

Artikel

9 Same-sex spouses as “spouses” under the EU family reunification and citizens directives

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Although often overlooked, family-based migration is the most prevalent type of migration into and within the European Union (EU).² EU law now governs many aspects of family-based migration in Member States, and it relies on the term “spouse” to determine many rights under the Family Reunification Directive,³ the Citizens Directive,⁴ and other directives (col-

lectively, Family Migration Directives).⁵ Thus, the meaning of the term “spouse” has life-altering ramifications for migrating couples and children. But that meaning is unclear for married same-sex couples in EU Member States, which treat their relationships in dramatically different ways, ranging from legal marriage to registered partnership, to legal invalidity and constitutional opprobrium.

The Family Migration Directives fail to define the term “spouse” and the Court of Justice of the European Union (ECJ) has not stepped in to resolve the ambiguity. Legal scholars’ views on the issue vary widely. Some scholars argue that married, same-sex couples do not qualify as “spouses”, but only as “registered partners” or “unmarried partners”, alternative categories whose immigration eligibility is generally left

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2 *Residence Permit Statistics*, Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics#Residence_permits_by_reason (last visited April 16, 2016).

3 Directive 2003/86/EC, on the Right to Family Reunification.

4 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.

5 Two additional directives expressly adopt the definition of “family member” in the Family Reunification Directive. See Council Directive 2003/109 Concerning the Status of Third-Country Nationals Who are Long-Term Residents, 2004 O.J. L 16/44, art. 2; Council Directive 2009/50, on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2009 O.J. L 115/17, art. 2(f). Family members of refugees and asylees are covered by the Qualification Directive, which is beyond the scope of this article.

up to each host Member State.⁶ Others argue that same-sex spouses qualify as “spouses” generally, or at least if the marriage is recognized in their EU “home state”.⁷ Koen Lenaerts, the current President of the ECJ has opined extra-judicially that the ECJ should “proceed on a case-by-case basis” to balance the EU’s fundamental goal of free movement against any “overriding reasons of general interest” that opposing Member States can muster.⁸

This article analyzes the Family Reunification and Citizens Directives in context and ultimately concludes that their use of the term “spouse” is best interpreted through a broadly inclusive autonomous EU definition or a state-of-formalization choice-of-law rule similar to that adop-

ted by the Obama administration in the United States.⁹

The EU Family Migration Directives

The Family Reunification Directive sets the baseline for the migration of family members of third-country national legal residents in EU Member States, while the Citizens Directive provides a more detailed framework for migration to other Member States by EU citizens and their family members.

The Family Reunification Directive provides minimum rights for third-country-national spouses and minor children of legal residents with residence permits valid for a year or longer in an EU Member State.¹⁰ It requires Member States to authorize entry, residence, and certain other benefits to qualifying family members of legal resident “sponsors”.¹¹ The directive also establishes procedural, temporal, and evidentiary parameters for decisions regarding family reunification.¹² However, individual Member States continue to independently regulate waiting periods, integration requirements, and other restrictions on immigration.¹³

The Family Reunification Directive enumerates three categories of “family members”, each corresponding with different rights. First, Member States generally “shall authorize the entry and

6 See Elspeth Guild, Steve Peers & Jonathan Tomkin, *The EU Citizens Directive: A Commentary*, 35-36 (2014) (focusing on the apparent intent of some EU lawmakers that the term “spouse” would not apply to same-sex couples); Helen Toner, *Partnership Rights, Free Movement, and EU Law*, 76-78 (2004) (stating that EU legislation does not yet require Member State immigration rights for any partner “other than opposite-sex spouses,” but arguing in favor of such recognition).

7 See Jessica Guth, ‘When is a Partner not a Partner?: Conceptualisations of ‘Family’ in EU Free Movement Law’, 33 *J. Soc. Welfare & Fam. L.* 193, 201 (2011) (European antidiscrimination laws require recognition of “same-sex married partners” as “spouse[s]”); Jorrit Rijpma & Nelleke Koffeman, ‘Chapter 20 - Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?’, in: *Same-Sex Couples before National, Supranational and International Jurisdictions* 455, 471-72, 489 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds. 2014) (arguing for “mutual recognition” coverage of any marriage valid in the relevant EU “home state”).

