

**‘Am I my parents’ child in each EU Member State?’**

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**Freedom of Movement and Personal Status  
of Rainbow Families in the EU**

Submission for the EJTN THEMIS Competition 2022

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## 1. Introduction

On the 14 December 2021 the Court of Justice of the European Union (CJEU) issued a significant preliminary ruling<sup>1</sup> and decided:

*‘The Member States are [...] free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. Nevertheless, [...] each Member State must comply with EU law [...] by recognising [...] the civil status of persons that has been established in another Member State in accordance with the law of that other Member State.’*

The initial case concerns the question of EU citizen rights for a child of two mothers. In 2018, a woman of Bulgarian nationality and a woman of British nationality entered the state of wedlock in Gibraltar. The following year, the couples’ first child was born by one of the women in Spain. This formed family structure is an example of many multinational families in the EU. Following, the women requested a Bulgarian passport for the child as an EU citizen, which was first rejected by the Bulgarian authorities, due to different national EU Member State family law.

The facts presented emphasise a typical problem of non-traditional multinational families, who are subjected to divergent national Member States law: A frequent confrontation with the possibility that legally established parent-child relationships will not be recognised once they cross a national border in the EU.

This paper will further assess the legal ground of the reasons for various resulting obstacles to these families and expose different changes, which derive from the CJEU findings in this case. Due to a strict review of the legal aspects thereto, cultural developments as well as the specific national laws on parental rights, will solely be mentioned as a sidenote.

## 2. Previous Standing on Rainbow Family Rights in the EU

To assess the importance of the CJEU ruling for Rainbow Families<sup>2</sup>, it is necessary to consider the current standing on their rights concerning family and personal status within the EU Member States.

Spain, as the host Member State, is the country of birth and the current residing place of the applicant's family. Spains’ administration issued the birth certificate for S.D.K.A. including two mothers. Bulgaria on the other hand, is the Member State of origin and its Administrative Court initiated the request in front of CJEU by invoking Art. 267 of the Treaty on the Functioning of the European Union (TFEU), due to an opposition to issue a passport and birth certificate for

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<sup>1</sup> Case C-490/20, *V.M.A. v Stolichna obshtina* (ECLI:EU:C:2021:1008).

<sup>2</sup> The term includes two parents of the same sex with children.

S.D.K.A. that includes two mothers. The family law in Spain is one of the most liberal and progressive in the world.<sup>3</sup> In 2005 same-sex marriage was legalised and in 2015 it became legal for two married women to automatically both be recognised as the child's mothers, where one of the mothers gave birth.<sup>4</sup> Even though Spain is considered to be strongly catholic influenced and might therefore be directed towards a traditional understanding of family, which excludes the acceptance of Rainbow Families, the government of political left parties in the early 2000s has established a broader understanding of family in the Spanish legal system.

Bulgaria on the contrary, is one of the countries with the most restricted rights for Rainbow Families and LGBTQIA+ people<sup>5</sup> in general. Although it has an Anti-discrimination Act deriving from the EU Council Directive 2000/78/EC<sup>6</sup> and Bulgarian law (Law for protection against discrimination, Art. 4), marriage is strictly reserved for couples of opposite genders by the Bulgarian Constitution<sup>7</sup>. Despite recommendations from different states at the last summit of the UN Human Rights Council in 2020, Bulgaria is still opposed towards a legal framework of registered partnership for same-sex couples<sup>8</sup> and does not grant them adoption rights. A Bulgarian birth certificate can therefore only state one female as the mother and one male as the father.

These tendencies are in accordance with the total overview of EU Member States legislation towards Rainbow Families. Member States in the middle and western parts of the EU have a more liberal legislation, while eastern states grant these families no or only limited rights<sup>9</sup>. These differences in national family law often result in a conflict with the guarantee of several fundamental freedom rights for EU citizens, which need to be respected in all Member States equally.

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<sup>3</sup> L. E. Alguacil and A. Nonelli Rodríguez, *Good Intentions May Not Be Enough, The Spanish Draft Bill for the Equality of Trans and LGTBI People* (08 December 2021), available at <https://verfassungsblog.de/spanish-lgbtq-bill/>.

<sup>4</sup> P. Esteban, *El laberinto legal que sufren las parejas homosexuales para inscribir a sus hijos* (08 April 2019), available at [https://elpais.com/economia/2019/04/05/mis\\_derechos/1554465687\\_049095.html](https://elpais.com/economia/2019/04/05/mis_derechos/1554465687_049095.html).

<sup>5</sup> The abbreviation includes lesbian, gay, bisexual, transsexual/transgender, queer, intersexual and asexual people.

<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022.

<sup>7</sup> Submission to the United Nations Human Rights Council for its Universal Periodic Review of Bulgaria (9th Session), p. 1; EPRS | European Parliamentary Research Service, p. 6.

<sup>8</sup> UN. Doc A/HRC/46/13, p. 12 f.

<sup>9</sup> K. Raibagi, *Where does Europe stand on LGBTI rights?* (15 June 2019), available at <https://www.europeandatajournalism.eu/eng/News/Data-news/Where-does-Europe-stand-on-LGBTI-rights>.

### 3. Renewed understanding concerning the Scope of European Citizen Rights

The CJEU, as of the 14 December 2021 judgement, defined a new scope of the European citizen rights in question in this case.

