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# **Family policies and diversity in Europe: The state-of-the-art regarding fertility, work, care, leave, laws and self-sufficiency**

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## Chapter 4: Legal family formats for (same-sex) couples

*By Kees Waaldijk*

### IV.1 National legislation extending the range of available formats

For a long time, across Europe, the only available legal family format for a couple was marriage, different-sex marriage. By marrying each other, the partners triggered a range of legal rights and responsibilities, between themselves and in relation to any children and others. However, over the last 40 years, in response to what the European Court of Human Rights now calls the need of same-sex and different-sex couples ‘for legal recognition and protection of their relationship’,<sup>18</sup> new legal family formats have been created and have been made available to same-sex and/or different-sex couples. Examples are registered partnership, civil partnership, legal cohabitation, de facto union, etc. This has been happening in a growing number of countries, and recently some of these countries have also opened up marriage to same-sex couples. In most member states of the European Union, and in a handful of other European countries, now at least one legal family format is available to same-sex couples (see *Table 1*).<sup>19</sup>

In spite of the lack of uniformity between the legislation of different European countries, it seems that the picture of Europe’s map is becoming less diverse than a few years ago. With the opening up of marriage in France and soon in Great Britain and Luxembourg, the situation will be as follows (see also *Tables 1 and 2*): All countries in the North-Western part of Europe (from Spain to Finland), plus some countries in central Europe (Austria, Hungary, Slovenia) are allowing same-sex couples to enter into a legal format that is either called marriage or that entails almost all of the legal consequences of marriage. In the countries in the South-Eastern part of Europe (from Italy to Russia) this is not yet the case, although some of the rights of marriage are available in Croatia and the Czech Republic, while it seems that at least one of those many rights has been extended to same-sex partners in Poland, Italy and Serbia.<sup>20</sup>

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<sup>18</sup> ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 99 (for case law of the ECtHR, see [chr.coe.int/hudoc](http://chr.coe.int/hudoc)).

<sup>19</sup> For sources of most data in *Table 1*, see Waaldijk, 2009; Paoli Itaborahy & Zhu, 2013.

<sup>20</sup> For the applicability to same-sex couples of the legal protection against domestic violence in Serbia, see Cvejić Jančić, 2010, p. 81.

*Table 1: Chronology of the 25 European countries that legally recognize same-sex couples*

	Is there any legal recognition of <i>informal cohabitation</i> of same-sex couples? If so, since when?	Can same-sex couples enter into a <i>registered partnership</i> ? If so, since when?	Do same-sex couples have access to <i>civil marriage</i> ? If so, since when?
Netherlands	1979	1998	2001
Belgium	1996	2000	2003
Spain	1994	regionally since 1998	2005
Norway	1991	no longer (1993-2009)	2009
Sweden	1988	no longer (1995-2009)	2009
Iceland	1994?	no longer (1996-2010)	2010
Portugal	2001	no	2010
Denmark	1986	no longer (1989-2012)	2012
France	1993	1999	2013
Greenland (DK)	?	1996	in preparation?
Germany	2001	2001	no
Finland	2001?	2002	in preparation?
Luxembourg	?	2004	in preparation
England & Wales (UK)	1999	2005	2014?
Scotland (UK)	2000	2005	in preparation
Northern Ireland (UK)	?	2005	no
Czech Republic	?	2006	no
Slovenia	?	2006	no
Andorra	?	2006	no
Switzerland	2000?	2007	no
Hungary	1996	2009	no
Austria	1998	2010	no
Ireland	1995	2011	in preparation?
Liechtenstein	?	2011	no
Jersey (UK)	?	2011	no
Isle of Man (UK)	?	2012	no
Croatia	2003	no	no
Serbia	2005?	no	no
Italy	2011?	no	no
Poland	2012	no	no
Malta	in preparation	in preparation	no
Estonia	?	in preparation?	no
Greece	?	in preparation?	no

In both halves of the continent further developments are under way. Plans for (more) recognition of same-sex partners are being discussed in Slovenia, Malta, and other countries.<sup>21</sup> The opening up of marriage is being expected soon in England and Wales, Scotland and Luxembourg, and within a few years in Greenland, Finland and Ireland, while in Portugal, Austria, the Netherlands and Denmark legislation is underway to increase the possibilities for same-sex partners to jointly become legal parents of the children in their family, something that has also been effected by recent case law in Germany.<sup>22</sup> It is not quite clear whether the trend of growing legal recognition is equally strong with respect to different-sex couples that do not (want to) marry.

