



EU-CITZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

Member States that recognise registered partnerships as equivalent to marriage and thus registered partners in this situation as family members pursuant to Article 2(2) of Directive 2004/38/EC

Study for Type B Report

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1. Introduction

Article 2(2)(b) of Directive 2004/38/EC provides that under certain conditions a registered partner is to be considered a privileged family member who can accompany the Union citizen to the host Member State. Conditional for this, however, is that the host Member State treats registered partnerships as equivalent to marriage. The objective of this study is to analyse which Member States treat registered partnerships as equivalent to marriage for the purpose of a residence right based on Directive 2004/38/EC and how they treat registered partnerships concluded in other Member States for this purpose.

Since the introduction of the registered partnership for same-sex¹ couples by Denmark in 1989 many states have followed in its footsteps. However, the structure and content of these registered partnerships differs greatly from state to state. This has led to a differentiation between ‘weaker’ and ‘stronger’ registered partnerships, where the weaker registered partnerships have some rights, while the stronger registered partnership were nearly equivalent in all rights to marriage. Also, there have been numerous cases on the question of which rights could be reserved to marriage, while excluding these to same-sex registered partnerships.

Furthermore, where many states felt that there was a duty to create some form of legal framework specifically for same-sex couples, some considered that there should generally be another legal framework which all couples could choose instead of marriage.

Furthermore, many issues have arisen as to the recognition of such civil status. In cases of marriage, the usual applicable law as to the establishment and validity of the status is the common nationality or the nationality of each spouse separately. However, the use of such law as the applicable law would for in many cases result in the non-existence of registered partnerships based on the ground that the state of nationality did not provide for such an institution. Due to this, in most states a subsidiary connecting factor to its own law, as to the conditions of establishment of the status was made, with the recognition of foreign registered partnerships based on the *lex loci registrationis*.

Article 2(2)(b) raised, furthermore, an additional issue: did the Member State, that considers its own registered partnership as equivalent to marriage, have to treat all foreign registered non-marital relationships as equivalent, especially when such foreign registered partnerships is far ‘weaker’ than its own registered partnership or even where the foreign institution would only constitute a registered cohabitation agreement.

Additionally, issues would arise from the moment that a Member State would discontinue registered partnerships upon granting the rights of marriage to same-sex couples.

1.1. Case law

Both the ECtHR and the CJEU have ruled on multiple cases concerning registered partnerships. In this part the case law of the ECtHR will primarily be considered when examining access to registered partnerships and the conditions of registration. It will not be considered whether specific questions

¹ In this study the terms ‘same-sex’ and ‘opposite-sex’ are used to describe couples of the legal same gender or of legal different genders, since these are the terminologies used in legislation and case-law. This is not an endorsement for gender binarism. Since the issue of gender identification is outside of the scope of this study, the position of transgender, queer and inter-sex persons will not be considered.



regarding if certain rights should be attached to registered partnerships, like the right to adopt.² The case-law of the CJEU concerning Directive 2000/78/EC will be considered when addressing the question of ‘equivalence.’

The ECtHR has ruled on multiple occasions that the contracting states can exclude same-sex couples from marriage,³ but until 2013 had not had to rule specifically on the question of access to registered partnerships.

Greece introduced partnerships in 2008,⁴ but this status was only possible for opposite-sex couples and not, as such, granted to same-sex couples. The ECtHR had to deal with this in the case of *Vallianatos*⁵. The ECtHR considered that it should limit the scope of the case by not considering whether there was a duty for States to provide for a form of legal recognition for same-sex relationships,⁶ but whether the State by introducing a civil union which excludes same-sex couples had failed in its obligation according to Arts 14 and 8 ECHR.⁷ The court restated that the aim of protecting the family in the traditional sense was a valid aim, however, that in doing so the State “*must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.*”⁸ The Greek government had argued that the new institution was specifically created to protect children born out of wedlock, but the court noted that even though the law also deals with this its foremost purpose is to create a new form of non-marital partnership.⁹ Problematic was also the fact that already before the creation of the civil union, opposite-sex couples could have their relationship recognised by the creation of *de facto* partnerships, which was not possible for same-sex couples. Same-sex couples therefore had an even greater interest in being able to form a civil union as it would be their sole method of having their relationship legally recognised.¹⁰ The court noted that all States, with the exception of Greece and Lithuania¹¹, that had established a civil union or registered partnership had granted this right to same-sex couples, which could also be seen in the Council of Europe materials¹². Only very weighty reasons, which were not brought forward by the Greek government, could justify such a distinction. The court therefore concluded that there was a violation of Article 14 jo. 8 ECHR.

In *Oliari v. Italy*, the question was raised as to whether same-sex couples have a right to a status other than marriage, if a Contracting State had not introduced same-sex marriage. An important factor in determining this case was the judgement given in *Schalk and Kopf*, the ECtHR had decided that same-

² E.g. ECtHR *X and Others v. Austria*, Appl.No. 19010/07.

³ ECtHR judgment of 04.06.2010 in *Schalk and Kopf v. Austria*, Appl. No. 30141/04.

⁴ ΝΟΜΟΣ 3719/2008 - ΦΕΚ 241/Α'/26.11.2008 Μεταρρυθμίσεις για την οικογένεια, το παιδί, την κοινωνία και άλλες διατάξεις.

⁵ ECtHR judgment of 07.11.2013 in *Vallianatos and others v. Greece*, Appl.No. 29381/09 and 32684/09.

⁶ The court said interestingly enough “*In other words, applicants’ complaint is not that the Greek State failed to comply with any positive obligation which might be imposed on it by the Convention*”. It therefore neither affirmed nor rejected that there might be such a positive obligation.

⁷ ECtHR *Vallianatos*, Appl.No. 29381/09, 32684/09, para. 75.

⁸ ECtHR *Vallianatos*, Appl.No. 29381/09, 32684/09, para. 84.

⁹ ECtHR *Vallianatos*, Appl.No. 29381/09, 32684/09, para. 86-87.

¹⁰ ECtHR *Vallianatos*, Appl.No. 29381/09, 32684/09, para. 90.

¹¹ Technically seen Lithuania had provided in its civil code for a registered partnership for opposite-sex couples, but had actually not created yet a procedure to actually register such partnerships. After ECtHR *Vallianatos*, Appl.No. 29381/09, 32684/09 the bill for creating this procedure was put on hold as the Seimas did not want to create a same-sex partnership.

¹² Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe; Committee of Ministers Recommendation CM/Rec(2010)5.



sex relationships do not only fall within the ambit of private life, but also family life. In *Oliari*, in essence, the ECtHR considered that where family life is lived, the state must provide for a form which enables a couple to prove their relationship without having to prove family life. This status is therefore protected by private life.¹³

The ECtHR considered that only in very limited instances could same-sex couples get some basic rights under Italian law and mostly only after a judicial process the outcome of which was not always certain. The ECtHR therefore decided “*that in the absence of marriage,*” which the court has accepted may still be reserved for opposite-sex couples, the court has recognised that, “*same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance.*”¹⁴ In deciding what rights should be attached to this status, the court reiterated that the Member States have a wide margin of appreciation.¹⁵ In the literature on *Oliari* it is often noted that nothing specific has been said by the court on the scope and form of such a status, which has left room for considering that a cohabitation agreement may suffice. However, in *Oliari* the ECtHR also stated that these forms of cohabitation agreements “*fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship.*” The court ruled that basic rights should be ensured¹⁶ and that cohabitation may not be required as a condition for the establishment of the status.¹⁷

*Interestingly, AG Jääskinen already in 2010 in the case Römer stated that, “It is the Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals, an obligation to recognise their right to conduct a stable relationship within a legally recognised commitment.”*¹⁸ However AG Jääskinen, also considered the matter to fall outside the scope of Union law.

In 2017, the ECtHR ruled on the question as to whether there was a duty to extend registered partnership to include opposite-sex couples as well.¹⁹ The ECtHR stated that in these cases one should compare unmarried opposite-sex couples to unmarried same-sex couples and whether there is a

¹³ DE GROOT, D.A.J.G. (forthcoming), *Civil Status Recognition in the European Union* (PhD Thesis, Bern). The author shows that all civil statuses are primarily governed by private life. Due to the fact that the ECtHR accepted that individuals are free to choose their sexual partners based on private life, this means that in turn these couples in time would create family life. This family life would have to be proven all the time. Consequently, the state is again under an obligation to create a form of civil status, which would exempt these couples from proving family life. Rights like family reunification – which is a family life right – are attached to this status. The same principle applies to other civil statuses, like parentage. See as an example for the latter: ECtHR judgment of 28.06.2007 in *Wagner and JM.W.L. v. Luxembourg*, Appl.No. 76240/01.

¹⁴ ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para 174.

¹⁵ ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para. 177

¹⁶ Mentioning non-exhaustive moral and material support, maintenance obligations and inheritance rights.

¹⁷ ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para. 169.

¹⁸ Opinion of AG Jääskinen delivered on 15.07.2010 in C-147/08 *Römer* ECLI:EU:C:2010:425, para. 76.

¹⁹ ECtHR judgment of 26.10.2017 in *Ratzenböck and Seydl v. Austria*, Appl.No. 28475/12.



distinction in access to a civil status. As both would have access to an enhanced status, there is no discrimination.²⁰

Another two cases heard before the ECtHR concerned a differentiation between concluding a marriage and a registered partnership regarding the place of celebration.²¹ Since by the time that the decision was given there was a possibility to have civil partnerships in Austria, the ECtHR did not consider them and struck the cases out.²² The ECtHR could have adopted the view that when creating a civil status for same-sex couples, it is up to the State to set the conditions for celebration provided that such conditions do not influence the effects of the registered partnership as a civil status.