#### *A. Freedom of Movement and Civil Status of Persons*

Freedom of movement and residence for persons in the EU is the cornerstone of Union citizenship, which was established by the Treaty of Maastricht in 1992 (TEU).<sup>10</sup> EU workers and citizens have the right to move and reside in other Member States without being discriminated. This right can only be restricted based on a public interest that is proportionate to the restriction imposed. The right to free movement goes hand in hand with civil status law and can merely be properly exercised by issuing and recognising certificates for "life events" such as birth, marriage or even just one's own name.

#### *1. The Legal Framework*

##### (a) Freedom of Movement

Articles 21, 45, 49 and 56 TFEU are collectively known as "the free movement of persons provisions" and grant to EU citizens the right to move to, and reside in the territory of another Member State. The provisions governing free movement of people have always been supplemented by a plethora of secondary legislation. For the purposes of this paper, the most important instruments are Directive 2004/38<sup>11</sup> and Regulation 492/2011<sup>12</sup>. The former provides a more detailed explanation of the right of residence and others, such as family reunification rights under EU law<sup>13</sup>, whereas the latter further develops the prohibition of discrimination on the basis of nationality. It was recognised early on, that to ensure the free movement of Member State nationals, provisions should be made for them to be joined by close family members in the Member State, to which they move. To that end, family reunification rights were recognised as secondary rights, in addition to the primary right to move freely between EU Member States

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<sup>10</sup> R. Corbett, *The Treaty of Maastricht: A Comprehensive Reference Guide* (1993).

<sup>11</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

<sup>12</sup> Regulation (EU) 492/2011/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

<sup>13</sup> Article 3 (1) of Directive 2004/38.

conferred by free movement of persons provisions. Such rights were – and continue to be – unmentioned in the Treaties but have been explicitly granted through secondary legislation.<sup>14</sup> Directive 2004/38 grants automatic (Article 2(2)) and discretionary (Article 3(2)) family reunification rights to all Union citizens who move to and reside in the territory of another Member State. Union citizens who return to their Member State of nationality after exercising their free movement rights derive family reunification rights from the free movement of persons provisions, and Directive 2004/38 applies 'by analogy' in those cases.<sup>15</sup> However, the right of EU citizens to have freedom of movement is not unconditional; it may be exercised under the conditions and restrictions of European Community law. For example, the CJEU ruled in 2021 that EU citizens must carry an identity document when travelling to other Member States and that such a requirement does not violate the right to free movement.<sup>16</sup>

Historically, free movement in the EU has been based on the assumption that the EU citizen is heterosexual, that her or his partner is of the opposite sex, that they are married, and that both spouses are listed as the child's legal parents on each of their children's birth certificates.<sup>17</sup> A 'traditional family' of this type can expect a warm welcome when exercising their free movement rights under EU law by moving to (or returning from) another EU Member State. The host Member State (or, if the family is returning, the home Member State) will recognise the parents' marriage certificate and the children's birth certificates. The parents will have all of the rights and responsibilities of married couples such as that both are the legal parents for their children.<sup>18</sup> When Rainbow Families exercise that exact same right and relocate to a Member State that does not recognise same-sex couples and/or their families, they face the risk that that Member State will refuse to legally recognise the familial ties for all or some members of that family, as these have been legally established elsewhere. This shows that Rainbow Families are not treated in the same way when it comes to free movement as traditional families. While the same-sex couple is legally recognised as a married couple, registered partners, or unregistered partners on one side of the border (in a durable relationship), they become two unrelated individuals on the other side of the border, devoid of the rights and duties enjoyed by comparable opposite-sex couples in the host or home Member State.

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<sup>14</sup> G. Barrett, *Family matters: European Community law and third-country family members* (2003) 40 *Common Market Law Review* 369, 375-376.

<sup>15</sup> Case C-456/12, *O. and B.* (ECLI:EU:C:2014:135), at para. 49 and 50.

<sup>16</sup> Case C-35/20, *Syyttäjä* (ECLI:EU:C:2021:813).

<sup>17</sup> A. Tryfonidou and R. Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU* (March 2021), available at

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL\\_STU\(2021\)671505\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf).

<sup>18</sup> *Ibid.*

### (b) Civil Status

The ‘civil status’ is the family law position of a person within the legal system. It includes data on birth, marriage, civil partnership and death, as well as all related facts under family- and name law.<sup>19</sup> While the right to marry and the right to found a family exist under Article 9 ECHR, they are only guaranteed under national laws governing the exercise of these rights. Accordingly, the civil status law is subject to the Member States and has been little harmonised so far. Only the EU Regulation 2016/1191<sup>20</sup> allows the informal use of so-called civil status documents from EU member states, which serve to document birth, death, name, marriage or divorce, a registered civil partnership, adoption, or citizenship. Under the provisions of this Regulation, which was accepted to simplify the free movement of EU citizens within its territory, the Member States are obliged to recognise the authenticity of the document issued but not its legal effect. Although there are also provisions within the framework to exercise the right to free movement, which oblige the Member States to issue their nationals with an identity card or passport and which thus have an impact on civil status law.<sup>21</sup> Nevertheless, the civil status law remains within the competence of the Member States. For this reason, the issuance and recognition of public documents is largely up to them and is only guided by decisions of the European courts.

