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When is a Partner not a Partner? Conceptualisations of ‘Family’ in EU Free Movement Law

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Abstract

This paper considers the definitions of spouse, civil partner and partner in European Union free movement of persons law in order to question the EU’s heterocentric approach to defining ‘family’ in this context. It argues that the terms ‘spouse’ should include same sex married partners to ensure there is no discrimination on the grounds of sexual orientation. It further highlights the problems created by basing free movement rights of civil partners on host state recognition of such partnerships. This approach allows Member States to discriminate on the grounds of sexual orientation and is therefore not compatible with EU equality law in others areas. The position of unmarried or unregistered partners is also considered. In particular the paper examines the requirement of a duly attested durable relationship and its impact on same-sex partners wishing to move from one Member State to another. The paper argues that it is time to reconsider the law in this area and bring it in line with the EU’s commitment to eliminate discrimination on several grounds including sexual orientation.

Keywords: Same-sex marriage, Civil Partnership, Family in EU Law, Citizens’ Rights Directive

Introduction

European Union citizens can take advantage of a number of rights when migrating from their home Member State to a host state in the European Union (EU). Many of these rights are extended to family members of those citizens. Being able to show that one is a family member of an EU citizen and, in particular, an economically active EU citizen is thus important when trying to access rights linked to migration. This is even more so the case where the family member in question is a third country national who cannot take advantage of EU citizenship and associated benefits in their own right.

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This paper considers how family is conceptualised in EU law with a particular focus on spouses and partners. It examines the scope of the terms ‘spouse’ and ‘partner’ and in doing so pays specific attention to the extent to which the legal provisions might negatively impact on same-sex couples. This paper begins by examining the definitions applied to couples under the terms of Directive 2004/38, the Citizens’ Rights Directive, before moving on to examine the importance of developing clear and non-discriminatory definitions of family in EU law in this context.

Defining Family in EU Law

The EU does not have any express or explicit competence over family law matters. Nevertheless, certain provisions of EU law – free movement being a prime example – have clearly impacted on family-type issues (Bell 2004, Caracciolo di Torella and Masselot 2004). EU involvement tends to arise where it is required, for some reason, to define the notion of family. The EU had to consider who would constitute a ‘family’ member from the inception of the internal market. Free movement and associated rights were extended to workers’ families initially by Regulation 1612/68 which afforded rights to the EU worker’s spouse and their descendants who were under the age of 21 years or dependants; and ‘dependent relatives in the ascending line of the worker and his spouse’ (Article 10(1) (a) and (b)). More limited rights were granted to ‘any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes’ (Regulation 1612/68 Article 10(2)). The EU thus initially only granted rights to the EU worker and some limited family members rather than the worker’s family in a broader sense. These provisions have now been replaced by the definitions in Directive 2004/38, the Citizens’ Rights Directive (CRD). The CRD sets out the legal framework governing ‘the right of citizens of the Union *and their family members* (my

emphasis) to move and reside freely within the territory of the Member States'. The definition of EU citizen in this context is straight forward and simply refers to a national of any Member State (Article 2(1) CRD). The definition of family member however necessitates further consideration. Article 2(2) CRD sets out the family members to whom the rights laid down in the Directive apply. The EU family here includes the spouse and civil partner if civil partnerships are treated as equivalent to marriage in the host state, and each of these categories will be considered in turn in order to highlight differences in the granting of rights to different categories of partners.ⁱ

Spouses

The term 'spouse' refers to a married partner. In most Member States this is assumed to refer to husband and wife, in other words a heterosexual partnership (European Agency for Fundamental Rights 2010). The possibility of decoupling the term spouse from marriage has been the subject of policy and judicial consideration (Bell 2004, D'Oliviera 2000). For example, in *Netherlands v Reed* the ECJ considered a claim brought by a heterosexual unmarried couple for equal treatment with a married couple. The ECJ declined to extend the scope of the term 'spouse' to include partners in a long term relationship who were not married. It concluded:

'In the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term 'spouse' in Article 10 of the Regulation refers to a marital relationship only'.

It is clear then, that 'spouse' cannot be interpreted to include cohabitants or long term partners. Interestingly the ECJ did acknowledge that this area of law is susceptible to changing social attitudes. Given that the provisions in the Regulation would affect all

Member States and there was no consensus across Member States on whether or not long term partners should have equal rights with married partners, the ECJ did not consider it appropriate to intervene and interpret 'spouse' broadly.

