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Full recognition of similar personal and family status in the EU: The Mazowiecki Case and the innovative interpretation of national identity*

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Abstract: in the past two years, significant progress has been achieved in the recognition of equivalent personal and family status within the European Union. This development has materialized through their acknowledgment in the context of the exercise of the right to full freedom of movement and residence of Union citizens. Following the initially controversial and inconsistent case law of the Court of Justice in *Coman* and *Pancharevo*, which were practically indistinguishable, the 2023 judgment of the European Court of Human Rights in the *Fedotova* line of cases appears to have prompted a reorientation in the Luxembourg Court's stance. The *Mirin* case and the recent *Mazowiecki* judgment seem to mark a turning point in this respect. In its emerging doctrine, the Court of Justice makes it clear that the invocation of the Member States' national identity cannot serve as a pretext for infringing the fundamental rights to equality and non-discrimination on grounds of sexual orientation. This approach culminates in the effective recognition of analogous personal and family statuses across the Union. Where national legislation must be adapted to ensure such recognition, Member States are under an obligation to undertake the necessary reforms. Although they are not required to introduce or recognize same-sex marriage or filiation per se, they must, while respecting their margin of appreciation, ensure that same-sex families enjoy a comparable set of rights to those accorded to opposite-sex couples in matters of marriage and parenthood. Only such an interpretation secures conformity with the right to family identity enshrined in article 7 and the principle of non-discrimination laid down in article 21 of the Charter of Fundamental Rights of the European Union.

Keywords: freedom of movement in the EU national identity same-sex marriage private and family life national identity.

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(A) THE DEBATE ON FREEDOM OF MOVEMENT IN THE EU AND PERSONAL AND FAMILY STATUS

The debate on achieving full freedom of movement and residence for people with the same personal and family status throughout the territory of the Member States of the European Union has been a long one. It has evolved alongside European society, grounded in the work of social groups most closely linked to the interests of same-sex couples in recent decades. The European Commission has also developed a broad agenda of equal rights[1]. Thus,

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achieving the free movement of people and families[2] while respecting their equal status within the EU[3] has been one of the objectives of this process and this human movement.

This evolution has taken place more through the mutual recognition of judgments, public documents, and legal statuses existing in other States, than through legislative developments. It stems from a clash between two sets of rights and competences with different origins and content. On the one hand, there is the competence of Member States to regulate their domestic family law, and the obligation of the Union to respect the national identity of the Member States. This entails that the Union cannot impose legislative changes on Member States that affect essential principles of their societal structure. On the other hand, stands the right to move and reside freely throughout the European Union, one of the core rights of all Union citizens and a fundamental component of the status of Union citizenship[4]. As a result, legislative amendments have not proved to be the appropriate means for implementing this evolution.

Thus, it was essential that this evolution in the recognition of legal statuses should take place through the case law of the CJEU, whose judgments have progressively shaped the overall legal framework governing the enjoyment of the rights of European citizens[5]. This decades-long development has not been exempted from fluctuations, criticism, or more or less questionable decisions. Nonetheless, it is clear that, in the last two years, the extension of the recognition of personal status beyond the borders of a single Member State has been particularly significant.

In the 2000s, the use of the same name throughout the European Union was recognized as an element of personal identity. This recognition was generally satisfactory. In the 2010s, up until 2021, the freedom of movement of same-sex couples and the parentage arising from same-sex relationships were only partially recognized[6]. From 2023 onwards, with the ECtHR's judgment on marriage equality, the overall understanding of the conflict began to shift towards fuller recognition, a development that has been endorsed by the CJEU's case law over the last two years.

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1 For all these reasons, the latest strategy, that of the European Commission of October 8, 2025, "Free to love, free to be", is included. https://commission.europa.eu/news-and-media/news/free-love-free-be-eus-new-lgbtiq-strategy-2025-10-08_es.

2 Regarding the importance of cross-border mobility and family life, which we will analyze in this paper, P. Jiménez Blanco, "Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado", *REEI*, June 2018, No. 35, pp. 1-49.

3 A very interesting study on the theoretical conditions for this recognition can be found in the paper of S. Gössl and M. Melcher, "Recognition of a status acquired abroad in the EU. A challenge by national laws from evolving traditional methods to new forms of acceptance and bypassing alternatives", in *Cuadernos de Derecho Transnacional* (March 2022), Vol. 14, No. 1, pp. 1012-1043.

4 In the words of the CJEU itself, "the purpose of the status of citizen of the Union is to become the fundamental status of nationals of the Member States." Among many others, the CJEU judgment of 2 October 2003, García Avello, which we will cite below, in paragraph 22.

5 The CJEU and its case law have always played an essential role in shaping the interpretation of European law, in one way or another. In this regard, AL. Calvo Caravaca and J. Carrascosa González, "La jurisprudencia normativa del Tribunal de Justicia de la Unión Europea y el Reglamento Bruselas I-Bis" in AL. Calvo Caravaca and J. Carrascosa González, in *El Tribunal de Justicia de la Unión europea y el Derecho internacional privado*, Aranzadi, Cizur Menor (Navarra), 2021, pp. 31-58.

6 On this recognition in same-sex marriages, M. Requena Casanova, "Libre circulación de los matrimonios del mismo sexo celebrados en el territorio de la Unión Europea: consecuencias del asunto Coman y otros", *Revista de Derecho Comunitario Europeo*, 62, 2019, pp. 41-79.

This paper examines this entire line of case law in order to elucidate the crucial significance of the latest judgment delivered by the CJEU, which may constitute a decisive step towards securing the recognition of a similar personal and family status throughout the European Union. It focuses on the judgment of 25 November 2025 in *Mazowiecki*[7]. Such recognition of a personal and family status endowed with analogous rights across the Union is likewise essential for the full exercise of freedom of movement within the European Union. It enables individuals who enjoy a particular personal identity, and couples who enjoy a particular family status in one Member State to move freely within the territory of the twenty-seven Member States, with a similar bundle of essential rights being acknowledged, regardless of whether they are Union citizens or not.