Birth registrations, for example, involve the official recording of a birth within the civil registry, which records both the fact of the birth and its characteristics.<sup>22</sup> This usually leads to the issue of a birth certificate by the civil registrar, that is essential evidence of a child’s family ties as well as their place of birth. For the establishment of the child’s nationality and legal identity, these are key aspects. Nationality is usually acquired either through the parents (*jus sanguinis*) as it is the case in Spain<sup>23</sup> or the place of birth (*jus soli*) as is the general principle in England.<sup>24</sup> In the present case, Bulgaria, that generally acknowledges the *jus sanguinis* principle<sup>25</sup>, does

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<sup>19</sup> Federal Ministry of the Interior and Community, *Civil status law*, available at <https://www.bmi.bund.de/DE/themen/moderne-verwaltung/verwaltungsrecht/personenstandsrecht/personenstandsrecht-node.html>.

<sup>20</sup> Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016, on promoting the free movement of citizens, by simplifying the requirements for presenting certain public documents in the EU and amending Regulation (EU) No 1024/2012.

<sup>21</sup> See Article 4(3) of Directive 2004/38 (Free Movement Directive).

<sup>22</sup> P. Cabral, *Protecting the right to a nationality for children of same-sex couples in the EU – A key issue before the CJEU in V.M.A. v Stolichna Obsthina (C-490/20)* (15 February 2021), available at <https://eumigrationlawblog.eu/protecting-the-right-to-a-nationality-for-children-of-same-sex-couples-in-the-eu-a-key-issue-before-the-cjeu-in-v-m-a-v-stolichna-obsthina-c-490-20/>.

<sup>23</sup> Art. 17 Spanish Civil Code.

<sup>24</sup> Art. 1 British Nationality Act 1981.

<sup>25</sup> Art. 8 Bulgarian Citizenship Act.

not recognise the same-sex marriage<sup>26</sup> and refused to issue the birth certificate and subsequently the passport for the child.

### ***B. Rights of the Child***

The rights of the child are generally regarded as part of human rights, that recognise at the same time the vulnerability and fragility of children resulting of their age.<sup>27</sup> The definition of the rights of the child is broad and covers fundamental guarantees, civil and political rights as well as economic, social, and cultural rights in their individual and collective form.<sup>28</sup>

The legal framework regarding rights of the child within the EU is governed by different legal sources.<sup>29</sup> First, the UN Convention on the rights of the child is as a basic document regulation regarding the protection of minors that was ratified by all Member States of the EU. Furthermore, Articles 24 and 31 of the Charter of Fundamental Rights of the EU (the Charter) explicitly recognise children rights. Finally, Article 3 of TEU sets the protection and promotion of the rights of the child as one of the objectives of the EU.

Furthermore, within the legal framework there are also secondary legal sources that work as guidelines, for instance Political Guidelines of the European Commission 2019-2024, the European Parliament resolution on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child (2019/2876(RSP)) as well as the European Parliament Resolution of 11 March 2021 on children's rights in view of the EU Strategy on the rights of the child (2021/2523(RSP)).

The CJEU found a violation of the Rights of the Child of Bulgaria based on the refusal of Bulgarian authorities to issue the birth certificate. The CJEU identified this refusal as a violation of Art. 24 (2) of the Charter, i.e., that the Bulgarian Authorities disregarded child's best interests. Due to a lack of a definition for this term, it is necessary to take the child's best

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<sup>26</sup> Danish Institute for Human Rights, *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Bulgaria* (2009), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/363-fra-hdgso-part2-nr\\_bg.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/363-fra-hdgso-part2-nr_bg.pdf), p.3.

<sup>27</sup> UN General Assembly, *Convention on the Rights of the Child* (20 November 1989), available at <https://www.refworld.org/docid/3ae6b38f0.html>.

<sup>28</sup> Child Rights International Network, *What rights are unique to children* (2018), available at <https://archive.crin.org/en/guides/introduction/what-rights-are-unique-children.html>.

<sup>29</sup> Commission of the European Communities, *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* (4 June 2007), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:en:PDF>.



interests into account under the conditions of the case.<sup>30</sup> In this case the CJEU found the refusal of the registration of the child not in accordance with its best interests. It reasoned with the possible unacceptable limitation of the rights to move and reside freely within the EU territory because the parents of the child are of the same sex and emphasized that the Art. 24 (2) of the Charter had to be interpreted in conjunction of other provision of the Convention on the rights of the child, especially Art. 2 of the UN Convention.

To grant the applicant these rights to the full scope marked by these considerations, the Court had to state that the best interests of the child are solely recognised, if the right to free movement with its family is respected.

### ***C. The Human Right to Family Life***

The CJEU upheld its standing on the meaning of ‘family life’ under Art. 7 of the Charter from previous cases<sup>31</sup>, which also includes Rainbow Families<sup>32</sup>. This finding is in line with the case law of the ECtHR (European Court of Human Rights) on the right to family life under Art. 8 ECHR, with the requirement of evidence of an existence of close personal relation and a mutual enjoyment of each other's company for the child and its parents<sup>33</sup>. The ECtHR has confirmed that this condition can be met with a non-traditional family as well<sup>34</sup>. Seen that between S.D.K.A. the relationship to both V.M.A. and K.D.K. has been established from the moment of birth, this has never been questioned by the Court.

These formed family ties directly fall within the scope of family rights and are not to be further determined by any given Member States legislation on the legal status of Rainbow Families<sup>35</sup>. If this would have been made a condition to invoke the right under Art. 7 of the Charter, it would result in a different scope measurement of the protection deriving from the right to family life for different EU citizens, depending on the national legislation of the host Member State. However, in an earlier case, which has not been motioned by the CJEU judgement, the ECtHR held in 2013, that the female life-partner of the mother has no right under Art. 8 seen in

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<sup>30</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (29 May 2013), available at <https://www.refworld.org/docid/51a84b5e4.html>, para 32.