If 'spouse' refers to 'marital relationships only' (Netherlands v Reed), the question of whether the term includes same-sex couples who have entered into a civil partnership or similar registered union arises. The answer here appears to be 'no'. The ECJ considered the position of same-sex registered partners in D and Sweden v Council. The issue here was the granting of certain benefits to spouses which were not granted to civil partners. The ECJ held that this was lawful as the difference arose not from the difference in sexual orientation of the parties concerned but from the differing legal status between marriage and civil partnership. The ECJ stated that it was accepted that 'the term marriage means a union between two persons of the opposite sex' (at paragraph 34). It also recognised that an increasing number of states have provided for legal recognition of same-sex partnerships (at paragraph 35). The ECJ then commented:

It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage. (Paragraph 36).

And crucially:

In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. (Paragraph 37)

The ECJ further considered whether or not the difference in treatment here amounted to discrimination. In making its assessment it considered that the 'principle of equal treatment can apply only to persons in comparable situations' (D and Sweden v Council, Paragraph 48).

The court recognised, as it has done in *Reed* in relation to cohabitants, that there was no consensus amongst Member States. It therefore concluded that

‘In those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official’. (paragraph 51)

It is difficult to see how the Judgment can be construed as anything other than discrimination on the grounds of sexual orientation. Certainly, given that in the majority of countries where civil partnerships are recognised, only same-sex couples can enter into them and marriage is still restricted to heterosexual couples in all but 5 Member States it is hard to see how treating marriage and civil partnership differently is anything other than discrimination on the grounds of sexual orientation.ⁱⁱ

However, the ruling in *D and Sweden* was concerned with civil partners as opposed to married partners. It does therefore leave the door open for the term spouse as set out in the CRD to include same-sex married partners. There seems no logical reason to exclude them as indeed there is no difference in status between them and a heterosexual couple who have married in the same jurisdiction. Whether or not the term ‘spouse’ also includes same-sex spouses was subject to debate in the run up to the enactment of the CRD (Bell 2004). The version which was enacted in 2004 simply refers to spouse but, as with similar phrasing in human rights jurisprudence, is assumed to refer to heterosexual spouses (Tobin 2009). In fact the European Parliament argued for the inclusion of a reference to spouse of either sex into the directive, thus explicitly recognising same-sex marriage (European Parliament 2003, Bell 2004). However this amendment was rejected on the basis that there is no Member State consensus on same-sex marriage or even civil partnership status. The Commission explained the rejection of the amendment as follows:

The Court has also ruled that an interpretation of legal terms on the basis of social developments that has effects in all the Member States must take into account the situation in the whole Community [original footnote omitted]. The Commission therefore prefers to restrict the proposal to the concept of spouse as meaning in principle spouse of a different sex, unless there are subsequent developments.

What this does suggest is that at some point in the future, when the recognition of same-sex marriage is more widespread, the EU is likely to recognise the inclusion of same-sex married partners within the term spouse. In fact the 2008 report on the implementation of the CRD (European Commission 2008) noted that not doing so would be direct discrimination in breach of the general principle of equality and the requirement not to discriminate as set out in Article 21 of the Charter of Fundamental Rights. The report urged Member States to recognise same-sex spouses but no concrete move has been made to amend the CRD to reflect that (European Union Agency for Fundamental Rights 2010, Tobin 2010). Until that happens, it seems, same-sex spouses will remain not really spouses at all.

Civil Partners

Civil partners are recognised in EU Law if the host state recognises civil partnerships as being equivalent to marriage. However, the question of what is required for a civil partnership to be equivalent to marriage is not clearly defined. If, for example, equivalence means that the civil partnership must offer the same rights and responsibilities as marriage, there will be no such unions which meet that standard. Civil partnerships, while in some cases offering almost identical rights to marriage, often have different provisions in relation to, for example, parental responsibility, succession issues or adoption. In some cases there are further differences relating to, for example, questions of tax which in reality mean that civil partnerships differ significantly from marriage (ILGA Europe 2010). If taken in this sense,