(B) RIGHTS AT STAKE: FIRST-CLASSS AND SECOND-CLASS FREEDOM OF MOVEMENT VERSUS NATIONAL IDENTITY

(1) Freedom of movement and personal and family status

Freedom of movement and residence is regulated by article 21.1 of the TFEU and article 45 of the Charter of Fundamental Rights of the European Union and was further developed by Directive 2004/38/EC of 29 April 2004[8]. It is defined as the right to move freely throughout the territory of the Union, to live and work in any of its Member States[9], and is recognized for EU citizens and their immediate non-EU family members.[10] The Directive conceived this right as a citizens' right, without a specific economic component, but following the CJEU's judgment in *Grzelczyk* of 20 September 2001[11] and the subsequent adoption of the Directive, the exercise of this right became conditional upon not placing an unreasonable burden on the social welfare system of the host State[12]. Once this condition is fulfilled, the right entails equal treatment and equal rights with

7 In case C 713/23, ECLI:EU:C:2025:917.

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L 158, 30.4.2004, p. 77.

9 P. Jiménez Blanco, "Las libertades de circulación y de residencia de los miembros de la familia de los ciudadanos de la Unión Europea", *Diario La Ley*, No. 5771, Sección Unión Europea, April 30, 2003, Year XXIV, Ref. D-103, Editorial LA LEY (LA LEY 693/2003); A. Elvira Perales, *Libertad de circulación de personas en la Unión Europea*, Centro de Estudios Políticos y Constitucionales, Madrid, 2017, pp. 19-35.

10 On this freedom as applied to same-sex couples before the *Coman* judgment, M. Soto Moya, "Free movement within the territory of the European Union of same-sex marriages celebrated in Spain", *Centro de Estudios Políticos y Constitucionales*, No. 43, September December 2012, pp. 807-847. And on its application to non-EU family members by the CJEU before the *Coman* judgment, J.M. Velasco Retamosa, "Libre circulación de personas en la Unión Europea: los nacionales de terceros Estados como beneficiarios de esta libertad", *International Law: Revista Colombiana de Derecho Internacional,* No. 22, 2013, pp. 51-85, pp. 65-71.

11 In case C-184/99, ECLI:EU:C:2001:458.

12 The 2008 economic crisis may have had much to do with this economic configuration of law. MILLENIUM, "Is the EU's freedom of movement a full right? Comentario Millennium DIPr" available at https://www.millenniumdipr.com/n-119-es-la-libertad-de-circulacion-de-la-ue-un-derecho-pleno-comentario-millennium-dipr.

nationals of the host State, together with a prohibition of discrimination on grounds of nationality[13], which Member States are not permitted to restrict.

The CJEU has carried out extensive interpretative work to delineate the contours of this right, the most notable examples of which are the judgments examined in the following sections of this paper. Freedom encompasses all areas of law[14] and is conceived as an essential element in shaping the personal status of all European citizens[15].

Although, as noted in the introduction, EU law does not govern the rules on the establishment of a person's civil status, marital rights, or parentage — matters falling within the exclusive competence of the Member States[16] — the domestic law of those States may not obstruct the exercise of the rights and freedoms guaranteed by the Treaties, including freedom of movement. Any restriction must be justified on grounds of national public policy, may not amount to a genuine impediment, and cannot give rise to discrimination on the basis of nationality[17].

Thus, as regards the recognition of personal and family status, freedom of movement merely enables citizens travelling within the EU to change their place of residence. It does not in itself guarantee the preservation of the rights they enjoyed in their State of origin.

It is the development of case law, from the right to a name through to the *Mazowiecki* judgment, that has progressively shaped this dimension of the right, in direct connection with the entry into force in 2009 of the Charter of Fundamental Rights of the European Union. The Charter secures the enjoyment of fundamental rights by European citizens throughout the Union and informs the entire EU legal order. Among these fundamental rights, the rights to respect for private and family life and to non-discrimination on any ground are essential. The case law has consistently turned on the question whether these rights have been infringed, and it appears that, by 2025, a respectful interpretation has finally been reached[18].

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13 According to the CJEU's case law, this obligation is of a family nature, not a personal one. D. Córdoba Castroverde, "El derecho de circulación y residencia de los padres de ciudadanos de la Unión Europea", *Elderecho.com*, 9-8-2017, in https://elderecho.com/el-derecho-de-circulacion-y-residencia-de-los-padres-de-ciudadanos-de-la-union-europea.

14 MC. Chéliz Inglés, "Restricción a la libre circulación de ciudadanos de la UE, en el contexto de la sustracción internacional de menores (Sentencia del Tribunal de Justicia de 19 noviembre 2020, Asunto C-454/19)", *Ley Unión Europea*, No. 88, January 2021, pp. 111-121.

15 This is what the CJEU has repeatedly stated in numerous cases. Paragraph 22 of the judgment in the García Avello case (analyzed later) points out that "the purpose of the status of citizen of the Union is to become the fundamental status of nationals of the Member States".

16 ECJ judgment of 7 July 1992, case C-369/90, Micheletti and Others, EU:C:1992:295; ECJ judgment of 2 March 2010, case C-135/08, Rottmann, EU:C:2010:104; ECJ judgment of 12 March 2019, case C-221/17, Tjebbes and Others, EU:C:2019:189.