The ECtHR had decided in multiple cases that there is no obligation on the Contracting States to extend marriage to same-sex couples. However, if they refrain from doing so, the Contracting States are under an obligation to provide for another status that ensures that same-sex couples can prove their relationship and which guarantees certain rights.

In this context, the ECtHR decided the case *Orlandi and Others v. Italy* on 14 December 2017.²³ The case concerned five same-sex couples who had married abroad²⁴ and wanted their marriages to be recognised in Italy.

The ECtHR first stated that the Contracting States remain free to decide whether or not they should provide conditions for same-sex marriage. However, the court also considered that it had held in *Oliari* that the Contracting States are under an obligation to provide a status of near equivalence for same-sex couples, if they do not provide for same-sex marriage.²⁵ The ECtHR considered that there is still no consensus as to same-sex marriage and consequently, “the States must be in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad.”²⁶ The ECtHR elaborated, stating that, “the Court can accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognise from a Convention perspective. Indeed the refusals in the present case are the result of the legislator’s choice not to allow same-sex marriage - a choice not condemnable under the Convention. Thus, the Court considers that there is also a State’s legitimate interest in ensuring that its legislative prerogatives are respected and therefore that the choices of democratically elected governments do not go circumvented.”²⁷ However, the ECtHR then considered that by not providing for any legal framework prior to the introductions of civil union, which were only introduced after the *Oliari* judgment, which would allow for the recognition of the foreign marriage in some form, the state had left the applicants in a “legal vacuum.”²⁸ Consequently, the state had failed to strike a fair balance as to

²⁰ ECtHR *Ratzenböck and Seydl v. Austria*, Appl.No. 28475/12, para. 39-41.

²¹ ECtHR decision of 07.03.2017 in *Hörmann and Moser v. Austria*, Appl.No. 31176/13; ECtHR decision of 07.03.2017 in *Dietz and Suttasom v. Austria*, 31185/13.

²² ECtHR *Hörmann and Moser v. Austria*, Appl.No. 31176/13, para. 10-11.

²³ ECtHR judgment of 14.12.2017 in *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12.

²⁴ Two couples had married in Canada, one couple in the United States (California) and two couples in the Netherlands.

²⁵ ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 192.

²⁶ ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 205.

²⁷ ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 207.

²⁸ ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 209.



the competing interest by failing “to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions.”²⁹

Thus, according to the *Orlandi* judgment, the ECtHR considered that there is no duty to recognise a same-sex marriage as a marriage, if such a marriage is not provided for under domestic law. However, another status, like a registered partnership for same-sex couples, must be available, including a framework which would allow a foreign same-sex marriage to be recognised as such a status.

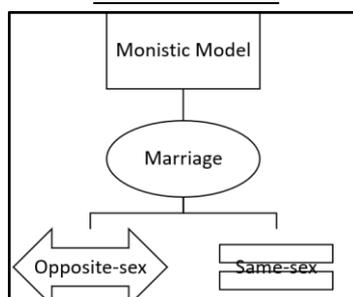
In its *Coman* judgment the CJEU came to a rather different conclusion as to the question whether a same-sex marriage had to be recognised as a marriage for the purpose of a residence right derived from Article 21 TFEU.

1.2. Models on introducing registered partnerships and rights of marriage to same-sex couples

Many issues that arise concerning the recognition of registered partnerships for the purpose of a residence card are due to the fact that the creation of them in a specific Member State can have different causes and different goals.

IAN CURRY-SUMNER has proposed several models how same-sex relationships have been introduced, which have now been commonly accepted in the literature. He differentiates between monistic, dualistic and pluralistic models.

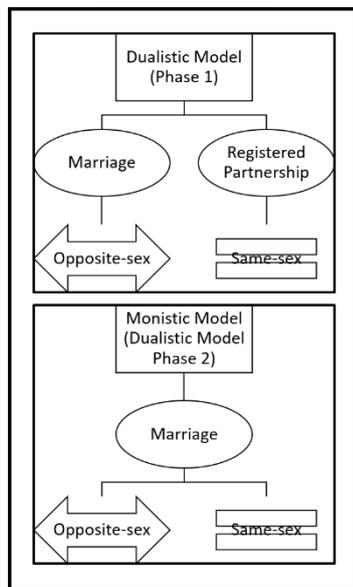
1.2.1 Monistic Model



In a monistic model, a state would directly introduce same-sex marriage, without having introduced a registered partnership for same-sex couples. Such a direct introduction of same-sex marriage has not occurred in any European jurisdiction and is limited to certain Canadian and the American jurisdictions.

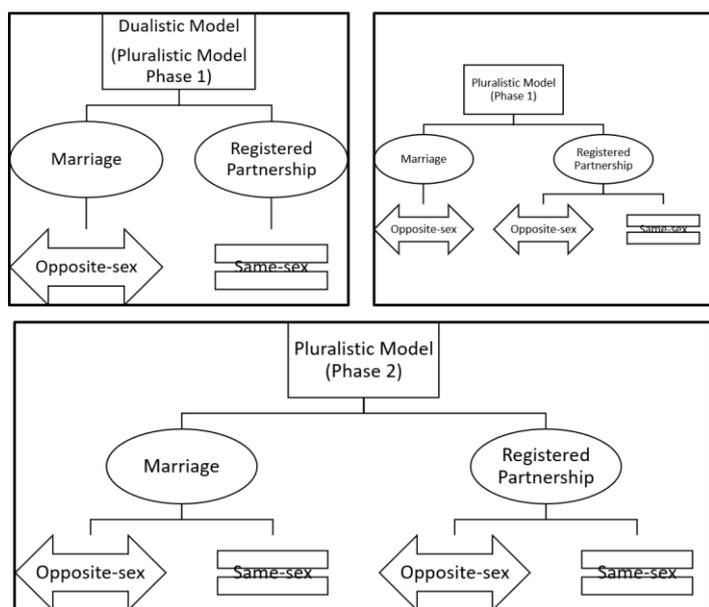
²⁹ ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 210.

1.2.2 Dualistic Model



In several instances, Member States introduced a same-sex registered partnership, which was excluded for opposite-sex couples, with the clear intention that it was a (temporary) substitute for same-sex couples to marriage. Consequently, when such Member States introduced same-sex marriage, the registered partnership was no longer required as a substitute and, therefore, discontinued. Specific rules would accompany such a discontinuation allowing for the transformation of existing registered partnerships into marriages and continuation of the rules on registered partnerships to already existing ones that were not transformed. This is the so-called dualistic model, where in the second phase it is transformed into a monistic model after the introduction of same-sex marriage.

1.2.3 Pluralistic Model



In other instances, a Member State may introduce registered partnerships not only for same-sex couples, but would also open this status to opposite-sex couples. In these Member States, the registered partnership was never considered a temporary accommodation for same-sex couples, but a permanent alternative status to marriage. Consequently, when such a Member State would introduce same-sex marriage, the option of a registered partnership would continue to exist. The registered partnership would, however, no longer be considered by other

Member States as the maximum status attainable to same-sex couples.

In certain special cases, an originally dualistic model would transform into a pluralistic model. This was the case for the England and Wales in the United Kingdom, for example, where a civil union was reserved to same-sex couples. After introduction of same-sex marriage, this civil union was, however, not discontinued. This led to the situation that same-sex couples had the option between a civil union and marriage, while opposite-sex couples only had the option of marriage. This was considered discrimination based on sexual orientation by the Supreme Court in *Steinfeld and Keidan*.³⁰ Due to this judgment both marriage and the civil union are now open to both opposite-sex and same-sex couples.

³⁰ R (on the application of *Steinfeld and Keidan*) v. Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) [2018] UKSC 32.



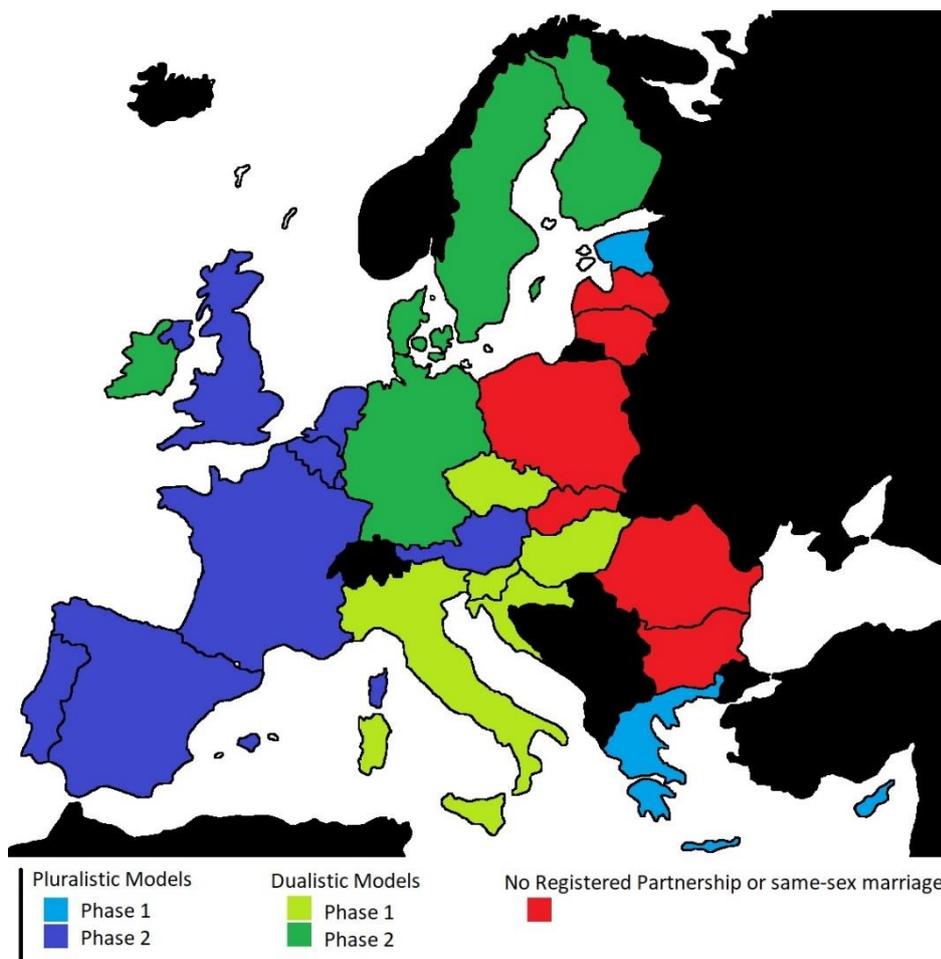
In Austria, the Constitutional Court ruled in a joined case requesting simultaneously for the opening of marriage to same-sex couples and the opening of the registered partnership to opposite-sex couples that both instances were discrimination based on sexual orientation. Consequently, both status were opened to both opposite-sex and same-sex couples from the 1st of January 2019.