one might argue that when referring to civil partnerships with marriage equivalent status, the CRD is actually referring to same-sex marriage in which case this provision would be applicable in only 5 Member States. However, it seems unlikely that this narrow interpretation was intended, given that the provision does refer specifically to civil partnerships rather than same-sex marriage. A broader notion of equivalence is therefore required. This might be based on establishing equivalence in relation to immigration rules. So, if national rules treat civil partners in the same way as heterosexual spouses then equivalence for the purposes of the CRD is established. This analysis is also unsatisfactory as it would mean that EU rules would add nothing and would be dependent on states recognising immigration rights first. A more holistic and perhaps common sense approach is to accept that there are likely to be differences in rights between civil partners and heterosexual spouses because they are ultimately different legal statuses. Rather than looking for identical rights and responsibilities and focusing on differences between the two statuses, the focus should be on the similarities and the question of whether in law they are broadly equivalent even if there may be some differences in the detail. Viewing equivalence in this way would bring the 13 Member States recognising civil partnerships within the scope of the CRD.ⁱⁱⁱ If those states allowing same-sex marriage were also included within this provision a total of 18 states would provide recognition of same-sex relationships (ILGA Europe 2010, European Union Agency for Fundamental Human Rights) and thus allow couples to derive rights as family members of EU citizens.

However, whether or not rights can be derived on that basis is explicitly made dependant on host state recognition (CRD Article 2(2) (b)). While the policy rationale for this is perhaps clear; the EU shied away from interfering with the organisation of family law and telling states that they must accept same-sex partnerships in some official capacity, the provisions

makes no logical sense if traditional free movement rationales are applied. If the aim is the encouragement of free movement amongst economically active citizens and we recognise that they are likely to want to be able to move with their families and perhaps partners in particular, making the rights of civil partners dependant on host state recognition is a backward step. Why would an EU national whose partnership is recognised in the home country choose to move to another Member State where their relationship is not recognised? This point was argued in *D and Sweden* but was held to be inadmissible because it was not argued at first instance and only introduced on appeal. We therefore do not have the benefit of the ECJ's opinion on this matter. Furthermore the Commission, in the process of enacting the CRD, expressed concern about reverse discrimination, that is the idea that EU migrants have more advantageous rights in the host country than nationals of that state:

‘To confer rights which are not recognised in the case of its own nationals on couples from other Member States could in fact create reverse discrimination, which the Commission would prefer to avoid’. (European Commission 2003, p 11)

The Commission does not, however, seem too concerned with avoiding discrimination on the grounds of sexual orientation in this context which sits uneasily with its commitment to eliminating such discrimination more generally. In addition, Case C-25/02 *Rinke v Ärztekammer Hamburg* suggests that where Union instruments fall foul of equal treatment law, their legality can be questioned: the ECJ concluded ‘that compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions’ (*Rinke* at paragraph 28). Given the EU's clear stance on the prohibition of discrimination on the grounds of sexual orientation in other areas it is difficult to see how it can justify its definition of family in relation to civil partners in this context.

By prohibiting discrimination on the grounds of sexual orientation in employment the EU is already influencing the way Member States have to conceptualise family at least in terms of how that relates to employment related issues. Is it really a step too far to ask the EU to compel Member States to recognise civil partnerships lawfully entered into in another Member State within their territory for the purposes of the rights enshrined in the CRD? The rights are after all mostly related to immigration rules and access to employment and not with matters which will fundamentally impact on national family law systems, which is where the EU's concern seems to lie. Very recently, in Case C-34/0 Ruiz Zambrano v Office national de l'emploi (ONEm), the ECJ showed its willingness to interfere in domestic systems relating to residence of third country nationals deriving rights from non mobile EU citizens. It is argued that those couples who have lawfully entered into a civil partnership in one Member State and then move to another Member State have an equally strong claim to fall within the scope of EU law. In their case there is a much clearer EU dimension to which attach their claim whereas in Zambrano no intra-EU mobility had taken place. Furthermore, free movement of persons jurisprudence confirms that the free movement provisions must be interpreted broadly (Case 291/05 Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind) and that Member States must be prevented from 'eliminat[ing] at will the protection afforded by the Treaty'. (Case 75/63 Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten at paragraph 1). On that basis, civil partnerships should be recognised by a host state where lawfully entered into in another Member State; it is difficult to see how doing so is anything other than discrimination on the grounds of sexual orientation. Allowing and indeed facilitating such discrimination seems contrary to EU intentions and thus undermines its work in other areas. As well as being of real practical importance to those civil partners considering moving between Member States, this issue may also be of great symbolic significance because the EU could have chosen to send a clear

signal that marriage is not the gold standard (Frimston 2006) and civil partnerships are not a consolation prize in EU law. As things stand, civil partners are only civil partners in EU law if the chosen host state recognises them as such.