17 A. Durán Ayago, "El TJUE y el nombre de las personas físicas principio de reconocimiento mutuo, derecho a la identidad y libre circulación de personas en la Unión Europea El TJUE y el nombre de las personas física", in A. L. Calvo Caravaca y J. Carrascosa González (dir.), *El Tribunal de Justicia de la Unión Europea… op. cit.*, pp. 515-543, p. 542.

18 J. Sarrión Esteve, "Nuevas reflexiones sobre la libre circulación de personas y el derecho de residencia como derechos fundamentales en la UE. Un estudio de su origen, titularidad, ámbito de aplicación y la más reciente jurisprudencia", *Revista Parlamentaria de la Asamblea de Madrid*, No. 46, 2024, pp. 175-202.

(2) National identity

National identity is the right of Member States that comes into tension with the full exercise of the right to freedom of movement and with the recognition of the same personal and family status throughout the EU. The coexistence within the Union of civil-law regimes recognizing different forms of marriage and parentage naturally gives rise to this conflict. This provision arose during the negotiations of the Maastricht Treaty on the concept of European citizenship. Confronted with this catalogue of rights, which includes freedom of movement, the Member States agreed to establish this right as a kind of safeguard for their fundamental principles as society[19]. Ultimately, it gives concrete expression to the Union's motto "United in Diversity", in that it respects the distinctive characteristics of each Member State[20].

Article 4.2 of the TEU establishes that "The Union shall respect the equality of Member States before the Treaties and their national identity inherent in their fundamental political and constitutional structures, including with regard to local and regional autonomy". This right to respect for national identity preserves the notion that the European Union is founded on an international treaty concluded by sovereign States, from which it follows that the EU continues to operate as an organization of States, even though it has established a form of citizenship common to all their nationals. The collective European demos at this stage of the creation of the EU still belong to each of the member states, and not to the collectivity as such[21].

National identity, although intrinsically connected to the State, cannot be invoked to exempt a State from complying with the essential principles of EU law. It does not confer a principle of non-interference shielding the State's internal affairs from the application of Union law in areas falling within the Union's competences. The principle of competence and supremacy means that national law must adapt to European regulations in the area of EU competences. Nor is national identity an abstract notion: its content depends, first, on how the Member States rely on it in practice and, secondly,

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19 A kind of intergovernmental control of European integration is established to safeguard the principle of state sovereignty. A. Mangas Martín, "Comentario al artículo 24 de la Carta de los Derechos Fundamentales de la UE", in A. Mangas Martín. (directora), Carta de los Derechos fundamentales de la UE, comentario artículo por artículo, Madrid, Fundación BBVA, 2008, pp. 442 453, p. 451; or P. Cruz Mantilla de los Ríos, *La identidad nacional de los Estados miembros en el derecho de la Unión Europea*, Aranzadi, Thomson Reuters, Cizur Menor, 2021.

20 Regarding this conflict in a cross-cutting manner that encompasses both general aspects, such as marriage, civil partnerships, transnational family crises and even immigration, M.V. Cuartero Rubio and J.M. Velasco Retamosa (dirs.), *La vida familiar internacional en una Europa compleja: cuestiones abiertas y problemas de la práctica*, Tirant lo Blanch, Valencia, 2021.

21 And it is embodied in the rights that constitute the fundamental political and constitutional structures of each State, which may differ. These include the form of the State, nationality, the means of acquiring national citizenship, territory, the statutes of churches, defense and armed forces, the protection of language, aspects of family law, culture, education, and the electoral procedure. F. Rubio Llorente, "Derechos Fundamentales, principios estructurales y respeto por la identidad nacional de los Estados miembros de la Unión Europea", *AFDUAM*, No. 17, 2013, pp. 515 527; or P. Cruz Villalón, "La identidad constitucional de los Estados miembros: dos relatos europeos", *AFDUAM*, No. 17, 2013, pp. 501-514, p. 503.

on how it is modulated, in the event of conflict, by the CJEU in light of its extensive case law on the matter[22].

To conclude this explanation of the configuration of this right, in relation to the European rights with which it coexists, it is worth recalling the CJEU's ruling on the free movement of same-sex married couples, in which the Court held that reliance on national identity is not independent of the duty of legal cooperation in fulfilling treaty obligations and cannot be invoked to limit the autonomous concept of "spouse" in the Directive by excluding same-sex marriage from its scope[23]. In the field of parentage, Advocate General Kokott[24], who refers to the term national identity 64 times, emphasizes that the Lisbon Treaty evolves from the concept of "conflict of competences" to that of "distribution of competences". Within distribution, national identity cannot prevent a Bulgarian citizen from exercising the right to move freely throughout the territory of the Union with the two women registered as their mothers in a Member State, as this would contravene the exercise of this freedom. However, it may still result in the non-recognition of her filial relationship, because parentage falls within the exclusive jurisdiction of the State. This understanding has been further refined in the *Mazowiecki* judgment, due to its connection with names and surnames[25], or its connection with fundamental human rights[26].

(C) HISTORY OF AN INCOMPLETE EVOLUTION

(1) The precedent, the right to a name

The debate on the full freedom of movement of persons and its tension with national law began in the 2000s with the right to a name in the *García Avello*[27] and *Grunkin-Paul* judgments[28]. Given that these are early precedents that have evolved substantially over time with respect to the current situation regarding personal status, we will briefly note that the CJEU stated that the right to a name forms part of the personal status protected by the free movement and citizenship of the Union. Member States are therefore required to accept the entry in their public registers of the forenames and surnames of dual nationals in the form already registered and recognized in another Member State, even where that manner of attributing surnames (essentially, one or two surnames following the forename) diverges from that regulated by their own national

22 M. Azpitarte Sánchez, "Identidad nacional y legitimidad del Tribunal de Justicia", *Teoría y realidad constitucional*, No. 39, 2017, pp. 413-448.