8 Koen Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’, 33 *Fordham Int’l L. J.* 1338, 1360-61 (2010).

9 Like the EU, the US had to determine the meaning of “spouse” for federal immigration purposes when state laws diverged regarding same-sex marriage. It experimented with an anti-gay federal definition of “spouse,” then settled on a “place-of-celebration” rule. See Scott Titshaw, ‘Revisiting the Meaning of Marriage: Immigration for Same-Sex Couples in a Post-Windsor World’, 66 *Vand. L. Rev. En Banc* 167 (2013).

10 See Family Reunification Directive, *supra* note 2, art. 3(1).

11 *Id.* arts. 4, 14, 15.

12 *Id.* arts. 5-8.

13 *Id.* arts. 7(2), 8.

residence of (...) the sponsor's spouse" and the minor children of the sponsor or the spouse.¹⁴ Second, Member States "may (...) authorize" family reunification for underage spouses, spouses of underage sponsors, parents, grandparents, certain dependent adult children, registered partners, unmarried partners with whom the sponsor is in "a duly attested stable long-term relationship" and the partner's qualifying children.¹⁵ Third, Member States "shall not authorize the family reunification of a further spouse" where "the sponsor already has a spouse living with him in (...) the Member State".¹⁶

The Citizens Directive confers greater rights to a broader group of family members than does the Family Reunification Directive. It recognizes that EU citizenship generally "confers on every citizen (...) a primary and individual right to move and reside freely within the territory of the Member States".¹⁷ In principle, Union citizens and their "family members" may enter and reside in any Member State with the possibility of eventually acquiring the right to permanent residence.¹⁸ The Citizens Directive defines "family member" to cover "spouse[s,]" minor children,¹⁹ and registered partners "if the host Member State treats registered partnerships as equivalent to marriage".²⁰ It also states that a "Member State shall, in accordance with its national legislation, *facilitate entry and residence* of (...) the partner with whom the Union citizen has a durable relationship, duly attested[,]" as

well as "any other family members" who have been "dependents or members of the household of the Union citizen".²¹

Current Implementation of the Directives

The Family Migration Directives have been implemented inconsistently. Some Member States fully recognize same-sex spouses and partners for family reunification purposes.²² Others allow the admission of same-sex partners but only on a narrower basis,²³ and several EU Member States do not seem to "facilitate" the migration of same-sex couples under either directive.²⁴

According to a widely held view, if same-sex married couples are not treated as "spouses" for purposes of the directives, their formal marriage still qualifies under the Citizens Directive as a registration scheme "equivalent to marriage" in the state of formalization.²⁵ But this does not help the spouses of legal residents or those living in Member States that do not recognize such partnerships. The Family Reunification Directive guarantees no legal rights to married same-sex couples if they do not qualify as "spouses",

14 *Id.* art. 4(1) (emphasis added).

15 *Id.* art. 4(3) (emphasis added).

16 *Id.* art. 4(4) (emphasis added).

17 Citizens Directive 2004/38/EC, *supra* note 3, recitals 1-2, at 78.

18 *Id.* arts. 5-7, 9-11, 16.

19 *Id.* arts. 2(2)(a)-(c).

20 *Id.* art. 2(2)(b). "Family members" also include other dependent relatives, who are "direct descendants" or "direct relatives in the ascending line." *Id.*, arts. 2(2)(c)-(d).

21 *Id.* art. 3(2).

22 The EU's Fundamental Rights Agency reports that seventeen Member States do not treat same-sex spouses as "legal spouses" under the Family Reunification Directive. European Agency for Fundamental Rights, *Protection against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU: Comparative Legal Analysis – 2015 Update* 81-85 (2015), <http://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015> (at least nineteen of the current twenty-eight EU member states provide benefits for same-sex spouses and/or partners) [hereinafter "FRA Report"].

23 Helena Wray, Agnes Agoston & Jocelyn Hutton, 'A Family Resemblance?: The Regulation of Marriage Migration in Europe', 16 *European J. of Migration & L.* 209, 238 (2014).