1.2.4 Other approaches

Another model that exists is the approach that was originally applied by Greece. Greece had originally introduced a registered partnership; however, it had reserved this partnership to opposite-sex couples. Consequently, opposite-sex couples had a choice between marriage and the registered partnership, while same-sex couples had no possibility at all to formalise their relationship. In *Vallianatos v. Greece* the ECtHR considered that while a state may have margin of discretion as to the form and timing of introducing a registered partnership, it may not reserve such a status to opposite-sex couples, while excluding same-sex couples of both this new status and marriage.

1.2.5 Overview approaches Member States

Pluralistic Model		Dualistic Model	
Phase 1	Phase 2	Phase 1	Phase 2 (monistic)
Cyprus	Austria	Croatia	Denmark
Estonia	Belgium	Czech Republic	Finland
Greece	France	Hungary	Germany
	Luxembourg	Italy	Ireland
	Malta	Slovenia	Sweden
	Netherlands		
	Portugal		
	Spain		
	United Kingdom		



1.2.6 Consequences of the models

The greatest difference in approach in the models exists between the dualistic model and the pluralistic model. States with a dualistic model have as their main aim to have a (temporary) status available for same-sex couples, while pluralistic models have as their main aim the creation of a permanent alternative to marriage. For this reason, states with a dualistic model might only recognise same-sex registered partnerships and only for so long as that the registered partnership in the state of registration was considered the maximum status.

Pluralistic Model Phase 1

If registered partnerships are considered equivalent to marriage for family reunification purposes, both opposite-sex and same-sex registered partnerships will be recognised. For purposes other than family reunification, same-sex marriage will most likely be recognised as a registered partnership.

Pluralistic Model Phase 2

If registered partnerships are considered equivalent to marriage for family reunification purposes, both opposite-sex and same-sex registered partnerships will be recognised. Same-sex marriages will be recognised as marriage.

Dualistic Model Phase 1



Registered partnerships are usually considered equivalent to marriage for the purposes of family reunification. Only same-sex registered partnerships concluded abroad are recognised. Opposite-sex registered partnerships concluded abroad are sometimes treated as marriage, but only occasionally. Same-sex marriages are recognised, for purposes other than family reunification, as registered partnerships.

Dualistic Model Phase 2/ Monistic Model

Same-sex registered partnerships concluded abroad may still be recognised for the purpose of family reunification. In some states, it is made conditional that the registered partnership concluded abroad has been concluded before the Member State introduced same-sex marriage. Opposite-sex registered partnerships are still not recognised. Same-sex marriages are recognised as marriage.

1.3. Conditions of Article 2(2)(b) Directive 2004/38

Article 2(2)(b) of Directive 2004/38/EC contains a so-called reciprocity clause, stating:

“‘Family member’ means:

[...]

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;”

The paragraph, therefore, contains three cumulative conditions:

- a) The registered partnership has been concluded in a Member State;
- b) The host Member State treats the registered partnership as equivalent to marriage; and,
- c) The registered partnership meets the conditions laid down in the relevant legislation of the host Member State.

One could add that an additional condition would be that the host Member State has introduced a registered partnership.

1.3.1 Host State principle

While the article, technically does not contain a condition that the host Member State has introduced a registered partnership, but only that the host Member State treats registered partnerships as equivalent to marriage, it should be considered that it is rather unlikely that a state would treat a non-marital status as equivalent to marriage, if such a status would not be provided for in their own laws.³¹

In light of the absence of more specific rules in Directive 2004/38 and the use of the wording ‘in accordance with the conditions laid down in the relevant legislation of the host Member State,’ each Member State has considerable discretion with regards to the selection of factors to be taken into account.³²

³¹ BE is maybe an exception to this rule, since it introduced a form of partnership which it, however, does not consider equivalent to marriage, while treating the registered partnerships of certain other states as equivalent to marriage.

³² See as to the similar wording in Article 3(2): C-89/17 *Banger*, para. 40.



It is unclear what types of conditions a Member State may set. For example, it is unclear whether a Member State could set conditions as to the type of foreign registered partnerships it would accept for the purpose of Article 2(2)(b). If a Member State were not allowed to set any conditions to the status acquired abroad, it may be under an obligation to recognise foreign registered non-marital relationship, for the sole purpose of granting a residence right under Article 2(2)(b).

In many cases, Member States have opted to choose Private International Law applicable to these provisions. According to these provisions, foreign registered partnership will be recognised as valid if certain conditions are fulfilled. In some Member States, there are explicit criteria that the foreign status a) has to be exclusive; b) must be an impediment to conclude another registered partnership or marriage; c) cannot be concluded between blood relatives. In addition, especially in dualistic systems, there is the condition that only same-sex registered partnerships can be recognised as such.

In certain Member States there are specific lists of foreign registered partnerships that will be recognised for the purpose of 2(2)(b).³³

1.3.2 Equivalence

It is unclear from the wording of Article 2(2)(b) of the Directive to what extent the registered partnership has to be similar or equivalent to marriage. Furthermore, it is unclear whether any non-marital relationship that is registered with the authorities can fall under the scope of this article if it is the maximum status attainable for same-sex couples in the light of the case law of the ECtHR. For example, it is unclear whether cohabitation agreements, which can be considered as non-marital relationships in certain cases, could equally be considered applicable for this article. In addition, in some Member States there are more than one type of non-marital relationships available. For example, a Member State might provide next to a registered partnership also for a cohabitation agreement.

Until now there has been no case-law interpreting the meaning and scope of equivalence as defined in Article 2(2)(b) of Directive 2004/38/EC. In case C-459/14 *Cocaj*, the CJEU was asked whether a registered partnership has to be equivalent in all aspects to marriage, or if not, in which aspects it has to be considered equivalent in order for Article 2(2)(b) to be applicable. However, the referring court in *Cocaj* withdrew the case before an AG opinion or judgment was published.³⁴

There is, however, case-law concerning Directive 2000/78 which relates to similar issues concerning the question of equivalence as to the establishment of comparability of a situation of a registered partnerships in comparison to marriage as regards direct discrimination.

In *Maruko* the CJEU considered that whereas the German life partnership had gradually been considered more and more equivalent to marriage. It considered that “*a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor’s benefit at issue in the main proceedings.*”³⁵ The Court considered that it was for the national court to decide whether life partnerships and marriage were comparable situations and

³³ E.g. BE, IE, MT, UK.

³⁴ Order of 16 July 2015 in C-459/14 *Cocaj*, ECLI:EU:C:2015:546.

³⁵ C-267-07 *Maruko*, para. 69



to declare, upon finding a comparable situation, that the legislation distinguishing between life partnerships and marriage as to survivor benefits to be discrimination based on sexual orientation.³⁶

In *Römer* the CJEU clarified the means of comparison more by stating that “*the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.*”³⁷

In *Hay* the CJEU considered concerning the French PACS, that “[t]he PACS, which must be the subject of a joint declaration and registration with the Registry of the court within whose jurisdiction the persons concerned establish their common residence, constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. Although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties.”³⁸ The Court further emphasised that “*the differences between marriage and the PACS, [...] in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood, are irrelevant to the assessment of an employee’s right to benefits in terms of pay or working conditions such as those at issue in the main proceedings.*”³⁹

The Court considered the fact that a certain right was reserved for married couples, while marriage was only open to opposite-sex couples, and not granted to same-sex couples who contracted the only legal framework available to them, constituted direct discrimination based on sexual orientation.⁴⁰ The Court, furthermore, considered that since the discrimination was direct, a legitimate aim could not be used as a justification.⁴¹

Thus, this case-law is only applicable where marriage is not available to same-sex couples and consequently the registered partnership is the maximum status available to them.

It could, therefore, be considered that when a Member State has not opened marriage to same-sex couples, but has introduced a different status which is open to same-sex couples, and is consequently, the maximum status attainable to such couples, not bringing such a status within the ambit of Article 2(2) of Directive 2004/38/EC could constitute direct discrimination based on sexual orientation. This line of reasoning would also be in accordance with the jurisprudence of the ECtHR.

³⁶ C-267-07 *Maruko*, para. 72-73.

³⁷ C-147/08 *Römer*, para. 43 (emphasis added DdG).

³⁸ *Hay*, para. 36.

³⁹ *Hay*, para. 39.

⁴⁰ *Hay*, para. 41-44.

⁴¹ *Hay*, para. 45.



This would, however, only be of consideration for pluralistic and dualistic states in the first Phase. From the moment marriage is opened to same-sex couples, the argument falters.