Partners

So far this paper has considered the position of spouses and civil partners. The limitations of the provisions, especially for same-sex couples have been acknowledged but at least there are provisions in place which allow for further interpretation and development through the case law of the ECJ as well as forming the basis of debate and future reform. The provisions do not however adequately capture the situation of the significant proportion of couples, whether same-sex or heterosexual, who choose not to get married or enter into civil partnerships. Article 2 CRD does not recognise unmarried or unregistered partners as family who have access to the rights enshrined in the Directive.

Instead Article 3 CRD confers more limited rights on other dependant family members or those needing personal care as well as on members of the citizen's household and partners with whom the citizen has a durable relationship. The focus here is on the latter group. To fall within this definition of partner there has to be a 'durable relationship' which is 'duly attested'. The first question arising is what might constitute a durable relationship. Little guidance is provided at EU level. The European Commission's guidance on the transposition of The CRD states that the Directive applies to 'a de facto durable relationship, duly attested', this requirement must be assessed taking into account the Directive's aim 'to maintain the unity of the family in a broad sense (European Commission 2009; 5). The guidance further suggests that documentary evidence that the relationship is durable can be required by the

host state but gives no guidance on what sort of evidence that might be. The UK Border Agency (2009), for example, has the following advice:

‘You would generally need to show us that you have been in a subsisting relationship for two years or more. This could be through joint bank or building society statements, joint tenancy agreements, council tax bills or evidence that you are both paying utility bills at the property at which you reside’.

A durable relationship thus appears to be one that is of at least 2 year duration although less time together may give rise to rights where the durability of a shorter relationship can be ‘duly attested’ (see below). This in itself is perhaps not particularly controversial as it is not difficult to understand a policy rationale which stops those partners who are in new relationships, which may or may not turn out to be stable and long lasting, to derive immigration rights. The possibilities of abuse of such rights are arguably too great.

The ‘duly attested’ requirement is much more difficult. The requirement for documentary evidence may cause problems for some couples: for example a couple who have been in a relationship for a number of years but because of personal choice, or perhaps work commitments, have chosen not to live together. They do not share bank accounts or pay joint bills. They spend some time at each others’ places of residence and go on holiday together. Is this sufficient proof that they are in fact in a durable relationship? It seems that authorities might well presume that durability does not relate to time in a relationship but time living together and that without proof of living together, couples will struggle to convince the authorities that their relationship is in fact durable (European Union Agency for Fundamental Rights 2010). This may be particularly problematic for younger couples who have not yet been able to move in together but intend to do so or perhaps for couples later in their life-course after a previous relationship has broken down. They may well be moving to another

Member State precisely to start a new part of their lives together and proving that their relationship is durable may be tricky given the criteria set out above.

In addition, the criteria may be particularly difficult for some same-sex couples to fulfil. If, for example, they are moving from a Member State where there is no, or limited recognition of their relationship, or where they would face persecution if they were open about their relationship, they might struggle to meet the criteria. Couples moving to another Member State because of greater equality in the chosen host state may struggle to prove their relationship exists at all, never mind that it is durable.

Whereas in considerations of spousal and civil partner rights one might argue that the solution is to simply place them on an equal footing and thus avoid discrimination on the grounds of sexual orientation, this argument does not apply to unmarried couples. The provision in Article 3 CRD is gender neutral and could apply to partners of same or different sex. The potential for discrimination here relates to how national authorities interpret durability and the required proof (European Union Agency for Fundamental Rights 2010). Further research in this area is required to shed light on what states expect and the extent to which there is a risk of indirect discrimination on the grounds of sexual orientation. As the provisions currently stand partners in EU law are partners but that does not mean they are able to access EU law rights.

Why does any of this matter?

Inevitably the question of why any of this matters arises when examining an area of law which might at first appear to be of significance only to a minority of EU citizens. However, it is argued that the issues raised in this paper so far are important for three principal reasons. First they are important because EU citizens and their partners or spouses can derive

important rights from the CRD if they can bring themselves within the relevant definitions; secondly the issues raised are important because they highlight tensions between EU policy and law relating to rights as contained in the CRD and other EU policy areas and legislation which are concerned with eliminating discrimination; and finally the issues raised are important because of the symbolic message they convey. In the following section each of these contentions will be examined further.