24 See FRA Report, *supra* note 21, at 81, 90-91.

25 See Citizens Directive, *supra* note 3, art. 2(2)(b).

and the Citizens Directive only requires host Member States that do not recognize registered partnerships as the equivalent of marriages to “facilitate entry and residence” for the partners of EU citizens.²⁶ In spite of the Citizens Directive, some Member States do not seem to “facilitate” migration for the same-sex spouses of EU citizens.²⁷

European Trends in Same-Sex Couple Recognition

Before examining the meaning of “spouse” in the EU directives, it is useful to briefly examine the rapidly developing legal status of same-sex couples and their children in Europe. Many countries in the EU and around the world have now followed the lead of the Netherlands to legally recognize same-sex couples.²⁸ There has been a clear trend towards marriage equality among states in the West and North of Europe, where eleven EU Member States have elected to authorize same-sex marriages.²⁹ Several additional Member States grant entry and residence rights to the spouses or registered partners of EU citizens on the basis of partnership recognition.³⁰

A countertrend against same-sex marriage can be observed in changes to the constitutions or statutes of nine countries: Bulgaria, Croatia, Estonia, Hungary, Romania, Latvia, Lithuania,

Poland, and Slovakia.³¹ At least eleven states, including some of the aforementioned, have implemented the Citizens Directive in ways that are either unfavorable or unpredictable for same-sex spouses.³²

Textual and Systematic Analysis: Defining “Spouse” Broadly and Consistently

Like many national courts, the ECJ generally commences legislative analysis with a close reading of the relevant text. Systematic analysis of how various provisions of one or more related directives function together is also important. Combining textual and systematic approaches to the Family Migration Directives generally supports a broadly inclusive interpretation of “spouse”, to include married same-sex couples under both directives.

As described above, the Family Reunification Directive provides three lists of family members, whom Member States (1) shall, (2) may, or (3) shall not provide entry and residence.³³ The “sponsor’s spouse” and “the minor children of the sponsor and his/her spouse” fall in the man-

26 *Id.* art. 3(2).

27 See FRA Report, *supra* note 21, at 81, 90-91.

28 *Id.*, at 81-85.

29 *Id.*, at 82.

30 See *Id.*, at 84 (listing Austria, the Czech Republic, Finland, Germany, Hungary, Latvia, Malta, Slovenia, and Slovakia).

31 European Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity: Comparative Legal Analysis – 2010 Update 46–47* (2010), <http://fra.europa.eu/en/publication/2012/homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender> (referencing laws in Bulgaria, Estonia, Romania, and Slovakia); see also Alina Tryfonidou, *Same-Sex Marriage: The EU is Lagging Behind*, EU Law Analysis: Expert Insight into EU Law Developments n.iii (June 29, 2015), <http://eulawanalysis.blogspot.com/2015/06/same-sex-marriage-eu-is-lagging-behind.html> (referencing constitutional same-sex marriage bans in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia).

32 FRA Report, *supra* note 21, at 82-83 (listing Bulgaria, Cyprus, Greece, Hungary, Latvia, Poland, and Slovakia as refusing to recognize married same-sex couples as “spouses” although some grant them rights as partners, and describing the situation in Estonia, Lithuania, Croatia, and Romania as “unclear or developing”).

33 Family Reunification Directive, *supra* note 2, art. 4.

datory first category.³⁴ In 2003, when the Family Reunification Directive was enacted, the term “spouse” arguably included same-sex couples, who could already marry in the Netherlands, Belgium and Ontario (Canada). Nevertheless, some European jurisdictions have adopted or expressly rejected same-sex marriage since 2003, indicating that the term’s ordinary meaning may not yet have been settled. A systematic close reading of the text of Article 4, however, demonstrates that any consistent meaning of “spouse” throughout its six paragraphs must be broad enough to encompass *all* marriages valid under the law of the jurisdiction where they were formalized.³⁵ Article 4(1) provides that “the sponsor’s spouse” is generally a qualifying “family member” under the mandatory first category. Then, “spouse” is also used to reference underage and polygamous “spouses” in the second and third categories for whom entry and residence are optional or even prohibited.³⁶

Polygamous marriages cannot be legally formalized in any EU country, and Article 4(4) expressly provides that Member States “*shall not* authorise” entry and residence for a “further spouse” if the sponsor “already has a spouse living with him in the territory of the Member State”.³⁷ Thus, the term “spouse” in Article 4 encompasses spouses who are not recognized by EU Member States and even spouses whose recognition the directive expressly prohibits.

³⁴ *Id.* art. 4(1).

