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What Is a 'Family' in EU Law?

Do EU Policies Sufficiently Address Family Diversity and Its Consequences?

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2.1 INTRODUCTION

The family is recognised in national laws and international human rights and other instruments as being a fundamental group in society deserving of protection. It has no official or universal definition – it means different things to different people and meets different needs for different people.[1] Moreover, the concept of 'family' is not common across geographical spaces and its social and cultural understandings are constantly shifting – it is a 'highly elastic and changeable form'.[2] Accordingly, it is difficult – if not impossible – to provide a single, universal, definition for the notion of 'family' that encompasses the variety of relationships and forms of contemporary family life,[3] and, as noted by another commentator, 'we can never be quite sure what family means unless we can understand the context in which it is used'.[4]

This is the case even in the context of the European Union (EU).[5] Despite the fact that the EU Member States share some common values,[6] when it

[1] A. Diduck, *Law's Families* (Cambridge University Press 2003) 1.

[2] E. Leeder, *The Family in Global Perspective: A Gendered Journey* (Sage 2004), ch 1.

[3] A. Diduck and F. Kaganas, *Family Law, Gender and the State* (Hart Publishing 2012), ch 1.

[4] S. Coltrane, *Gender and Families* (Rowman & Littlefield 1998) 5. For an analysis of the concept of 'the family', see Chapter 3 by David Archard.

[5] It should be noted that, for ease of reference, the umbrella terms 'EU' and 'EU law' will be used throughout the chapter, even when referring to periods preceding the establishment of the EU in 1993.

[6] Article 2 of the Treaty on European Union (TEU) provides, 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

comes to the question of what constitutes a 'family', there appears to be great divergence among them, especially with regard to specific matters such as same-sex relationships, cohabitation, registered partnerships, and parenting in situations which do not involve a man and a woman who are married and who are both biologically connected to their child(ren). It is not surprising, therefore, that family law and matters that touch on family life are areas that remain tightly controlled by the Member States, as the Court of Justice of the EU (CJEU) has repeatedly reminded us in its judgments.[7]

The EU does not have the competence to legislate in the area of family law,[8] and thus, in most instances, it falls on the Member States to determine whether a group of persons constitutes – in law – a family.[9] Nonetheless, there are certain EU legal instruments which require the existence of familial ties to apply or to bestow rights on persons whose situation falls within the scope of EU law. Accordingly, from the early days of the EU's existence, its legislature and judiciary have been confronted with the question of what constitutes a family for the purposes of EU law.

In the EU context, the prevalence of the nuclear family model – in secondary legislation and the case law interpreting it – has traditionally meant that the only valid form of family in EU law was one consisting of an adult male and an adult female who are married and live together in a single-state context and produce their own biological children. This model is also premised on the sexual division of labour: the man is the main breadwinner, whilst the woman is the homemaker.[10] Nonetheless, although this continues to be the 'gold standard' under the law, recent years have witnessed a growing visibility of diverse family forms, which include single-parent families, rainbow families, reconstituted families, and families consisting of more than two adults who together parent their (biological and non-biological) children.[11] There is, also, an increasing departure from the traditional sexual division of

[7] See, for instance, Case C-148/02 *Garcia Avello* EU:C:2003:539, para 25; Case C-267/06 *Maruko* EU:C:2008:179, para 59; Case C-443/15 *Parris* EU:C:2016:897, para 59.

[8] Apart from measures concerning family law with cross-border implications – see Article 81(3) of the Treaty on the Functioning of the EU (TFEU).

[9] For this reason, as Clare McGlynn has noted, 'The Union's regulation of families is piecemeal and ad hoc and the development of family law is in its early stages': C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 21.

[10] For an explanation of the role of women in this model both in the past and the future (and especially for the purposes of social security), see V. Paskalia, *Free Movement, Social Security and Gender in the EU* (Hart Publishing 2007), ch 2.

[11] L. Hodson, 'Ties that bind: Towards a child-centred approach to lesbian, gay, bi-sexual and transgender families under the ECHR' (2012) 20 International Journal of Children's Rights 501, 502. See, also, L. Carlson, L. Sz. Oláh, and B. Hobson, 'Policy recommendations: Changing families and sustainable societies: Policy contexts and diversity over the life course

labour, with women and men often equally engaging in earning as well as caring activities.[12] Moreover, the modern family is often characterised in terms of flux and fluidity. Many families conduct their lives across borders, live under different roofs or, even, in different countries. The above changes can be attributed to a combination of social and other trends, including shifting gender relations, globalisation, evolving employment patterns, and an increased acceptance of conjugal relationships outside marriage as well as of same-sex relationships.[13] Of course, to use the words of Advocate General Geelhoed pronounced twenty-three years ago in his Opinion in *Baumbast*, 'none of these phenomena are really new; it is merely that the intensity with which and the scale on which they now occur have become so considerable that the [EU] legislature must take account of them'.[14]