The Practical importance

Those bringing themselves within the definition of family as defined in Article 2(2) CRD benefit from all the rights contained in the Directive. In other words they will have the right to enter and reside in the host state as well as access to the labour market regardless of their nationality. The rights are potentially important for EU spouses and relevant civil partners. While they will have an initial three months right to residence as well as the right to access to the labour market because of their own EU citizenship status, if they are unable to find work or do not wish to be economically active, they will need to derive rights of residence and access to social advantages from the economically active EU citizen they have moved with. The provisions are of course of greater importance to those family members who are not themselves EU nationals as they cannot rely on their own status for rights.

Many Member States have strict immigration rules which make it difficult to bring third-country national family members into that state. EU citizens can therefore be at an advantage over nationals who have not exercised their free movement rights but wish to bring non EU nationals to live with them in a Member State. Once matters come within the scope of EU law, the parties can rely on the Directive rights and no further conditions can be imposed by

the Member States (Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform*). This, it is argued, creates at least as great a potential for reverse discrimination as basing the recognition of same-sex partnerships on the host state system does, yet the EU does not seem overly concerned about reverse discrimination in this context. In fact the ECJ commented in *Metock* that ‘if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed’ (at paragraph 62).

Applying a similar argument to the recognition of civil partnerships, it is accepted that there is a potential for reverse discrimination and that, rather than providing rights for those who currently do not enjoy recognition of their relationships in any formal way, the rights of those already enjoying such protection are (rightly) strengthened. However, the central issue in this context is not reverse discrimination but the elimination of discrimination on the grounds of sexual orientation across the EU. Having decided that sexual orientation is one of the protected characteristics in relation to equality law, the EU, it is argued, should be reducing the discriminatory reach of Member States. In addition, compelling Member States to recognise civil partnerships entered into in other Member States would increase the pressure to offer such unions to their own nationals and would also send a clear message that sexuality discrimination is not tolerated within the EU.

The definitions as they stand are problematic in more than a theoretical context. Restricting the term spouse to heterosexual married couples places same-sex spouses in a legal limbo as far as family rights in EU law are concerned. As they are not recognised as spouses in EU law but are also not really civil partners as defined in the CRD, they do not fall into any category of family member recognised by the Directive. It seems nonsensical that those who have chosen to marry and are, in a national context, placed on an equal legal footing with

heterosexual married couples are not protected in EU law should they chose to migrate to another Member State. Their rights might be protected if the chosen host state recognises the union or if it can be argued that for the purposes of the CRD the marriage is actually a civil partnership recognised as equivalent to marriage. However, including same-sex married couples in the definition of civil partnerships seems to distort that particular definition rather more than including same-sex married couples in the definition of spouse. It is therefore hard to see how this is anything other than discrimination on the grounds of sexual orientation. Discrimination which, it is argued cannot be justified because it denies important rights to some couples purely on the basis of their sexual orientation. The same argument can be applied to the denial of rights to those in civil partnerships if the civil partnership is not recognised in the chosen host state.

Article 3 family members enjoy more limited rights which seem to apply to entry and residence only. The CRD notes that host Member States should 'in accordance with [their] national legislation, facilitate entry and residence' of partners (Article 3(2)). It is questionable whether affording more limited rights to partners as compared to spouses or civil partners still makes sense. Research suggests that the notion of family is changing and that many more couples are choosing not to marry or register their partnership (Williams 2004). These couples should, it is argued have access to the same rights under the CRD as their married or registered counterparts. If this is not the case, a significant proportion of EU citizens may not be able to move to another Member State without risking not being able to take their third country national partners with them or putting them into a situation where those partners may not be able to work or access other rights in the host state. EU law clearly remains biased in favour of heterosexual married couples (McGlynn 2007).