#### **IV.2 Academic literature trying to classify the new formats**

Authors of comparative law and other disciplines have been struggling to find suitable classifications for the new legal family formats. Several authors speak about registered partnership as a form of (unmarried, non-marital) ‘cohabitation’.<sup>23</sup> Others see cohabitation and registered partnership as two distinct alternatives to marriage.<sup>24</sup> The main problem in the many classifications that have so far been proposed (see *Table 2*), is that different criteria are being used – often simultaneously. These criteria include: the legal name used for a format (‘marriage’), the procedure that is required to use the format (‘registration’), the place in legal doctrine that the format has been given (‘contract’, ‘civil status’), the level of legal consequences that is attached to a format (‘strong’ or ‘weak’ registration, ‘some’ or ‘most’ rights of marriage), and the general similarity to marriage (‘non-marital’, ‘quasi-marriage’, ‘semi-marriage’).

The ‘life partnership’ in Germany is a good example of the difficulties of classification. Introduced in 2001, it was at first mostly classified as ‘registered cohabitation’, ‘semi-marriage’ or ‘weak registration’. However, after more legal consequences had been attached to it, by legislation and by case law,<sup>25</sup> it is now mostly seen as a ‘strong’ form of registered partnership entailing most rights of marriage. The same could be said about registered partnership in Slovenia.

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<sup>21</sup> On 7 November 2013 the ECtHR decided that it is not acceptable that registered partnership in Greece is only available to different-sex couples (case of *Valianatos v Greece*, App. 29381/09 and 32684/09, par. 92).

<sup>22</sup> *Bundesverfassungsgericht* (Constitutional Court, Germany) 19 February 2013, 1 BvL 1/11, [www.bverfg.de/entscheidungen/ls20130219\\_1bvl000111.html](http://www.bverfg.de/entscheidungen/ls20130219_1bvl000111.html).

<sup>23</sup> Bradley, 2001; Barlow, 2004; Perelli-Harris & Sánchez Gassen, 2012.

<sup>24</sup> Wintemute, 2001, p. 764; Waaldijk, 2005.

<sup>25</sup> See Scherpe, 2013, p. 92.

Table 2: Classifications of legal family formats for non-marital couples

Authors using or proposing a classification	Countries with one or more new legal family formats for same-sex (and different-sex) couples					
	<i>italics = for same-sex only</i>					
	Netherlands Denmark Norway Spain Iceland Hungary etc.	Sweden parts Spain Portugal Croatia, etc.  [Slovenia for different-sex only]	Belgium parts Spain Iceland	France parts Spain  [Greece for different-sex only]	<i>Czech Republic</i>  [at first <i>Germany and Slovenia</i> ]	<i>Netherlands Finland UK Switzerland Hungary Ire-land Austria Germany Slovenia</i>
Barlow, 2004	cohabitation					
Bradley, 2001	unmarried cohabitation					
Perelli-Harris & Sánchez Gassen, 2012	cohabitation (unregistered)			cohabitation (registered)		
Forder, 2000	cohabitation protection by operation of law		optional co-habitation protection	enrolled contract	partnership registration	
Fulchiron, 2000	'unions libres'		'partenariats-cadres'		'partenariats-statuts'	
Kessler, 2004			'partenariats contrats'		'partenariats institutions'	
Coester, 2002	piecemeal regulation	domestic partnership (cohabitants) legislation	registered partnership			
Scherpe, 2005	simple partnership (for specific purpose(s))	simple partnership (for 'bundle' of purposes)	formalized partnership ('formalisierte Lebensgemeinschaft')			
Waaldijk, 2005	informal cohabitation		registered partnership			
Kollman, 2007	unregistered partnership		registered partnership			
Wintemute, 2001	unregistered cohabitation		registered cohabitation			registered partnership
Bell, 2004	cohabitation		legally recognized partnership			registered partnership
Waaldijk, 2004	para-marriage		semi-marriage			quasi-marriage
Curry-Sumner, 2005	unregistered forms of cohabitation		non-marital registered relationships (weak registration)			non-marital registered relationships (strong regist.)
Curry-Sumner, 2012	unregistered relationship forms		registered partnership (weak registration)			registered partnership (strong regist.)
Paoli Itaborahy & Zhu, 2013	some rights of marriage					most or all rights of marriage