23 Conclusions of Advocate General Wathelet of 11 January 2018, ECLI:EU:C:2018:2, subsequently followed by the decision.

24 Conclusions of 15 April 2021, ECLI:UE:C:2021:296.

25 MD. Ortiz Vidal, "El caso Grunkin-Paul: notas a la STJUE de 14 de octubre de 2008", *Cuadernos de Derecho Transnacional*, March, No. 1, 2009, pp. 143-151.

26 We have already expressed our critical opinion on this matter previously, and for this reason we cite it in L.A. Pérez Martín, "Doctrina del TJUE en Pancharevo y Rzeczhnik: un paso atrás en el ejercicio de los derechos europeos", *Anuario Español de Derecho Internacional Privado*, Vol. XXII, 2022, pp. 483-514.

27 CJEU 2 October 2003, case C-148/02, *García Avello*, ECLI:EU:C:2003:539.

28 CJEU 14 October 2008, case C-353/06, *Grunkin-Paul* case, ECLI:EU:C:2008:559.

law[29]. A Member State may not automatically impose its national rules on the attribution of surnames on dual nationals whose name is already recognized differently in another State where this would create serious difficulties in their private life and infringe the principle of non-discrimination enshrined in the Charter.

To understand when national identity can or cannot limit the application of European law, the foregoing case law must be contrasted with that of the *Sayn-Wittgenstein*[30] and Von *Wolffersdorff*[31] judgments. These cases resolve the situations of two citizens whose surnames included noble titles not recognized in the Member States concerned. In both cases, the Constitution prohibited noble titles for historical reasons and on the principle of equality, and in both instances the CJEU acknowledged that the refusal constituted a restriction on free movement justified and proportionate on grounds of constitutional public policy, given that the abolition of nobility forms part of the constitutional identity of those States and may prevail over the continuity of the name[32].

(2) Limited rights of marital freedom of movement

The debate gained greater prominence and significance when the Court first addressed the application of freedom of movement to same-sex marriages in the *Coman* case[33]. The basic facts of the *Coman* case are well known[34]. Relu Adrian Coman, a Romanian national employed as a parliamentary assistant in the European Parliament, married Robert Hamilton, a United States citizen, in Brussels in 2010. At that time, Hamilton was living in New York and, consequently, after the marriage the couple never established a common habitual residence in Brussels. When Hamilton's employment with the European Parliament came to an end, the couple sought to begin a new life together in Romania in 2012[35]. Romania granted Mr. Hamilton only a three-month residence permit because, as Romanian law did not recognize same-sex marriage, the authorities refused to regard him as Mr Coman's spouse. Following a series of appeals, the Romanian courts referred a request for a preliminary ruling to the Court of Justice, asking whether this position was contrary to freedom of movement.

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29 These resolutions and a very complete work on the recognition of legal situations linked to Human Rights, and specifically those related to the Right to a name, can be studied in the monograph by A. Durán Ayago , *Derechos Humanos y método de reconocimiento de situaciones jurídicas hacia la libre circulación de personas y familias, Aranzadi*, Cizur Menor, 2023, pp. 97 to 121.

30 CJEU 14 October 2010, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:608.

31 CJEU 11 January 2016, case C-438/14, *Wolffersdorff*, ECLI:EU:C:2016:11.

32 A detailed study of all the resolutions in A. Durán Ayago, "El TJUE y el nombre de las personas físicas…", *op. cit.*, pp. 515-543. On the consequences of the judgment and the resolution of the DGRN of 24-2-2010 issued after it, C. Esplugues Mota, G. Palao Moreno and J.L. Iglesias Buhigues, *Derecho Internacional Privado*, Tirant lo Blanch, Valencia, 18th edition, 2025, p. 391.

33 CJEU 5 June 2018, case C-673/16, *Coman-Hamilton*, ECLI:EU:C:2018:385.

34 S. Álvarez González, "¿Matrimonio de personas del mismo sexo para toda la UE? A propósito de las conclusiones del Abogado General en el Asunto Coman", *La Ley Digital*, No. 56, February 2018.

35 The publicly available accounts of the events are not always entirely accurate. For previous papers, we had the opportunity to contact Adrián Coman, who very kindly agreed to clarify certain aspects of both the events themselves and the subsequent legal proceedings following the CJEU ruling. We are extremely grateful for Mr. Coman's generosity in clarifying these points.

In its judgment, the Court essentially establishes[36] that the concept of "spouse" in Directive 2004/38 is gender-neutral from the moment one Member State recognizes it as such, even if another Member State does not. Personal status recognized in one State must be accepted as such in all Member States for the exercise of the right to freedom of movement and residence. This status may be relied upon even where the right to freedom of movement has never been exercised in that State and must, therefore, be applicable at any point in a person's life. The conclusion is that, regardless of the domestic law of the Member States, all of them must recognize family situations created and established in another Member State, at least for the purposes of exercising the European right to freedom of movement[37].

This recognition does not affect national identity since Romanian law remains unchanged, and Romania may continue, through its own legislature, to prohibit same-sex marriage. It merely requires the recognition of this status, already recognized in the European Union by another Member State, solely for the purpose of granting residence permits to family members of a Union citizen[38]. This is a key aspect of the *Coman* ruling, which is subsequently reflected in decisions concerning minors and which the Court fortunately abandons in the *Mazowiecki* case. Recognition of the concept of spouse is only permitted for the purposes of freedom of movement, entry into the country, and cohabitation. However, within the country, they will not be considered spouses under civil law, as the Court argues that such recognition would be contrary to Romanian public policy.