Some EU Member States are already acknowledging this changing landscape of family life in their law and policy. But has the EU been influenced by this? The aim of this chapter will be to consider whether the EU has remained faithful to the traditional ideology of the nuclear family or whether it has kept pace with recent developments by embracing a notion of the 'family' that is broad enough to encompass all diverse forms of family and goes beyond the male breadwinner / female carer model of heterosexuality. Moreover, I will consider whether the increasing (intra-EU) migration that has been brought about by European integration and – more broadly – the process of globalisation, with the resultant internationalisation of families and family life, has been taken into account by the EU when determining whether a group of persons can be considered a family for the purposes of EU law. To answer the above questions, there will be an examination of the concept of 'family' employed across a spectrum of fields of substantive EU law – free movement law, anti-discrimination law, and immigration law. The chapter does not claim to exhaustively cover all areas of EU law which demonstrate the EU's approach towards the notion of the 'family', nor does it cover the three fields of substantive EU law on which it focuses in their entirety; rather, a few of the most characteristic examples from each of the chosen areas have been

and across generations' (2017) FamiliesAndSocieties project consortium <www.familiesandsocieties.eu/wp-content/uploads/2017/06/WorkingPaper78.pdf>.

[12] For a sociological analysis of this, see S. Irwin, 'Resourcing the family: Gendered claims and obligations and issues of explanation' in E. B. Silva and C. Smart (eds), *The New Family?* (Sage 1999).

[13] See Opinion of Advocate General Szpunar in Case C-335/17 *Valcheva v Babanarakis* EU:C:2018:242, paras 28 and 29.

[14] Opinion of Advocate General Geelhoed in Case C-413/99 *Baumbast and R* EU:C:2001:385, para 26.

selected. The chapter concludes that there is no single, overarching, definition of the family under EU law, but, rather, there are different definitions in different areas of EU law that are – still – underpinned by the traditional nuclear family model which has as its basis heterosexual marriage and genetic parenthood.[15]

2.2 THE TRADITIONAL NUCLEAR FAMILY MODEL UNDER EARLY EU LEGISLATION

The process of European economic integration began in the 1950s, taking the form of three economically orientated Communities.[16] Accordingly, just like with fundamental (human) rights for which the Treaties made no provision simply because it was unlikely that the promulgation and implementation of EU policies would give rise to their breach,[17] the founding Treaties were not concerned at all with the concept of 'family' or any related family rights or entitlements. This was for the simple reason that these were matters that were for the Member States to decide and in relation to which the EU had – and still has – no competence and, back at the time it was thought, no impact.[18]

The first time that EU law made provision for families was in the 1960s, with Regulation 1612/68.[19] The Regulation had as its main aim to bolster the free movement rights that were granted to workers by the European Economic Community (EEC) Treaty. For this purpose, it introduced the notion of 'family reunification', which required the Member State to which a worker moved to *automatically* accept certain of his/her family members within its territory without applying its immigration requirements. Provision for such family reunification rights was subsequently extended to other categories of

[15] See also Chapter 4 by Ségolène Barbou des Places.

[16] For more on the early steps in the history of the EU and, in particular, the creation of the three Communities, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials (UK Version)* (Oxford University Press 2020) 3–5. See also L. Van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2014), ch 4.

[17] R. Schütze, *European Union Law* (Cambridge University Press 2018) 447.

[18] The CJEU still emphasises that family law and important family law questions such as a person's status which is relevant to the rules on marriage and parenthood are matters that fall within Member State competence. See, for instance, Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008, para 52.

[19] Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2. Though, Berneri explains that, in fact, the first such piece of legislation was Regulation 15/1961 which was 'the first regulation of a three-step phase that culminated with Regulation 1612/1968/EEC and the full liberalisation of manpower': C. Berneri, *Family Reunification in the EU* (Hart Publishing 2017) 7 and 43.

free movers – the self-employed[20] and, in the 1990s, the economically inactive.[21]

Although the pieces of legislation that followed employed gender-neutral language or inclusive – albeit binary – language (by employing the pronouns 'he' and 'she') when referring to the migrant and his/her family members,[22] the first piece of legislation granting family reunification rights to migrant Member State nationals – Regulation 1612/68 – used the pronoun 'he' throughout when referring to the worker that would be joined by 'his' family. This way, it demonstrated the prevalence of the male breadwinner model.[23] The use of the male pronoun precisely demonstrates that the legislative drafters at the time could not envisage a situation whereby a woman would choose to move between the EU Member States for career purposes and her family would follow. The model treated 'women and children as the non-productive appendages of male workers'.[24] Of course, the Court has interpreted all the instruments providing family reunification rights to migrant Member State nationals (including Regulation 1612/68) as applying to both male and female 'sponsors' of family reunification rights, and, thus, no distinction has been drawn between men and women in the interpretation and application of these instruments.[25]

As regards categories of family members, provision for automatic family reunification rights in all instruments (apart from Directive 93/96, which only granted such rights to the spouse and the dependent children of the migrant Member State national and his/her spouse) was only made between the

[20] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L172/14.

