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THE EU FAMILY: IS MARITAL STATUS EMERGING AS A PROHIBITED GROUND OF DISCRIMINATION?[1]

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Abstract: The EU has been reluctant to do is introducing a general prohibition to discriminate on the basis of marital status. Despite this, this contribution argues that the Court of Justice of the European Union often adopts lines of reasoning, concepts and theories traditionally associated with marital status discrimination. Skimming through the Court's jurisprudence, one can notice that on occasions it has rejected marriage as the linchpin to confer benefits, rights, and obligations upon families. By way of these decisions, the Court has actively contributed to combating discrimination against nonmarital families in disparate areas.
Keywords: Nonmarital families; EU law; Civil unions; Marital status; Discrimination.

Resumo: A UE tem-se mostrado relutante em introduzir uma proibição geral de discriminação com base no estado civil.

Apesar disso, esta contribuição argumenta que o Tribunal de Justiça da União Europeia adota frequentemente linhas de raci-

[1] This article as also been published in Elsa Bernard, Marie Cresp and Marion Ho-Dac (dir.), La famille dans l'ordre juridique de l'Union européenne / Family within the Legal Order of the European Union, coll. Droit de l'Union européenne – Colloques, Bruxelles, Bruylant, 2020.

ocínio, conceitos e teorias tradicionalmente associadas à discriminação do estado civil.

Percorrendo a jurisprudência do Tribunal, percebe-se que, houve ocasiões em que rejeitou o casamento como elemento fundamental para conferir benefícios, direitos e obrigações das famílias. Por meio dessas decisões, o Tribunal contribuiu ativamente para o combate à discriminação contra famílias não conjugais em áreas distintas.

Palavras-chave: Famílias não conjugais; Direito da UE; Uniões civis; Conjugal status; Discriminação.

1. Introduction

A lack of power to regulate substantive family law at the European Union (EU) level[2] has not prevented EU institutions from actively molding notions of family. However, what the EU has been reluctant to do is introducing a general prohibition to discriminate on the basis of marital status. The ground, if adopted, would prohibit the Union and Member States – in their capacity to implement EU law – to discriminate persons based on their decision to marry.

Taking a closer look at the legal framework, marital status does not feature on the list of prohibited grounds in the two Treaty

[2] In the area of family law, the European Union only has the power to harmonize private international law rules applying to families under Article 81(3) of the TFEU. This power has been exercised in the Brussels IIa Regulation, which sets out jurisdictional rules governing divorce and in two regulations on property and registered partnerships and in matters of matrimonial property regimes. Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, OJ, 23.12.2003, L 338, pp. 1–29; Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ, 8.7.2016, L 183, pp. 30–56. Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ, 8.7.2016, L 183, pp. 1–29.

provisions enshrining a general principle of nondiscrimination: article 19 of the Treaty on the Functioning of the European Union (hereafter « TFEU »)[3] and article 21 of the Charter of Fundamental Rights of the European Union (hereafter « the Charter »)[4]. It is also absent from secondary sources specifically devoted to combatting discrimination, such as the equality directives in the field of employment. This absence has special significance, for the Union adopts a closed system of review of discriminatory acts. Closed models are those which outline a fixed catalogue of prohibited grounds, and whose equality test is legislatively mandated with a precise enumeration of reasonable justifications for discrimination. This model, in principle, bars judicial courts from adding new grounds to the list and differs from the approach of jurisdictions adopting an open model. In Canada and the system of the European Convention of Human Rights (ECHR), i.e. two jurisdictions with an open model, judges can carve out new grounds of discrimination through the residual « other statuses » clause – and have ample leeway in designing the equality test.

Despite a closed model theoretically preventing the introduction of new grounds, this contribution argues that the Court of Justice of the European Union (hereafter « CJEU » or « the Court ») often adopts lines of reasoning, concepts and theories traditionally associated with marital status discrimination. Skimming through the Court's jurisprudence, one can notice that on occasions it has rejected marriage as the linchpin to confer benefits, rights, and obligations upon families. By way of these decisions, the Court has actively contributed to combating discrimination against nonmarital families in disparate areas. The « nonmarital family » is a broad category that encompasses all relationships unfolding outside of marriage. Hence, I stipulate to use a working definition of marital

[3] Article 19 of the TFEU refers to "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[4] Article 21 of the Charter refers to "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".

status discrimination as encompassing discrimination suffered by either informal cohabitants, registered partners, or persons who have otherwise formalized their relationship through means other than marriage (e.g. through contracts). Put differently, the ground covers all sorts of discriminations that stem from states' conferring upon marital couples a privileged status.

As a general matter, this broad definition of nonmarital family is neutral as to the actual attributes of family relationships. It could also include nonconjugal families (i.e. pairs of interdependent relatives or friends, that lack a sexual component). However, as illustrated in Section 2.3., the Court has firmly rejected any attempt at including nonconjugal partners within the scope of the definition.