Tension with anti-discrimination law and policy

The EU's reluctance to recognise same-sex relationships as equivalent to heterosexual ones sits uneasily with EU policy in other areas. Article 10 TFEU states that the EU shall 'aim to combat discrimination based on ... sexual orientation' in implementing its policies and activities. Article 19 TFEU gives the EU institutions further powers to enact legislation to take action to combat discrimination and indeed it has done so. Directive 2000/78 provides for equal treatment in employment and occupation. This so called Framework Directive notes in recital 11 that:

Discrimination based on [...] sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

It seems therefore that some of the arguments previously rejected by the ECJ as discussed above are actually acknowledged as valid in the recital to the Framework Directive. In addition the Commission has further recognised that protection from discrimination should be extended beyond the employment sector. In 2008 it proposed a new Directive to combat discrimination on a number of grounds including sexual orientation (European Commission 2008). This proposal is still under consideration and was last considered in December 2010 where it was noted that further work and consultation was required before it could be enacted (European Council 2010). Clearly however, the EU is committed to combating discrimination on the grounds of sexual orientation in a number of areas. Why then is it so reluctant to afford same-sex partners recognition on the same basis as straight couples? It seems that the EU has no coherent strategy for eliminating discrimination on the grounds of sexual orientation generally. Instead it is sending mixed messages about the value of same-sex unions whether formalised or not. This is unacceptable from the perspective of those affected but also problematic for EU law more broadly. If EU law lacks coherence in this area, it is difficult to

take any of the policies in relation to equality all that seriously. It is difficult to believe the EU rhetoric of equality and combating discrimination when the EU itself is not applying the principle of equal treatment in its own law making. The symbolic impact and damage to the EU's equality agenda are potentially significant and the answer to the question posed in the title of this paper seems to depend on whether it is considered in a migration policy or in an equality policy context.

The Symbolic Importance

In addition to the issues around consistency of EU policy in relation to non discrimination on the grounds of sexual orientation outlined above, setting definitions which do not discriminate or have the potential to be interpreted in such a way as to discriminate is important symbolically. As Deech (2010) shows, Justice Albie Sachs in the South African Constitutional Court judgement of *Home Affairs v Fourie* (at paragraph 71) sets out with clarity why discrimination should not be allowed:

'The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples'.

Although Albie Sachs was writing in the context of denying same-sex couples the right to marriage where no other possibility for legal recognition of such relationships existed, similar arguments can be applied to the way same-sex couples are not afforded the same recognition across the EU or indeed in EU law as their heterosexual counterparts. The idea that the term ‘spouse’ applies only to heterosexual married couples is obviously discriminatory and sends much of the same messages Justice Sachs criticises. The fact that EU law has so far stopped short of forcing host Member States to accept civil partnerships entered into in home Member State is difficult to reconcile with the principle of equal treatment which is otherwise seen as so important in Commission rhetoric. Should the EU not be at the forefront of trying to eliminate attitudes which are discriminatory? Furthermore, the position of unmarried and unregistered partners, whether same-sex or heterosexual, has perhaps not been examined carefully enough to ensure that families are not unnecessarily kept apart. Symbolically the EU could have sent a clear message that same-sex relationships are valued as much as heterosexual ones and it could have shown that it really does want to encourage the unity of the family in the broader sense. Instead it continues to allow Member States to discriminate on the grounds of sexual orientation and, arguably, on outdated notions of family.^{iv} While Member State interests and traditions do need to be balanced, cases such as *Kozak v. Poland* or *Schalk and Kopf v. Austria* perhaps indicate, the societal attitudes referred to by the ECJ in *Reed*, in *D* and *Sweden* as well as in relation to the enactment of the CRD have surely now shifted sufficiently to warrant a re-think in this area (European Agency of Fundamental Rights 2010).^v

Conclusion

This paper has considered the conceptualisation of family in EU free movement law with particular reference to partners. It has argued that the EU takes a heterocentric approach to defining family which places heterosexual marriage at the centre; affording such couples the

most generous free movement rights. It has been argued that the exclusion of same sex married partners from the term 'spouse' is direct discrimination on the grounds of sexual orientation which is not justifiable given the EU's prohibition of such discrimination in other areas. While civil partners enjoy some of the same rights, their enjoyment of EU citizenship provisions is limited because it is based on host state recognition of their partnership. Furthermore, the treatment of partners who are neither married nor in a civil partnership calls into question whether EU law in this area reflects the changing nature of families. It also gives rise to potential indirect discrimination on the grounds of sexual orientation. Overall, it is argued that further research is required to fully understand the impact of EU law on same-sex couples exercising free movement rights and that it is time that the EU reconsidered its approach to bring it in line with its emphasis on non discrimination in other areas of law. Ultimately, who is an EU citizen's spouse or partner should not depend on where in the EU they happen to find themselves.