Some legal scholar shave argued that the judgment recognizes the right to same-sex marriage throughout the European Union with a broad scope[39]. Others criticized the fact that it only allows freedom of movement for same-sex couples, without any further implications[40]. Yet others, on a closer reading of the ruling, have maintained that it recognizes only the freedom of movement of individuals, and not that of same-sex couples as such. In any event, it is clear that the CJEU allows a non-EU national married to a Union citizen of the same sex to move within the EU in a capacity analogous to that

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36 For more details, S. Romboli, "El conflicto entre identidad nacional y derecho de la Unión Europea en el caso Coman: el Tribunal de Justicia añade otra pieza fundamental para la protección de las parejas homosexuales frente a la discriminación", *Revista de Derecho Constitucional Europeo*, 2020, No. 33, January-June 2019, pp. 75-93; or A. Rivas Vaño, "Matrimonio y orientación sexual: la fuerza expansiva del derecho a la no discriminación. Comentario de las sentencias Taddeucci y Coman", *Lex Social*, Vol. 9, No. 1, 2019, pp. 136-161.

37 In a matter that cannot be explained in this paper due to space constraints, Mr. Coman has not yet been able to reside in Romania. In this regard, L.A. Pérez Martín, "El caso Coman entre el TJUE y el TEDH: la identidad nacional como límite ¿ilícito? A la práctica de la libertad de circulación", in P. Jiménez Blanco e I. Rodríguez Uría-Suárez, *Obstáculos de género a la movilidad transfronteriza de personas y familia*, Colex, A Coruña, 2024, pp. 260-290, pp. 264-267. This paper examines the case in much greater detail.

38 This must be the case because public order and national identity allow states to regulate their own civil status, but not to impede the exercise of the European right to free movement among the 27 Member states without limitation. To avoid violating its public order, the state is not obliged to recognize marriage with full constitutive and civil effects, but it must recognize it for the purpose of exercising the right to free movement in this specific case. This argument is developed primarily in paragraphs 39 to 45 of the resolution.

39 S. Romboli, "El conflicto entre identidad nacional…", *op. cit.*, p. 91.

40 M. Requena Casanova, "Libre circulación de los matrimonios…", *op. cit.* p. 77.

of a spouse, while nevertheless withholding that formal status[41]. It is likewise clear that the Court confines itself to applying the Directive, without addressing the necessary linkage with the rights to respect for private and family life under article 7 of the Charter of Fundamental Rights of the European Union and the right to non-discrimination under article 21. In *Coman*, the Court begins to create a two-tiered system of freedom of movement. Adrian Coman and Clai Hamilton are considered spouses in the Member States that recognize this type of marriage, and as persons with the right to cohabit, but without this status, in the States that do not. In the latter States, they therefore do not enjoy the rights inherent in that status. They are residents, but they do not enjoy the same family privacy as in Belgium. This shows that their fundamental rights relating to family life are being infringed, or at the very least placed in doubt[42].

(3) Conditional freedom of movement for children

The evolution of this debate led to the recognition of same-sex parentage. In the *Pancharevo*[43] and *Rzeczhnik* cases[44] the CJEU was called upon to examine the recognition, in Member States that do not provide for it in their domestic law, of a situation of joint motherhood between two women that was fully recognized in Spain[45].

In both instances, the mothers sought registration of their children, but the authorities in Bulgaria and Poland refused. Following the *Pancharevo* judgment, and in view of the close similarity of the facts in *Rzeczhnik*, the Court, relying on article 99 of its Rules of Procedure[46], disposed of the latter case by way of an order reproducing the same reasoning.

In both cases, the Court adopted an approach very similar to that in *Coman*. It first authorized the registration of the child, it allowed the registration of the child to establish her nationality of an EU Member State, in order to safeguard her best interests. However, as regards freedom of movement, the three women were permitted to travel within the EU, but could not circulate in Bulgaria and Poland in the capacity of two mothers of a minor. The issue of enjoying family status within the European Union thus

41 J. Carrascosa González, Libre circulación de personas, matrimonios entre personas del mismo sexo y la sentencia del TJUE de 5 junio 2018 en el asunto Coman-Hamilton, in *ACCURSIO DIP,* blog, http://accursio.com/blog/?p=851.

42 E. Del Rocío Rodríguez-Salcedo and S. Pazmay-Pazmay, "La familia y los derechos humanos", *Dominio de las ciencias*, Vol. 7, 2021, pp. 612-622; M. López Serna and J. Kala, "Derecho a la identidad personal como resultado del libre desarrollo de la personalidad", *Ciencia Jurídica*, No. 14, 2018, pp. 65-76.

43 CJEU December 14, 2021, case C-490/20, *Pancharevo*, ECLI:EU:C:2021:1008.

44 CJEU Order 24 June 2022, case C 2/21, Rzeczhnik, ECLI:EU:C:2022:502.

45 In both cases, the European mothers (Bulgarian and Polish) who had a daughter with a non-EU woman in one case and an EU woman in the other (United Kingdom and Ireland), and who were recognized as such in Spain, requested their countries of origin to recognize the daughters by registering them in their national registries. The national registries only accepted registration as the daughter of the EU woman, not the non-EU woman, and only if they proved that the daughter was their biological child. If this proof was not provided, the minors were not registered. Following subsequent appeals, the courts of those countries referred a preliminary question to the Supreme Court, asking whether this refusal was contrary to European law.

46 Rules of Procedure of the Court of Justice. OJ L 265, 29-9-2012, p. 1.

resurfaces here, with the particular feature that the rights at stake are those of minors, who are in greater need of protection[47].

