referring to the article 24 of the Charter poses significant importance.

The opinion of Advocate General Kokott was published 15 April 2021.She opened up her opinion by a question:

'Must a Member State issue a birth certificate showing two women as mothers, one of whom is a national of that Member State, to a child born in another Member

[100] Later in the hearing in the court of justice, Spanish government pointed to the article 17 of Spanish civil code that allows the child to claim Spanish nationality, if she fails to obtain British or Bulgarian one, hence she will not be state-less, see para 53 of AG Kokott opinion on C-490/20*, V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo'*

[101] ILGA-Europe's report, 'European Court must rule in favour of a child at risk of statelessness and her family's freedom of movement in the EU, say leading LGBTI rights organisations',Posted: 4 February 2021, available at: <https://www.ilga-europe.org/resources/news/latest-news/european-court-must-rule-favour-child-risk-statelessness-and-her-familys>

[102] Ibid.

[103] AG Kokott opinion on Case C-490/20*, V.M.A. v. Stolichna Obsthina, Rayon 'Pancharevo',* para. [28(2)].

State in which that child has been issued with such a birth certificate?'[104] explaining that this is basically what the court has been asked to answer.

Then continued with what, in her eyes, is really stopping the Bulgarian authorities from issuing the birth certificate, hence granting the Bulgarian nationality to the child: 'The reason for the Bulgarian authorities' refusal to issue such a birth certificate is, ... the fact that Bulgarian law does not allow two mothers to be registered as the parents of a child on a birth certificate. This is precluded since, in Bulgaria, the conception of the so-called 'traditional' family prevails, which, according to the information provided by the referring court, is a value protected as an element of **national identity** (emphasis added) within the meaning of Article 4(2) TEU. Since that means that there can be only one mother of a child, the Bulgarian authorities therefore consider it necessary to identify the woman who gave birth to the child in order to record only her name on the birth certificate, information which the couple concerned refuses to disclose.'

In her opinion, she pointed out to the fact the referring court appears to have already established that the child has the Bulgarian citizenship, according to the Article 25(1) of the Constitution of Bulgaria that states '" a person is a Bulgarian national if at least one of the parents is a Bulgarian national …". In that regard, the Bulgarian referring court confirmed that the acquisition of Bulgarian nationality under the provision cited above is automatic, that is to say no administrative act granting nationality is necessary.'[105] But the Bulgarian government disputed that assumption by Bulgarian referring court and pointed to article 60(2) of Bulgarian family code, which rules that the mother of a child is 'the woman who gave birth to that child' and since the Bulgarian government does not know which one of the two ladies is the **biological mother**, since the ladies did submit that piece of information to the Bulgarian administration. 'In other words, Bulgaria does not recognize the parent-child relationship between the applicant in the main proceedings and the child and, therefore, that that child has Bulgarian nationality, on the sole basis of the presentation of the Spanish birth certificate.'[106]

Pointing to the fact, that 'it would be sufficient, for the purpose of granting the child Bulgarian nationality, for the applicant in the main proceedings to

[104] AG Kokott opinion on Case C-490/20*, V.M.A*, para. [1].
[105] Ibid, para [32].
[106] Ibid, para [33].

acknowledge her maternity in accordance with Article 64 of the Family Code. That possibility is neither reserved for a man in a heterosexual relationship nor subject to proof of biological parentage. In other words, even if the applicant … was not the biological mother within the meaning of Article 60(2) of the Family Code, she could acquire the status of mother of the child under Bulgarian law in this way … However, … that would have the effect of erasing any parent-child relationship between the child and her biological mother under Bulgarian law.'[107](which means the other mother, will not be considered a mother)[108], She presumed two different hypothesis, and explained their resulting scenarios in rest of her opinion:

1-The Bulgarian mother is not the biological mother, or does not wish to acknowledge her maternity, and the child is not Bulgarian, and won't be one until her Bulgarian mother do so.