[21] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.

[22] This, obviously, was the case for Directives 73/148 (n 20), 90/364 (n 21), 90/365 (n 21), 93/96 (n 21), but also the more recent Directives (which we shall mention in the next section) 2004/38 (n 45) and 2003/86 (n 46).

[23] G. Milios, 'Defining "family members" of EU citizens and the circumstances under which they can rely on EU law' (2020) Yearbook of European Law 293, 295. See also, I. Moebius and E. Szyszczak, 'Of raising pigs and children' (1998) 18 Yearbook of European Law 125.

[24] L. Ackers and H. Stalford, 'Children, migration and citizenship in the European Union: Intra-community mobility and the status of children in EC law' (1999) 21 Children and Youth Services Review 987, 990. See also, Paskalia (n 10), ch 3, for an analysis of female migration within the EU.

[25] See, for instance, Case C-1/05 *Jia v Migrationsverket* EU:C:2007:1, and Case C-40/11 *Iida* EU:C:2012:691.

migrant and (a) his/her spouse and their descendants under the age of twenty-one or dependants, and (b) dependent relatives in the ascending line of the migrant and his/her spouse.[26] The initial instruments covering the economically active, namely Regulation 1612/68 and Directive 73/148, also provided, respectively, that 'Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes,'[27] and 'Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'[28]

When it comes to adult conjugal relationships, only marriage was, initially, considered a family relationship which could give rise to automatic family reunification rights. At the time, the status of civil partnership was inexistent in Europe and beyond. Moreover, it would have been even less likely back in the 1950s and 1960s to recognise unmarried partners as constituting a 'family', given that cohabitation outside marriage was often, at the time, frowned upon. And even in the 1980s, in the *Reed* case,[29] when the CJEU was confronted with the question whether the unmarried partner of a migrant worker could be considered his 'spouse' and, thus, could *automatically* join him in the host Member State, the Court held that only marital relationships can fall within the notion of 'spouse' for the purposes of Article 10 of Regulation 1612/68. In the same case, nonetheless, the Court recognised that migrant workers would need to be allowed to be accompanied by their unmarried partners in the host Member State – in case this right was granted to the nationals of that State – to ensure they would not be discouraged from moving. This right to be joined by their unmarried partners was designated as a social advantage for the purposes of Article 7(2) of the same Regulation, which meant the host Member State would need to extend it to non-nationals if it already granted it to its own nationals. Alternatively, in situations where the host Member State did not grant to its own nationals the right to be joined by their unmarried partners – and, thus, Article 7(2) did not apply – the migrant worker would be able to rely on Article 10(2) of the Regulation to claim family reunification rights with 'any other member of the family' of the worker. However, this merely required the host Member State to 'facilitate'

[26] Article 10 of Regulation 1612/68 (n 19).
[27] Article 10(2) Regulation 1612/68 (n 19).
[28] Article 1(2) of Directive 73/148 (n 20).
[29] Case 59/85 *Reed* EU:C:1986:157.

admission of the family members who fell within those categories. The right was, thus, not automatic.

As regards 'descendants', that is, the children of the worker and his/her spouse, not much detail was provided in the legislation, apart from the fact that they should be either their dependants or under twenty-one years of age. The legislature, as well as the Court when interpreting the older pieces of legislation mentioned in this section, did not have the opportunity to clarify whether this would include children who were not biologically connected to either the migrant Member State national or his/her spouse, such as, for instance, adopted children or children conceived through assisted reproduction techniques where both the sperm and the egg were donated. McGlynn has pointed out that it would be 'repugnant' if the Court excluded such children from the scope of these provisions.[30] In any event, the Court had made clear that to be recognised as a 'descendant' it is not necessary that the child is biologically related to *both* spouses. In *Baumbast*, it was held that the step-children of the worker can also be considered as 'descendants' for the purposes of Article 10 of the 1968 Regulation. In this way, in one of the most important cases where the old legislative regime was interpreted, the notion of 'family' was extended to include reconstituted families which is already a departure from the traditional nuclear family model. This is notwithstanding the fact that, still, a marriage between a man and a woman forms the central relationship that bonds the family together.

In addition, in a series of cases, the Court devised the notion of the 'primary carer' that is, a third-country national who is the primary carer of a child who is either the direct beneficiary of free movement rights[31] or derives rights through his/her relationship with a Member State national who has exercised free movement rights.[32] From this case law, it can be observed that it is mainly women who were assigned the role of primary carer of children and other dependants despite the fact that some of them were equal or – even primary – contributors to the family finances. And this is so even in more recent case law.[33] This was also seen, albeit less explicitly, in the well-known *Carpenter* case where the Court did not employ the term 'primary carer' but may have based its reasoning on the fact that the wife of the Union citizen who was also the step-mother of his children needed to be allowed to stay in the United Kingdom to take care of her step-children so that her husband – a

[30] McGlynn (n 9) 48.
[31] Case C-200/02 *Zhu and Chen* EU:C:2004:639.
[32] *Baumbast and R* (n 14).
[33] Case C-310/08 *Ibrahim* EU:C:2010:1065, and Case C-480/08 *Teixeira* EU:C:2010:83; Case C-529/11 *Alarape* EU:C:2013:290; Case C-247/20 *VI* EU:C:2022:177.