The challenge of classification is also highlighted by Scherpe, who points out that in some jurisdictions a mix of ‘simple’ and ‘formalized’ partnership has been created.<sup>26</sup> Gonzalez Beilfuss describes a few examples of this ‘double-track model’: In some regions of Spain the legal recognition applies automatically after living together for two or three years or having a child together, but it is also possible for the couple to ‘enter the institution through a private contract recorded in a public deed’.<sup>27</sup>

It is clear from *Table 2* that no consensus on classification has been reached in (legal) literature. (In fact, some authors may not agree with how I have used their classification to group the countries at the top of *Table 2*.) Nevertheless, it seems that for formats not involving registration the words used most frequently are ‘cohabitation’ and ‘unregistered’. Because the word ‘cohabitation’ is easy to understand, and because ‘unregistered’ is somewhat confusing in its suggestion of a previous registration that has been un-done, I will stick to my preference for the phrase ‘informal cohabitation’,<sup>28</sup> as in *Table 1*.

For formats that do involve registration, the phrase ‘registered partnership’ is used most frequently, and I will continue to do so. However, it should be borne in mind that the use of this phrase covers a very wide range of legal formats across Europe. Therefore it will often be useful (for example, when conducting demographic or sociological research) to distinguish between strong and weak forms of registered partnership. Curry-Sumner has proposed to call registration ‘strong’ when there is a ‘near assimilation of the legal effects attributed to registered partners and spouses’.<sup>29</sup> In other words, a ‘strong’ registration can be characterized as a ‘quasi-marriage’.<sup>30</sup> Typically, such a registration would also be very much like marriage in two other dimensions: the conditions and procedures to enter into it and the procedures to get out of it. A weak form of registered partnership, on the other hand, would entail only a limited selection of the legal consequences attached to marriage.<sup>31</sup> Typically the conditions and procedures for entering into such a weak registration (a ‘semi-marriage’) would be different from those for marriage, and it would also be easier to get out of it. Occasionally (as the examples of Germany and Slovenia have shown) it may be difficult to decide whether the form of registered partnership enacted by a particular jurisdiction should be classified as

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<sup>26</sup> Scherpe, 2005, p. 582.

<sup>27</sup> González Beilfuss, 2012, p. 47.

<sup>28</sup> Waaldijk, 2005. Within this category it will only rarely be necessary to distinguish between piecemeal recognition, and situations where there is one general law on informal cohabitation.

<sup>29</sup> Curry-Sumner, 2012, p. 82.

<sup>30</sup> Waaldijk, 2004, p. 570.

<sup>31</sup> Waaldijk, 2004, p. 571.

strong or as weak.<sup>32</sup> When the level of legal consequences attached to it is somewhere between ‘a limited selection’ and ‘near assimilation’, then regard can be had to how closely the formalities resemble those of marriage. All this will require a more systematic study (and indeed monitoring) of the rights, responsibilities and formalities attached to the various legal family formats that have been enacted or are being considered in many European countries.

### **IV.3 European Union legislation hesitantly following some national trends**

Just like national lawmakers and legal scholars, the institutions of the European Union have not found it easy to deal with new forms and formats of family life. Family law as such is not a field in which the EU plays an important role. However, in quite a number of its fields of operation (ranging from free movement to accounting standards) family relationships do play a small or bigger part. At EUR-lex.europa.eu, a search for the words ‘marriage’, ‘spouse’ and/or ‘child’ generates a list of more than 500 EU regulations and directives in force today. Only some of these also make reference to non-marital partnerships. *Table 3* gives an overview of the main examples.