2- The Bulgarian mother is the biological mother, and the child is automatically Bulgarian.[109]

AG Kokott clarified that both scenarios fall into scope of EU law[110]:

The scenario No.1 (in which the Child is not automatically a Bulgarian) will not take the issue at hand out of the scope of EU law since the applicant(her Bulgarian mother) is an EU citizen and has exercised her right of movement, has become a mother along with her wife under a member state's law and that she 'request that her Member State of origin recognize that situation and issue, for those purposes, a birth certificate designating both women as the parents of the child concerned.'[111]Noting that the question referred by Bulgarian court does 'not refer expressly or exclusively to the child's right to freedom of movement'.[112]

In the scenario No.2, albeit the child is automatically Bulgarian, that 'would not alter the fact that the Bulgarian authorities are not willing to issue the birth certificate applied for designating, like the Spanish birth certificate, the applicant in the main proceedings and her wife as mothers of the child…The refusal to issue the birth certificate applied for also makes it *de facto* impossible for the child to

[107] Ibid, Para [34], emphasis added.
[108] See para [64] of the AG Kokott opinion on Case C-490/20, *V.M.A.*
[109] Ibid, para [37].
[110] Ibid, para [40].
[111] Ibid, para [38].
[112] Ibid, same

obtain a Bulgarian identity document. The question therefore still arises as to whether that situation is compatible with Articles 20 and 21 TFEU and Articles 7, 24 and 25 of the Charter.'[113](A rather interesting fact in this paragraph is the point out to article 25 of The Charter [The rights of the elderly] that appears to be prudent of the rights of both mothers as parents in future when they are aged.)

In the 1st scenario, since the Bulgarian authorities has the power to lay down conditions for 'acquisition and loss of nationality'[114], and the condition that they shall exercise this competence with due regard to EU law, can only be applied 'where the exercise of that power affects the rights conferred and protected by the legal order of the European Union… In other words, it is only by restricting the rights deriving from the status of citizen of the European Union that a measure determining the acquisition or the loss of the nationality of a Member State is capable of falling within the ambit of EU law.'[115], if the child is not automatically an EU-citizen, 'the question as to whether the Republic of Bulgaria could be required to grant her nationality under Articles 20 and 21 TFEU cannot be examined from the child's point of view'[116]and 'she does not enjoy the rights deriving from Article 4(3) of Directive 2004/38 and Articles 20 and 21 TFEU, which are reserved for European Union citizens. Consequently, the refusal by the Bulgarian authorities to issue the child with a Bulgarian birth certificate designating, like the Spanish birth certificate, the applicant in the main proceedings and her wife as mothers of that child, and the refusal to issue that child with a Bulgarian identity document, cannot infringe those rights.'[117]

While pointing toward fact that the member states are not required 'to grant nationality to the direct descendants of their citizens. That consideration is illustrated by the very existence of Directive 2004/38, the specific purpose of which is to guarantee the freedom of movement of European Union citizens together with their family members, including, inter alia, their direct descendants who are **third-country nationals**'[118], after mentioning that 'the mere fact that the child of a European Union citizen is not granted the nationality of a Member State

[113] Ibid, para [39], emphasis added.
[114] Ibid, para [50].
[115] Ibid, para [51].
[116] Ibid, para [52].
[117] Ibid, para [54].
[118] Ibid, para [65].

on account of those relationships is not liable to hinder the free movement of the European Union citizen concerned'[119], AG Kokott also opined that while in 1st scenario, the Bulgarian authorities may be free to grant **nationality** to the child or not, same might not be true about **the birth certificate**, since that can **constitute an obstacle to applicant's right to free movement[120]**, as 'she has legally acquired the status of mother of the child under Spanish law'[121] and although 'it is apparent from the request for a preliminary ruling and the explanations provided by the Bulgarian Government …that a transcript of the Spanish birth certificate would, in practice, confer the status of mother on the applicant in the main proceedings and on her wife. Conversely, if one of the two women does not appear on that document, she will not be regarded as the mother of the child for the purposes of Bulgarian family law'[122], **still**, '... [since] The status of family member forms the basis of numerous rights and obligations arising from both EU and national law… from the uncertainties surrounding the child's right of residence in Bulgaria, to obstacles relating to custody and social security, that refusal would also have consequences in matrimonial and inheritance matters. In those circumstances, there is no doubt that the failure to recognize the family relationships established in Spain could deter the applicant in the main proceedings from returning to her Member State of origin.'[123] In this regard, while reiterating that a person's civil status, (mentioning in particular, parentage) is not govern by the EU law[124], she cited case-laws of the CJEU(among them *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 38)), and reminded that 'where a situation falls within the scope ***ratione materiae*** of the Treaties, when exercising their powers, Member States must comply with EU law.'[125] Therefore, as a result, if a member state's measures constitute an obstacle to the right, the member state should provide justifications that are 'based on objective considerations'[126] and are 'proportionate

[119] Ibid, same
[120] Ibid, para [67].
[121] Ibid, para [56].
[122] Ibid, para [57].
[123] Ibid, para [62].
[124] Ibid, para [58].
[125] Ibid, same
[126] Ibid, para [68].

to the legitimate objective pursued by national law'[127] which must be 'examined'[128] by the CJEU.