<sup>31</sup> Such as Case C-673/16, *Coman and Others* (EU:C:2018:385).

<sup>32</sup> Case C-490/20, *V.M.A. v Stolichna obshtina* (ECLI:EU:C:2021:1008), at para. 61.

<sup>33</sup> ECtHR, *K. and T. v. Finland*, 25702/94, Judgement 12 July 2001, (CE:ECHR:2001:0712JUD 002570294), §§ 150 and 151.

<sup>34</sup> ECtHR, *Boeckel and Gessner-Boeckel v. Germany*, Application no. 8017/11, Judgement of 7 May 2013, §27.

<sup>35</sup> ECtHR, *Vallianatos and Others v. Greece*, Applications nos. 29381/09 and 32684/09, Judgement delivered 7 November 2013, (CE:ECHR:2013:1107JUD002938109).

conjunction with Art. 14 ECHR to obtain a second motherhood by birth of the child and to be mentioned as such in the child's birth certificate<sup>36</sup>. This statement could have been interpreted as a justifiable rejection of a broader guarantee of the applicants' family right by the CJEU too. Still, this was not the case, because although the circumstances in these two cases concerning the structure of the two Rainbow Families seem similar, in 2013 it was not legally possible for the two women in the *Boeckel and Gessner-Boeckel v. Germany* case to be married in Germany. The CJEU had to consider the different initial legal status of the partnership between the applicants V.M.A. and K.D.K., who were already married and granted the same rights as a traditional family in Spain.

#### **4. Margin of Legal Decision-Making by the CJEU**

In every legal process, the margin of decision-making by the CJEU must be carefully assessed and thereto the question whether the Court made an appropriate decision within this framework. The challenge here is to balance the rights of the individual with the preservation of the national identity of the Member States, in accordance with Art. 4 (2) TEU. It is questionable where the outer limits of the decision-making range lie - what was the minimum decision that the CJEU had to take and were the possibilities fully exhausted or could the court have gone further?

##### ***A. Limited Approach***

If a violation of fundamental freedoms has been established, it is the task of the European Courts minimum to ensure that existing Union law limits are observed and respected by all Member States. The requirements for a restriction of fundamental freedoms are generally high and the concept of 'ordre public' must be interpreted narrowly in this context. It is conceivable that the CJEU could have rejected an obligation for Bulgaria to issue a birth certificate with two mothers. On the one hand, this could have been justified by the fact that the Spanish government confirmed that the child was also entitled to Spanish citizenship and thus an identity document could also be issued there.<sup>37</sup> This would have circumvented the specific question referred and the fact that the child undisputedly holds Bulgarian citizenship would have remained unnoticed. However, the child would thus be able to exercise its right to freedom of movement in the EU. Secondly, it would have been possible to decide that the Bulgarian authorities could request information on the identity of the child's biological mother. This would have left Bulgaria free

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<sup>36</sup> ECtHR, *Boeckel and Gessner-Boeckel v. Germany*, Application no. 8017/11, Judgement of 7 May 2013, § 31.

<sup>37</sup> Opinion of advocate general Kokott delivered on 15 April 2021, Case C-490/20, *V.M.A. v Stolichna obshtina* (ECLI:EU:C:2021:296), at para. 53.

to determine parentage according to its national law and would have entitled it to consider only one woman as the child's mother, be it the birth mother or the woman who assumed the role of second parent. Nevertheless, if the other partner is also stated as the mother on the original birth certificate, resulting in divergent data on the issued civil status documents, this could lead to considerable administrative, professional, and private disadvantages for the persons concerned.<sup>38</sup> Ultimately, this would also result in a (minor) restriction of freedom of movement, but this could be justified by the preservation of Bulgaria's national identity. With the limited approaches described above, the Court would have respected the minimum degree of freedom of movement, but at the same time would be more weighted towards the competence of the Member States.

### ***B. Broader Approach***

In contrast, the margin towards an interpretation of a broader scope of EU citizen rights, originates from the Member States obligation to respect Union law as stated in Art 4 (3) TEU. Was it within the resources of the CJEU to compel the Bulgarian government not only to issue a passport on another Member States certificate, but to transform the generated birth certificate and certify a Bulgarian birth certificate with the same content, stating two mothers?

Referring to the aforementioned, the framework to the rights in question allow a high standing on the freedom of movement and right to family life under Art. 21, 45, 49,56 TFEU and Art. 7 of the Charter. The protection of these rights is one of the Unions profoundest aims and can only be fully respected if a certain personal status is granted to a citizen throughout all Member States. This allows a true unified understand in the EU. Still, it would have been beyond the competence of the CJEU to deliver a judgement to this extend.

Another approach by the CJEU could have been, to respect the Bulgarian family law only to the extent to oblige the authorities to issue two birth certificates combined, to state in each of them one of the two parents as a mother, without disrespect for the gender-based differentiation. On this occasion, the same dilemma of having two, even three different birth certificates for the child between Spain and Bulgaria would still exist. Bulgaria then might also invoke its right to grant the personal status by national legislation and mark an overstep of competence by this CJEU ruling.