As described above, in a dualistic model registered partnerships will be abandoned and only access to same-sex marriage will be available. Consequently, same-sex and opposite-sex couples are in the identical situation that they only have access to marriage which falls under Article 2(2)(a).

However, in states with a pluralistic model the registered partnership will continue to exist. In this model, after marriage has been opened to same-sex couples, same-sex couples in a registered partnership and opposite-sex couples in a marriage are no longer comparable, since the registered partnership will no longer be the maximum status available to same-sex couples. Consequently, from that moment on rights of the registered partnership can be more limited compared to marriage.

However, the case law on Directive 2000/78 is not very clear as to the question whether a right granted to same-sex couples in a registered partnership – which is the maximum status for same-sex couples – on the basis of its comparability to opposite-sex couples in a marriage, should equally be applied to opposite-sex couples in the same registered partnership. Contrary to the same-sex couples, the opposite-sex couples in the registered partnership are not in a comparable situation to opposite-sex couples in a marriage, since the couples in the registered partnership had the choice to contract a marriage instead. However, from a regulatory point of view, a differentiation made within a status between opposite-sex couples and same-sex couples would equally constitute direct discrimination based on sexual orientation.

2. Study of Member States

2.1. Member States with only same-sex marriage (* = RP was abolished with introduction same-sex marriage)

2.1.1 Belgium

A. Status in Member State

Belgium introduced the *wettelijke samenwoning* in 1998 for both same-sex and opposite sex couples. This form has been classified either as a weak registered partnership or as a cohabitation agreement. The *wettelijke samenwoning* itself is not considered equivalent to marriage for the purpose of free movement law.

Private International Law is applicable to the recognition of foreign relationships.

The Belgian Aliens Act⁴² distinguishes between two forms of registered partnerships:

1. *Foreign Registered Partnership Equivalent to Belgian Marriage*

According to Article 40bis(§2)(1) of the Aliens Act family members are the spouse and the registered partner, where the registered partnership is considered equivalent to marriage in Belgium. The law

⁴² Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, <http://www.ejustice.just.fgov.be/eli/wet/1980/12/15/1980121550/justel>.



elaborates that it will be announced by Royal decree which foreign registered partnerships will be considered equivalent.⁴³

According to Article 4 of the Royal Decree 7 May 2008,⁴⁴ the partnership of the following countries were considered equivalent: Denmark, Finland, Iceland, Norway, Sweden, Germany and the United Kingdom.

According to the *circulaire* of 29 May 2007,⁴⁵ which concerned the recognition of foreign status as equivalent to a Belgian marriage in private international law and applicable to the Aliens Act, it is considered that a foreign registered partnership has to fulfil three conditions in order to be considered equivalent to a Belgian marriage:

1. The status must constitute an impediment to conclude a marriage;
2. The status must have nearly identical rules as to the establishment and dissolution of the status as marriage; and,
3. The rights and consequences of the status have to be nearly identical to those of marriage, with the exception of the rules on parentage and adoption.

An additional criterion has been set, being that the partners should not have had a choice in the country of establishment of the partnership to conclude a marriage. It was considered that in such countries, the partners had explicitly chosen not to be considered equivalent to marriage.

Explicitly excluded was the registered partnership of the Netherlands, due to the fact that same-sex couples have access to the same-sex marriage. In addition, Swiss registered partnerships were excluded, due to the fact that it would not contain certain property law consequences that are attached to marriage.

Also the French PACS, the Luxembourgish Partnership and the cohabitation forms available in certain Spanish ‘provinces’ were excluded due to the fact that they do not constitute an impediment to marriage.

The Minister added that if information on new developments would become available this would be published. As far as the author is aware, no new communications in this field as to this subject have been made.

It should be noted, that in all states that were considered equivalent at the time, same-sex marriage has been introduced in the meantime, and many other states have introduced registered partnerships. It should further be noted that based on the argumentation employed in the *circulaire* no opposite-sex registered partnerships can be recognised as equivalent to a Belgian marriage.

⁴³ “De Koning bepaalt, bij een besluit vastgesteld na overleg in de Ministerraad, de gevallen waarbij een partnerschap dat geregistreerd werd op basis van een vreemde wet, moet beschouwd worden als zijnde gelijkwaardig met een huwelijk in België”

⁴⁴ Koninklijk besluit tot vaststelling van bepaalde uitvoeringsmodaliteiten van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, <http://www.ejustice.just.fgov.be/eli/bsluit/2008/05/07/2008000447/justel>.

⁴⁵ Circulaire tot wijziging van de circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut, http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=2007-05-31&numac=2007009513#top.



2. *Registered Partnership not equivalent to marriage*

According to Article 40bis(§2)(2) of the Aliens Act a partner who has concluded a registered partnership (which is not considered equivalent to a Belgian marriage) is also considered a family member if certain extra conditions are fulfilled. Such registered partnerships can be recognised also to other effects, like fiscal rights. The Belgian *wettelijke samenwoning* belongs to this category.⁴⁶

The extra conditions are:

- Proof of a durably attested relationship. This is proven by either:
 - One year cohabitation in Belgium or abroad; or
 - Two years of relationship, in which time the couple must have met at least three times constituting at least 45 days; or
 - Have a common child.
- Intention to cohabit; and
- Be unmarried and not in a durably attested relationship with a third party; and
- The partners are not related in a manner which constitutes an impediment to marriage according to Articles 161 to 163 Civil Code (direct descendants; siblings; second degree relatives).

Originally, there were two extra conditions, being that both partners are older than 21, which could be reduced to 18 if the partners had cohabitated abroad for at least a year; and a condition that to either of them there is no final decision of the civil status officials refusing to conclude a marriage. These two conditions were declared unconstitutional by the Constitutional Court.⁴⁷

Consequently, in these cases the registered partnership is applied to Article 3(2)(b) of Directive 2004/38 and not to Article 2(2)(b).

B. Conditions for registered partnerships to fall under Article 2(2)(b)

B.1. EU citizen Sponsor

Family members of EU citizens have to fulfil the conditions of Article 40bis of the Aliens Act as described above.

B.2. Returning national

According to Article 40ter, the right to accompany one's spouse is based on Article 40bis(§2)(1) is extended to returning Belgian nationals. However, additional criteria are added:

- The spouses and registered partners must be over the age of 21;

⁴⁶ The Belgian Constitutional Court considered this justified. Judgment of the Belgian Constitutional Court nr. 43/2015 of 26.03.2015.

⁴⁷ Judgment of the Belgian Constitutional Court nr. 121/2013 of 26.09.2013.



- Proof by the Belgian national of having sufficient means consisting of 120% of the amount mentioned in Article 14(§1)(3) of the law on social integration;⁴⁸
- Having proper accommodation.

2.1.2 Germany*

A. Status in MS

Germany introduced the *Lebenspartnerschaft* in 2001,⁴⁹ which was reserved for same-sex couples, but after introduction of same-sex marriage in 2017, it was discontinued. Until 2017, the *Lebenspartnerschaft* was the maximum status available to same-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

§3(2)(1) FreizügG/EU provides that family members are both the spouse and the *Lebenspartner*. Consequently, the *Lebenspartnerschaft* was considered equivalent to marriage for the purpose of Article 2(2)(b) of the Directive.

While the FreizügG/EU does not provide for a specific scope of the *Lebenspartnerschaft*, the *AVV zum FreizügG/EU*⁵⁰ states specifically that opposite-sex registered partnerships are excluded from its scope due to the fact that these forms of registered partnership are unknown in Germany.⁵¹

According to Article 17b of the EGBGB, the law of the state of registration is applicable to the validity of the registered partnership.

2.1.3 Denmark*

A. Status in Member State

Denmark was the first state to introduce a same-sex registered partnership in 1989.⁵² This registered partnership was discontinued after the introduction of same-sex marriage in 2012.⁵³

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Paragraph 2 Stk. 2 of the EU Residence Order,⁵⁴ registered partnerships will be treated like marriage. According to Paragraph 2(1) of the EU Residence Order, the spouse and consequently the registered partner are automatically considered family members of the EU citizen.

⁴⁸ Wet betreffende het recht op maatschappelijke integratie, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2002052647&table_name=wet. Article 14(§1)(3) requires €8.800. This amount times 120% constitutes €10.560.

⁴⁹ *Lebenspartnerschaftsgesetz vom 16. Februar 2001*, Bgbl. I S. 266.

⁵⁰ *Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU* (AVV zum FreizügG/EU), GMBL 2016 Nr. 5, S. 86.

⁵¹ AVV zum FreizügG/EU, para. 3.1.0, second paragraph.

⁵² Lov nr. 372 af 7.06.1989 *Lov om registreret partnerskab*.

⁵³ Lov nr. 532 af 12.06.2012 *Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab*.

⁵⁴ Bekendtgørelse om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler (EU-opholdsbekendtgørelsen).



A foreign registered partnership must be valid in the state of registration and must give similar rights to registered partnership in Denmark. An opposite-sex registered partnership will not be recognised.

2.1.4 Spain

A. Status in Member State

Spain introduced same-sex marriage in 2005.⁵⁵ Next to these, the regions have introduced registered partnerships, called *Pareja de Hecho*, which can be concluded by both same-sex and opposite-sex couples. The *pareja de hecho* is, however, treated as a durably attested relationship.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 2(b) of Royal Decree 240/2007⁵⁶ provides for family reunification with the registered partner. This is conditional on the fact that the registered partnership has to have been registered with a public authority and that it is exclusive.

It is unclear whether an opposite-sex registered partnership would be recognised for the purpose of Article 2(b).