AG Kokott, took the argument put forth by Bulgarian authorities, regarding **National Identitiy** within the meaning of article 4(2) TFEU, and dissected it meticulously.

She basically recognized that the issue in hand (refusal to issue a birth certificate recognizing both ladies as parents, or recognition of same-sex parentage) can fall within the scope of article 4(2)[129], after explaining, among other reasons, 'Family law – whether based on traditional or more 'modern' values – is the expression of a State's self-image on both the political and social levels'[130], and that 'where a State applies the principle of *ius sanguinis* in this regard, the parentage of a person determines nationality and therefore the very fact that a person belongs to a given State.'[131] And pointed out to the fact that unlike the situation in *Coman*[132]' where the act requested on the basis of EU law is actually capable of altering the national institution or conception, thus encroaching on the exclusive competence of the Member States in the area concerned'[133], 'it is… necessary to restrict the intensity of the review in order to preserve the existence of areas of substantive powers reserved for the Member States within the scope of EU law'[134].

She reiterated that <u>family law is out of the EU's competence, and does not fall within the meaning of article 51(1) of the charter</u>, and given sensitivity and fundamental importance of the issue, it can even fall within the scope of article 4(2),[135] and stated: 'as soon as there is a cross-border element in a family relationship, any national provision of family law is capable of constituting a restriction to Article 21(1) TFEU simply because it differs from the legislation of another Member State. If, when examining the justification for such a restriction, the Court were to carry out, on each occasion, an exhaustive review of the national

[127] Ibid, same
[128] Ibid, para [69].
[129] Ibid, para [79].
[130] Ibid, para [77].
[131] Ibid para [78].
[132] *C-673/16 Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne ECLI:EU:C:2018:385*
[133] The AG Kokott opinion on Case C-490/20*, V.M.A*, para 95
[134] Ibid, para [96].
[135] Ibid, para [98].

legislation in the light of the Charter and in particular its provisions concerning family relations – such as Articles 7 and 24 – this would mean that all national family law, including the fundamental expression of the differences which the European Union respects under Article 4(2) TEU, would have to conform to a uniform vision of family policy which the Court would draw from its interpretation of those provisions'[136] and added that this approach would also be in contradiction with article 51(2) of the charter.[137]

After these clarifying her views in general regarding the article 4(2), she applied those views to the ongoing situation of the case: '…where the fundamental expression of national identity in accordance with Article 4(2) TEU is at issue, the Court must confine itself to a review of the limits of the reliance on that principle, in particular respect for the values enshrined in Article 2 TEU..'[138] for that purpose, she examined the situation from two perspectives of:

1- 'The recognition of parentage for the purposes of drawing up a birth certificate'*[139]*, which as she opined, although in her eyes it does not adversely affect the concept traditional family, will remain in the competence of the member states, adding that 'that reliance on the essence of national identity cannot be subject to a review of proportionality'*[140]*

2- 'The recognition of parentage for the purpose of exercising rights deriving from secondary EU law on the free movement of citizens'*[141]* which falls under the competence of the EU[142].

Stating that in her opinion, 'the recognition of family relationships established in Spain for the sole purpose of applying secondary EU law on the free movement of persons does not adversely affect the national identity of the Member States'*[143]* , citing paragraphs 45 and 46 of the *Coman* judgement[144], she reviewed the

[136] Ibid, para [99].
[137] Ibid, para [100].
[138] Ibid, para [101].
[139] Ibid, section C(i), between paras. [102] & [103].
[140] Ibid, para [107].
[141] Ibid, section C(ii), between paras. [107] & [108].
[142] Ibid, para [109].
[143] Ibid, para [110].
[144] *C-673/16 Coman and others v Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne ECLI:EU:C:2018:385*

proportionality of the action of Bulgarian authorities in light of the charter, and concluded that 'the Republic of Bulgaria may not refuse to recognize the applicant and her wife as the child's parents for the sole purpose of applying secondary EU law on the free movement of citizens on the ground that Bulgarian law does not provide for the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child.'[145]