The protection of nonmarital families at the EU level has had varying degrees of intensity depending on the area in question. The present chapter offers an analysis of the Court's jurisprudence in three key areas: free movement of persons, legal treatment of EU staff, and employment. The question driving the case law analysis is whether and to what extent marital status discrimination has been employed as a conceptual tool to disentangle discrimination in these fields. The prediction is that there is no single answer and that the degree of protection of nonmarital families varies across areas. The account provided in the chapter should not only deepen understanding of the extent to which the EU has proven a fertile ground for the protection of nonmarital families. It should also shed light on the present moment and help predict how promising is the EU as an avenue to further expand family definitions beyond the (narrow) marital family.

2. The nonmarital family in EU case law

Under EU law, the Union should not intrude into matters involving marital status. The EU has no exclusive or shared power to regulate substantive family law, as the relative power has been retained by Member States. Thus, one could be tempted to think that « EU family » and « discrimination » is perhaps an oxymoron since the EU has no weapons when it comes to tackling nonmari-

tal families' discrimination. However, a thus-framed distribution of competences has not prevented the EU from making strides in the protection of nonmarital families in areas which, after Duncan Kennedy's classification, are tagged Family Law 2 (FL2) rules[5]. Based on this distinction, FL1 rules are those governing access to and exit from marriage or other family regimes. In principle, these rules are the exclusive province of Member States. By contrast, FL2 rules concern the panoply of benefits, privileges, and rights stemming from family status, and include succession rights, employment benefits, pensions, welfare benefits, and so on and so forth. In these domains, EU institutions have not been wary to act to expand the coverage of family benefits.

As previously argued, a slow emersion of judicial reasoning that utilizes concepts and theories borrowed from the realm of marital status discrimination is likely occurring. Yet, this trend has not always followed a linear trajectory nor a consistent one. I shall explore three key areas where the Court has protected nonmarital families, to assess the different approach the Court takes to issues involving marital status discrimination in each area.

2.1. Employment

The directive on equal treatment in employment and occupation, introduced in 2000, establishes a framework to counter discrimination in the employment context. Article 1, titled « purpose », lists the grounds based on which it is impermissible to discriminate, namely: religion or belief, disability, age or sexual orientation[6]. Unlike the Race Directive[7], the directive on equal treatment in em-

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[5] D. Kennedy, « Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought », *American Journal of Comparative Law*, vol. 58, n° 4, 2010, p. 811.

[6] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ, 2.12.2000, L 303, pp. 16–22.

[7] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ, 19.7.2000, L 180, pp. 22–26.

ployment does not extend its reach to social and welfare benefits, education and healthcare. A proposal to this effect was rejected[8]. As a matter of principle, its material scope limits the number of FL2 rules that could be affected by the implementation of the directive. However, the CJEU has found its way around this limitation and managed to include social benefits through an expansive interpretation of the notion of « pay »[9].

In the principal cases regarding the extension of employment benefits to same-sex couples, the CJEU has paid lip service to the formal allocation of powers enshrined in the Treaties. To this effect, it has stated that « as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States »[10]. The Court's approach is consistent with the EU legislature's intent, as enshrined in the Preamble of the Equality Directive[11]. Under Recital 22, the implementation of the directive is without prejudice to domestic regimes on marital status and benefits thereof[12]. Both law and case law thus endorse the view that the EU is not entitled to interfere with the design of substantive family law matters.

However, in practice, the Court followed a different path and did not fall short of intervening in key areas regarding fam-

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[8] European Commission, 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) 426 final.

[9] For social benefits to be considered "pay" two conditions should be met: they are a general scheme under the law, and they are obligatory for a category of workers. Judgment of the Court of 25 May 1971, *Gabrielle Defrenne v Belgian State*, C-80/70, EU:C:1971:1:55.

[10] Judgment of the Court (Grand Chamber) of 1 April 2008, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen,* C-267/06, EU:C:2008:179, par. 58–60 [*Maruko*]; Judgment of the Court (Grand Chamber) of 10 May 2011, *Jürgen Römer v Freie und Hansestadt Hamburg*, C-147/08, EU:C:2011:286, par. 38 [*Römer*]; Judgment of the Court (~~Fifth Chamber~~), 12 December 2013, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, EU:C:2013:823, par. 26 [*Hay*].

[11] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ, 2.12.2000, L 303, pp. 16–22.

[12] Directive 2000/78, Recital 22.

ily benefits. A watershed moment in its case law on employment discrimination is likely the *Karner* decision of its other European counterpart, the European Court of Human Rights (hereafter « the ECtHR »)[13]. Once the ECtHR became determined to protect same-sex partners (by holding that they enjoy the institution of family life under Article 8 ECHR), the Court of Justice decided to reverse its previous approach to same-sex couple (non)recognition[14].