³⁵ This appears equally true regarding equivalents of “spouse” such as “le conjoint,” “el cónyuge,” “il coniuge,” “dem Ehegatten,” or “de echtgenoot” used in the French, Spanish, Italian, German, and Dutch versions of the directive.

³⁶ Family Reunification Directive, *supra* note 2, art. 4(4)-4(5). This is also true in the other language versions described above.

³⁷ *Id.* Again, this holds true in each language version listed above.

The word “spouse” is also used to describe underage spouses, whose marriages are legal where they were formalized but conditionally exempt from the directive’s recognition requirements.

Thus, any reading of the word “spouse” that is internally consistent throughout the text of the directive must encompass all marriages that were legally valid where formalized, presumably including same-sex marriages from other EU Member States.

Because the Family Reunification Directive is comprehensive and detailed (even differentiating among the polygamous spouses and their children), it is logical to infer that same-sex spouses must be covered *somewhere* within its scheme. Either they are “spouses” or *de facto* or registered partners. Yet there is no reference to same-sex spouses in the detailed discussion “of unmarried partners (...) in a duly attested stable long-term relationship, or (...) bound (...) by a registered partnership”.³⁸ This omission suggests that a spouse is still a “spouse”, regardless of the gender of his or her partner.

Finally, the directive’s procedure for adjudicating family reunification cases tends to support the inclusion of same-sex spouses. Article 5(2) states that “[t]he application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 [defining ‘family members’] and 6 [individual ‘public policy’ exceptions]”.³⁹ There is no reference to proof of the spouses’ sex, and documentation of a legal marriage would normally be identical for same- and different-sex spouses.

The Citizens Directive defines “family member” to include (a) the spouse; [and] (b) the partner

³⁸ *Id.* art. 4(3).

³⁹ *Id.* arts. 4, 5(2), 6.

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 (...).⁴⁰

Paragraph (b) incorporates a choice-of-law element into the definition of qualifying “registered partner[s]” – which ensures a single, uniform Union-wide rule by deferring to the host Member State law in these politically sensitive situations. However, “the spouse” in paragraph (a) is deemed a qualifying “family member”, without qualification. This comparative silence seems to reject a host-state choice-of-law for “spouses”.

If the EU adopted an autonomous heterosexual EU definition of “spouse” it would relegate same-sex spouses to the inapt status of “registered partner[s]” whose relationships are “equivalent to marriage” in the host Member State. Describing a legal marriage as a “registered partnership equivalent to marriage” would not only be linguistically torturous, but it could also lead to absurd results. Read literally, Article 2(b) then would require recognition of same-sex foreign spouses in Germany, which authorizes marriage-like same-sex registered partnerships, but not in Sweden, which recognizes same-sex marriages, but not marriage-like registered partnerships.⁴¹

The cannon of *effet utile* also supports the inclusion of same-sex spouses as “spouse[s]” under the Citizens Directive.⁴² If the term “registered partnerships” encompassed marriages, that

should apply equally to both same- and different-sex marriages, and any different-sex marriage clearly could be treated “as the equivalent to marriage in all EU Member States”. Thus, the provision for “registered partners” under Article 2(2)(b) would provide full recognition of all different-sex spouses as “family members” and the provision for “the spouse” would be redundant unless it also included same-sex spouses.

As discussed below, a unified meaning for the same term in both directives is desirable, and the textual and systematic analyses of the directives together militate in favor of a broad EU definition of the word “spouses”, which includes legally married same-sex couples.

Historical Analysis: Constructive Ambiguity as Legislative Intent

European legislators were aware that the unqualified term “spouse” could incorporate same-sex couples legally married in EU Member States when they enacted the Family Migration Directives in 2003 and 2004, soon after Belgium and Ontario (Canada), had joined the Netherlands in recognizing marriage equality for same-sex couples. There were lively debates on this issue, but both directives were silent on this point in the end. The clear implication is that legislators “agreed to disagree”, accepting constructive ambiguity as a way to conclude their work on the directives while leaving gaps in the texts for the ECJ to fill at a later date.