The overview makes it very clear that the EU has not yet found one consistent approach to the topic; it uses at least ten different phrases. The overview also shows that – unlike national legislation in some countries – EU legislation does not distinguish between same-sex and different-sex non-marital relationships.<sup>33</sup> This is not surprising, because such a distinction would have been contrary to well-established case law of the European Court of Human Rights (see *Table 4*). Interestingly, none of the examples in *Table 3* is limited to registered partnership; forms of informal cohabitation are normally also covered, provided all substantive and formal conditions are met.

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<sup>32</sup> See the critical remarks of Curry-Sumner, 2005, p. 308-309.

<sup>33</sup> Whether it is still permissible in EU law to distinguish between same-sex and different-sex marriages that have lawfully been entered into, is a question that has not yet been decided by the Court of Justice of the EU.

Table 3: Main examples of EU legislation on non-marital partners (MS = member state(s))

Area & legislative text	Article	Terms used	Restrictions
Free movement – Directive 2004/38/EC	art. 2(2)	'registered partnership on the basis of the legislation of a MS'	'if ... host MS treats registered partnerships as <i>equivalent</i> to marriage'
	art. 3(2)(a)	'any other family members ... who ... are dependants or members of the household'	MS only have a duty to ' <i>facilitate</i> entry and residence'
	art. 3(2)(b)	' <i>durable</i> relationship, duly attested'	
Family reunification for third country nationals – Directive 2003/86/EC	art. 4(3)	'duly attested <i>stable long-term</i> relationship' or ' <i>registered</i> partnership'	'MS <i>may</i> ... authorize entry and residence'
Asylum seekers – Dir. 2011/95/EU	art. 2(j)	'unmarried partner in a <i>stable</i> relationship'	'where ... MS concerned treats unmarried couples in a way <i>comparable</i> to married couples under its law relating to third country nationals'
Jurisdiction etc. in matters relating to maintenance obligations – Regulation 4/2009	Annex VII, 4	'Certificate of marriage or <i>similar</i> relationship'	
	Annex VII, 9.3.1.7	' <i>Analogous</i> relationship to marriage'	
Staff Regulations of Officials of the EU, as amended by Regulation 723/2004	art. 72(1) & Annex V, art. 6	'unmarried partner'	'legal document ... of a MS, acknowledging their status as non-marital partners'
	art. 1d	'non-marital partnerships'	'legal document ... of a MS, acknowledging their status as non-marital partners' & 'no access to legal marriage in a MS'
	Annex VII, art. 1(2)(c)	'registered as a <i>stable</i> non-marital partner'	
Statute for Members of the European Parliament – Decision 2005/684/EC	art. 17(9)	'partners from relationships recognized in the MS'	
Implementing measures for Statute Members European Parliament – Decision of 19 May & 9 July 2008	art. 3(1)(a) & 58(2)	' <i>stable</i> non-marital partners'	'official document ... of a MS acknowledging their status as non-marital partners'
Equal treatment of men and women in self-employment – Directive 2010/41/EU	art. 2	' <i>life partners</i> '	'when and in so far as recognized by national law'
Accounting standards – Regulation 632/2010	art. 9	' <i>domestic partner</i> ' and 'dependants'	
Victims of crime – Directive 2012/29/EU	art. 2	'the person who is living with the victim in a <i>committed intimate</i> relationship ... and the dependants of the victim'	'in a joint household and on a <i>stable and continuous</i> basis'

Finally it is important to point out that the listed directives and regulations hardly oblige unwilling member states to start to recognize unmarried partners: The obligation typically

only applies when the member state concerned is already recognizing such partners. The only example where all member states are being forced to provide some substantial recognition is the recent Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime. The unease surrounding this novelty becomes apparent in the fact that the relationship not only needs to have a ‘stable and continuous basis’, but that it also must be both ‘committed’ and ‘intimate’.