Without going into the details of the rulings, the CJEU resolved both cases by imposing two obligations on the Member States. First, they are required to identify the minors so as to confer on them the nationality of a Member State and, consequently, Union citizenship, thereby safeguarding their best interests. Second, they must recognize the Spanish document in order to enable the three persons concerned the mothers and their daughters to travel together within the Union. However, the obligation is to recognize the Spanish document for the purpose of travel, not to register it: whether the State proceeds to register it is immaterial from the perspective of European Union law. The Court requires the recognition of the parentage of one of the mothers. Furthermore, the Court does not oblige the State to recognize the girls as the daughters of the non-national woman of the Eastern Member State in each case. In other words, as in *Coman*, the document is recognized solely for the purpose of exercising freedom of movement, not for establishing parentage. While the resolutions refer to the women as the girls' mothers, the ruling states that the document must allow the minors to exercise their right to travel 'with each of those two people' not with their mothers, since it does not obligate the Eastern European country to recognize them as such. Therefore, the Court does not recognize the right to same-sex parenting throughout the EU[48].

Thus, the *Pancharevo* doctrine consolidates a two-tier system of freedom of movement and the non-recognition of the family status claimed by the women concerned. When confronted with the requirement to issue a document attesting to the child's nationality, national law gives way and no breach of public policy may be relied upon. It likewise gives way to the recognition of the Spanish document for the purpose of enabling the two women to move freely. However, it does not in any respect yield to recognition, in Spain, of one woman's status as mother: only one of them is acknowledged as such.

This continuation of the existing approach must be regarded as clearly unsatisfactory. How can the two women reside in Bulgaria and Poland with their daughter if only one of them is recognized as her mother? Family life, the right to privacy, the right to responsible parenthood and the right to take decisions in relation to the child are all plainly undermined by this solution. The fundamental rights of those concerned are once again infringed, entrenching a two-tier system of freedom of movement. The European Commission itself has acknowledged, in its proposal for a Regulation on parentage, that this unsatisfactory case law was one of the catalysts for its initiative[49].

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47 R. Arenas García, "El reconocimiento de las situaciones familiares en la Unión Europea", in M.V. Cuartero Rubio, J. M. Velasco Retamosa, *La vida familiar internacional en una Europa compleja… op. cit.,* pp. 47-78; G. Palao Moreno, "Los Reglamentos europeos en materia de familia: cuestiones abiertas y problemas prácticos", in M.V. Cuartero Rubio, J.M. Velasco Retamosa, *La vida familiar internacional en una Europa compleja… op. cit.,* pp. 23-46.

48 As S. Álvarez González finally stated, "La Justicia europea no reconoce el derecho de los hijos de parejas LGTBI en toda la UE (o la Justicia europea no obliga a los Estados miembros a reconocer la homoparentalidad)", *LA LEY Unión Europea,* No. 102, April 2022, pp. 1-18, p. 5.

49 As highlighted in the line of achieving a great advance after the resolutions *Pancharevo* and *Rzeczhnik*, B. Campuzano Díaz, "Reflexiones sobre el certificado de nacimiento a propósito de los casos Pancharevo y Rzeczhnik", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 241-256, p. 256.

(D) AND FULL FREEDOM OF MOVEMENT ARRIVED

(1) The rights of same-sex couples in the ECHR doctrine

The first steps towards remedying this highly unsatisfactory situation did not come from the CJEU, but from the ECtHR. They arose from the persistent failure to recognize the right of same-sex couples to be treated as such, a right that was perceived as conflicting with the national identity of Member States and is, in this respect, analogous to the national-identity clause of the TEU[50]. Article 8 of the ECHR protects the right to respect for private and family life, as well as the inviolability of the home and correspondence, mirroring article 7 of the Charter of Fundamental Rights of the European Union. Article 12 guarantees the right to marry, corresponding to article 9 of the Charter. Finally, article 14 enshrines the prohibition of discrimination, comparable to article 21 of the Charter of Fundamental Rights of the European Union. In 2023, the ECtHR delivered a series of judgments on the recognition of the rights of same-sex couples which prepared the ground for the subsequent case law of the CJEU, a challenge that the latter, it should be stressed, has been quick to take up.

In 2023, in deciding these cases, the ECtHR departed from its earlier case law.[51] The most extensive and significant judgment, which set the tone as the first, was *Fedotova and others v. Russia*, delivered on 17th January 2023[52].

This ruling will serve as the primary point of reference, since the subsequent judgments largely reiterate its reasoning, although it should be noted that those later decisions concerned situations arising in Member States[53]. The ECtHR held that States enjoy a certain margin of appreciation as regards the legal status conferred by the chosen form of recognition and the rights and obligations attached to relationships between same-sex couples, whether they regulate them as marriage or as another form of registered partnership. Accordingly, States are not required to introduce same-sex marriage into their domestic legal systems.

However, the right to marry, regulated in article 12 of the ECHR, is distinct from the recognition of the rights of same-sex couples and their families, regulated in article 8[54]. The legal recognition and essential protection of the applicants as same-sex couples is a

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50 We cannot dwell on the debate regarding the relationship between the national identity defended by States in the application of the ECHR and the national identity of the TEU. In this regard, P. Cruz Mantilla de los Ríos, "Identidad nacional y sistema del CEDH: una dudosa analogía", *Anales del Derecho*, 2020: Special Issue AdD : The ECHR on its Sixtieth Anniversary, pp. 1-28.

51 Regarding the previous case law of the ECtHR regulating the general recognition of the rights of same-sex persons, I. Manzano Barragán, "La jurisprudencia del Tribunal Europeo de Derechos Humanos sobre orientación sexual e identidad de género", *Revista Española de Derecho Internacional*, Vol. LXIV (2012), 2, pp. 49-78.

52 ECHR, *Fedotova and Others v. Russia.* case judgment (Grand Chamber) of 17 January 2023. Applications nos. 40792/10, 30538/14 and 43439/14. Art. 8: Right to respect for private and family life.