Union citizen – could travel between Member States and offer his services in a cross-border context.[34]

In CJEU jurisprudence, it is thus women who have carried the double burden of labour market participation and expectations at home as the primary carers of children as well as homemakers.[35] Especially in the early years when the EU focused mainly on its market-building ambitions, taking care of the home and the children were not 'valued' as much as participation to the market and, thus, women who focused on home-building and child-care responsibilities were disadvantaged.[36] Moebius and Szyszczak noted back in 1998 that 'Community law maintains a rigid distinction between the market and the domestic sphere which perpetuates gender stereotyped roles for men and women and upholds discrimination in national laws'.[37]

It could be asked whether in the majority of cases it simply happened that it was the mother who was the primary carer of the child, and that if it had happened that the primary carer had been the father, the Court would have been equally willing to consider him a 'primary carer' and grant him a derivative right under EU law. This can be answered positively as, not only does the Court use gender-neutral terms when referring to the primary carer in its case law but, also, in *Rendon Marín*, it held that a father was the primary carer of his two minor children.[38] This way, the Court indicates that a man, too, can be considered as bearing that role. Moreover, the assignment of the

[34] See Case C-60/00 *Carpenter* EU:C:2002:434. This argument was actually explicitly rejected by the (female) advocate general in the case, Advocate General Stix-Hackl, in paras 102–106 of the Opinion: EU:C:2001:447. As noted by McGlynn, 'The apparent aim of Community law, therefore, is to privilege, and encourage the movement of, those families which provide the "infrastructure for men's mobility", that is, the availability of a (preferably full-time) wife': C. McGlynn, 'A family law for the European Union?' in J. Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 225.

[35] For the same argument in relation to EU anti-discrimination law, see C. McGlynn, 'Ideologies of motherhood in European Community sex equality law' (2000) 6 European Law Journal 29. This approach has also been evident in the Court's older anti-discrimination case-law in situations where parental leave was only granted to women (i.e. the mother) and where this was held *not* to amount to discrimination on the ground of sex (disadvantaging men): see, for instance, Case 163/82 *Commission v Italy* EU:C:1983:295; Case 184/83 *Hofmann v Barmer Ersatzkasse* EU:C:1984:273; Case C-243/95 *Hill and Stapleton v The Revenue Commissioners and the Department of Finance* EU:C:1998:298; Case C-218/98 *Abdoulaye v Renault* EU:C:1999:424.

[36] For an analysis of the EU's approach towards caregivers, see E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy* (Routledge 2020).

[37] Moebius and Szyszczak (n 23) 133. See also, K. Scheiwe, 'EU law's unequal treatment of the family: The case law of the European Court of Justice on rules prohibiting discrimination on grounds of sex and nationality' (1994) 3 Social and Legal Studies 243.

[38] Case C-165/14 *Rendón Marín* EU:C:2016:675.

role of the 'primary carer' to the mother in the majority of cases can be attributable to the fact that it were the parties to the case themselves who claimed that the mother of the child was the primary carer. Hence, the Court's assignment of this role to the mother has been prescribed by the parties to the cases and cannot be attributed to perpetuated gender-stereotyped roles for men and women *maintained by the Court*.

Finally, by selecting to grant family reunification rights only to 'spouses', the old legislative regime excluded by default same-sex couples from automatic family reunification rights given that same-sex marriage was only introduced in 2001, and in only one EU Member State – the Netherlands. The same approach was followed by the Court when in two cases in the late 1990s and early 2000s it was confronted with the question of whether same-sex unmarried partners[39] and same-sex registered partners[40] should be treated as equivalent to opposite-sex spouses for the purposes of, respectively, EU anti-discrimination law and the EU staff regulations. In its judgments, the Court stated in a truly homophobic fashion that same-sex relationships, whether legally recognised or not, could not be treated as equivalent to opposite-sex relationships.[41]

From the above analysis, it can be concluded that the initial EU instruments which took into account familial ties for the purpose of bestowing rights stemming from EU law were based on a nuclear family model which only recognised as a family *married* couples and their parents and children. Hence, these persons were entitled to *automatic* family reunification rights. Of course, this rather narrow approach should be placed within the social and legal context in which the six founding EU Member States were operating. Admittedly, this context was more homogeneous than the EU of today whose membership has expanded to twenty-seven.[42] Hence, at a time when all Member State family laws made provision for marriage as the only legally recognised status for couples, it does not come as a surprise that the only status that turned two adults into a family for the purposes of EU law was marriage, which was available only between two persons of the opposite sex. At the time that the founding Community Treaties, as well as the European Convention on Human Rights (ECHR), were signed, even consenting sexual relationships among adult males remained a crime within many of the participating