The next narrower step was in fact, to grant the existing Spanish birth certificate enough power to be accepted in Bulgaria as well, to directly obtain a passport. Thus, the assertion of EU citizen

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<sup>38</sup> *Ibid*, at para. 142.

rights by this Rainbow Family, is not under the condition, to give to the Bulgarian state personal information on the biological decent and reduces the Bulgarian state on its independence to determine this strictly under national law.

### ***C. Waive on the Review of Non-Discrimination Principle by the CJEU***

Surprisingly, there is no mention of a possible violation of Article 21 (1) EU CFR in the request of the preliminary ruling of the referring Court, when it comes to the rights of parents<sup>39</sup>. However, regarding the wording of the Article 21 (1) CFR the violation of the non-discrimination cannot be excluded. In consideration comes especially the discrimination based on sex and sexual orientation.

#### *1. Discrimination in the Light of Article 21 (1) EU CFR*

The non-discrimination principle contains a prohibition of different treatment based on protected grounds.<sup>40</sup> These grounds are explicitly listed and in general regarded as identifiable, objective, or personal characteristics, or ‘status’, by which individuals or groups are distinguishable from one another. According to the CJEU case law the different treatment may be justified, nevertheless that such treatment shall be based on objective factors unrelated to this discrimination ground.<sup>41</sup>

##### (a) Discrimination based on Sex

The direct sex discrimination is based on the fact, that an individual is either a woman or a man and either this man or this woman receives less favourable treatment than persons of the opposite sex.<sup>42</sup> In this case it can clearly be stated a discrimination based on sex. There is a different treatment because a birth certificate is issued stating two mothers, i.e., women in that case as parents. The National Authorities of a Member State refused to issue such a birth certificate because only a man and a woman may be registered as parents in the Bulgarian national certificate. Thus, under the circumstances that a man and a woman as parents would apply for a birth certificate, the National Authorities of a Member State would issue such a birth

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<sup>39</sup>de Groot, *EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obsthina* (2021), available at <https://hdl.handle.net/1814/69731>, p. 10.

<sup>40</sup> European Union Agency for Human Rights, *Handbook on European non-discrimination law* (2018) available at [https://www.echr.coe.int/Documents/Handbook\\_non\\_discr\\_law\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf), p. 42.

<sup>41</sup> CJEU, C-173/13, Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales, 17 July 2014, para. 79.

<sup>42</sup> European Union Agency for Human Rights, *Handbook on European non-discrimination law* (2018) available at [https://www.echr.coe.int/Documents/Handbook\\_non\\_discr\\_law\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf), p. 44.

certificate with no additional questions. Under this comparison between the alleged of the homosexual couple and theoretical heterosexual couple in the same situation, results the refusal to issue a birth certificate in this case in a different treatment based on the sex.

The question is whether this different treatment also justifiable in the light of the EU CFR.

Under the CJEU case law, the justification for a different treatment based on grounds of sex should reflect a legitimate social-policy objective, which is appropriate to achieve that aim and is necessary to do so.<sup>43</sup> This existence of the legitimate social-policy seems to be questionable in this case. Even though the CJEU made no statement regarding the social-policy, it made a statement regarding the public policy and referred to its previous judgments including the Coman judgment and emphasized that the concept of public policy as justification must be interpreted strictly.<sup>44</sup> This thought regarding public policy derogating a fundamental freedom is transferable of the social-policy as a justification for the direct sex discrimination. Because of its strict interpretation it does not offer a sufficient justification in this case. Thus, a sex discrimination should have been stated.

#### (b) Discrimination based on Sexual Orientation

Sexual orientation can be defined as ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.’<sup>45</sup> This includes discrimination of persons identifying as gay, lesbian, bisexual, heterosexual, or queer.

As the Bulgarian authorities in this case refused to issue a birth certificate, they carried out a different treatment of the married women as they requested to obtain information on who was the pregnant parent and who was the non-pregnant parent for this child. Also, in that case there seems to be no other justification that the social-policy of Bulgaria and consequently, a discrimination based on sex has to be stated.

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<sup>43</sup> CJEU, C-173/13, Maurice Leone and Blandine Leone v. Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales, 17 July 2014, para. 79.

<sup>44</sup> Coman Judgment, para 55.

<sup>45</sup> European Union Agency for Human Rights, *Handbook on European non-discrimination law* (2018) available at: [https://www.echr.coe.int/Documents/Handbook\\_non\\_discr\\_law\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf), p. 176.

## *2. Discrimination under the Convention on the Rights of the Child*

Although the CJEU omitted to state the possible discrimination of parents, it still made its point regarding the child. The CJEU stated the possible violation of Article 2 of the Convention on the rights of the child, i.e., referred to the failure of the respective public authorities that did not register the child. This unactioned registration saw the CJEU carry out a possible discrimination based on sexual orientation of parents.

## *3. Lack of Discrimination*

It remains unclear whether the CJEU did not witness any relevant violation of the non-discrimination principle or whether it simply decided not to address this possible violation. The question is what the possible explanation for the decision of the CJEU may be.

Firstly, it is possible that the CJEU did not state the violation of the non-discrimination principle in this case. Secondly, the CJEU expressly stated that the National Member State is obliged to issue the passport of the child and is not entitled to require the issuing of a birth certificate first. Therefore, the question whether there was a violation of the non-discrimination principle became irrelevant. However, based on the aforementioned considerations, it would be preferable if the CJEU would have stated if there was a violation of Art. 21 (1) EU CFR or not to clarify the question.