In *Maruko*, the first of a string of cases in favor of same-sex families, the CJEU conceded that marital status and benefits therefrom fall within the exclusive competence of the states. However, it also stated that the states' power to exercise such competence is not unfettered and must always comply with Union law and, more specifically, with EU nondiscrimination law[15]. The Equality Directive sets out an express prohibition to discriminate based on sexual orientation. Therefore, the Courts found that under certain conditions – the family regime is voluntarily adopted and the domestic court themselves think that opposite-sex and same-sex couples are in a comparable situation –, a differential treatment of same-sex couples constitutes direct discrimination. No doubt marital status is a matter left to Member States. Nonetheless, the duty to comply with EU law entails that states cannot hide behind this distribution of competences to violate EU law. Therefore, whenever same-sex couples are comparable to heterosexual couples under domestic law, direct sexual orientation discrimination occurs. The comparability assessment is frequently engaged in matters of marital status discrimination. In the case at hand, the Court concluded that the two situations were comparable so far as concerns the survivor's pension. The conclusion was reached upon considering that the referring court itself acknowledged that a harmonization of marriage and civil partnerships in terms

[13] ECtHR, 24 October 2003, *Karner v Austria,* application n° 40016/98 [*Karner*].

[14] *E.g*. Judgment of the Court of 17 February 1998*, Lisa Jacqueline Grant v South-West Trains Ltd*, C-249/96, EU:C:1998:63 [*Grant*].

[15] *Maruko*, par. 59.

of material benefits was underway in Germany, seeing it « as a gradual movement towards recognising equivalence »[16].

The subsequent judgments continued this reasoning. A doctrinal change worth mentioning was the Court's decision to take upon itself the comparability assessment, i.e. the decision whether they are in a comparable situation under national law, once reserved to national courts. This move was remarkable in that it led to an important clarification. In *Hay*, the Court concluded that a *pacsée* same-sex couple was in a comparable situation with married heterosexual couples in France for purposes of a marriage bonus and paid leave. The conclusion was not obvious since the French *pacte civil de solidarité* (Pacs) is much « lighter » in terms of material benefits conferred and the procedures to dissolve it. However, the Court stressed that the differences between the two regimes are irrelevant, and that the applicants were comparable essentially because, at the time, the *pacte* was the only recognition mechanism for same-sex couples[17].

A case law analysis reveals that the margin of manoeuvre in cases of marital status discrimination is circumscribed. At present, situations of (*de facto*) marital status discrimination at the EU level can only be challenged if:

(i) the discrimination affects same-sex partners in a dyadic, conjugal relationship;
(ii) the Member State has enacted a recognition mechanism for same-sex couples (and any regime will suffice if it is the sole regime open to them) – therefore, states such as Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia, which lack a recognition mechanism, are at present immune from scrutiny;
(iii) the two same-sex partners formalized their relationship under the regime as a sign that they would have entered marriage where they be able to do so.

[16] *Ibid.*, par. 69.

[17] Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

In the end, while not entirely absent, protection against marital status discrimination is only reserved to same-sex couples under precise conditions. This stands in sharp contrast with the approach of other jurisdictions that prohibit marital status discrimination as a matter of law. The most paradigmatic case is Canada, a country which starting from the 90s has struck down differences between (same-sex and opposite-sex) informal cohabitants and marital couples to the point that it is not necessary to marry in Canadian common law provinces to gain most marital entitlements.

It also contrasts with the (slightly) braver approach of the ECtHR. The ECtHR, starting from 1986 has ruled that unmarried cohabiting couples enjoy the institution of family life[18], irrefutably so if they have children[19], or after a showing of functional attributes in other cases (attributes such as long-term cohabitation and subsistence of the relationship)[20]. These rulings led the Court to shield unmarried families from marital status discrimination in a host of situations involving the rights of children born outside of marriage or the deportation of an unmarried partner (however, only if children are present). Now and then, the Court has even extended family benefits in situations involving a couple « married » under Roma customs, reasoning that if the prohibition of marital status discrimination is to have any meaning the state cannot ask the Roma couple to enter a civil marriage to obtain the benefit. Yet, in most cases the ECtHR will find that the exclusion of nonmarital partners from the benefit is buttressed by the legitimate aim of promoting a traditional understanding of family and that the means employed is proportionate to achieving the aim[21]. This is consistent with the ECtHR's role as human rights' defender – which uses broader abstract definitions when it comes to human

[18] ECtHR, 18 December 1986, *Johnston v Ireland,* application n° 9697/82.

[19] ECtHR, 3 October 2000, *Camp and Bourimi v The Netherland,* application n° 28369/95.

[20] *E.g*. ECtHR, 2 November 2010, *Şerife Yiğit v Turkey*, application n° 3976/05.