2.1.5 Finland*

A. Status in Member State

Finland introduced the registered partnership in 2001,⁵⁷ but discontinued it after the introduction of same-sex marriage in 2015 which took effect in 2017.⁵⁸

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Section 8 of the Registered Partnership Act provides that unless otherwise specified, the registered partnership is treated as a marriage in all laws. Consequently, Article 154(1)(1) of the Aliens Act, which establishes the right to family reunification for the spouse of an EU citizen, equally applies to couples in a registered partnership.

Section 12 of the Registered Partnership Act provides that a registered partnership concluded abroad will be valid, if it was valid in the state of registration.

It is, however, unclear whether an opposite-sex registered partnership would be recognised for the purpose of Article 154(1)(1) of the Aliens Act.

⁵⁵ Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio.

⁵⁶ Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo.

⁵⁷ *Laki rekisteröidystä parisuhteesta* 9.11.2001/950.

⁵⁸ [Lag om ändring av äktenskapslagen](#) [Act on Amendment of the Marriage Act] FFS 20.2.2015/156249.



2.1.6 Ireland*

A. Status in Member State

Ireland introduced civil partnerships in 2010.⁵⁹ Civil partnerships were discontinued with the introduction of same-sex marriage in 2015.⁶⁰

Section 3(5)(b)(i) of the European Communities Regulation 2015 treats a civil partnership as equivalent to marriage for the purpose of being treated as a qualifying family member. Civil partnerships were considered equivalent to marriage for the purpose of family reunification based on section 6(4)(a).

B. Conditions for registered partnerships to fall under Article 2(2)(b)

The European Communities Regulation 2015 defines a civil partnership in section 2(1) as meaning either a civil partnership as defined by section 3(a) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which is a civil partnership concluded in Ireland, or as a ‘legal relationship; as defined by section 3(b) of the Civil Partnership Act 2010. Section 3(b) again refers to legal relationships as established by an order in accordance with section 5 of the Act.

Section 5 of the Civil Partnership Act provides that, “*the Minister may, by order, declare that a class of legal relationship entered into by two parties of the same sex is entitled to be recognised as a civil partnership*” if certain conditions are fulfilled. There are four conditions: (1) the relationship is exclusive in nature, (2) the relationship is permanent unless the parties dissolve it through the courts, (3) the relationship has been registered under the law of that jurisdiction and (4) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership. Additionally, even if the minister has indicated that a foreign registered partnership is to be considered equivalent, if the civil partners are related to a prohibited degree, it will not be given effect.

The first order on foreign registered partnerships which are considered equivalent was S.I. No. 649 of 2010 - Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010. Subsequently, up until the introduction of same-sex marriage in 2016 with the exception of 2015, every year a new order adding same-sex registered partnerships or same-sex marriages from other states was made.⁶¹

Notably, in the orders regarding registered partnerships, certain Member States, or of constituent jurisdictions, were not mentioned. To the extent that registered partnerships in the Belgium, France and the Netherlands were not mentioned, nor were registered partnerships available in Portugal or Spain. For these Member States, only marriage was mentioned. Contrary, to other Member States, both the registered partnership and marriage were mentioned,⁶² or marriage was added to the list at a later moment.⁶³

⁵⁹ *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (2010/24)

⁶⁰ *Marriage Act 2015* (35/2015).

⁶¹ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011 (S.I. No. 642 of 2011); Civil Partnership (Recognition of Registered Foreign Relationships) Order 2012 (S.I. No. 505 of 2012); Civil Partnership (Recognition of Registered Foreign Relationships) Order 2013 (S.I. No. 490 of 2013); Civil Partnership (Recognition of Registered Foreign Relationships) Order 2014 (S.I. No. 212 of 2014); Civil Partnership (Recognition of Registered Foreign Relationships) Order 2016 (S.I. No. 132 of 2016).

⁶² E.g. Sweden.

⁶³ E.g. Denmark, United Kingdom.



With the introduction of same-sex marriage, section 12(6) to (10) of the Marriage Act 2015 deleted any references to foreign same-sex marriages from the orders so that they could be recognised as a marriage.

It is important to note, that section 13 of the Marriage Act 2015 added section 5A to the Civil Partnership Act 2010 stating: “Neither section 5, nor any order made (whether before or after the date of the commencement of this section) under section 5, shall apply to a legal relationship entered into by two parties on or after the date that is 6 months after the commencement of [section 8](#) of the Marriage Act 2015.” This means that only registered partnerships concluded before 16 May 2016 can be recognised as a civil partnership, if the registered partnership in question was included on one of the orders.

2.1.7 Malta

A. Status in Member State

In 2014, Malta introduced civil unions for both same-sex and opposite-sex couples.⁶⁴ In 2017, same-sex marriage was introduced.⁶⁵

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Civil unions provide the same rights as marriage with regards to residence rights under Directive 2004/38. Therefore, the term spouse in the definitions under family members in Article 2 of the Free Movement of European Union Nationals and their Family Members Order⁶⁶ has to be read in conjunction with Article 4(1) of the Civil Union Act, making it also applicable to civil unions.

Article 6 of the Civil Union Act provides that an equivalent status celebrated abroad shall be valid for all purposes of the law if two conditions are fulfilled: (1) “*the formalities required for its validity by the law of the country where the union of equivalent status is celebrated are observed;*” and (2) “*each of the persons forming the union of equivalent status is, by the law of the country of his or her respective domicile, capable of entering into such a union of equivalent status.*” According to Article 10 of the Civil Union Act the Minister can, by regulations, provide a list of foreign registered partnerships which they deems to fulfil these criteria. The only regulation that was made on the basis of this article was the *Unions of Equivalent Status to Civil Unions Regulations* from 2014.⁶⁷ As far as the author is aware, this list has not been updated since.

⁶⁴ Act No. IX of 2014, Civil Unions Act.

⁶⁵ Law XXIII of 2017, Marriage Act and other Laws (Amendment) Act 2017.

⁶⁶ Subsidiary Legislation 460.17.

⁶⁷ Subsidiary Legislation 530.01.



2.1.8 Portugal

A. Status in Member State

Portugal introduced same-sex marriage in 2010.⁶⁸ Next to these, Portugal also knows de facto unions, which are, however, without a registration process.⁶⁹

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 2(e)(2) of the Law governing the exercise of the right of citizens of the European Union and their families to move and reside freely in the national territory and transpose to national law Directive 2004/38/EC⁷⁰; provides that the family member is also “the partner with whom a Union citizen lives in a de facto union, established under the law, or with whom the Union citizen has a permanent relationship duly certified by the competent entity of the Member State where he resides.” A document proving the family relationship has to be provided according to Article 14(6)(b).

2.1.9 Sweden*

A. Status in Member State

Sweden introduced registered partnerships for same-sex couples in 1994,⁷¹ but discontinued it when introducing same-sex marriage in 2009.⁷²

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Concerning family reunification for the Union citizen’s partner, registered partnerships are treated as marriage for the purpose of Section 2(1) of Chapter 3a of the Aliens Act,⁷³ on the basis of Section 1 of Chapter 3 of the Registered Partnership Act. As to the recognition of the registered partnership, the private international law rules applicable to marriage are applied by analogy based on Section 9 of Chapter 1 of the Registered Partnership Act. These rules⁷⁴ stipulate that in essence the partnerships have to be recognised, if it was valid in the state of registration and where no conditions were contrary to those required for the establishment of a partnership in Sweden.

It is unclear whether an opposite-sex registered partnership would be recognised to this purpose. However, durably attested relationships are equated with marriage; therefore, the opposite-sex registered partnership should be accepted as proof to that purpose.

⁶⁸ Lei N. 9/2010 de 31 de Maio Permite o casamento civil entre pessoas do mesmo sexo.

⁶⁹ Lei N. 135/99 for opposite-sex couples and Lei. N. 7/2001 for same-sex couples.

⁷⁰ Lei N. 37/2006 Regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE.

⁷¹ Lag (1994:1117) om registrerat partnerskap.

⁷² Lag (2009:260) om upphävande av lagen (1994:1117) om registrerat partnerskap.

⁷³ Utlänningslag (2005:716).

⁷⁴ Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, Sections 4-9 of Chapter 1.



2.2. Member States with both registered partnership and same-sex marriage

2.2.1 Netherlands

A. Status in Member State

The Netherlands introduced the registered partnership for both same-sex and opposite-sex couples in 1997.⁷⁵ They went on to introduce same-sex marriage in 2001.⁷⁶

B. Conditions for registered partnerships to fall under Article 2(2)(b)

The registered partner of a Union citizen has a right to family reunification in the Netherlands in accordance with Article 8.7(2)(b) Aliens Decree,⁷⁷ if it is valid according to Dutch private international law. The rules concerning the recognition of foreign registered partnerships is laid down in Article 10:61 of the Civil Code. This article states that in general a registered partnership established abroad will be recognised if it has been concluded in front of a competent authority according to the law. However, Article 10:61(5) BW lays down certain conditions. (1) The registered partnership must have been registered by the competent authority; (2) the registered partnership must be exclusive and be an impediment to conclude another partnership or marriage; and (3) the rights attached to the registered partnership must be similar to those attached to marriage.

Especially due to the last condition, certain registered partnerships cannot be recognised. This was the case for the Belgian *wettelijke samenwoning*.⁷⁸ This point, however, can be very confusing and unclear. Concerning the previous version of Article 10:61 BW, being Article 2 of the Conflict laws on Registered Partnerships, it was explicitly stated by the government when it proposed the law, that certain registered partnerships can be recognised, giving the examples of the registered partnerships in Denmark, Sweden, Norway and Germany. The government, however, also stated that certain registered partnerships that do not have the name registered partnership, but something else, could equally be applicable, giving the specific examples of the Belgian *wettelijke samenwoning*, the French PACS and the cohabitation forms available in Catalunya and Aragon.⁷⁹ However, it has often been considered that the PACS would not fulfil the criteria, nor the Belgian *wettelijke samenwoning*.