#### **IV.4 European courts gradually giving more guidance**

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU, previously CJEC) have been asked several times to rule on (denied) access to certain legal family formats, or to rule on controversial differentiations that have been made between different legal family formats.

As regards access for same-sex couples to civil marriage, the ECtHR has ruled that it is up to the individual countries to decide whether or not to give such access.<sup>34</sup> Even when married partners have become ‘same-sex’ through a sex change of one of them, the ECtHR does not (yet) consider it a human rights violation if national law forces them out of their marriage (and into registered partnership).<sup>35</sup> However, the court has ruled that transsexuals should not be excluded from the right to enter into a different-gender marriage.<sup>36</sup> As regards access to a form of registered partnership or other form of legal recognition of same-sex couples, the ECtHR has ruled that each country enjoys a margin of appreciation ‘in the timing of the introduction of legislative changes’, and that Britain could not be criticized for not doing so until 2005, nor Austria for not doing so until 2010.<sup>37</sup>

There have been many court challenges claiming that it is discriminatory to distinguish in law between same-sex and different-sex unmarried cohabitants. The only challenge so far at the Court of Justice of the EU (CJEU) was unsuccessful, but that outcome is no longer valid since the Employment Equality Directive (2000/78/EC) came into force in 2003. Also since 2003, the other European court, ECtHR, has consistently held that to distinguish between same-sex and different-sex cohabitants is incompatible with the right to non-discrimination (see *Table 4*).

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<sup>34</sup> ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04.

<sup>35</sup> ECtHR 28 November 2006, *Parry v United Kingdom*, App. 42971/05; ECtHR 13 November 2012, *H v Finland*, App. 37359/09 (now being reconsidered in the Grand Chamber of the ECtHR).

<sup>36</sup> ECtHR 11 July 2002, *Goodwin v United Kingdom*, App. 28957/95.

<sup>37</sup> ECtHR 4 November 2009, *Courten v United Kingdom*, no. 4479/06; ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 105-106.

*Table 4: Challenges of differentiations between same-sex and different-sex cohabitants*

Court	Case	Area	Did court find discrimination?
CJEU 17.2.1998	<i>Grant v SW Trains</i> C-249/96	partner benefits in employment	no, sexual orientation is not covered by prohibition of sex discrimination
ECtHR 24.7.2003	<i>Karner v Austria</i> 40016/98	succession to tenancy after death partner	yes, with respect to home
ECtHR 2.3.2010	<i>Kozak v Poland</i> 13102/02	succession to tenancy after death partner	yes, with respect to home
ECtHR 22.7.2010	<i>PB &amp; JS v Austria</i> 18984/02	sickness insurance	yes, with respect to family life
ECtHR 28.9.2010	<i>JM v United Kingdom</i> 37060/06	calculation of level of child maintenance	yes, with respect to property
ECtHR 19.2.2013	<i>X v Austria</i> 19010/07	second-parent adoption	yes, with respect to family life

Until now, the European courts have not been willing to declare differentiations between marriage and cohabitation to be discriminatory, except in very specific circumstances (see *Table 5* and *Table 6*). However, the ruling of the ECtHR on phone calls from prison suggests that this court may be willing to entertain further challenges to rules that exclude unmarried partners, provided there are no strong counter arguments of the type acknowledged in the case on giving evidence.

*Table 5: Challenges of differentiations between different-sex cohabitation and marriage*

Court	Case	Area	Did court find discrimination?
CJEC 17.4.1986	<i>Netherlands v Reed</i> C-59/85	right to residence for partner of EC worker	no, in comparison with spouses; yes, in comparison with unmarried partners of Dutch workers
ECtHR 22.5.2008	<i>Petrov v Bulgaria</i> 15197/02	right to use prison phone to call partner	yes, with respect to family life
ECtHR 3.4.2012	<i>Van der Heijden v Netherlands</i> 42857/05	right not to give evidence in criminal proceedings against partner	no, differentiation is justified for the prevention of crime

The only case where one of the two main European courts has honoured the challenge of an unmarried same-sex couple (*Table 6*) must be read in the context of the fairly generous recognition provided in the EU Staff Rules (see *Table 3*). In this case the EU Civil Service Tribunal has given a wide (non-legalistic) interpretation of the condition that non-marital couples will only be given a household allowance if the couple has ‘no access to legal marriage in a member state’.