The Commission has been inconsistent in its interpretation of the word “spouse”. In 2002, it indicated it would not recognize married same-sex couples as “spouses” in enforcing the laws

40 Citizens Directive, *supra* note 3 art. 2(2) (emphasis added).

41 See joined cases C-122/99 P and C-125/99 P, *D. and Sweden v. Council*, 2001 E.C.R. I-4319, 36.

42 Citizens Directive, *supra* note 3 art. 2(2).

that preceded the directives.⁴³ Then, regarding the Citizens Directive, the Commission indicated first that it was intended to cover same-sex married couples as “spouses”, but later that it was not, at least temporarily.⁴⁴

Determining the specific legislative intent underlying the Family Migration Directives is complicated by changes in the EU legislative processes as they were debated and enacted. The 2003 Family Reunification Directive was enacted by the Council alone, by unanimous vote, after proposal by the Commission and consultation with the Parliament and other EU actors.⁴⁵ Seven months later, the Citizens Directive was enacted by both the Council and the Parliament, but with lower thresholds for approval.⁴⁶ The legislative histories discussed below reflect these shifting procedural requirements and political realities.

The Commission’s initial draft of the Family Reunification Directive would have required Member States to “authorize entry and residence” of “the applicant’s spouse, or an unmar-

ried partner living in a durable relationship with the applicant, if the legislation of the Member State concerned treats the situation of unmarried couples as corresponding to that of married couples”.⁴⁷ As in the final version of the directive, the language in the initial draft did not single out same-sex spouses specifically.⁴⁸

The Commission’s report on the initial draft of the Family Reunification Directive expressed two goals for harmonizing Member State legislation on family reunification for legal residents: (1) that non-citizens should “be eligible for broadly the same family reunification conditions, irrespective of the Member State in which they are admitted for residence purposes”; and (2) that immigrants’ choice of a Member State in which to reside should not be based on the Member State’s laws and its “more generous terms offered”.⁴⁹ As the Commission stated, both of these goals serve “to establish a right to family reunification that can be exercised in accordance with common criteria in all Member States” and to “improve certainty as to the law for third-country nationals”.⁵⁰ Both rationales would be supported by Union-wide recognition of valid same-sex legal relationships.

In drafting the Citizens Directive, the Commission originally intended to treat married same-sex couples as “spouses”, not as “*unmarried* partners”. During the first reading of that draft to the responsible committee in the Council, the Italian representative specifically asked whether “a homosexual couple legally married in the M[ember] S[tate] of origin would (...) be regarded as a spouse (point (a)) or as an unmarried partner (point (b)) in the host M[ember]

43 Communication from the Commission: *Free movement of workers – Achieving the Full Benefits and Potential*, COM (2002) 694 Final 8 (Dec. 12, 2002) [hereinafter Communication on Worker Movement]. Before the Family Migration Directives were enacted, several ECJ cases had indicated that same-sex couples were not covered by the term “spouses” in certain EU contexts. But those cases were all decided before same-sex marriage gained traction in many Member States, and none of the cases regarded the status of legally married same-sex spouses. See Titshaw, *supra* note 1, at 92-96.

44 Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 15380/01, 7 n.5 (Dec. 18, 2001) & Amended Proposal for a Directive of the European Parliament and of the Council 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 (2003) 199 Final 3 [hereinafter Commission’s Response to Parliament’s Proposed Amendments].

45 Helen Toner, *Partnership Rights, Free Movement, and EU Law*, 61, 69-70 (2004).

46 *Id.* at 61-62.

47 Commission Proposal for a Council Directive on the Right to Family Reunification, 5.1 COM (1999) 638 Final 26 (Dec. 1, 1999) [hereinafter Council’s Family Reunification Proposal].

48 *Id.*

49 *Id.* at 9, 7.4.

50 *Id.* at 11, 9.3.

S[tate.]”⁵¹ The Commission representative responded “this case would be covered by point (a) [.]” referencing Article 2(2)(a).⁵²

The Council’s Working Party on Free Movement of Persons was less anxious to recognize same-sex spouses or unmarried partners. Five of its members lodged scrutiny reservations to Article 2(2)(a), asserting that “a homosexual spouse should only be admitted to the host M[ember] S[tate] on that basis if the host M[ember] S[tate]’s legislation provided for such marriages”.⁵³ But the provision for “unmarried partner[s]” in the original draft of Article 2(2)(b) was more controversial, drawing nine reservations.⁵⁴

The Commission eventually reworked the proposal into its present form. That final version defines “family member” to include “(a) the spouse; [or] (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*”.⁵⁵ Subparagraph (a) was left entirely unchanged from the original draft, but subparagraph (b) underwent several changes. Most significantly, the final text replaced “unmarried partner” with “partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [M]ember [S]

tate[.]” and replaced “unmarried couples as equivalent to married couples” with “registered partnerships as equivalent to marriage”.

