

The fight for the Freedom of Movement Directive of 2004 and the outlook for the future

Notes for the speech delivered at the International Conference on *The Lack of Mutual Recognition of Same-sex partnerships and marriages in the European Union and in the member states of the Council of Europe* (Strasbourg, 18 – 19 November 2011)

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(1) How did the demand for mutual recognition of same-sex partnerships reach the EU agenda? And what was the outcome of the political fight that followed ?

(2) Where do we stand now? Political evaluation of that result. What happened afterwards and what progress/ standstill / backlash can we expect ?

Part 1

How did the demand for mutual recognition of same-sex partnerships reach the EU agenda? And what was the outcome of the political fight that followed

>>> in EP debate on the (draft) Free Movement Directive.

Full title: ... Directive on the right of citizens of the Union and their family members *to move and reside* freely within the territory of the Member States.....

>> issue is restricted to right of entry and right of residence

>> not about recognition in civil law

>> co-decision procedure, i.e. European Parliament has a real say in the matter

Before we start, I must explain:

- (a) What means free movement?
- (b) What means mutual recognition?

Ad (a) Free movement (of persons) is an important issue? Why?

- * Fundamental principle of the EU – linked to values as equality and non-discrimination;
- * Condition for the proper functioning of the internal market (free movement of goods, services, labour and capital) > economic prosperity (labour mobility)
- * Linked to EU citizenship and to the idea of Europe/ European identity >> with all its ambiguity and political hang ups

* ALSO A DARKER SIDE:

real issue behind all this is the non-EU partner who is considered a burden or a risk (what ever the names ('alien', TCN, immigrant), xenophobia is around the corner, Fortress Europe...

Ad (b) What does the concept of mutual recognition (MR) entail and where does it come from?

- Comes from the world of international trade. Free movement of goods supposes doing away with tariffs and other barriers, such as technical specifications.
- But harmonization (from above) often a bridge too far. Then mutual recognition is a solution. Home country rules must be recognized by other member states (MS), basis is (supposed) trust (horizontal transfer of sovereignty). Sometimes sensitive issue >> exceptions.
- MR with the free movement of services even more difficult. See *the Polish Plumber* and the intense debate about the Services Directive.
- MR with Free movement of persons.....
- MR in judicial decisions another sensitive issue (EU Council Tampere, 1999, put this on the agenda, both in civil and in criminal matters)
See European Arrest Warrant.

The making of the Directive – see my “hand out” (Working document annexed to this speech)

I only deal with the partnership-issue. (For the rights of children see ILGA Europe publications)

1 Commission proposal:

COM 2001(257), 23 May 2001

- spouse
- host country principle applied to ‘unmarried partner’

2 Fierce debates in LIBE >>>> EP position in 1st reading

P5-TA(2003)0040 – 11 February 2003

Main argument: this proposal would lead to discrimination on the basis of nationality.

EP vote in first reading. 269 + / 225 - / 46 abstentions

Definition of family member includes

- (same-sex) spouses,
- registered partners (idem)
- and unmarried (de facto) partners, irrespective of sex,
 - o “if the host and/or home country treats those couples in a corresponding manner to married couples”.

Remark: modest proposal. No obligation for all MS to receive couples from all other MS!

MR is a horizontal agreement, not a vertical transfer of sovereignty to a higher level (harmonization).

MR does not change domestic family law in the MS

3 Commission > amended proposal > rejected EP amendments.
COM(2003)199 – 15 April 2003

- reason given: family law is outside Community competences
- in my view : smokescreen
- but mentions both registered partnerships and other (de facto) relationships

4 Political agreement in Council.

Council Common Position No 6/2004 of 5 December 2003

Two categories:

- (1) Fully fledged free movement rights for
 - spouse (undefined)
 - registered partner (host country principle, i.e. “if the legislation of the host Member State treats registered partnership as equivalent to marriage”)
- (2) “MS shall facilitate entry and residence”
 - The partner in a durable relationship, duly attested.”

EP accepts Council text in second reading

(absolute majority needed to change Council agreement; i.e. 314 of 627 MEPs; this was not feasible)
EP debate/vote 8/10 March 2004

- Count our blessings:
 - registered partnerships as such recognized
 - marriage not limited to different-sex marriage
 - door to full recognition of all partnerships put ajar
 - de facto partnerships mentioned

[note that MR does function in other EU rules concerning family law with cross-border consequences

Brussels II - Regulation (no.2201/2003)– recognition of judgements about paternal responsibility in case of separation and divorce;

Rome III - Regulation (no.1259/2010) implementing *enhanced cooperation* in the area of the law applicable to divorce and legal separation.]