[21] K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 4th ed., London, Sweet & Maxwell, 2011, p. 374. *See e.g*. ECtHR, 30 August 1993, *G.A.B. . Spain*, application n° 21173/93; *Karner*, at par. 35.

rights – but also with the Court's being an international system of protection that, as such, should grant some margin of appreciation to the states' implementation of the Convention (unlike the EU which is a *supranational* organization). At the same time, however, under the state-of-art jurisprudence of the ECtHR, the interest of promoting a traditional understanding of family cannot be used across the board to justify all outcomes. Lately, it has been rejected in a case regarding a same-sex couple willing to access the newly introduced civil partnership scheme in Greece, that the Greek government only reserved to opposite-sex couples[22].

Therefore, the autonomous prohibition to discriminate based on marital status plainly allows for a broader leeway in rejecting laws that are discriminatory to nonmarital partners, both cis-sex and same-sex. By contrast, the absence of this ground in the employment field has led the European Court to carve out a narrow « exception » for same-sex couples, in light of the existence of an explicit prohibition to discriminate based on sexual orientation, under certain conditions.

2.2. Free movement

The family which moves across the EU is of relevance to the Union. The Union has a competence on the matter since the possibility for EU citizens to freely move across the Union (one of the « Four Freedoms ») would be chimerical should the citizen be forced to disrupt her or his family life after moving to another Member State. A EU competence on « cross-border families » also comprises the power to regulate the status of non-citizens who move within Europe. There are differentiated legal regimes depending on whether is at stake: (i) family reunification, involving the possibility for a third-country citizen to reunite with his or her family members; (ii) free movement, as enjoyed by EU citizens moving across the EU; (iii) free movement, as enjoyed by static

[22] ECtHR, 7 November 2013, *Vallianatos and others v Greece,* applications n° 29381/09 and 32684/09, par. 84.

citizens (defined below). Overall, it can be noted that this is the area where the Court has been more reluctant to adopt lines of reasoning associated to marital status discrimination to enhance the protection of nonmarital families.

I should start from point (iii). As argued, the protection of family grids with a cross-border element is consistent with the need to safeguard free movement. The Court has taken this reasoning one step further. For such freedoms to be meaningful, it is also necessary to include the static or non-mobile citizen under certain circumstances. The doctrine is known as genuine enjoyment formula. Under the doctrine, national laws are incompatible with EU law if they deprive EU citizens of a genuine enjoyment of the substance of the rights flowing from their EU citizenship[23]. Put in simpler terms, whenever a EU citizen could be discouraged from moving across the EU due to a national legislative/administrative measure, this measure is incompatible with EU law. By way of illustration, in the recent *Coman* case, Romania's denial of a residence permit to the same-sex spouse of Mr. Coman (whom he married in Belgium) was discouraging Mr. Coman from exercising this core freedom: moving to Belgium to consolidate a family life and then returning to his home country, Romania[24].

The first scenario (under (i)), involving third-country nationals, is of reduced utility to the present analysis. Family reunification is governed by the Directive on Family Reunification.[25] The Directive essentially leaves the determination of admissibility conditions to the Member States. The only positive obligation is recognizing a right to family reunification in favor of the nucle-

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[23] K. Kaesling, « Family Life and EU Citizenship: The Discovery of the Substance of the EU Citizen's Rights and its Genuine Enjoyment », in K. Boele-Woelki, N. Dethloff, W. Gephart (Eds.), *Family Law and Culture in Europe: Developments, Challenges and Opportunities,* Cambridge, Intersentia, 2014, 297.

[24] Judgment of the Court (Grand Chamber) of 5 June 2018*, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, EU:C:2018:385 [*Coman*].

[25] Council Directive 2003/86 of 22 September 2003 on the right to family reunification, OJ, 3.10.2003, L 251, pp. 12–18.

ar family members, the spouse and minor children. Other family members, such as unmarried partners, registered partners and first-degrees ascendants do not enjoy such a right, and Member States are free to decide whether to authorize reunification.

By contrast, the rights of mobile EU citizens are broader (scenario under (ii)). Originally, the applicable regulation concerned workers. Only workers could freely move and install themselves in another European country. The family members that could accompany the worker were the spouse, descendants under certain conditions[26] and ascendants under certain conditions[27]. By contrast, the entrance of cohabitants or other dependents needed only be facilitated.

From the inception, the notion of spouse under the applicable directive has been interpreted in a rigidly narrow fashion. Informal cohabiting couples sought to expand it so as to fall within the purview of the term; however, the Court rejected their claim by adopting a formal construction of spouse[28]. In addition, not only did the Court refuse to equate spouses and informal cohabitants, it also refused to recognize that same-sex couples could qualify as informal cohabitants for purposes of EU law[29].