As regard the adaptability of the action of Bulgarian authority, after examining the issue in light of ECHR, Charter of fundamental rights and the case-laws of ECtHR, mentioning that 'not every infringement of the ECHR can be regarded as an infringement of Article 2 TEU. Second, as regards the areas of competence which are reserved for the Member States, the observance of fundamental rights is ensured by the ECtHR and not by the Court of Justice'[146], she concluded 'Bulgaria's reliance on national identity with regard to the determination of parentage for the purpose in particular of applying Bulgarian family and inheritance law does not infringe Article 2 TEU'[147].

As regard the 2nd Scenario, AG Kokott again examine the situation from the point of view of the child, and then the applicant (her Bulgarian mother).

Considering in this scenario, the child is automatically Bulgarian, the Bulgarian government would have to issue a birth certificate (which is a prerequisite for a Bulgarian ID document) which under the article 4(3) of Directive 2004/38, the Bulgarian government is obliged to issue for its citizens(not having an ID document will 'seriously compromise' the child's free movement's right) , and as it became apparent in the course of hearing, the Bulgarian government would be ready to issue a birth certificate but with only the applicant's name as the mother of the child.[148]

Even a birth certificate, but with only the applicant's name on it as the mother is **still** an infringement of child's EU-citizenship's right, as it 'constitute an obstacle to her free movement.[149]

[145] The AG Kokott opinion on Case C-490/20, *V.M.A,* para [115].
[146] Ibid, para [128].
[147] Ibid, para [129].
[148] Ibid, paras. [136]-[138].
[149] Ibid, para [139].

With a reference to *Grunkin and Paul (*C-353/06, EU:C:2008:559, paragraph 29*)*, she reminds that '… the presentation of a birth certificate is required in a variety of administrative and professional procedures. Therefore, with regard to the divergence between the information on the Bulgarian birth certificate – if that latter mentions only the applicant in the main proceedings as the mother – and the Spanish birth certificate, this would therefore raise questions or even suspicions of false declaration if those documents were presented and… cause serious inconvenience for the child.'[150]

Moreover, issuing a birth with only the applicant's name on it as the mother, will leave the British mother out of scope of parenthood for the purpose of Bulgarian family law, which in turn can cause major legal issues for the family in case they want to move to Bulgaria and therefore would 'deter the child from returning to her Member State of origin'.[151]

In an interesting paragraph, about the ID document to be issued on basis of the birth certificate of which is not known to encompass all the information on the certificate, or just the information of the holder, AG Kokott opined: 'if that document or other travel documents accompanying it, which are used to designate the persons authorized to travel with the child concerned, refers to only one of the two women who are designated as the child's mother on the Spanish birth certificate, this may also hinder the child's right to freedom of movement. For the reasons set out in the preceding points and as noted, in essence, by the Commission in the proceedings before the Court, the right to freedom of movement under Article 21(1) TFEU means that the child must be able to travel with each of her parents'[152] and concluded that in the 2nd scenario, not just the refusal to issue a birth certificate, but also refusal to issue a birth certificate that introduces both ladies as mothers(like the Spanish one) would 'constitutes an obstacle to the freedom of movement of the child.'*[153]*

Regarding the justification for such obstacles to the child's free movement's rights, AG Kokott opined that unlike the 1st scenario, since the nationality of the child is Bulgarian, and the issuing of ID documents for the sole purpose of those right does

[150] Ibid, para [143].
[151] Ibid, para [145].
[152] Ibid, Para [146], Emphasis added.
[153] Ibid, para [147].

not alter the **fundamental expression of the concept of family** that the Bulgarian government is seeking to **protect**[154], and taking into account that the family relationships between two mothers, and between them and their child, is protected under article 7 of CFREU[155], 'dependent upon the real existence in practice of close personal ties'[156], 'irrespective of their legal classification in a given Member State'[157], Republic of Bulgaria cannot refuse to issue, on the ground of non-recognition of such parentage or marriage,' an identity document and the necessary travel documents to the child …, in accordance with Article 4(3) of Directive 2004/38, .. Nor [to]refuse, on the same ground, to recognize the family relationships between that child and those two women for the purpose of applying secondary EU law on the free movement of citizens.'[158]