The two deletions of “unmarried” could possibly be read to extend the meaning of “partners” in subparagraph (b) to include same-sex spouses. Yet the deletions also were clearly necessary to accomplish other intended objectives. In particular, they served to reduce the obligation of Member States to “facilitation” under Article 3(2)(b), for “unmarried partners”, an even more controversial category of relationships, and to also ensure that only registered partnerships “contracted” in EU Member States, not third countries, would be covered. If the reformulation of Article 2(2)(b) was meant to include same-sex spouses as the Commission indicated at one point, that intent was lost on the Parliament.

The Commission’s co-legislator, the Parliament, preferred a broad definition of “family members”. The responsible committee rejected its chairman’s proposed amendment to clarify the still unclear language of Article 2(2) by limiting the definition of “spouse[s]” to different-sex spouses.⁵⁶ Instead, the committee, and later the Parliament, adopted an affirmative position paper returning the directive with an amendment to clarify that “family member” includes a “spouse” or “registered partner” “*irrespective of sex, according to the relevant national legislation*” and “the unmarried partner, if the legislation or practice of the host and/or home Mem-

51 Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 15380/01, 7 n. 5 (Dec. 18, 2001).

52 *Id.*

53 Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 10572/02, 11 n. 15 (July 10, 2002), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010572%202002%20INIT> (Germany, Greece, Spain, Ireland and Italy) [hereinafter *Council Doc. Dated July 10, 2002*].

54 *Id.* at 11 n. 16 (Belgium, Germany, Greece, Spain, France, Ireland, The Netherlands, Portugal and Austria).

55 Citizens Directive, *supra* note 2, art. 2(2) (emphasis added to indicate additions to the original draft).

56 Toner, *supra* note 44, at 64.

ber State treats unmarried couples (...) and married couples in a corresponding manner”.⁵⁷

The Commission did not accept the Parliament’s broad definition of “family member”, leaving Article 2(2) as it was after the Council’s last changes.⁵⁸ The Commission described the final language as “an equitable solution” that avoids “imposition on certain Member States of amendments to family law legislation” while allowing “for a possible change in interpretation in the light of developments in family law in the Member States”.⁵⁹ Thus, it seemed ready to temporarily interpret “spouse” to exclude migrating same-sex couples while recognizing the intentional ambiguity built into the final directive.

In the end, the legislative history does not demonstrate a single legislative intent regarding the meaning of “spouse” in the Citizens Directive. As both the Council and the Parliament were required to enact this directive, and the two institutions held different views of the “spouses” they wished to cover, the text appears to have been left intentionally ambiguous – reflecting the institutions’ willingness to “agree to disagree” (or perhaps, their desire for finality and reluctance to restart negotiations on this directive to include ten new Member States⁶⁰).

⁵⁷ *Id.* at 64–65. Position of the European Parliament Adopted at First Reading on 11 February 2003, file EP-PE_TC1-COD(2001)0111, (Feb. 11, 2003) 10, 42, 46. The Commission clearly understood the reference here to be to the Member State of formalization. *Commission’s Response to Parliament’s Proposed Amendments*, *supra* note 43, at 3 (“Parliament’s amendments would recognize as family members the spouse of the same sex in the same way as the spouse of a different sex, the registered partner in accordance with the legislation of the [member State] of origin, and the non-married partners in accordance with the legislation or practice of the host or home [Member State].”).

⁵⁸ *Commission’s Response to Parliament’s Proposed Amendments*, *supra* note 43, at 3.

⁵⁹ *Id.*

⁶⁰ Toner, *supra* note 44, at 62.

Teleological Analysis: Furthering the Purposes of Equality, Family Unity, and Free Movement Within a Borderless Union

Many of the same primary goals underlie the Family Reunification Directive, the Citizens Directive, and their predecessor legislation since the early 1960s, as well as the EU constitutional order: freedom of movement within a borderless Union territory, protection of family and respect for family life, and equality, now including prohibitions of discrimination on the bases of sex and sexual orientation.