⁷⁵ *Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opnemings daarin van bepalingen voor het geregistreerd partnerschap*, Stb. 1997, 324.

⁷⁶ *Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk)*, Stb. 2001, 9.

⁷⁷ *Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000)*, Stb. 2000, 497.

⁷⁸ The tribunal of The Hague had refused to recognize the Belgian *wettelijke samenwoning* since it is not considered equivalent to marriage. This case concerned, however, the automatic transmission of parentage to the father. ECLI:NL:RBDHA:2017:15602.

⁷⁹ *Memorie van Toelichting, Regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap (Wet conflictenrecht geregistreerd partnerschap)*, 2002-2003, Kamerstukken 28924, Nr. 3.



2.2.2 France

A. Status in Member State

France introduced the Pacte Civil de Solidarité (PACS) in 1999, which is open to both same-sex and opposite-sex couples.⁸⁰ It, furthermore, opened same-sex marriage in 2013.⁸¹

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Contrary to spouses, registered partners have no right of family reunification according to L121-1(4) CESEDA.⁸² However, with registered partnerships the 5-year duration required for a durably attested relationship is reduced to 1-year cohabitation.⁸³

2.2.3 Austria

A. Status in Member State

Austria introduced same-sex registered partnerships, called *eingetragene Partnerschaft*, in 2010. In December 2017, the Austrian Constitutional Court ruled that excluding both same-sex couples from contracting marriage, and opposite-sex couples from contracting a registered partnership was discrimination based on sexual orientation.⁸⁴ Consequently, as of the 1st of January 2019, both institutions are open to both same-sex and opposite-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

§52(1)(1) NAG⁸⁵ treats marriage and registered partnerships as equivalent.

§52(1)(4) NAG mentions the ‘*Lebenspartner*’, which might be confusing with the German *eingetragene Lebenspartnerschaft*. *Lebenspartner* in the context of the NAG means, however, durably attested relationship.

For the purpose of acquiring a residence right the registered partnership has to be recognised in accordance with § 27a. *IPR-Gesetz*.⁸⁶ The law applicable to the validity of the registered partnership is the law of the state of registration. This recognition for the purpose of acquiring a residence right applies for all purposes. Since 2019, both same-sex and opposite-sex registered partnerships are recognised.

⁸⁰ *Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarité.*

⁸¹ *Loi n°2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.*

⁸² The Circulaire du 10 septembre 2010 sur le droit de séjour des citoyens européens et suisses ainsi que des membres de leur famille specifically states in para. 3.5.2 “*Les partenaires pacésés et les concubins ne sont pas assimilés à des conjoints au sens des articles L 121-1 et L. 121-3.*”

⁸³ Circulaire du 10 septembre 2010 sur le droit de séjour des citoyens européens et suisses ainsi que des membres de leur famille, para. 3.5.5.2 and Circulaire NOR INTD0400134C du 30 octobre 2004 pour l'admission au séjour des étrangers signataires d'un pacte civil de solidarité.II.2.)2.).

⁸⁴ Decision of the VfGH of 4.12.2017 G 258-259/2017-9

⁸⁵ Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG), [BGBl. I Nr. 100/2005](#).

⁸⁶ Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz), [BGBl. Nr. 304/1978](#)



2.2.4 Luxembourg

A. Status in Member State

Luxembourg introduced a PACS type of registered partnership⁸⁷, in 2004 which is open to both same-sex and opposite-sex couples, and same-sex marriage in 2014.⁸⁸

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Partnerships are treated as equivalent to marriage for the purpose of family reunification based on Article 12(1)(b) Law of 29 August 2008 on the Free Movement of Persons and Immigration.⁸⁹ Foreign registered partnerships have to comply with the conditions set in Article 4 of the partnership Act. These conditions are that the partners (1) have capacity to contract; (2) are not bound by another partnership or marriage; and (3) are not related to the second degree.

2.3. Member States with only same-sex registered partnership or cohabitation

2.3.1 Cyprus

A. Status in Member State

Cyprus introduced the registered partnership in 2015, which is open to both same-sex and opposite-sex couples.⁹⁰

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 4 of the Partnership Act establishes that unless otherwise provided partners have to be treated as spouses.⁹¹ Consequently, the term spouse in Section 2 of The Right of Union Citizens and their Family Members to Move and Reside Freely within the Territory of the Republic Law of 2007 also applies to registered partnerships.⁹² Section 43 of Partnership Act provides that a foreign registered partnership

⁸⁷ *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats.*

⁸⁸ *Loi du 4 juillet 2014 portant réforme du Titre II.- du Livre Ier du Code civil «Des actes de l'état civil» et modifiant les articles 34, 47, 57, 63, 70, 71, 73, 75, 76, 79, 79-1 et 95;b) réforme du Titre V.- du Livre Ier du Code civil «Du mariage», rétablissant l'article 143, modifiant les articles 144, 145, 147, 148, 161 à 164, 165 à 171, 173 à 175, 176, 177, 179, 180 à 192, 194 à 199, 201, 202, 203 à 206, 212 à 224, 226, 227, introduisant les articles 146-1, 146-2, 175-1, 175-2 nouveaux et abrogeant les articles 149 à 154, 158 à 160bis, 178, le Chapitre VIII et l'article 228;c) modification des articles 295, 351, 379, 380, 383, 390, 412, 496, alinéa 1, 509-1, alinéa 2, 730, 791, 847 à 849, 852, alinéa 3, 980, alinéa 2, 1405, 1409 et 1676, alinéa 2, et abrogation des articles 296 et 297 et 1595 du Code civil;d) modification de l'article 66 du Code de commerce;e) modification des articles 265, alinéa 1er, 278 et 521 du Nouveau Code de procédure civile;f) introduction d'un Titre VI.bis nouveau dans la Deuxième Partie du Nouveau Code de procédure civile;g) introduction d'un Chapitre VII.-I nouveau au Titre VII du Livre Ier du Code pénal;h) abrogation de la loi du 23 avril 1827 concernant la dispense des prohibitions du mariage prévues par les articles 162 à 164 du Code civil; et i) abrogation de la loi du 19 décembre 1972 portant introduction d'un examen médical avant mariage.*

⁸⁹ *Loi du 29 août 2008 1) portant sur la libre circulation des personnes et l'immigration; 2) modifiant la loi modifiée du 5 mai 2006 relative au droit d'asile et a des forms complémentaires de protection, la loi modifiée du 29 avril 1999 portant creation d'un droit a un revenue minimum garanti, le Code du travail, le Code penal; 3) abrogeant la loi modifiée du 28 mars 1972 concernant 1. l'entrée et le séjour des étrangers; 2. le contrôle médical des étrangers; 3. l'emploi de la main-d'oeuvre étrangère, - la loi du 26 juin 1953 portant fixation des taxes à percevoir en matière de cartes d'identité pour étrangers, - la loi du 28 octobre 1920 destinée à endiguer l'affluence exagérée d'étrangers sur le territoire du Grand-Duché.*

⁹⁰ *Ο περί Πολιτικής Συμβίωσης Νόμος του 2015 (184(I)/2015)*

⁹¹ See TRYFONIDOU, A. (2018), “The legal position of LGBT persons and same-sex couples in Cyprus”, *The Cyprus Review*, 29(1), 183-213, p. 201.

⁹² *Ο περί της Δικαιώματος των Πολιτών της Ένωσης και των Μελών των Οικογενειών τους να Κυκλοφορούν και να Διαμένουν Ελεύθερα στη Δημοκρατία Νόμος του 2007 (7(I)/2007).* See also: TRYFONIDOU, A. (2018), “The legal position of LGBT persons and same-sex couples in Cyprus”, *The Cyprus Review*, 29(1), 183-213, p. 199-205.



will be recognised if it has been concluded in conformity with the formalities and conditions provided by the state and each party is capable of concluding such a registered partnership in accordance with the law of habitual residence. Both same-sex and opposite-sex registered partnerships should be recognised.

2.3.2 Czech Republic

A. Status in Member State

The Czech Republic introduced the registered partnership in 2006 for same-sex couples. The registered partnership is the maximum status available to same-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

The registered partnership is considered equivalent to marriage for the purpose of family reunification under Directive 2004/38 on the basis of Article 180f of the Aliens Act.⁹³ Article 180f(2) specifies that it only concerns same-sex registered partnerships. A partnership is defined in Article 180f(3) as an officially confirmed permanent community of two persons of the same sex.⁹⁴ Consequently, opposite-sex registered partnerships will not be recognised to this purpose.

2.3.3 Estonia

A. Status in Member State

Estonia introduced laws on registered partnerships (*Kooseluseadus*) in 2014 which entered into force in 2016.⁹⁵ The partnership is open to both same-sex and opposite-sex couples. However, Estonia has since failed to introduce the necessary implementing legislation which is required to actually contract such a partnership.⁹⁶ So technically, while Estonia has a registered partnership, it is currently impossible to conclude such a registered partnership since the implementing legislation required has not yet been passed.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 7(2) *Kooseluseadus* states that a partnership concluded abroad will be valid in Estonia pursuant the provisions of private international law. However, the private international law code has not yet been adapted. In addition, the Citizen of the European Union Act⁹⁷ has not yet been changed.

This was challenged in a case at the Supreme Court where it concerned the recognition of a German registered partnership for the purpose of family reunification.⁹⁸ The Supreme Court held that the Citizen of the European Union Act and multiple ministerial regulations implementing that Act were

⁹³ Zákon č. 326/1999 Sb, Zákon o pobytu cizinců na území České republiky a o změně některých zákonů.