In the case law of the ECtHR there is no full recognition yet for the fact that in many countries same-sex couples cannot marry (or even register as partners) and that therefore the

exclusion of unmarried partners from certain rights and benefits has a disparate impact on same-sex partners (i.e. is indirectly discriminatory on grounds of sexual orientation).<sup>38</sup> The latter argument has been tried several times. In one older case, the Court responded by saying that the differentiation in question was justified by the legitimate aim of protecting the family based on marriage (see *Table 6*). In more recent cases, the typical response of the Court is that in law cohabitation is not similar to marriage (and that therefore the right to non-discrimination is not affected).

*Table 6: Challenges of differentiations between same-sex cohabitation and marriage*

Court	Case	Area	Did court find discrimination?
ECtHR 10.5.2001	<i>Estevez v Spain</i> 56501/00	survivor's pension	no, differentiation is justified for protection of family based on marriage
ECtHR 29.4.2008	<i>Burden v United Kingdom</i> 13378/05	inheritance tax	no, situation of cohabiting sisters is not analogous with marriage
ECtHR 4.11.2008	<i>Courten v United Kingdom</i> 4479/06	inheritance tax	no, situation of gay cohabitants is not analogous with marriage
ECtHR 23.6.2009	<i>MW v United Kingdom</i> 11313/02	bereavement payment	no, situation of gay cohabitants is not analogous with marriage
EU Civil Service Tribunal 14.10.2010	<i>W v Commission</i> F-86/09	household allowance for EU official	yes, the fact that W and his Moroccan partner are not married should not be used against them, because the situation regarding homosexuality in Morocco makes it not realistic for them to marry in Belgium
ECtHR 19.2.2013	<i>X v Austria</i> 19010/07	second-parent adoption	no, lesbian couple is not in relevantly similar situation as married couple

Finally, there is a growing number of cases in which registered partners demanded to be treated in the same way as married spouses (see *Table 7*). In the first of these cases the EU Court of Justice still emphasized the incomparability of marriage and registered partnership (even in Sweden, where registered partnership was rather strong and quasi-marital). In more recent cases, however, the CJEU has emphasized that it depends on whether the actual legal situation of registered partners and married spouses is comparable, and it suggested that – in the context of pension law – the situation of German registered life partners should indeed be considered as comparable to that of spouses. It seems that this is also the approach of the ECtHR, but the two cases this Court has had to decide so far both concerned France, and the

<sup>38</sup> Johnson, 2013, p. 139; Waaldijk, 2012, par. 10, 22, 31.

conclusion was that – as regards pensions and as regards adoption – the legal situation of people in a PaCS (*pacte civil de solidarité*) is not similar to marriage.<sup>39</sup>

*Table 7: Challenges of differentiations between registered partnership and marriage*

Court	Case	Area	Did court find discrimination?
CJEC 31.5.2001	<i>D &amp; Sweden v Council</i> C-122/99 & C-125/99	household allowance for EU official	no, (Swedish) registered partnership is distinct from marriage
CJEU 1.4.2008	<i>Maruko v Versorgungsanstalt der deutschen Bühnen</i> C-267/06	survivor's pension	yes, assuming that in Germany the situation of registered partners is comparable to marriage, their exclusion from a pension amounts to direct sexual orientation discrimination
ECtHR 21.9.2010	<i>Manenc v France</i> 66686/09	survivor's pension	no, PaCS in France is not analogous with marriage
CJEU 10.5.2011	<i>Römer v Hamburg</i> C-147/08	retirement pension	yes, situation of registered partners in Germany is comparable to marriage
ECtHR 15.3.2012	<i>Gas &amp; Dubois v France</i> 25951/07	second-parent adoption	no, legal situation of lesbian couple in PaCS is not comparable to marriage

All in all, the main European courts have only provided little concrete recognition of same-sex and non-marital relationships. And the recognition they have so far offered is mostly depending on whether the national legislation in question already provides some legal recognition. It is a similar phenomenon as what we have seen in EU legislation (see *Table 3*).