As regard the applicant in the 2nd scenario, explaining that not all differences in treatment between member states constitute an obstacle, and that as long as the issuance of the birth certificate does not create an 'obstacle to the freedom of movement'[159], not recognizing the British lady as the parent of the child can create an obstacle to freedom of movement(of Bulgarian mother since in case they decide to move to Bulgaria, all the legal parental duties would be on her shoulder[160]) but since Bulgaria is not obliged to recognize, for the purpose of Bulgarian national law, the parent-child relationship as it is on the Spanish birth certificate (under article 4(2)[161]), 'the Republic of Bulgaria must recognize the wife of the applicant in the main proceedings as being her 'spouse' within the meaning of Article 2(2)(a) of Directive 2004/38, and as being the child's 'direct relative in the ascending line' within the meaning of Article 2(2)(d) of that directive.'[162]

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[154] Ibid, Paras [149]-[150].

[155] Ibid, para [153].

[156] Ibid, Para [112], with reference to ECtHR case-law (ECtHR, 12 July 2001*, K and T v. Finland* (CE:ECHR:2001:0712JUD002570294, § 150)

[157] Ibid, para [112], emphasis added.

[158] Ibid, para [155].

[159] Ibid, paras. [157] & [158].

[160] See to that effect, ibid, para [64].

[161] See to that effect, ibid, paras. [116]-[133].

[162] Ibid, para [160], with a reference to *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 51) in the opinion.

In the final conclusions, AG Kokott basically stated that for the purpose of exercising the right of free movement, with all of its prerequisites, necessary considerations and marginal issues, the member states cannot refuse to recognize same-sex partnerships, or parent-child relationships of such partnerships based on their **national identity** related concerns, or that they simply did not adopt legislations to legally recognize such relationship, long as it does not alter their status of family law within their own national law.[163]

With the facts of this case, and the opinion of AG Kokott about it, in conjunction with the ruling of the court in *Coman*, it appears to me that the CJEU is trying to interpret the existing legal basis in a way that would help as much as possible (although in an unbiased and careful fashion) to further **normalize** the very existence of the LGBTI community and to legally protect their fundamental rights, in the context of the Union, the scope of its law and the existing area of competence conferred upon it. As AG Kokott pointed out herself in her opinion[164], even when such a sensitive issue as **family**, which has been deliberately kept out of the competence of the Union, touches the *ratione materiae* of the Treaties (in the most important cases of *Coman* and *V.M.A*, the right of free movement and its prerequisites), it falls into the scope of the EU law, and it is for the CJEU to interpret the union's law regarding that matter, which gives the court a chance to protect the LGBTI community, at least to a degree and as much as the scope of EU law and the competence of the Union allows, against the injustice and the legal localism they have to endure in their course of life, because of who they are.

3-B. Future Legislations

In case C-353/06 *Grunkin and Paul*, regarding a dispute about discrepancy in surname of a child, which could cause the child **an obstacle to his freedom of movement** as a result of a **serious inconvenience**, the court stated that :" An obstacle to freedom of movement such as that resulting from the serious inconvenience described in paragraphs 23 to 28 of this judgment could be justified only if it was based on objective considerations and was proportionate to the

[163] See Ibid, para [170(Nos.1,2,3)].
[164] See notes 131 & 132 and the text they mark.

legitimate aim pursued…"[165], and cites to that effect, to its former case-laws(directly to 'C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 133', and indirectly to few others) concerning the principle of proportionality and **legitimate aims**.

Reading the above-mentioned, in conjunction with:

*"*Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned …"[166] and considering that so far there has not been(and will never be) a legitimate aim to discriminatory non-recognition of the community fundamental rights, and the fact that now the ground of sexual orientation has been added to classic grounds of discrimination(e.g. nationality, ethnicity, religion and belief, etc) by the union law, "There can be no doubt that **non-recognition of the same-sex marriage** of an EU citizen (or a returning national), for purposes of **national law** other than immigration law, could 'preclude or deter' the citizen or national from exercising her or his right to freedom of movement (today the statement in *Bosman*, clearly applies, not just to workers, but to all movement by EU citizens), and therefore constitute an **obstacle** to that freedom"[167] even if the member state doesn't discriminate against persons on ground of their nationality by treating its own nationals who has not practiced their right of free movement in the same undesirable way, by not adopting any legal recognition regarding their fundamental right to found a family. "For example, non-recognition of a same-sex marriage under national legislation relating to tax, social security, pensions, inheritance, or medical law (e.g. hospital visitation and consultation) might **'preclude or deter' the citizen or national** from exercising her or his right to freedom of movement, because it could cause her or him 'serious inconvenience'. (The CJEU does not treat a difference between the law of the home Member State and the law of the host Member State, such as a

[165] C-353/06 *Stefan Grunkin and Dorothee Regina Paul* ECLI:EU:C:2008:559, para [29].