53 Specifically those of the alleged *Pancharevo* and *Rzeczhnik,* Bulgaria and Poland.

54 The Court has a well-established body of case law on the application of Article 8 of the ECHR and the positive obligations of States, which we cannot discuss here. In this regard, L. Redondo Saceda, "El papel del artículo 8 CED en la construcción del margen de apreciación nacional y la doctrina de las obligaciones positivas del Estado", *Anales del Derecho*, 2020: Special Issue AdD: The ECHR on its sixtieth anniversary, pp. 1-28.

crucial aspect of their identity, and the State should have a reduced margin of regulatory power in this regard.

Failure to recognize rights analogous to those of heterosexual couples leaves same-sex couples in a legal vacuum, preventing them from benefiting from legal protection and exposing them to significant difficulties in their everyday lives. In particular, they are prevented from enjoying the same rights as different-sex couples in respect of property, inheritance, insurance, parentage and giving evidence in civil or criminal proceedings, as well as access to medically assisted reproduction. Although States retain a "choice of means" to secure these rights, the creation of a "specific legal framework" is mandatory. States that do not regulate these rights are in breach of their obligations under the ECHR.

Following its initial ruling concerning Russia, the ECtHR has issued two more recent judgments on similar claims involving Member States of the European Union. The first is the judgment of 5th September 2023, in the case of *Koilova and Babulkova v. Bulgaria*[55]. The second ECtHR judgment concerning an EU Member State is that of 12 December 2023, in the case of *Przybyszewska and others v. Poland*[56]. In both cases, the Court, applying the *Fedotova* doctrine, held that considerations of national interest cannot justify the present autonomous evolution of domestic regulation among the States Parties to the ECHR. The positive obligation to legislate, as established in *Fedotova*, exists, and without compliance, the effective protection of the private and family life of homosexual persons is not guaranteed. Without the recognition of these family rights, the values of a democratic society, which the Convention requires, such as pluralism, tolerance, and openness, are not respected. This recognition affects particularly essential aspects of personal and social identity and allows for inclusion in society regardless of sexual orientation. In deciding how to regulate these matters, the margin of appreciation accorded to States is wider as regards same-sex marriage but is substantially narrower as regards the recognition of family rights. What must be guaranteed are concrete and effective rights, not theoretical or illusory ones. These include both material rights (maintenance, taxation and inheritance) and moral rights (rights and duties of mutual support) specific to the life of a couple, which are best secured within a legal framework that is open to same-sex couples[57].

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55 ECHR, *Koilova and Babulkova v. Bulgaria*, No. 40209/20, judgment of 5 September 2023. Art. 8: Right to respect for private and family life.

56 ECHR, *Przybyszewska and Others v. Poland*, No. 11454/17, judgment of 12 December 2023. Art. 8: Right to respect for private and family life.

57 Even the ECHR points out that, without a societal commitment to the recognition of these rights, a supposedly negative, or even hostile, attitude on the part of the heterosexual majority cannot override the applicants' interest in having their respective relationships adequately recognized and protected by law. The protection of the family in the traditional sense is, in principle, a legitimate reason that could justify differential treatment based on sexual orientation, but this objective is quite abstract, and a wide variety of concrete measures can be used to implement it. This national interest cannot currently evolve autonomously in each State, because guaranteeing the rights of same-sex couples does not in itself imply weakening the rights guaranteed to other individuals or other couples. There is no basis for considering that granting legal recognition and protection to same-sex couples in a stable and committed relationship could, in itself, harm traditionally constituted families or compromise their future or integrity.

The ECtHR's case law does not address the right to freedom of movement, but rather the rights to family life and privacy of same-sex couples in the signatory States, and it is very clear in its ultimate meaning. Even though the Convention permits States not to recognize same-sex marriage as such, those couples must be afforded a set of rights that establishes two equivalent regimes of personal and family status, thereby ensuring comparable family privacy and excluding discrimination on grounds of sexual orientation.

(2) The *Mirin* case: personal identity over national identity

The *Mirin* case is the most recent precedent in which the CJEU issued a ruling prior to the *Mazowiecki*. In that case, the judgment of 4th of October 2024[58] resolved an issue related to personal identity[59]. The Court examined the refusal of the Romanian authorities to record the change of gender of a Romanian national who had been registered as female at birth in the civil register, had transitioned in the United Kingdom, and had been registered there as male[60]. In this case, the rights at stake were not those of freedom of movement and residence under article 21 TFEU, since the person concerned was a Romanian national. The case concerned the individual's identity and the manner in which that identity is recognized throughout the Union. Refusing to acknowledge an identity already recognized in a Member State affects aspects closely linked to the free development of the person's personality and engages human dignity as an inherent right protected in all human-rights instruments.

This case addressed the identity of the person and how that identity is recognized throughout the Union. Not recognizing the identity that a person already enjoys in a Member State involves aspects closely linked to the free development of their personality, connecting with the dignity of the person as an inherent right recognized by all human rights protection treaties[61].

In *Mirin*, the Court begins by analyzing the case in order to show how the non-recognition of a person's legal status can obstruct the exercise of their freedom of movement. It concludes that the refusal to record the change will create two distinct legal realities: on the one hand, a person with one name and gender in a Member State no longer corresponding to their actual situation who will, however, be recognized

58 CJEU of October 4, 2024, case C-4/23, *Mirin*, ECLI:EU:C:2024:845.

59 For a detailed study of the current configuration of the right to identity of the person in Spanish Private International Law, P. Blanco-Morales Limones, "Derecho de la persona y la familia", *Cuadernos de Derecho Transnacional* (March 2025), Vol. 5, No. 1, pp. 955-985, specifically pp. 966-973, in which he makes several of the resolutions analyzed here.