The European Parliament expressed concern that a narrow construction of the term spouse could undermine the full exercise of movement freedoms. Yet, when the new directive was passed in 2004 (c.d. Citizens' Rights Directive), the legal treatment of cohabitants remained fundamentally unchanged. These families could now fall under either of these two categories:

(a) persons who are financially or physically dependent on the EU citizen or members of the citizen's household;

[26] The Regulation No. 1612/68 applied to "Descendants under the age of 21 years or dependents over that age".

[27] The Regulation No. 1612/68 applied to "Dependent ascendants of the worker or his spouse".

[28] Judgment of the Court of 17 April 1986, *State of the Netherlands v Ann Florence Reed*, C-59/85, EU:C:1986:157.

[29] *Grant*.

(b) the partner with whom the citizen has a stable relationship, duly attested[30].

As under the previous regime, their entrance need only be facilitated, in the sense that Member States have a duty to duly examine the application and put forward justifications in case they opt for denying the derivative residence permit. Not much has changed through the Court's case law, which, but for this clarification on the core meaning of « facilitation », has provided no interpretative guidance to construct the two categories. The only safe bet so far is that informal cohabitants face additional hurdles not only due to the uncertainty around whether the state will eventually grant a residence permit but also in terms of additional evidential burden put on them to prove the stability of the relationship (e.g. proof of a minimum period of cohabitation and of an intention to permanently live together). However, from this limited clarification scholars rightly inferred that a blanket ban on such couples would surely violate EU law[31]. The duty to conduct an investigation on applications means at minimum that there must be a procedure for unmarried couples to apply for entrance, which should be fair and consistent.

By contrast, the situation of registered partners improved upon the enactment of the Citizens' Rights Directive. Registered partners are now equated to spouses, despite only partially. The principle of home state regulation applies to their residence rights and requires that such rights be granted «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 legisla-

[30] Article 3 of Directive 2004/38/EC n the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ, 30.4.2004, L 158, pp. 77–123.

[31] M. Bell, *EU Directive on Free Movement and Same-sex Families: Guidelines on the Implementation Process*, Report ILGA-Europe, October 2005, 8. https://www.ilga-europe.org/sites/default/files/Attachments/eu_directive_free_mouvement_guidelines_2005.pdf, [accessed May 30, 2020].

tion of the host Member State»[32]. This is to say that the host state – where the EU citizen intends to move – must have registered partnerships in place and must treat them as equivalent to marriage.

Skimming through relevant case law, the only notable advancement regards same-sex *married* couples. In *Coman,* the Court has taken a brave stance and adopted an autonomous definition of « spouse » which includes same-sex spouses. However, the judgment did not employ a marital-status-discrimination-like line of reasoning or a discrimination analysis. While the applicant claimed that he was discriminated based on sexual orientation under Article 21 of the Charter of Nice, the Court completely sidelined the argument and based its decision on free movement rights.[33] The decision is of reduced utility to the present analysis. First, because Mr. Coman and his partner were married. Hence, it was a pure sexual orientation problem, not a marital status one. Second, the Court declined to address the alternative claim made by Mr. Coman, under which his partner « at the very least » constituted a « dependent on members of the household » (under a financial or physical point of view)[34] or « partner in a durable relationship » under Article 3[35].

Should one want to find the reasons for this timid approach to protecting nonmarital families in the area of free movement the first tentative reason would be the relative rigidity of the legal framework. The applicable framework does not leave much leeway for innovation. Recital 31 of the Directive, despite mentioning quite a number of prohibited grounds of discrimination in the implementation of the Directive, leaves out marital status. Second, informal cohabitants can be recognized under a facultative provision. Therefore, as long as entrance is optional the Union can only

[32] Article 2b Directive 2004/38.

[33] Article 21, §1 TFEU, setting forth a right of residence in another Member State for the Union citizen.

[34] See also Recital 6 of Directive 2004/38, speaking of a family "in a broadest sense".

[35] Be reminded that the entrance of the family member under Article 3 of Directive 2004/38 shall be merely "facilitated".

realistically require that procedures that are fair and consistent be put in place, as it did. This notwithstanding, I contend that when it comes to registered partnerships the Union could play a more incisive role in countering discrimination.

Registered partnerships vary significantly from state to state. They run a gamut from mechanisms which are functionally equivalent to marriage, open as they are to both same-sex and cis-sex couples, to mechanisms only open to same-sex families. They also vary substantially in terms of defaults attendant to them, with « weak » schemes such as Pacs offering a pared-down set of rights and other (« strong ») regimes offering nearly the same benefits as marriage. It is in light of this stark diversity that the Union might play a critical role in expanding cross-border recognition of non-marital families that have formalized their relationship through a registration scheme.