[166] Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman* ECLI:EU:C:1995:463, para. [96].

[167] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page [45]-[46].

Available at : <https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065>

difference between rates of taxation, as an 'obstacle', unless it causes 'serious inconvenience'. "[168]

In a rather rash manner, and with the sarcastic tone of Dimitry V. Kochenov and Uladzislau Belavusau: 'the gay community faces a situation where, though the dignity of fundamental human bonds is unquestionably recognized, loving each other is only possible in the Union today if one avails themselves of at least some protections of the law, particularly when the context is 'cross-border' and market-friendly. 'Bad citizens' of the EU, unlike the 'good citizens', fail to understand and live by the ideal of the internal market and cross-border movement, and as such do not enjoy the most basic dignity under EU law. Family life for gay EU citizens is still light years away from being fully recognized and solidified as a true enforceable right at the level of EU law. It is not mentioned in Part II TFEU and thus, apparently, is not part of 'other rights in the Treaties', which Article 20 TFEU refers to, pace Article 9 CFR: what is not expressly mentioned in the open list of EU citizens' rights thus seem to fall short of emerging as a true right at all, no matter what the Charter has to say on the issue.'[169]

There are recommendations and suggestion from other scholars, regarding this issue:

*"*With a view to removing the obstacles to freedom of movement that non-recognition of a same-sex marriage (or a registered partnership…) can create, and to facilitating the right to move and reside freely within the territory of the Member States, the Commission should **propose legislation**, on the basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU… **, requiring all Member States to recognize a marriage (or a registered partnership) formed in another Member State for the purposes of national law**, in all situations in which the spouses or the

[168] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page 46.

Available at :< https://www.europarl.europa.eu/committees/en/obstacles-to-the-free-movement-of-rainbo/product-details/20210309CAN60065> and C-353/06 Grunkin and Paul, paras [23] – [29], see footnote [59]

[169] After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts" by Dimitry Vladimirovich Kochenov and Uladzislau Belavusau

registered partners would have a right to equal treatment under the case law of the ECtHR... *''*[170]

Although there is no doubt that the Union lacks the competence regarding the issue of legal status of family, which remains within the competence of member states, according to Article 81(3) of Treaty of FEU:

"3. Notwithstanding paragraph 2(civil matters having cross-border implications), measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

Which brings, at least, measures concerning family law having **cross-border implications** into the EU's competence, under strict conditions of unanimity and absence of national parliamentary opposition.

Legislation under Article 19 TFEU, in the field of non-discrimination, also shall go through' ..the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, …'[171]

The Commission's 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' (COM/2008/0426 final), also known as

[170] Alina TRYFONIDOU and Robert WINTEMUTE, Obstacles to the Free Movement of Rainbow Families in the EU (2021)Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,PE 671.505- March 2021. Page 48.

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[171] Article 19(1) TFEU

‘equality directive’ or ‘horizontal directive’, which was approved by the European Parliament in 2009, has been blocked by the Council since then, because the ‘unanimity has not yet been reached in the Council’.[172]

However, it is possible to adopt legislations through **ordinary legislative procedure**, as it happened regarding ‘Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’, COM (2001) 257 final (23 May 2001)’ that later became the 2004/38 directive.[173]

Paragraph 3.1 of proposal explains the legal basis of the proposal:

‘This proposal for a Directive is based on Articles 12, 18(2), 40, 44, and 52(of Treaty of European Community). Since Article 18(2) of the Treaty [now Article 21(2) TFEU] is a sort of back-up legal basis that can be used only for people not working, the specific legal bases of Articles 40, 44 and 52, which cover people engaged in gainful activity in the host Member State, need to be used, so that a single instrument can be adopted, applying a single procedure covering all the procedures laid down in the above provisions.’