[39] Case C-249/96 *Grant* EU:C:1998:63.
[40] Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* EU:C:2001:304.
[41] *Grant* (n 39), para 35; ibid, paras 33–40.
[42] L. Hantrais, 'What is a family or family life in the European Union?' in E. Guild (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1999) 19.

countries,[43] and thus, legal recognition of same-sex relationships and the parenting rights of same-sex couples were not even contemplated when the original pieces of EU legislation that made provision for family reunification rights were drafted. Similarly, in the 1950s, and until not too long ago, the male breadwinner model was prevalent across the world including within the founding EU Member States and, hence, the assumption was made by the EU legislature that it would be the paterfamilias that would decide to move for economic purposes, and that it would be his wife and children that would need to move with him.

2.3 THE CURRENT EU LEGAL FRAMEWORK: A DEPARTURE FROM THE TRADITIONAL NUCLEAR FAMILY?

The question that this section aims to answer is whether the current EU legal framework has departed from the traditional nuclear family model. For this purpose, it will be examined whether the current legal framework covers same-sex spouses and the children of same-sex parents, whilst it will also be considered whether there is evidence of a departure from the traditional male breadwinner/female homemaker model.

Currently, there are only a few pieces of EU legislation that include the term 'family' as a concept which activates legal consequences. The term is not mentioned at all in the Treaty on European Union (TEU), whilst in the Treaty on the Functioning of the EU (TFEU) it is only used to refer to 'family law' or 'family reunification'.[44] In secondary legislation, the term 'family', either alone or with other terms, is used more widely. For instance, the terms 'family', 'family life', 'family members', 'family situation', and 'family relationship' are included in Directive 2004/38,[45] which has repealed and replaced all of the previous secondary law instruments governing the rights to free movement and residence of EU citizens (including family reunification rights), which were mentioned in the previous section. Similarly, Directive 2003/86,[46] which lays down the family reunification rights that third country nationals enjoy under EU law, makes extensive use of the terms 'family', 'family relationship', 'family life', 'family ties', and 'family members'.

[43] Namely, Germany, Ireland, the UK, and Norway.

[44] Articles 79 and 81 TFEU.

[45] 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 [2004] OJ L158/77.

[46] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

Despite the replacement of the old legislative regime with new instruments which came into force in the wake of the new millennium, the traditional nuclear family remains the ideal of the family around which the majority of the existing legislation revolves. This is obvious, for instance, in the EU's immigration policy and, in particular, in Directive 2003/86, where recital 9 provides, 'Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.'[47] For other relationships, Member States maintain their discretion:

> It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.[48]

Marriage between two persons of the opposite sex is still the law's 'gold standard' at both EU and Member State level, which means that anything resembling it may be recognised and regulated by the law insofar as it is performing similar societal functions. This becomes obvious when we look at the text of Directive 2004/38, which explicitly notes that registered partners are considered 'family members' of Union citizens only if the host Member State *treats registered partnerships as equivalent to marriages*.[49] In other words, only registered partnerships (whether opposite-sex or same-sex) which are treated – under the law – as marriages, deserve to be automatically recognised as a familial relationship for the purposes of EU law. Similarly, in 2018, the Court was in *Coman* called to clarify the meaning of the term 'spouse', for the purposes of the 2004 Directive.[50] It held that same-sex spouses are included

[47] See also, Article 4(1) of Directive 2003/86 ibid.

[48] Recital 10 and Articles 4(2) and (3) of Directive 2003/86 (n 46).

[49] Article 2(2)(b) of Directive 2004/38 (n 45).

[50] Case C-673/16 *Coman and others* EU:C:2018:385, paras 37–38. For an analysis, see, inter alia, J. J. Rijpma, 'You gotta let love move: ECJ 5 June 2018, Case C-673/16, *Coman, Hamilton, Accept v. Inspectoratul General pentru Imigrări*' (2019) 15 European Constitutional Law Review 324; A. Tryfonidou, 'The ECJ recognises the right of same-sex spouses to move freely between EU Member States: The *Coman* ruling' (2019) European Law Review 663; D. V. Kochenov and U. Belavusau, 'After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts' (2020) 27 Maastricht Journal of European and

within the term 'spouses' for the purposes of Article 2(2) of the Directive and, thus, enjoy automatic family reunification rights. Hence, same-sex couples whose relationship conforms to the 'marriage ideal' are for the purposes of Directive 2004/38 brought within the scope of privileged relationships. Nonetheless, in *Coman*, the Court was also careful to emphasise the limitations attached to its pronouncement, ensuring that the interpretation of the term 'spouse' to include same-sex spouses is only applicable in cross-border situations and only for the purpose of granting family reunification rights. In this way, the Court avoided to appear as if imposing same-sex marriage on all Member States through the back door.[51]