As seen, if the host state treats registered partnerships as equivalent to marriage then the applicant's partner will have a derivative right of residence as if he or she were a spouse. If the host state does not see same-sex spouses as equivalent, the relationship will be equated to that of cohabitants « in a durable relationship » and entrance will be optional (and should be only « facilitated »). The relative decision will thus vary from state to state. In light of this, the possibility for a EU intervention is two-fold:

(1) Member States that do not recognize same-sex relationships at all: in light of a sharp east-west cultural cleavage on the issue, at present the following Member States do not recognize either (same-sex marriage or registered partnerships): Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia. In these states, though same-sex partners might be granted entrance and residence, they will not be « recognized » as married or registered, with all the consequences thereof.
(2) Member States that only recognize registered same-sex relationships under strict conditions. These countries may set the bar high for recognition. For instance, Ireland requires that the relationship be: same-sex, registered, dissolvable by

> court order, exclusive, and that the Minister considers the benefits attached to the regime as comparable to those of civil partnerships in Ireland – now closed to new entrants, after the enactment of the Marriage Act 2015[36]. As a consequence, many foreign partnerships are not recognized (e.g. Italian civil unions, or the French Pacs, for dissolution is not conditional on a court order).

In the situation under (1), concerning member states that do not recognize same-sex couples at all, a *Coman*-like line of reasoning could apply. This line of reasoning is could be conducive to expanding the notion of registered partner to the point of preventing host states from rejecting an application on the basis that such states do not recognize same-sex partnerships. The interpretative leeway in reaching this outcome is narrow, due to the existence of an explicit home state rule. Yet, it is somewhat paradoxical that « spouse » (i.e. the most value-laden notion in family law) was expanded to include same-sex partners and, conversely, « registered partnerships » is interpreted narrowly. Put differently, doctrinal consistency would require that if states cannot discriminate same-sex spouses on the ground that they do not recognize same-sex marriage, *a fortiori* they should not discriminate registered partners on such ground. Besides consistency, the concerns that gave rise to the creation of the genuine enjoyment formula apply – chief amongst them the concern that restrictive immigration laws or measures could hinder the free movement of persons throughout the Union. Furthermore, restrictive immigration laws run counter the prohibition to discriminate based on sexual orientation built into the Treaties (Art. 21 of the Charter) and Recital 31 of the Directive. Ultimately, a liberal and large interpretation of Article 2b of the Directive (on registered partners) would be further buttressed by the progressive approach taken by its European counterpart, the ECtHR. In the *Taddeucci* decision, handed down in 2016, the ECtHR reviewed the denial of a residence permit to the

[36] S. 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010 (S.I. No. 648 of 2010).

applicant's same-sex partner[37]. Italy argued that it was merely treating same-sex couples as all unmarried couples. Yet, in Italy same-sex couples were unable to marry (and, at the time, to enter a civil union). The Court hence concluded that by denying the permit Italy failed to treat qualitatively different situations differently.

Likewise, when it comes to states that do offer civil partnerships to same-sex spouses (situation under (2)), the Court could make a greater effort to reduce uncertainty associated with moving to these countries. Notably, it could provide guidance over the equivalence of registered partnerships in the same way as it did in the employment context. The formulation of the home state regulation does not prevent the Court from clarifying the contours of the equivalence assessment. Neither does this formulation prevent it from curbing restrictive immigration laws that could undermine the freedom of movement of EU citizens, along the lines of what it did in *Coman*.

2.3. EU Staff

The legal treatment of the EU staff is the area that has witnessed the most expansive use of marital status-like lines of reasoning. Admittedly, this is a context where the Union enjoys a larger room for manoeuvre, as the matter does not affect national family law regimes[38]. It could be framed as a purely internal matter. Therefore, from the inception, substantive notions of family in this domain were not parasitic of that of Member States, but autonomous.

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[37] ECtHR, 30 giugno 2016, *Taddeucci and McCall v Italy,* application n° 51362/09. *See also* ECtHR, 23 February 2016, *Pajić v Croatia,* application n° 68453.

[38] Judgment of the General Court (Appeal Chamber) of 5 October 2009, *European Commission v Anton Pieter Roodhuijzen*, T-58/08, EU:T:2009:385, par. 87 [*Roodhuijzen*] (« In so far as the definition given relates to a term used in the Staff Regulations, its scope is necessarily circumscribed by the framework of the Staff Regulations. It governs solely the award of certain social benefits granted by the Staff Regulations to officials or other servants of the European Communities, and has no effects in the Member States, which are free to introduce statutory arrangements granting legal recognition to forms of union other than marriage, in accordance with established case-law »).

Starting from 2004, the Staff Regulations recognize the « non-marital partner » as equivalent to a spouse for purposes of the benefits conferred thereto[39]. The part on temporary servants does even mention marital and family status in art. 12 (hiring conditions), to prohibit that such statuses factor into hiring decisions[40]. The same applies to contract staff[41]. However, marital and family status are not mentioned in the general provision prohibiting discrimination in the application of the Staff Regulations[42].