‘**The equivalent Articles of the TFEU today are Articles 18 (freedom from nationality discrimination), 21(2) (the right to move and reside freely within the territory of the Member States), 46 (freedom of movement for workers), 50(1) (freedom of establishment for self-employed persons), and 59(1) (freedom to provide and receive services).** These Articles all provide for the **ordinary legislative procedure**, outlined in **Article 294**, which generally means that a **qualified majority** in the **Council**, as defined in Article 238(3), is sufficient for a measure to be adopted.

As in the case of Directive 2004/38, measures to remove obstacles to the free movement of rainbow families (which include an EU citizen moving with family members to another Member State or returning to their own Member State after exercising free movement rights) could be adopted with Articles 18, 21(2), 46,

[172] LEGISLATIVE TRAIN 04.2021 - 7 AREA OF JUSTICE AND FUNDAMENTAL RIGHTS / UP TO €7BN, available: https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive

[173] Ibid, page [94].

50(1), and 59(1) TFEU as their legal bases, on the understanding that these measures would **apply to EU citizens and their family members who are in a situation of free movement**, and **would not affect national family law or civil status legislation applying to a citizen or resident of a Member State, and the citizen or resident's family members, who are in an 'internal situation'**.'[174]

In this way, The Union is able to adopt binding legislations with the aim of removing obstacle to the free movement of LGBTI families, and to at least reduce the amount of discrimination that the rainbow community is facing, using the **cross-border** element and the concepts of **citizenship** and **freedom of movement**.

4- Conclusions:

The positive effect of Amsterdam and Lisbon treaties on equipping the EU with the competence, and primary binding provisions in combating discrimination on grounds of sexual orientation, as observed throughout this paper, is undeniable. Adding the literal phrase 'Sexual orientation' in the context of treaties, along with granting the Charter a binding effect, essentially changed situation of LGB citizens of the Union. A single look at *Grant*, and another look at *V.M.A* will explain how far the EU has come, in comparison.

It is clear, that the Union has the power and tools necessary in order to maintain its own legal regime regarding the LGB community, albeit in a limited fashion, serving to protect its norms and values. As long as there's a cross-border element involved, the LGB citizens exercise their right of free movement, and litigations seek interpretation of the CJEU, even though in practice some member states try and resist, *de jure*, the legal framework of non-discrimination on grounds of sexual orientation will grow within the competence of the Union.

This in turn can help further **Normalizing** the concept of non-heteronormative family/relationship in the territory of the Union, which is so heterogeneous when it comes to tolerating non-traditional relationships, among different member states. So far, the Union has managed to provide some limited legal protection for LGB citizens who has exercised their free movement right, along with the area of employment, and we are waiting to see what would be the outcome of the recent case from Bulgaria (Case C-490/20, *V.M.A*) and if the legal protection will be

[174] Ibid, pages [94]-[95].

expanded toward the parent-child relationship of same-sex families. Even though the special legislation procedure which is needed for issuing Directives under article 19 TFEU is almost useless considering the unanimity needed for legislation, the ordinary legislation procedure that can employ the elements of **Freedom of movement**, does not need unanimity and can be a reliable base for further legislations, albeit in a narrower scope.

The current situation is indeed not acceptable, and the EU may even face stronger defiance than the Romanian government complete indifference toward the ruling of the court in the aftermath of the *Coman*, but one should bear in mind that this conflict of old and new, traditionalism and modernity, prejudice and tolerance, is not just fought in theatre of the EU law. Considering the power of media, social activism, economic growth leading to higher standard of living and better education in younger generations, will help the legal and social situation of sexual minorities as the time goes forth.

The goal of an EU, where a Homosexual, a Transgender, a Bisexual or an Intersex person enjoys every single rights of Heterosexual people, and is not legally, socially, economically or politically discriminated against, **on grounds of sexual orientation**, albeit far from realization, is achievable. As the time goes forth, the culture and the mentality of societies change, usually toward a more libertarian attitude. Essentially, challenges of today are the *aquis* of tomorrow, and tomorrow has its own upcoming challenges: EU-wide recognition of same-sex marriage and parent-child relationship in LGB families, recognition of Polyamory for bisexual citizens, then for everyone, etc. However, as for now, and considering the area of competence conferred on it, and the amount of power vested in it by member states, and given the political aspects and sensitivity of the issue, it seems hard to accuse the Union of negligence, or indifference, when it comes to normative actions in combating discrimination against its LGB citizens.

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