This somewhat limited judicial harvest (which echoes the often slow, hesitant or limited developments in national and EU legislation, see *Table 1*, *Table 2* and *Table 3*) seems to contrast with the more general and quite inclusive language that is often used by the ECtHR in the very same judgments. The Court has repeatedly recognized, for example, that the right to respect for private life encompasses the ‘right to establish and develop relationships with other human beings’.<sup>40</sup> It has ruled that non-marital partnerships are covered also by the right to respect for family life,<sup>41</sup> and that this includes same-sex partnerships.<sup>42</sup> It has mentioned ‘the fact that there is not just one way or one choice when it comes to leading one’s family or private life’,<sup>43</sup> and it is aware of the ‘rapid evolution of social attitudes towards same-sex couples’.<sup>44</sup> It has acknowledged that ‘the consensus among European States in favour of

<sup>39</sup> See Johnson, 2013, p. 138.

<sup>40</sup> See for example ECtHR 22 January 2008, *EB v France*, App. 43546/02, par. 43 and 49; on this ‘right to relate’ in general, see Waaldijk, 2013.

<sup>41</sup> ECtHR 18 December 1986, *ston v Ireland*, App. 9697/82, par. 55-56.

<sup>42</sup> ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 94.

<sup>43</sup> ECtHR 19 February 2013, *X v Austria*, App. 19010/07, par. 139; see also ECtHR 2 Maart 2010, *Kozak v Poland*, App. 13102/02, par. 98; and ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 84.

<sup>44</sup> ECtHR 22 July 2010, *PB & JS v Austria*, App. 18984/02, par 29.

assimilating same-sex relationships to heterosexual relationships has undoubtedly strengthened' (since 2001),<sup>45</sup> and that a 'growing tendency to include same-sex couples in the notion of "family"' is also reflected in EU legislation.<sup>46</sup> The Court has stressed the 'importance of granting legal recognition to *de facto* family life',<sup>47</sup> and it has held that 'same-sex couples are just as capable as different-sex couples of entering into stable committed relationships' and that consequently they are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship'.<sup>48</sup> The Court acknowledged that for a same-sex couple 'an officially recognised alternative to marriage (would) have an intrinsic value', irrespective of its legal effects, and that '(s)ame-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples'.<sup>49</sup> Furthermore, it has consistently held that 'differences based on sexual orientation require particularly serious reasons by way of justification',<sup>50</sup> and that the exclusion must be shown to be 'necessary' in order to achieve the legitimate aim.<sup>51</sup> And it ruled that 'a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted (...) as necessary for the protection of the family viewed in its traditional sense'.<sup>52</sup>

All this may be seen as an indication that the European Court of Human Rights is contemplating to take more steps towards full legal recognition of same-sex and non-marital families than it has taken so far. The Court also seems to be encouraging lawmakers to extend greater legal protection and recognition to new forms of family life, and to provide access to legal family formats that meet the needs of the couples and children concerned. This makes it all the more probable that – for researchers and practitioners – this area of law will remain a moving target, both at national and at European level.

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<sup>45</sup> ECtHR 28 September 2010, *JM v United Kingdom*, App. 37060/06, par. 50.

<sup>46</sup> ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par 93.

<sup>47</sup> ECtHR 19 February 2013, *X v Austria*, App. 19010/07, par. 145.

<sup>48</sup> ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 99; see also ECtHR 15 January 2013, *Eweida v United Kingdom*, App. 48420/10, 59842/10, 51671/10 and 36516/10, par 105.; and ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 78.

<sup>49</sup> ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 81.

<sup>50</sup> ECtHR 24 July 2003, *Karner v Austria*, App. 40016/98, par. 37.

<sup>51</sup> ECtHR 24 July 2003, *Karner v Austria*, App. 40016/98, par. 41.

<sup>52</sup> ECtHR 2 Maart 2010, *Kozak v Poland*, App. 13102/02, par. 99.

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