⁹⁴ The Czech authorities informed that proof of citizenship of the Czech Republic is required for the registration. This could mean that only a registered partnership concluded with a Czech citizen can be recognized for the purpose of a residence right.

⁹⁵ *Kooseluseadus*, RT I, 16.10.2014, 1.

⁹⁶ The implementing act *Kooseluseaduse rakendamise seadus* 114 SE was withdrawn as was another act which would have replaced the *Kooselusedus*, *Paarkonna seadus* 151 SE.

⁹⁷ *Euroopa Liidu kodaniku seadus*, RT I 2006, 26, 191

⁹⁸ Decision of the Estonian Supreme Court of 21.07.2019, case number 5-18-5/17, ECLI:EE:RK:2019:5.18.5.9157.



unconstitutional in so far that they did not provide for the issue of and the means of application for a residence card to the same-sex registered partner. It considered that for the time being, the executive could apply the rules concerning marriage directly to such registered partnerships.⁹⁹ However, it is yet unclear whether the executive will do so.

Thus, while technically there might be a right of residence for registered partnerships in Estonia, the exact mode of acquiring such residence is still very unclear.

2.3.4 Greece

A. Status in Member State

Greece introduced registered partnerships in 2008; however, this registered partnership was only open to opposite-sex couples.¹⁰⁰ After the ECtHR judgment in *Vallianatos v. Greece*, Greece opened the registered partnership to same-sex couples in 2015.¹⁰¹ The registered partnership is the maximum status available to same-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 2(2)(a) of Presidential Decree 106/2007,¹⁰² which states that the spouse is a family member, has to be read in conjunction with Article 12 of Law 4356/2015 which states that where not otherwise provided registered partnerships are to be treated as marriage. The rules of private international law are applicable to the recognition of foreign registered partnerships. In general, the registered partnership will be considered valid if it was concluded in accordance with the law of the state of registration. However, the Ministerial Decision 23443/2011, which was made during the time that only opposite-sex couples had access to the registered partnership, might still be applicable. This Decision states that a registered partnership is proof of a durably attested relationship for the purpose of Article 3(2)(b) of P.D. 106/2007.¹⁰³ One should note that the Ministerial Decision also required that the registered partnership document originated from the Member State of origin of the Union citizen.¹⁰⁴

⁹⁹ Decision of the Estonian Supreme Court of 21.07.2019, case number 5-18-5/17, ECLI:EE:RK:2019:5.18.5.9157, para. 71. "Kuni kohase õigusliku aluse kehtestamiseni saab täitevõim tähtajalise elamisloa taotluste läbivaatamisel lähtuda välismaalaste seaduses abikaasa juurde elama asumiseks tähtajalise elamisloa andmise kohta sätestatust."

¹⁰⁰ Νόμος 3719/2008 Μεταρρυθμίσεις για την οικογένεια, το παιδί, την κοινωνία και άλλες διατάξεις.

¹⁰¹ ΣΥΜΦΩΝΟ ΣΥΜΒΙΩΣΗΣ Νόμος 4356/2015.

¹⁰² Προεδρικό Διάταγμα 106/2007, Ελεύθερη κυκλοφορία και διαμονή στην ελληνική επικράτεια των πολιτών της Ευρωπαϊκής Ένωσης και των μελών των οικογενειών τους.

¹⁰³ ΚΥΑ 23443/2011 Καθορισμός του τύπου άδειας διαμονής που χορηγείται σε υπηκόους τρίτων χωρών, συντρόφους πολίτη της Ε. Ε. ή Έλληνα, με τον οποίο διατηρούν σταθερή σχέση προσηκόντως αποδεδειγμένη, para. 5(a).

¹⁰⁴ ΚΥΑ 23443/2011, para. 6.



2.3.5 Italy

A. Status in Member State

Until 2016, Italy did not provide for registered partnerships. After the decision of the ECtHR in *Oliari v. Italy*, it introduced the *Unione Civile* for same-sex couples.¹⁰⁵ Italy also provides for cohabitation agreements (*contratto di convivenza*) which are both open to opposite-sex and same-sex couples.

The *unione civile* is the maximum status attainable for same-sex couples in Italy.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

According to Article 1(20) of the Civil Union Act, if not otherwise provided in the Civil Union Act, the reference to marriage in other laws will equally apply to the *unione civile*. Consequently, the *unione civile* is treated as equivalent to marriage for the purpose of Article 2 of Decree No. 30 of 2007.

Only same-sex registered partnerships are recognised in accordance with Article 32-ter of the Private International Law Code.¹⁰⁶ A foreign registered partnership will be considered valid if it was so according to either the law of registration, or the law of nationality of one of the parties, or the law of the habitual residence of the parties at the time of conclusion of the registered partnership. It should be noted the same-sex marriage concluded by an Italian citizen will automatically be treated as a registered partnership in accordance with Article 32-bis of the Private International Law Code.

2.3.6 Croatia

A. Status in Member State

Croatia introduced life partnerships for same-sex couples in 2014.¹⁰⁷ Life partnerships are the highest status available to same-sex couples in Croatia.

Other statuses available are the cohabitation for opposite-sex couples and the informal life partnerships for same-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 74 of the Life Partnership Act specifically governs its application in free movement law, considering the life partnership equivalent to marriage for the purpose of free movement law. Similarly, Article 75 of the Life Partnership Act provides for registered partnerships concluded in third countries to be treated equivalently. Additionally, Article 1(5) of the same EEA Nationals Act¹⁰⁸ provides that the provisions on family members also applies to life partnerships and informal life partnerships. Furthermore, Article 21 of the EEA Nationals Act provides specifically for the grant for a residence right for life partners of EU citizens.

¹⁰⁵ Legge 20 maggio 2016, n. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze

¹⁰⁶ Legge 31 maggio 1995, n. 218, Riforma del Sistema italiano di diritto internazionale private.

¹⁰⁷ Zakon o životnom partnerstvu osoba istog spola NN 92/14.

¹⁰⁸ Zakon o državljanima država članica europskog gospodarskog prostora i članovima njihovih obitelji, N66/19.



Also, Article 162(1)(1) of the Immigration Act,¹⁰⁹ which also provides for the right of residence for the EU citizen’s spouse, has to be read in conjunction with Article 74 of the Life partnership Act.

A same-sex registered partnership or same-sex marriage concluded abroad is considered valid if it is considered as valid by the *lex loci registrationis*.

2.3.7 Hungary

A. Status in Member State

Hungary introduced the registered partnership for same-sex couples in 2009.¹¹⁰ The registered partnership is the maximum status available to same-sex couples.

B. Conditions for registered partnerships to fall under Article 2(2)(b)

According to section 3(1) of the Registered Partnership Act, the registered partnership is treated as a marriage unless stated otherwise. Article 2(bi) of Act I of 2007¹¹¹ specifically provides that the registered partner of an EU citizen is considered a family member, on condition that the registered partnership is concluded in Hungary or in another Member State.

2.3.8 Slovenia

A. Status in Member State

Slovenia introduced a weak registered partnership for same-sex couples in 2005.¹¹² This partnership, however, only granted some property rights. This registered partnership was repealed by the introduction of a new registered partnership which is equal with marriage on nearly all points in 2016, which went into force in 2017.¹¹³

B. Conditions for registered partnerships to fall under Article 2(2)(b)

Article 2(2) of the new Registered Partnership Act provides that, unless otherwise provided, the civil union shall be treated as marriage. Consequently, in Article 127(1) of the Foreigners Act¹¹⁴ the spouse and registered partner are treated equivalently.

Only same-sex registered partnerships can be recognised.

¹⁰⁹ Zakon o strancima, prociscen pročišćeni tekst zakona NN 130/11, 74/13, 69/17, 46/18.

¹¹⁰ 2009. évi XXIX. Törvény a bejegyzett élettársi kapcsolatáról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról.

¹¹¹ 2007. évi I. törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról.

¹¹² Zakon o registraciji istospolne partnerske skupnosti (Uradni list RS, št. 65/05).

¹¹³ Zakon o partnerski zvezi (Uradni list RS, št. 33/16).

¹¹⁴ Zakon o tujcih (Uradni list RS, št. 1/18 – uradno prečiščeno besedilo, 9/18 – popr. in 62/19 – odl. US).



2.4. Member States with no status for same-sex couples

2.4.1 Bulgaria

While Bulgaria has not introduced registered partnerships, it does provide for registered partnerships together with marriages in paragraph 1(1)(a) of the additional provisions of the Act on Entrance, Residence and Departure of Citizens of the European Union and Members of their Families in the Territory of the Republic of Bulgaria (AERD). It is, however, unclear how this provision is applied.

2.4.2 Latvia

While Latvia has not introduced a registered partnership, Cabinet Regulation 675/2011¹¹⁵ provides in paragraph 4(2) that a durably attested relationship is either attested by two years relationship or by providing a document attesting a registered partnership in accordance with paragraph 37.2. Consequently, a registered partnership exempts proof of the relationship under Article 3(2)(b) of the Directive but does not make registered partners fall under Article 2(2)(b).

2.4.3 Lithuania

While Lithuania has not yet introduced a registered partnership, the Constitutional Court held in 2019¹¹⁶ that: *“a temporary residence permit may be issued to a foreign national who is not a citizen of a Member State of the European Union or the European Free Trade Association not exclusively in cases where an opposite-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit, but also in cases where a same-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit.”*¹¹⁷

The Lithuanian authorities have notified that this case will also be applied to situations where the sponsor is an EU citizen from another Member State.

Consequently, both same-sex and opposite-sex registered partnerships have to be recognised for the purpose of a residence right. However, it is yet unclear how this will be applied.