When the members of a couple formalise their relationship either by marrying each other or by entering into a civil partnership which is equivalent to marriage, the EU legislator assumes that this constitutes sufficient evidence of their commitment to each other. Thus, formalising the relationship entitles the couple to automatic family reunification rights. As Alan Brown has noted, the extension of legal regulation to adult relationships which possess 'marriage-like' conjugality illustrates the significance of this idealised image of the nuclear family within the legal understanding of the family.[52]

Nonetheless, marriage and civil partnership are by no means the only models for partnership between adults who together form a family. Although, in view of the increase in cohabitation outside marriage, one would have expected that recent legislative initiatives would make provision for unmarried/unregistered couples, this has not been the case. Instead, a privileged position has been maintained for married couples or couples who, albeit not married, have chosen to formalise their relationship by making a commitment which is – perceived to be – equivalent to the commitment made by married couples. Hence, although Directive 2004/38 – unlike the previous legislative regime – makes an explicit reference to unmarried partners, it nonetheless relegates them to the less privileged Article 3(3) category, which does not grant *automatic* family reunification rights.

Hence, McGlynn's point from eighteen years ago still holds true today: 'While a marriage does not have to fulfil the *ideals* of marriage for there to be "family life", a non-marital relationship has to be proven to be the match, at least in ideal terms, of marriage. The marriage contract, therefore, acts as a barrier to further intrusion into the relationship, and the functions of marriage

Comparative Law 549. See also Chapter 7 by Michal Bogdan and Chapter 9 by Geoffrey Willems.

[51] For an explanation of the limitations attached by the Court in this case, see Tryfonidou (n 50).

[52] A. Brown, *What Is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing 2019) 200.

are deemed to exist.'[53] This is reflected not only in the Court's approach towards marriage, which is, in all circumstances, considered to suffice for establishing family life (irrespective of the quality of the relationship) but also in its approach to situations where a marriage has broken down. In such instances, the Court has refrained from examining the particular circumstances of the case, noting that as long as the breakdown of the relationship is not officially established through a final divorce, the marriage is still considered as existing for the purposes of EU law.[54] This is so even if the spouses reside separately and with new partners,[55] the only exception being when the Union citizen from whom the rights are derived has left the host Member State prior to the issuance of the divorce.[56] This appears to be in contrast to the approach prevailing in the European Court of Human Rights (ECtHR) case law where all circumstances are taken into account to determine whether two or more persons enjoy family life together. As Stalford has observed, the CJEU has adopted a more 'formulaic approach' than the ECtHR, 'whereby the existence of genuine family *life* is irrelevant for the purposes of activating family rights under the free movement provisions' and what counts is 'the existence of a formal legal or biological link to confer the protection and entitlement of the free movement provisions'.[57]

Directive 2004/38 has also been interpreted by the Court as applying *only* to family members who are *joining or accompanying the Union citizen in the host Member State*.[58] This demonstrates that in the Court's view, families do not conduct family life across borders and a *disruption to enjoying family life which is conducted in a cross-border context* is incapable of impeding the free movement rights of Union citizens. This approach can be seen in the 2012 judgment in the case of *Iida*, where the Court refused to require a Member State (Germany) to grant the right of residence for the purposes of family reunification to a Japanese national whose wife and daughter had left Germany and moved to Austria where the wife worked.[59] One could have

[53] McGlynn (n 9) 16.

[54] See Case 267/83 *Diatta* EU:C:1985:67; Case C-370/90 *Singh* EU:C:1992:296; *Iida* (n 25), para 58.

[55] Case C-244/13 *Ogieriakhi* EU:C:2014:2068, paras 37–38.

[56] Case C-218/14 *Singh* EU:C:2015:476; Case C-115/15 *NA* EU:C:2016:487. Of course, Article 13 of Directive 2004/38 provides for a number of situations where the right of residence of the third country national spouse is maintained even after divorce.

[57] H. Stalford, 'Concepts of family under EU law – Lessons from the ECHR' (2002) 16 International Journal of Law, Policy and the Family 410, 413. See also, Diduck and Kaganas (n 3) 39–41.

[58] *Iida* (n 25), paras 61–63.

[59] Ibid, paras 73–81.

argued that if Mr Iida had lost his right to reside in Germany and, thus, would need to leave that Member State, this could have interfered with the right to family life of his wife and daughter who were both Union citizens, and, as a result, impede their right to move to Austria.[60]

One can, of course, question the logic of the Court in cases like *Iida*. This is so especially in the light of *Coman*, which involved a married same-sex couple who had initially lived together for four years prior to their marriage but – due to the fact that they worked in different countries – they subsequently did not live in the same country, even after they married. In *Coman*, the Court held that the situation fell within the scope of EU free movement law and that family reunification rights should be granted because the couple claimed the right to move *together* to the Member State of nationality of one of them. In *Iida*, the third country national spouse wished to continue residing in the Member State of origin of the family, even after the family members who were Union citizens had moved to another Member State.