- On the other hand:

Opposition fed by an ugly mixture of motives

 - xenophobia, dislike of immigrants (‘aliens’), racism
 - homophobia, fear for undermining of traditional marriage
 - nationalism, fear of losing nat. sovereignty, glorification of own culture

Part 2

Where do we stand now? Political evaluation of that result. What happened afterwards and what progress/ standstill / backslide can we expect ?

These considerations we had in 2004 are still relevant now.

>> Mixed judgement

But let me make an overall political evaluation of this issue as it stands now. Other speakers at this conference will present more details.

Summary

- Directive itself is unsatisfactory compromise
 - Leads to unequal treatment and uncertainty
 - Hampers the citizenship rights of LGBT people in Europe
- Transposition into legislation of the member states - far from complete.
(Only 50% or less of the MS have complied with the Directive, and in many cases the legal situation is unclear)
- Implementation in daily administrative practice in the member states – perhaps worse.
- The Commission and its role as “guardian of the treaties”
 - reports on implementation – 1st report COM(2008)840 – 2nd report announced for 2013
Commissions says that key problems are
 - right of entry and residence of TC family member
 - requirement of additional documents not mentioned in the Directive
 - but Commission does not inform us about its procedures against member states which failed to implement the Directive properly. A painful lack of transparency – at odds with the well-known pep-talk of the Commission...
 - Guidelines on better transposition – does lead us nowhere
see COM(2009) 313
 - does not explicitly mention same-sex relationships
 - mentions art. 21 EU Charter FR, but does not spell out what this means for the implementation of the directive
 - See FRA: not recognizing same sex-marriages and partnerships amounts to direct discrimination on the basis of sexual orientation and therefore is a violation of international human rights law
 - Follow up on Green Paper “Less Bureaucracy” – MR of civil status documents ???
What will the Commission do with all this input from NGOs, *inter alia* from ILGA-Europe....
- The Council pays only lip service to free movement (See Stockholm Programme, 2009)
 - more concerned about abuse of free movement by unwanted ‘aliens’
 - undermines the right to free movement, speaks of “an advantage” (quote)
[Stockholm Programme, OJ C 115/8, 4.5.2010]

- Neither the Commission nor the Council seems to have any intention to put a revision of the Directive itself on the agenda.
- More generally speaking: solidarity & mutual trust between member states is a difficult issue both for political leaders and for the ordinary citizens in the member states. The democratic legitimacy gap will frustrate any progress in the short run.
- We only have to look at the Euro crisis of today, to understand that this political problem touches the heart of the Union. There are no easy solutions.

Conclusion

- In the short run action at the national level is the best way forward. Better implementation, better practices.
- Commission could be asked to be more active in this respect
- But also better law-making: the more countries recognize same sex partnerships (be it by opening up marriage or by introducing registered partnership laws) the more strange the EU Directive will become >> it could simply melt down.....
- In the meantime >> more insight in the magnitude of the problem and its possible damaging effect on economic and social well-being of the EU and its citizens
 - Cf. study cost of VAW in terms of lost working hours, lost productivity
- Commission could be asked to facilitate such studies
- At the political level
 - be aware of the dangerous interplay between homophobia and xenophobia
 - prevent technocratic discourse from dominating this issue, but keep debating this issue in term of human rights and fundamental freedoms.

Annex

Working document for Joke's Swiebel's lecture on the fight for the EU Free Movement Directive of 2004 - Friday 18 November 2011, 10h10

The making of the EU Free Movement Directive – different definitions of spouses and partners

Commission proposal

Art. 2 (2) "Family member" means:

- (a) the spouse;
- (b) the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation.

EP position in first reading

Art. 2(2) "Family member" means:

- (a) the spouse, irrespective of sex, according to the relevant national legislation;
- (b) the registered partner, irrespective of sex, according to the relevant national legislation;
- (c) the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/or home Member State treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation;

Amended Commission proposal

Art. 2(2) "Family member" means:

- (a) the spouse;
- (b) the partner to whom the Union citizen is linked by registered partnership or with whom he/she has a duly attested durable relationship, if the legislation of the host Member State recognises the situation of unmarried couples, as equivalent to married couples in accordance with the conditions laid down in any such legislation;

Common position of the Council, accepted by Commission and Parliament (Final text)

Art. 2(2) 'Family member' means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

Art. 3(2)

Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

- (a) [...]
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.