Recognizing that a fundamental goal of the Union is ensuring “the free movement of (...) persons” by developing an area “without internal frontiers”, the Treaty on the Functioning of the European Union (TFEU) required adoption of certain immigration measures for third-country nationals, specifically “including those for the purpose of family reunification”.⁶¹

The dual EU goals of freedom of movement and family reunification underlying the Family Migration Directives can be traced back to the 1961 regulation that first provided for free movement of workers. Those directives extended migration rights to a worker’s spouse and minor children based on the assumption that family reunification was a necessary prerequisite for other freedom of movement.⁶² Important 1968 regulation on freedom of movement for workers within the European Community explained that “the right of freedom of movement, in order that it may be exercised (...) in freedom and dignity, requires that (...) obstacles

⁶¹ Consolidated Version of the Treaty on the Functioning of the European Union, arts. 26, 67(2), 79(1)–(2), Oct. 26, 2012, 2012 O.J. (C 326/49) 77.

⁶² Regulation Nr. 15 on Initial Steps to Provide Freedom of Movement for Workers within the Community, O.J. 61–62/1073 26 Aug. 1961, arts. 11–15 [hereinafter Regulation Nr. 15].

to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family".⁶³ Although the early free movement regulations were limited to workers who were nationals of EU Member States, the regulation made no nationality-based distinctions among the workers' family members because their rights were rooted primarily in the interests of the migrating EU workers, not their own.⁶⁴

The Commission, the ECJ, and the preambles of the Family Migration Directives expressly recognize these goals.⁶⁵ The Citizens Directive recognizes the "fundamental freedom of movement of persons" within the Union and extends parallel rights to family members, regardless of nationality.⁶⁶

The Family Reunification Directive was also based on the idea that the "integration of the family in the host country" is "the *sine qua non* [i.e. absolutely necessary] for the exercise of free movement in objective conditions of freedom and dignity".⁶⁷ It sought to grant legal residents rights and obligations comparable to those of citizens and recognized the concurrent "right to family reunification".⁶⁸

The history of the interconnected goals of family reunification and free movement supports an inclusive understanding of the term "spouse" in

the Family Migration Directives. A derivative family member's right is largely based on the interests of the sponsor. There is no reason to believe that a sponsoring EU citizen or legal resident has a lesser interest in not leaving behind her spouse or stepchildren if her spouse is female; her family's right to migrate with her is as necessary to the *sponsor's* freedom of movement as it is to the sponsor of a different-sex spouse. A discriminatory reading of the term "spouse" would not only undermine the sponsor's rights of free movement and family reunification, but it would also contravene the objective of nondiscrimination on the bases of sex and sexual orientation under the Union's Charter of Fundamental Rights and the preambles of the Family Migration Directives, and it would coerce her choice of Member State residence, an outcome that the Family Migration Directives were meant to prevent.⁶⁹

In the end, a teleological analysis tends to support an understanding of the term "spouse" which is the same in both Family Migration Directives, covering same-sex spouses, regardless of whether one focuses on the narrow goals of the directives alone, the broader goals of the Treaty provisions on which they were based, or the meta-teleological goals underlying the EU system as a whole.

Comparative Analysis: Balancing Evolving Family Forms and Resistant Member State Approaches

In an article from 2010, ECJ President Lenaerts opined that the best reading of the Citizens Directive might be one resulting in a "state of origin" rule, relying on the law of the place

63 Council Regulation No. 1612/68 on Freedom of Movement for Workers Within the Community, 1968 O.J. L (257/2), recital 5 (EC).

64 Gavin Barrett, 'Family Matters: European Community Law and Third-Country Family Members', 40 Common Mkt. L. Rev. 369, 376-77 (2003).

65 Titshaw, *supra* note 1, at 104-05.

66 Citizens Directive, *supra* note 2, at recitals 2, 5.

67 *Council's Family Reunification Proposal*, *supra* note 46, at 6 (description in the European Commission's Explanatory Memorandum accompanying its original draft of the Family Reunification Directive).