In this field, the Court did not fall short of protecting non-marital partners using a functional approach to family recognition. Functional recognition entails that family recognition should not be dependent on formalities (e.g. marriage) but on the actual attributes of the family. This approach aligns with the most advanced judgements on marital status discrimination, such as those delivered by the Supreme Court of Canada.[43] Illustrative in this regard is a 2003 decision handed down by the Civil Service Tribunal of the EU. The case concerned a woman and mother who felt discriminated when the Union denied her an orphan's pension after the partner in a durable relationship – a EU servant – died. The Tribunal framed the claim as involving discrimination based on personal conviction and assessed the reasonableness and proportionality of the differentiation drawn between married and unmarried servants. It concluded that the distinction was discriminatory as it did not consider that the deceased father had recognized the child and supported him materially all along. The criterion on which the differentiation was based (marriage) was discriminatory also in light of contemporary

[39] Article 1, §2 of Annex VII to Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 14.6.1962, P 045, p. 1385 (consolidated text).

[40] Art. 12, of the Regulation on the "Conditions of employment of other servants of the European Union".

[41] Art. 82 of the Regulation on the "Conditions of employment of other servants of the European Union".

[42] Art. 1d, "Staff Regulations of officials of the European Union".

[43] N. Palazzo, *Legal Recognition of Non-Conjugal Families: New Frontiers in Family Law in the US, Canada and Europe*, Oxford, Hart Publishing, forthcoming 2021, ch. 4.

social developments (« [e]n l'état actuel du développement de la société »)[44].

After the amendments, introducing an explicit definition of nonmarital partner, the efforts of the Court converged on the interpretation of such term. The *Roodhuijzen* case concerned a Eurostat worker who sought to have his same-sex partner recognized under the Joint Sickness Insurance Scheme, a benefit granted to the EU staff. Mr. Roodhuijzen was in a formal relationship with his partner, with whom he had entered a cohabitation agreement (*samenlevingsovereenkomst*) under Dutch law. The cohabitation agreement is a contractual recognition mechanism which offers a lighter set of rights and obligations compared to marriage and registered partnerships[45]. Through the agreement, the parties can only govern areas at free disposition, such as property and financial aspects of cohabitation. Yet, if parties include maintenance duties (*zorgverplichting*), they will also qualify for social security, welfare, and major fiscal benefits[46].

The Commission appealed the decision of the Civil Service Tribunal, which found in favor of Mr. Roodhuijzen. The Commission's argument was that the Dutch regime was essentially private in nature and, therefore, did not have « effects similar to those of a marriage »[47]. Further, these agreements could be entered by anyone, including persons who did not wish to form a « couple » (i.e. nonconjugal relationships).

The Court of Justice rejected the Commission's argument as untenable. The Commission was especially incorrect in its assessment of the equivalence of the regime with marriage. There is an autonomous notion of nonmarital partnership at the Community

[44] Judgment of the General Court of 30 January 2003, *C v Commission of the European Communities*, T-307/00, EU:T:2003:21, par. 51.

[45] R. Lamont, « Registered Partnerships in European Union Law », in JM Scherpe and A Hayward (eds), *The Future of Registered Partnerships – Family Recognition Beyond Marriage?* (Cambridge, Intersentia, 2017), p. 515.

[46] They qualify for the inheritance tax exemption threshold Art. 24, § 2, a of the Dutch Inheritance Tax Act 1956.

[47] *Roodhuijzen*, par. 51.

level, reasoned the Court. This notion can be inferred from Annex VII to the Staff Regulations and boils down to the existence of a union between two persons and the respect of certain formalities. In the case at hand, the conditions were met. The possibility for nonconjugal unions to enter the scheme was no bar to concluding that Mr. Roodhuijzen and his same-sex partner were nonmarital partners under the Regulations. In any such case, the focus should be placed on the relationship at stake (and the relationship of Mr. Roodhuijzen passed muster as it was dyadic, between two unrelated persons, and formalized).

Another decision handed down in 2010 concerned a cohabitation agreement entered in Belgium between two same-sex partners one of which had dual citizenship, Belgian and Moroccan. Belgium allows same-sex marriage[48]. As a consequence, the applicant was excluded from housing allowance, restricted to married couples. There is indeed a fourth condition for parties to be in a nonmarital partnership under Annex VII: the condition that « the couple has no access to legal marriage in a Member State».