My argument is not that the Court should have refrained from granting family reunification rights in *Coman*. Rather, my argument is that Union citizens and their family members should not be deprived of family reunification rights in situations like the one in *Iida* simply because all the members of the family do not live in the same Member State. As Advocate General Wathelet noted in his Opinion in *Coman*,

> In a globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children's education. The fact that the couple do not live together cannot in itself have any effect on the existence of a proven stable relationship . . . and, consequently, on the existence of a family life.[61]

Although the Court did not make any explicit statements regarding this point in *Coman*, it is clear from the judgment that it did not consider that the fact that the couple spent time living apart in different countries and even different continents precluded them from establishing family life. Accordingly, since the Court, in principle, appears to accept that family life can be conducted across borders, it should no longer insist that family reunification and

[60] A. Tryfonidou, '(Further) signs of a turn of the tide in the CJEU's citizenship jurisprudence: Case C-40/11, *Iida*, Judgment of 8 November 2012' (2013) 20 Maastricht Journal of European and Comparative Law 302, 317–320.

[61] Opinion of Advocate General Wathelet in Case C-673/16 *Coman and others* EU:C:2018:2, para 28.

related rights should only be granted if the family members *move* to the same Member State as the Union citizen.[62] If an obstacle to free movement can be proven to emerge as a result of a change in the 'status quo' of the family arrangements, this should suffice for finding a breach of EU law and for requiring the grant of family reunification rights.

Leaving aside conjugal relationships and moving on to consider the position of children, it will, again, be argued that the centrality of the nuclear family model means that, in general, the children who live in 'alternative families' often remain marginalised and largely excluded from many of the entitlements and benefits of Union membership.[63]

The last few years have shown a desire on the part of the EU to ensure that *all children* – irrespective of the family in which they live – should be treated in the same way under EU law. In 2019, for instance, the Court made it clear that children who are not biologically related to *either* of their (adoptive) parents can be considered as their parents' 'direct descendants' for the purposes of Directive 2004/38.[64]

More recently, the Court was invited to answer the more controversial question of the cross-border legal recognition of the familial ties among the members of rainbow families in a case which involved a baby girl whose parents were two persons of the same sex. Until recently, it was unclear whether Directive 2004/38 and, in particular, the terms 'direct descendant' and 'direct relatives in the ascending line' covered the members of rainbow families. This had given cause to Member States which do not recognise two persons of the same sex as the joint legal parents of a child, to refuse to recognise the legal ties among children and both of their (same-sex) parents – as these were established in another Member State – when families sought to claim rights deriving from EU law in their territory.[65] This issue was recently

[62] For another argument in favour of a broader approach to the scope of application of Directive 2004/38, in view of the increasingly cross-border nature of family relationships, see Opinion of Advocate General Szpunar in Case C-202/13 *McCarthy and others* EU:C:2014:345, paras 39–83.

[63] McGlynn (n 9) 22.

[64] Case C-129/18 *SM* EU:C:2019:248, para 54. See also Chapter 7 by Michal Bogdan.

[65] For a detailed analysis of this, see A. Tryfonidou, 'EU Free Movement Law and the children of rainbow families: Children of a lesser god?' (2019) 38 Yearbook of European Law 220. In 2020, NELFA (the Network of European LGBTIQ* Families Associations) produced a document which includes real life stories of rainbow families that have encountered obstacles in their (domestic and cross-border) legal recognition. The document is freely available online: <http://nelfa.org/inprogress/wp-content/uploads/2021/02/NELFA-fomcasesdoc-2021-1.pdf>. The obstacles to free movement faced by rainbow families in the EU have also been documented in a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the Request of the PETI Committee of the

clarified by the Court in the *V.M.A.* case,[66] when it ruled that the term 'direct descendants' in Directive 2004/38 should be interpreted as including the children of same-sex couples who should, thus, enjoy automatic family reunification rights with the parent or parents who are Union citizens and exercise free movement rights.[67] Moreover, in the same case, the Court held that all EU Member States are required to recognise the parent–child relationship between a child and both of her same-sex parents, which was established in the host Member State where the family lives and was attested in a birth certificate issued by that State, for the purpose of permitting the child, who is an EU citizen, 'to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States'.[68] Hence, *V.M.A.* has established that the children of same-sex couples can enjoy – with both of their parents – *at least*[69] family reunification rights under EU law, in the same way that the children of nuclear families do. Children may either be 'sponsors' of these rights if they themselves are Union citizens, or beneficiaries through their Union citizen parent or parents.

Recently, marking a departure from the nuclear family model, the Commission has signalled its intention of securing the right of *all* children to have their relationship with their parents – as established in an EU Member State – legally recognised across the EU. In December 2022, the Commission submitted a proposal for a Regulation which lays down rules on international jurisdiction on parenthood determining which Member State's courts are competent to deal with parenthood matters; rules on the applicable law, which designate the national law that should apply to parenthood matters in cross-border situations; and rules on the recognition of judgments and official

European Parliament: see A. Tryfonidou and R. Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU' (2021) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)671505>.