2.4.4 Poland

Poland does not recognise registered partnerships. According to responses received from the Polish authorities, both opposite-sex and same-sex registered partnerships are taken into account for the

¹¹⁵ Ministru kabineta noteikumi Nr.675 Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieeļo un uzturas Latvijas Republikā

¹¹⁶ Case 16/2016, KT3-N1/2019.

¹¹⁷ Case 16/2016, KT3-N1/2019, para. 41.3.



purpose of proving a durably attested relationship. The authorities also stated that a cohabitation agreement could be taken into account for assessing a durably attested relationship, however, that no such cases exist in practice. Consequently, a registered partnership constitutes proof of the relationship under Article 3(2)(b) of the Directive but does not make registered partners fall under Article 2(2)(b).

2.4.5 Romania

Article 277(3) of the new Romanian Civil Code provides that civil partnerships concluded between opposite-sex couples or same-sex couples, irrespective of whether it is between Romanian citizens or with foreigners, are not recognised in Romania. Article 277(4) of the new Romanian Civil Code limits the scope of this Article, stating that the free movement rules shall not be impeded.

While Romania does not provide for a registered partnership and will not officially recognise it, a registered partnership will be considered proof of a durably attested relationship in accordance with Article 2(1)(7) of GEO 102/2005.¹¹⁸ Consequently, a registered partnership is considered to sufficient meet the required proof the relationship under Article 3(2)(b) of the Directive but does not make registered partners fall under Article 2(2)(b).

2.4.6 Slovakia

Slovakia does not recognise registered partnerships. While Article I §2(5)(g) of Act 404/2011¹¹⁹ states that the partner of the EU citizen, with whom (s)he has a lasting, duly proven relationship is considered a family member, the Slovak authorities stated that they do not provide for a residence right for durably attested relationships. It is, therefore, unclear whether Slovakia would consider a registered partnership for the purpose of a durably attested relationship.

¹¹⁸ ORDONANȚĂ DE URGENȚĂ nr. 102 din 14 iulie 2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene, Spațiului Economic European și a cetățenilor Confederației Elvețiene.

¹¹⁹ Zakon z 21. Oktobra 2011, o pobyte cudzincov a o zmene a doplnení niektorých zákonov.



3. Comparison

Recognition of foreign same-sex registered partnerships¹²⁰

		Member State of Origin of the Registered Partnership																												
		AT	BE	BU	HR	CY	CZ	DK	EE	ES	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SI	SK	SE	UK	
Member State of Destination (residence right requested)	AT	✓		■								✓						■	■				■	■	■	■	■	■	■	
	BE	✓	✓	■				✓			✓	✓	✓		✓			■	■	✓		✗	■	■	■	■	■	■	✓	✓
	BU			■															■	■				■	■	■	■	■	■	
	HR			■															■	■				■	■	■	■	■	■	
	CY			■															■	■				■	■	■	■	■	■	
	CZ			■															■	■				■	■	■	■	■	■	
	DK			■				✓											■	■				■	■	■	■	■	■	
	EE			■															■	■				■	■	■	■	■	■	
	ES			■															■	■				■	■	■	■	■	■	
	FI			■				✓			✓								■	■				■	■	■	■	■	✓	
	FR	x	x	■	x	x	x	x	x	x	x	x	x	x	x	x	x	x	■	■	x	x	x	■	x	■	x	■	x	x
	DE	✓		■				✓			✓	✓	✓		✓				■	■			✓	■	M!	■	■	■	✓	✓
	EL			■															■	■				■	■	■	■	■	■	
	HU			■															■	■				■	■	■	■	■	■	
	IE	✓	M!	■	✓		✓	✓		M!	✓	M!	✓		✓				■	■		✓	M!	M!	■	■	■	■	✓	✓
	IT			■															■	■				■	■	■	■	■	■	
	LV	x	x	■	x	x	x	x	x	x	x	x	x	x	x	x	x	x	■	■	x	x	x	■	x	■	x	■	x	x
	LT			■															■	■				■	■	■	■	■	■	
	LU			■															■	■				■	■	■	■	■	■	
	MT	✓	✓	■			✓	✓			✓	✓	✓	✓	✓	✓	✓		■	■		✓	✓	✓	■	■	■	■	✓	✓
NL	✓	✗	■				✓			✓	✗	✓		✓				■	■			✓	■	■	■	■	■	✓	✓	
PL	x	x	■	x	x	x	x	x	x	x	x	x	x	x	x	x	x	■	■	x	x	x	■	x	■	x	■	x	x	
PT			■															■	■				■	■	■	■	■	■		
RO	x	x	■	x	x	x	x	x	x	x	x	x	x	x	x	x	x	■	■	x	x	x	■	x	■	x	■	x	x	
SI			■															■	■				■	■	■	■	■	■		
SK			■															■	■				■	■	■	■	■	■		
SE			■				✓			✓								■	■			✓	■	■	■	■	■	✓		
UK	✓	✓	■			✓	✓		M!	✓	✓	✓		✓	✓			■	■	✓		✓	■	M!	■	■	■	✓	✓	

As can be seen in the table above, it is not always certain whether a registered partnership will be accepted. Only for those Member States that have specific lists of equivalent partnerships can precisely be stated which foreign partnerships will be recognised. In most other cases, it is unclear. Especially accepted are the registered partnerships from the Nordic countries. However, these can no longer be concluded since in all those states same-sex marriage has been introduced and the registered partnership discontinued.¹²¹

¹²⁰ ✓ means registered partnership will be recognised;

✗ means registered partnership will most likely not be recognised.;

■ means no registered partnership exists in the original Member State;

M! means only same-sex marriage from the original Member State will be recognised, but not the registered partnership;

x means registered partnership will most likely be taken into account for the purpose of Article 3(2)(b), but not for 2(2)(b).

An empty cell means that the situation is unclear.

¹²¹ This table will be further filled in once answers on the questionnaire will be provided.



4. Conclusion

Most Member States that have introduced a registered partnership have considered it equivalent to marriage for the purpose of Article 2(2)(b) of Directive 2004/38/EC. However, the many different conditions applied to the recognition of registered partnerships leads to situations where a certain registered partnership might be recognised in one Member State for this purpose, but not in another Member State. All the Member States that have considered the registered partnership equivalent to marriage for the purpose of Article 2(2)(b), have not made specific rules for the recognition of a foreign status for this purpose, but require general recognition.

Those Member States that do not treat their registered partnership as equivalent to marriage for the purpose of Article 2(2)(b), mostly apply it has proof for a durably attested relationship under Article 3(2)(b) of the Directive or give it more favourable conditions.

There are clear differences between dualistic states, which consider the registered partnership as a temporary status for same-sex couples, and pluralistic states, which consider the registered partnership as a permanent status which will exist next to marriage.

Under no circumstance will a dualistic state recognise an opposite-sex registered partnership as a registered partnership, while a pluralistic state will recognise such a status.

There are two main approaches as to establishing which foreign registered partnerships are recognised for the purpose of granting residence rights under Directive 2004/38. The approach commonly applied by civil law countries is to have a general rule as to which conditions a foreign registered partnership must have in order to qualify for recognition. There is, however, not a clear indication as to which foreign registered partnerships will qualify. On the other hand, common law countries (e.g. IE) and some countries influenced by common law (MT) have specific lists of foreign registered partnerships that it will recognise. Belgium is a special case, as it does not consider its own form of registered partnership as equivalent to marriage; however, it has made a list stating which foreign registered partnerships it will consider equivalent. However, this list has not been updated since its creation in 2008.

While the general rule system gives some flexibility and can be applied to newly created foreign registered partnerships, it is often unclear whether a certain foreign registered partnership will be accepted. In the Netherlands, for example, there are contradictory statements as to the question whether the French PACS and the Belgian *wettelijke samenleving* can be recognised as a registered partnership.

On the other hand, the list system gives a lot of legal certainty. However, these lists are often not consistently updated. Malta, as far as the author is aware, has not updated the list since its establishment in 2014. Belgium has not updated the list of equivalent registered partnerships since 2008.

A combination of the two systems would be the most favourable. A general rule that can be applied by the executive and the judiciary also to newly introduced registered partnerships and a list of approved registered partnerships. This list should possibly also include a list of foreign registered partnerships that will not be recognised for this purpose.



There is limited, furthermore, clarity in dualistic states about the acceptance of foreign registered partnerships after same-sex marriage has been introduced and once registered partnerships have been discontinued. In most Member States there seems to be an approach to continue to accept foreign registered partnerships that would have been recognised prior to the introduction of the registered partnership.

In Ireland, however, only registered partnerships concluded before the same-sex marriage was introduced in Ireland will be recognised and only if the registered partnership was mentioned on one of the orders listing equivalent foreign registered partnerships. Since these lists are no longer updated and certain Member States have only introduced registered partnerships after Ireland introduced same-sex marriage, this could constitute indirect discrimination based on nationality, indirect discrimination based on sexual orientation and also in certain cases indirect discrimination based on age.¹²²

The only means of making such a measure proportionate, would require that the Member State allows immediately for the couple to transform their registered partnership into a marriage in order for them to fall under the privileged family members. While the rules on family law are mainly within the competence of the Member States, a residence requirement for foreigners in order to conclude a marriage or for transforming a registered partnership into a marriage, is not a part of family law, but of private international law.

One should consider that based on the *Oliari v. Italy* and *Orlandi v. Italy* judgments of the ECtHR the Member States are under the obligation to provide for a status for same-sex couples. Currently, most of the Member States that do not provide for a status for same-sex couples explicitly provide that they take registered partnerships into consideration for the purpose of a durably attested relationship.

¹²² E.g. if the persons involved were not of the legal age required to conclude a registered partnership at the time that Ireland introduced same-sex marriage.