## ***D. Possible Justification for the CJEU Findings***

The assessment of the reasons for the decision by the CJEU to that extend, is relevant for an understanding of the consequences. The impact of the decision is definitely not insignificant considering its consequences, both legal and social.

### *1. Social Development*

A major justification for the decision of the CJEU is the societal transformation in Europe towards unconditional acceptance and empowerment of LGBTQIA+ rights in recent decades. Diverse family forms exist and will always exist, whilst the social recognition and support of Rainbow Families in society is also steadily increasing. 76% of Europeans surveyed in 2019 agreed that gay, lesbian, or bisexual people should have the same rights as heterosexual people, compared to 71% in 2015.<sup>46</sup> For this reason, many Member States have already reacted and

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<sup>46</sup> European Commission, *Spotlight on the EU and LGBTQI Equality*, available at <https://op.europa.eu/webpub/com/factsheets/lgbti/de/>.

increasingly improved the legal status of same-sex partners.<sup>47</sup> This law is not rigid and therefore must take social developments into account. It is not there for its own purpose, but for the people. This is precisely why the CJEU must also take this social change into account and contribute to strengthening LGBTGIA+ rights. The EU has taken up the cause of equality and anti-discrimination<sup>48</sup> and must now enforce this in all areas - especially in such important issues surrounding the legal status of Rainbow Families. Despite the clear legal mandate of the EU and the commitment of two of its central bodies, the EU Commission and the EU Parliament, to uphold and protect human rights in Europe, the level of legislative protection against discrimination on the grounds of sexual orientation and gender identity is not sufficiently developed in some EU Member States.<sup>49</sup> This is another reason why it is paramount that European Courts, such as the CJEU, use their decisions to ensure that fundamental freedoms are respected by all, to offer guidance and to monitor implementation and progress by Member States. The role of civil society must not be underestimated - it is the basis and the carrier of our community of values. Neither political nor legal decisions can completely or permanently bypass the social influence; on the contrary, they must also be supported by society, so that social development ultimately constitutes an essential justification of the Court's decision.

## 2. Comparison to the USA

A comparable issue concerning the recognition of Rainbow Families, arose in the United States of America very recently. Clearly the EU, as a supranational organisation does not have the same legal standing as the federal government and the CJEU not the competence as the federal jurisdiction in the US, however similarities in this matter do occur. Originally the federal states in the US have the competence to issue marriage licenses and to define the guidelines to either support same-sex marriage or reserve marriage only to couples of opposite sexes. This resulted in a wide range of different legal recognition of same-sex couples, between the states<sup>50</sup>. Rainbow Families would be granted a marriage license in some states, or a registered civil partnership or similar regulation in other states. The federal law DOMA (Defense of Marriage Act from 1996) defines a marriage as the union of a man and a woman (not including

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<sup>47</sup> See above, at point 2. *Previous Standing on Rainbow Family Rights in the EU*.

<sup>48</sup> European Commission, *LGBTIQ Equality Strategy 2020-2025* (12 November 2020), available at [https://ec.europa.eu/info/sites/default/files/lgbtiq\\_strategy\\_2020-2025\\_en.pdf](https://ec.europa.eu/info/sites/default/files/lgbtiq_strategy_2020-2025_en.pdf).

<sup>49</sup> See above, at point 2. *Previous Standing on Rainbow Family Rights in the EU*.

<sup>50</sup> R. Barnes, *Supreme Court strikes down key part of Defense of Marriage Act* (26 June 2013), The Washington Post, available at [https://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc\\_story.html](https://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html).

transgender persons), and that one state is not obligated to oblige by the descending understanding of another state. This constitutes the question on, which legal status needs to be granted to Rainbow Families in case they make use of their right to free movement in the US between states of different family law. The federal government does not have legislative power in these matters. Therefore, in 2013 the US Supreme Court, had to come to a decision on the application of federal tax law and thereby equally granted taxation benefits to married same-sex couples and consequently considered a marriage between same-sex partners, that could only be issued in 13 states at the time, equal in the light of federal law<sup>51</sup>. This interpretation of the law was possible because the Court declared the specific sections of the DOMA unconstitutional, by reasons of a violation of the equal protection clause<sup>52</sup>. This adjudication can be interpreted as the first step towards a broader recognition of Rainbow Families in the US and goes hand in hand with an extensive acceptance of Rainbow Families in the US in general<sup>53</sup>. The aforementioned problems continued to exist until the final and ‘game changing’ ruling by the US Supreme Court in the case of *Obergefell v. Hodges* in 2015<sup>54</sup>. The Court stated that ‘*The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. (Pp. 27–28)*’, and thereby completed the full recognition of Rainbow Families in all 50 states. It must be highlighted, that in the year the judgement was delivered, research showed an overall acceptance in favour of same-sex marriage between 60% of US citizens for the first time<sup>55</sup>. Following, the US Supreme Court declared in the case of *Pavan v. Smith* in 2017, that the birth certificate of a child can and must include both married parents, even in the case of two married women<sup>56</sup>. Now, the CJEU has no competence to issue a similar judgment as in the *Obergefell v. Hodges* or *Pavan v. Smith* case, at present. The recent judgement by the CJEU, concerning a general recognition of the Spanish

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<sup>51</sup> U.S. Supreme Court, *United States v. Windsor*, 26 June 2013, available at [https://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](https://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf).

<sup>52</sup> Live Analysis of the Supreme Court Decisions on Gay Marriage, The New York Times, available at <https://www.nytimes.com/interactive/projects/live-dashboard/2013-06-26-supreme-court-gay-marriage>.