References

- BBC (2011). French gay marriage ban upheld by constitutional court'. BBC News, 28th January 2011 [online] www.bbc.co.uk/news/world-europe-12305858
- Bell, M. (2004) Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union. *European Review of Private Law*, 12(6), 613
- Buyse, A. (2010). 'Strasbourg Court rules that states are not obliged to allow gay marriage'. The Guardian ECHR blog. Thursday 24th June 2010.

Caracciolo di Torella, E. and Masselot, A. (2004). 'Under Construction: EU Family Law' European Law review 29(1): 32.

Deech, R.(2010) Civil Partnership'. [2010] Family Law 468

European Commission (2009), 'Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States'. COM(2009) 313 final

European Commission (2008a), "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.

European Commission (2008b)Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 10 December 2008,

European Council (2010) '3053rd Council meeting Employment, Social Policy, Health and Consumer Affairs Brussels, 6 and 7 December 2010' PRES/10/331

European Union Agency for Fundamental Rights 2010 Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity
2010 Update Comparative legal analysis Luxembourg: Publications Office of the European Union, 2010

Frimston, R. (2006). 'Marriage and non-marital registered partnerships: gold, silver and bronze in private international law'. *Private Client Business*. 6:352

ILGA-Europe (2010) Marriage and partnership rights for same-sex partners: country-by-country available online at http://www.ilga-europe.org/home/issues/families/recognition_of_relationships/legislation_and_case_law/marriage_and_partnership_rights_for_same_sex_partners_country_by_country

McGlynn, C. (2007). 'Families and the European Union: law, Politics and Pluralism'. Cambridge: CUP

O'BRIEN, C (2010) Yes to gay marriage and premarital sex: a nation strips off its conservative values *The Irish Times* - Wednesday, September 15, 2010

Paladini, L. (2010). 'Italy: Constitutional Court rejects same-sex marriage claim'. *Public Law* 2010: 807

Tobin, B. (2009). 'Same-sex couples and the law: recent developments in the British isles'. *International Journal of Law, Policy and the Family* 23:110-30

UK Border Agency (2009), 'Guidance Notes For Applying As A European National Or As The Family Member Of A European National' Version 1.0, July 2009. Available online at <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/guide-eea.pdf> at page 4 [last accessed November 2010].

Wagner, A (2010) 'Has the time come for gay marriage in the UK?' *The Guardian* guardian.co.uk, Wednesday 21 July 2010

Williams, F. (2004). *Rethinking Families*. Calouste Gulbenkian Foundation

ⁱ The rights of children or indeed the rights which can be derived from children's status as EU citizens will not be considered further here. Readers interested in this area may like to read the following as an example of commentary on recent case law in this area: Starup, P. And Elsmore, M. (2010). 'Taking a Logical or Giant Step Forward? Comment on Ibrahim and Teixeira'. ELR 2010 (4) p 571-588

ⁱⁱ The report by the European Union Agency for Fundamental Rights (2010) gives a useful overview of the rights available to same-sex couples in each of the Member States. The 5 recognising same-sex marriage are Sweden, Belgium, the Netherlands, Spain and Portugal. However, although legislation along the same lines seems likely in some Member States (see O'Brien 2010, Wagner 2010), there are also signs that others are standing firmly against same-sex marriage. See for example Paladini (2010) or the recent French decision reported by the BBC (2001) and the recent decision by the European Court of Human Rights in Schalk and Kopf which was commented on by Buyse (2010) .

ⁱⁱⁱ The 13 member States recognising Civil Partnerships are Austria Czech Republic Denmark Finland France Germany Hungary Ireland Liechtenstein Luxembourg Slovenia United Kingdom

^{iv} There has been much research over recent years which considers the changing notion of family. A useful starting place for interested readers is the website of the Care, Values and Future of Welfare website at <http://www.leeds.ac.uk/cava/> or Williams 2004.

^v In addition, the Charter of Fundamental Rights has a much more important legal status following the ratification of the Lisbon Treaty as it now has the same status as the Treaties. While a detailed consideration of the implications are beyond the scope of this paper, it is worth considering whether the change in status requires the EU to place greater emphasis on the rights contained within the Charter. Furthermore the accession of the EU to the European Convention on Human Rights, currently being negotiated, may bring up further questions in this area in the future.