[66] *V.M.A.* (n 18). The Court affirmed its *V.M.A.* ruling in its Order in Case C-2/21 *Rzecznik Praw Obywatelskich* EU:C:2022:502. See also Chapter 9 by Geoffrey Willems.

[67] For an analysis of the ruling, see, inter alia, A. Tryfonidou, 'The ECJ recognises the right of rainbow families to move freely between EU Member States: The V.M.A. ruling' (2022) 47 European Law Review 534; D. Thienpont and G. Willems, 'Le droit à la libre circulation des familles homoparentales consacré par la Cour de justice de l'Union européenne' (2022) 132 Revue trimestrielle des droits de l'homme 925; L. Bracken, 'Recognition of LGBTQI+ parent families across European borders' (2022) 29 Maastricht Journal of European and Comparative Law 399. See also Chapter 7 by Michal Bogdan and Chapter 9 by Geoffrey Willems.

[68] *V.M.A.* (n 18), para 49.

[69] For an explanation that the ruling can also be read more broadly, see Tryfonidou (n 67).

documents on parenthood issued in another EU Member State.[70] Although the proposed instrument applies to *all* families in situations where there is a cross-border element and, thus, obviously, families that fit the nuclear family model can benefit from it, it will in practice mostly be of interest to so-called 'alternative families'. This is due to the fact that it is mostly the latter type of families that face difficulties with the recognition of family ties among their members in cross-border situations.

Finally, since the 1970s, there has been a concerted effort to depart from the male breadwinner/female homemaker model by adopting measures aiming to achieve a reconciliation of professional and family lives, especially for women. The slow departure from this model is most recently reflected in Directive 2019/1158 on work–life balance for parents and carers, which came into force in 2019 and in which, also, the EU legislature made a conscious attempt to depart from the traditional nuclear family model albeit, as will be explained below, in a rather half-hearted manner.[71] It has been noted that the 'Directive aims to modernise the EU legal framework in order to allow parents and carers to better balance their life and work commitments, and to ensure equality between men and women regarding employment opportunities and treatment at work'.[72] The Directive acknowledges the existence of alternative families which do not conform to the nuclear family model. For example, it introduces the right to paternity leave for at least ten days upon the birth of a child for fathers *or equivalent second parents* but only where and insofar as recognised by national law; and it defines parental leave as leave that can be taken upon the birth or *adoption*, in this way removing any emphasis from the existence of genetic links between a child and their parents. However, the Directive states that the Member States 'have the competence to define marital and family status, as well as to establish which persons are to be

[70] European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022) 695 final. For an analysis of the proposal, see A. Tryfonidou, 'Cross-border recognition of parenthood in the EU: Comments on the Commission proposal of 7 December' (2023) 24 ERA Forum 149. See also the study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the Request of the PETI Committee of the European Parliament: A. Tryfonidou, 'Cross-border legal recognition of parenthood in the EU' (2023) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)746632>.

[71] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU PE/20/2019/REV/1 [2019] OJ L188/79.

[72] European Commission, Directorate-General for Employment, Social Affairs and Inclusion, N. Picken and B. Janta, *Leave Policies and Practice for Non-traditional Families* (Publications Office 2020) 2 <http://data.europa.eu/doi/10.2767/276102>.

considered to be a parent, a mother and a father'.[73] Thus, when it comes to alternative families and, in particular, rainbow families, reconstituted families, and adoptive families, the Directive leaves it entirely up to the Member States to determine whether they will grant parental leave. This demonstrates the half-hearted approach of this instrument. Although the intention is to extend the availability of parental leave to alternative families, in practice, this is entirely dependent on the choice of the Member States.

2.4 CONCLUSION

EU family law now recognises that more family forms count as a family than it did in the 1950s and 1960s. Yet, as the above analysis has shown, the influence of the nuclear family ideal still prevails. This continuing centrality of the nuclear family model sits uneasily against the complex and diverse family forms that currently exist within the EU. Regardless of legislative reforms both at national and EU level, and changes in social demographics and the growing diversity of familial practices, the legal understanding of the 'family' under EU law continues to be centred around the traditional nuclear family model consisting of the nexus of the conjugal relationship and the parent–child relationship. In the meantime, it is still assumed that families live under the same roof and within the same Member State. Although an attempt has been made to slowly depart from the male breadwinner / female carer model, this model is still very much embedded within the societal and legal structure. Thus, despite the fact that there are bits and pieces of EU law that demonstrate acceptance of a greater diversity of family forms, the EU legal system continues to conceptualise all families through the prism of the nuclear family. This is problematic for the regulation of the diversity of family forms and practices in contemporary EU as it marginalises, excludes, and potentially discriminates against anyone who does not conform to this model.

[73] Recital 18 of Directive 2019/1158 (n 71).