<sup>53</sup> The American Values Atlas, PRRI Overview Chart, Year 2015, available at [http://ava.prii.org/#lgbt/2020/States/lgbt\\_ssm/2,3,9](http://ava.prii.org/#lgbt/2020/States/lgbt_ssm/2,3,9).

<sup>54</sup> U.S. Supreme Court, *Obergefell v. Hodges*, 26 June 2015, available at [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

<sup>55</sup> The American Values Atlas (53).

<sup>56</sup> U.S. Supreme Court, *Pavan v. Smith*, 26 June 2017, available at <https://supreme.justia.com/cases/federal/us/582/16-992/>.



birth certificate by the Bulgarian state, is a first step in the same direction as the 2013 US Supreme Court ruling. In line with the obligation to respect EU citizen rights, this ‘compromise’ appears to be a first signal towards the Member States, that take into account the changing image of family values in society, which have already found their place in new national family law. It eliminates at least one problem deriving from this division of competences and conflicting legislation for Rainbow Families, as done so in 2013 in the US.

### *3. EU Parliament Recommendation*

Finally, the CJEU judgment was announced only three months after the historical resolution adopted by the EU Parliament on 14 September 2021.<sup>57</sup> The EU Parliament stressed the importance of the freedom of movement that might be limited due to the lack of mutual recognition of parenthood of Rainbow Families in some Member States.

The time coincidence of the judgment and the aforementioned resolution is notable. Within the light of the previous clarifications, it seems rather improbable that the judgment was a direct result of the judgment due to the immensely high figure of recent policy changes and documents on the issue of Rainbow Families. The resolution also refers explicitly to the opinion of the Advocate General Kokott delivered on 15 April 2021 in the case *V.M.A. v Stolichna Obsthina, Rayon ‘Pancharevo’*. Therefore, it is obvious, that the EU Parliament was aware of how these judicial proceedings and the resolution of the EU Parliament and the CJEU Judgment influenced each other. The impact of this seems to be limited and the resolution as well as the judgement rather reflect the current social development.

## **5. Impact of the CJEU Ruling on Rainbow Family Rights**

### *A. Parental Rights*

The birth certificate is essential to perform other legal acts. Often parental rights are awarded directly from the recognition in the birth certificate, which will only be noted briefly throughout this discussion.

The CJEU stated that the Member States are obliged to recognise the Spanish birth certificate to preserve the right to a free movement and to provide to proof that both parents in the Spanish birth certificate are entitled to accompany the child as its parents. However, it did not state whether this scope of recognition is also sufficient for other legal actions. Under Bulgarian law,

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<sup>57</sup> European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU (2021/2679(RSP)).

the citizens of the Republic of Bulgaria residing abroad are under the obligation to deliver to the Bulgarian diplomatic or consular mission in the relevant country within six months after a local authority draws up a birth record for their new-born child.<sup>58</sup> Afterwards, the Bulgarian authorities issue a Bulgarian national certificate including a Personal Identification Number that is often used in everyday situations in Bulgaria. It is unclear, if in that case no PIN was to be issued for the child and what the consequences are, should the family decide to settle in Bulgaria. It is expected that the two mothers would not legally be able to carry out parental rights for one child in Bulgaria, which constitutes an ongoing issue for the guarantee of family rights.

### ***B. Influence on Member States Ruling***

The influence on the Member States Ruling is yet unclear. The Member States have different visions when it comes to this matter.

#### *1. Czech Republic*

For example, there was a recent judgment from the Constitutional Court in the Czech Republic.<sup>59</sup> In 2016 based on the decision of the Constitutional Court, the legislation forbidding adoption of a child for registered same-sex couples was changed. Currently there is a possibility for one of the partners to individually adopt a child, however this adoption is not possible as a couple. The Constitutional Court stated the violation of the non-discrimination principle, right to personal dignity and family life.<sup>60</sup>

The Constitutional Court on 11 November 2021 delivered a new judgment No. Pl ÚS 6/20 regarding this matter. In this decision it refused to recognise the parenthood of two minor children that were adopted by a registered couple, one of them with the Czech nationality and the other of the non-EU nationality. The applicant, in this case the Regional Government Office, argued with the best interests of child and the right to a family-life and that the legal state shall reflect the existing state.

However, the Constitutional Court stated that there is no violation of the right to a family-life, as only the legislative power is entitled to decide what defines family-life and upon this premises decided the legislator is to guarantee this protection for heterosexual couples only. It also expressly stated that if the legislative power regulates a matter in the field of family, it is

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<sup>58</sup>de Groot, *EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obsthina* (2021), available at <https://hdl.handle.net/1814/69731>, p. 10.

<sup>59</sup> Hartingerová, *Stejnopohlavní manželství* (2021), available at <https://www.pravniprostor.cz/clanky/ostatni-pravo/stejnopohlavni-manzelstvi->.

<sup>60</sup> Constitutional Court of the Czech Republic, No. Pl ÚS 7/15 from 14. June 2016.

also entitled to refuse to recognise documents or deeds of other states that were obtained with the aim to benefit from the foreign legal regulation.