68 Family Reunification Directive, *supra* note 3, at recitals 2-3.

69 Charter of Fundamental Rights of the European Union, art. 21(1), Dec. 18, 2010, 2010 O.J. (C 364) 1; Family Reunification Directive, *supra* note 3, at recital 5; Citizens Directive, *supra* note 2, at recital 31.

where the marriage occurred.⁷⁰ In light of the EU legislators' apparent agreement to leave the issue to the judiciary, however, he advised that this might require a "case-by-case analysis", giving each objecting Member State an opportunity to "invoke overriding reasons of general interest in order to deny (...) legal recognition" of the marriages.⁷¹ However, such a piecemeal approach would arguably violate the general principle of equal treatment of EU citizens from various Member States, which in turn would create legal uncertainty and unnecessary litigation.⁷²

A holistic approach to balancing EU interests and Member State interests may be more appropriate. The Union's interests include protecting families and establishing a uniform interpretation of the Family Migration Directives, including the freedom of citizens and legal residents to migrate within the EU without having to leave their families behind. The Union also aims for EU law to be implemented in a non-discriminatory manner on the basis of sex or sexual orientation. The primary interests of the Member States, on the other hand, are to maintain family laws that reflect their particular cultural norms and to prevent any erosion of their primary jurisdiction over family law through the route of harmonized EU migration policy.

There is only one type of rule that balances the institutional interests of the Union and Member States in the two-tiered EU system: a generalized version of a state-of-origin rule like that suggested by Vice President Lenaerts. An autonomous new Union-wide definition of marriage, whether a heterosexual definition of marriage or a definition of "spouse" that includes same-sex couples, would subvert every Member State's primary competence for determining

familial status. Choice-of-law rules would respect one or both Member States' authority over family law, depending on whether their laws coincide or conflict.

A choice of the host state's law clearly fails to meet the EU's goal of uniform interpretation of the Family Migration Directives. Under that rule, the directives would mean something different with regard to *the same* couple depending on the host Member State. For example, if a Dutch man married a Canadian man in the Netherlands, the Dutchman would have a right under the Citizens Directive to bring his husband with him if he moved to France, but not if he moved to Cyprus. This coerced choice based on more or less generous Member State laws has been long rejected under EU law, and it was rejected specifically in the Family Migration Directives.

On the other hand, a choice-of-law rule based on the Member State of formalization or nationality would respect the Dutch law and entitle the couple described above to migrate to any EU Member State, while also respecting the Union's interests in free movement, family reunification, and uniform interpretation of its legislation. Of course, a state-of-formalization rule might allow a lesbian Cypriot to marry in the Netherlands and later claim a right to sponsor her wife under the Citizens Directive in Cyprus, undermining the interests of Cyprus.⁷³ Yet that seems preferable to a choice-of-law rule based on the sponsor's Member State of nationality (or legal residence, in the case of the Family Reunification Directive), because such a rule could lead

⁷⁰ Lenaerts, *supra* note 7, at 1356, 1360.

⁷¹ *Id.* at 1360-61.

⁷² Rijpma & Koffeman, *supra* note 6, at 471-72.

⁷³ See, e.g., Ordinanza del Trib. di Reggio Emilia (civil law section), sez. I civ., 1401/2011 (13 February 2012) (recognizing Spanish marriage of Italian citizen in Italy under the Citizens Directive); but see FRA Report, *supra* note 21, at 82 (describing a Cyprus Supreme Court decision finding no current obligation to recognize such a marriage).

to the sort of discrimination on the basis of nationality that has been anathema under EU law for decades.⁷⁴

Conclusion

The ECJ faces several options for defining “spouse” under the Family Migration Directives: an autonomous EU definition or a choice-of-law rule selecting the definition of the host Member State, the place or Member State of formalization, or the Member State of nationality.

An autonomous EU definition of “spouse” that excludes legally married same-sex couples is generally unsupported by the textual, systematic, teleological and comparative approaches above. While one can find some support for this approach in historical analysis of the Family Migration Directives, a better reading of their legislative history as a whole reflects a willingness to “agree to disagree” on ambiguous language regarding the definition of “spouses”.

An autonomous EU definition of “spouse” that includes same-sex couples would be fully supported by the textual, systematic, and teleological analyses above. However, a state-of-formalization rule might better strike the balance between Union and Member State interests by respecting both Union interests and the family law of at least one Member State.

⁷⁴ Titia Loenen, ‘Indirect Discrimination: Oscillating Between Containment and Revolution’, in: *Non-Discrimination Law: Comparative Perspectives* 195, 196 (Titia Loenen & Peter R. Rodrigues, eds., 1999) (noting that the ECJ views “discrimination on the basis of nationality” as “the ultimate sin” in the context of interstate movement within Europe).