The applicant's chief argument was that same-sex marriage would have forced him to run a risk of prosecution in his home country. Since Morocco put in place criminal sanctions against homosexuality, should he start an administrative proceeding requiring a statement of his civil status (e.g. to renew his passport) he could be prosecuted. As a consequence, the possibility for him to marry was only virtual impossible in practice[49]. The Tribunal therefore interpreted the relevant definition of nonmarital partner as exempting persons who cannot marry in practice. In reaching the conclusion, it construed such definition in light of the principle of nondiscrimination enshrined in Article 13(1) EC (now Article 19(1) TFEU), by referring to a need for « further development of a staff policy ensuring equal opportunities for all, regardless of the person's sexual orientation *or marital status*, which also corresponds to

[48] Judgment of the Civil Service Tribunal (~~Second Chamber~~) of 14 October 2010, *W v European Commission*, F-86/09, EU:F:2010:125 [*W*].

[49] *Ibid.*, par. 35.

the prohibition of any discrimination based on sexual orientation provided for in Article 21(1) of the Charter of Fundamental Rights »[50]. What is remarkable is that the Tribunal reads a prohibition to discriminate based on marital status not merely in the Regulations but in the Treaties, notably in Article 19(1) TFEU. However never does the Treaty mention marital status as a prohibited ground. Nor does the Charter of Nice mention it, despite the Tribunal referencing it to further buttress its contention.

Ultimately, a typical marital status-like line of reasoning emerges from paragraph 44, where the Tribunal rejects any formalism in the interpretation of the requirements set forth under the Regulations. Therefore, « access to legal marriage in a Member State » must not be construed in a formal sense. Rather, courts are always required to assess whether access to marriage is practical and effective[51].

3. Is there a European family free from discrimination?

The case law analysis illustrates that the Court is adamant in its conviction that the definition of « nonmarital partners » falls within the exclusive competence of Member States as it affects the civil status of persons[52]. However, it also illuminates the emersion from time to time of the typical reasoning associated with marital status discrimination in the Court's case law. Despite rarely mentioning marital status in its judgments, the Court has adopted lines of reasoning that could easily be associated with preventing that a family unit is being discriminated because it is not founded on marriage.

In the employment context, this approach is all the more evident. Clearly, the Court cannot use marital status discrimination

[50] *Ibid.*, par. 41.

[51] *Ibid.*, par. 44.

[52] Judgment of the Court of Justice [I would omit 'of justice' since the official mode of citation does not include it, can you confirm? Also other footnotes do not include it] of 31 May 2001, *D and Kingdom of Sweden v Council of the European Union*, C-122/99 P and C-125/99 P, EU:C:2001:304, pars. 34 and 35 [*D and Sweden*], and *Maruko*, pars. 59, 67 to 69 and 72.

as centerpiece of its decisions. Yet, it *de facto* uses it when there are compound violations that involve both marital status and a listed ground. In protecting same-sex partners from discrimination, the CJEU has engaged in an assessment over the comparability of same-sex and married couples. The ways in which it has conducted the assessment, which culminated with a decision to conduct it entirely at the EU level, demonstrate a growing familiarity with this typical prong employed in cases involving marital status discrimination.

An even bolder approach is displayed in the context of controversies engaging the Staff Regulations. In such area, the Court has utilized functional lines of reasoning to recognize partners of the EU staff beyond mere formalities. On one occasion, the Civil Service Tribunal has even read the ground in the Treaties, despite there being no such ground in the relevant provisions of the TFEU or Charter. However, this braver approach is consistent with the broader leeway the Court enjoys in areas that are detached from the Member States' competence over civil status. Enlarging the notion of family for purposes of the family benefits granted to EU officials is no synonymous with expanding or otherwise affecting family definitions under national law.

By contrast, the area that seems to be more « immune » from the typical thinking associated with marital status is that of free movement and family reunification. In particular, the chapter noted how the Court has fallen short of increasing the feeble protection of informal cohabitants and the insufficient protection of registered partners. An argument has been made that the Court could take a more courageous approach when it comes to movement freedoms of EU citizens, in light of its pivotal recent judgment expanding the notion of « spouse » and of the more advanced approach taken by the ECtHR. Notably, it could play a critical role in protecting the freedom of movement of same-sex registered partners moving to EU jurisdictions with restrictive immigration laws, with the category including both countries that do not recognize either same-sex marriage or registered partnerships, and countries that, despite domestically recognizing same-sex couples, pose hurdles to the recognition of foreign registered partnerships.

By way of concluding, locating the question « connaissez-vous la famille européenne? » in the area of nondiscrimination law and theory allows me to conclude that there is no single definition of « European family free from discrimination ». Legal protection is intermittent and variable depending on where discrimination occurs, with important steps forward being made in the context of employment and legal treatment of the EU staff. However, the vulnerable spot is at present the mobile family. Nonmarital families moving across the EU still face substantial hurdles. These hurdles are no longer acceptable if it is true that free movement and the possibility to exercise this core freedom free from discrimination touches at the heart of what it means to be an EU citizen.