## 2. Germany

Another EU country, that currently struggles with the changed understanding of family constellation and its very recent modification of family law towards same-sex marriage in 2017, is Germany. The German civil code was not modified to recognise married same-sex partners equally as birth parents of the child. In this respect it must be noted that several other EU countries adopted similar provision of the original German civil code<sup>61</sup> where the same issues will arise or are already in place. Concerning the recent adjustment, a case was brought before the German Constitutional Court by a married couple of two women, where one of them gave birth to the child and the other one intends, to be recognised as the child's second mother in the birth certificate.<sup>62</sup> The Higher District Court suggested a possible violation of German fundamental rights of the child and family rights and had to request the Constitutional Court for a preliminary ruling. The decision is pending to this day. Meanwhile the new German government is working on a legislative act to introduce a gender-neutral parenthood into the legal system, that as a result, will allow for a second mother to be noted in the child's birth certificate.<sup>63</sup>

The recent CJEU judgement to recognise specifically such a birth certificate from other Member States, for the purpose of EU citizen rights, might be considered for the assessment by the German Constitutional Court, which of course needs to respect EU Law and the scope set by the CJEU rulings, too.

### ***C. The Obligation to respect deviant Member States Family Law***

As the EU guarantees that the Member States are free to set their own definitions within the scope of family law, adopt their own regulation and they are generally not obliged to recognise

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<sup>61</sup> Sarmiento, *On the Road to German Hegemony in EU Law?* (2020), available at <https://verfassungsblog.de/on-the-road-to-german-hegemony-in-eu-law/>.

<sup>62</sup> Higher District Court Celle, *Constitutional doubts about lack of regulation of parental status of same-sex partners* (24 March 2021), available at <https://oberlandesgericht-celle.niedersachsen.de/startseite/aktuelles/presseinformationen/verfassungsrechtliche-zweifel-an-fehlender-regelung-der-elternstellung-gleichgeschlechtlicher-partner-198821.html>.

<sup>63</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Priority areas for action in the LGBTIQ\* field* (25 January 2022), available at <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/gleichgeschlechtliche-lebensweisen-geschlechtsidentitaet/handlungsschwerpunkte-im-bereich-lsbtiq--73924>.

institutions of other Member States including their general legal consequences. But they are obliged to recognise a certain scope of legal effects of these documents to guarantee rights ensured in the EU.

Therefore, those circumstance will lead citizens of a restrictive Member State, towards one, willing to use such a marriage or registration, to their benefit. And consequently, this leads also to an effect that Member States enabling same-sex marriage and/or registration or adoption of same-sex couples will force Member States that do not enable it, to recognise those values as a part of their own public policy. In this context it shall be also reflected that all Member States have committed themselves in Art. 3 TEU in conjunction with Art. 2 TEU to promote i.e., their values whereas the protection of minorities and respect for human rights are explicitly parts of them.

At the same time, it remains open, how will the proceedings in equivalent cases before international Courts influence national judgments. The current decision of CJEU within the preliminary ruling according to the Art. 267 TFEU is binding for the referring Court. As demonstrated by the Judgment of the Czech Constitutional Court from 2021, the values and public policy of the Member State may prevail the well-being of the child.

## 6. Conclusion

There is still a long way to go for LGBTQIA+ equality in Europe, but with its ruling, the CJEU has taken a significant positive step towards the full recognition of Rainbow Families. Accordingly, the ruling has a special impact and a high emotional value especially for all the individuals concerned - children, parents, and partners. Nowadays, there are a multitude of diverse family forms that unfortunately still struggle for recognition in many areas of life. The CJEU ruling has, at least in part, made this struggle a little easier for them. With its decision, the Court sent a strong message to all EU Member States, that Rainbow Families can under no circumstances be separated when they cross EU borders. Every child's question about whether they are the child of their parents in every EU Member State can now finally be answered with an unequivocal YES, at least regarding the recognition of civil status documents. Or as President von der Leyen asserted in her State of the Union address, *“if one is parent in one country, one is parent in every country”*.<sup>64</sup>

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<sup>64</sup> ILGA Europe, *“If You Are Parent in One Country, You Are Parent in Every Country”*: *But still today a child can be stateless in the EU just because it has two mothers* (3 February 2021), available at <https://www.ilga-europe.org/blog/if-you-are-parent-one-country-you-are-parent-every-country-still-today-child-can-be-stateless>.

The CJEU has an essential role to play in supporting progress towards a seamless implementation of international standards and human rights law in all EU Member States, and towards a European Union where Rainbow Families are fully recognised. As a union of values, the EU serves its citizens, so that the judiciary, above all, must ensure that these values and rights are really respected for all citizens. Although it is often criticised that the law is too slow and cannot keep up with the speed of social change, the CJEU has picked up speed with its decision. This means that the Court is much faster than many EU Member States and is taking on a pioneering role. This pioneering role is particularly progressive in view of the EU's lack of competence in family law matters. However, it remains to be seen whether all Member States will actively follow the Court's lead. Moreover, there will still be some obstacles to overcome before Rainbow Families are fully recognised. The next big challenge could be the clarification of the adoption question when the child is adopted by both parents under the condition that the adoption of both same-sex parents is not recognised within the legal framework of the Member State. It is expected that the CJEU will continue in its set direction and furthermore extend the rights of Rainbow Families. Finally, the Union's goal of full recognition of Rainbow Families can only be achieved and sustainably promoted if the strengthening of LGBTQIA+ rights not only gain acceptance in European society, but if politicians of all Member States, national authorities, EU institutions and bodies meet in the interest of maintaining and promoting family in all its possible forms as a long-term model for equality, non-discrimination, and value creation in the European Union.