60 M.-A. A. is a Romanian citizen who was registered as female at birth in the Cluj Civil Registry in 1992, reflecting his biological sex at the time. After moving to the United Kingdom in 2008 and acquiring British nationality in 2016, in 2017 he followed the legal process recognized under British law to change his name and began using the corresponding gender marker, transitioning from female to male. All his British documents bear this name and male gender. In 2020, he obtained definitive British documentation, which he attempted to register in the Cluj Registry in 2021. The Romanian authorities refused this registration, as Romanian law stipulates that a change of gender identity can only be recorded on a birth certificate once approved by a final court ruling. Upon appeal against this refusal, alleging a violation of European Union law and the case law of the ECHR on the matter, the Romanian court initiated preliminary proceedings.

61 G. Esteban de la Rosa, "Método y función del Derecho Internacional Privado", *REEI*, No. 40, December 2020, pp. 1-58, p. 44.

as such in those Member States that accept the change; and, on the other, a person with a different identity and gender in the State of their other nationality and origin. This is the same outcome that underpinned the Court's earlier judgments in *Coman*, *Pancharevo* and *Rzeczhnik*. This situation will clearly and decisively impede the exercise of freedom of movement and may cause problems in everyday life, both in the public and private spheres. Therefore, this lack of registration is contrary to European Union law[62].

A reading of the first part of the judgment gives grounds for pessimism as to any genuine development in the CJEU's interpretative approach, since, as noted above, it adheres to the *Coman* and *Pancharevo* line of reasoning, focusing essentially on the obstacles which the refusal would create for the freedom of movement and residence, rather than on other rights[63]. In fact, it might have been significant that the ruling refers to article 7 of the Charter of Fundamental Rights of the European Union, which regulates family privacy, but the freedom expressly mentioned in the ruling is only that of freedom of movement and residence, and the violation of family privacy is not expressly mentioned, even though the right to identity is expressly mentioned.

However, even at that time, a shift was already taking shape within the Court, which has materialized in *Mazowiecki*. In paragraphs 63 to 68 of its judgment, the Court develops a comprehensive defense of the application of the recognition of public documents in light of Article 7 of the Charter of Fundamental Rights of the European Union and article 8 of the European Convention on Human Rights emphasizing the protection of private life and its link to a person's gender identity[64]. The focus is no longer solely on freedom of movement, but on the enjoyment of personal and family privacy. The reason is clear: the Romanian national could perfectly well reside in Romania and his freedom of movement was not affected. His violated rights were those of personal and family privacy. If these were not respected by Romania, he would have a two-tiered freedom of movement: one as a man in the Member States that legally recognized gender reassignment, and another as a woman in Romania. What was permitted in *Coman*, *Pancharevo* and *Rzeczhnik* is thus no longer acceptable in *Mirin*, marking a clear step forward in the CJEU's protection of the fundamental rights of EU citizens compared with its earlier case law.

Because when a national legal system fails to recognize personal attributes such as name, gender, parentage or marital status, it not only violates the right to free movement but also clearly discriminates against individuals in the enjoyment of their right to private and family life and, in the case of minors, in the protection of their best

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62 A detailed study on gender identity in Spanish Private International Law, therefore, from an internal perspective, can be found in P. Orejudo Prieto de los Mozos, "La identidad de género en el derecho internacional privado español", *REDI*, Vol. 75, 2023, 2, pp. 343-366.

63 Let us remember that Romania did not recognize the registration of the change of name and gender identity, and referred the Romanian citizen to a new procedure, of a jurisdictional type, for change of gender identity in that first Member State, which disregarded the change already legally acquired in the other Member State.

64 We believe this fact is not trivial. The fact that CJEU judgments do not include dissenting opinions and must all be reached by consensus means that, in the judges' agreements within the chambers, some aspects of the more advanced reasoning of the judgment may not appear in the final ruling, perhaps as a balancing act between the drafter's opinion and the final agreement of the entire chamber. Regarding the procedure before the CJEU, C.F. Molina del Pozo, *El tribunal de Justicia de la Unión Europea: procedimiento y recursos*, Aranzadi, Cizur Menor (Navarra), 2023.

interests[65]. Therefore, the right to identity must therefore be interpreted in light of the national identity, which is required to give way where the two conflict. For this reason, the judgment provides a solid point for the full recognition of personal identity and other family rights throughout the European Union[66]. Mutual recognition within the EU has an evident and direct impact in this field: mere differences in the domestic rules of the Member States cannot be allowed to obstruct the free movement of persons in relation to their identifying characteristics, including both sex and name. For all the reasons set out above, the fact that the right at issue in these proceedings concerned personal identity has, in our view, been decisive in shaping this outcome[67]. In this case, civil registry certificates and related administrative documentation are inseparable[68].

(3) The *Mazowiecki* case, the end of the road?

Building on all of this evolution, the *Mazowiecki* judgment reshapes the analytical framework used thus far in the study of freedom of movement and residence. When the case reached the European legal stage, it seemed as if the stars had aligned to make possible the development that ultimately took place. Unlike the rather cautious responses in *Coman* and *Pancharevo* which have already been criticized, the evolution of the doctrine with the F*edotova* saga followed the initial revolution of the *Mirin* judgment, in which the CJEU clearly positioned itself on the path of recognizing the need for dialogue between courts and ensuring that national identity does not limit the enjoyment of fundamental rights by all citizens of the Union. In *Mazowiecki*, the Court is no longer dealing with an EU citizen and a third-country spouse, as in *Coman*, but with two Polish nationals seeking recognition in Poland of a marriage concluded in Germany. It addresses the recognition of the rights of same-sex couples, regardless of the exercise of this freedom, which more directly examines the core of the issue and places the ECtHR's doctrine on the matter in the foreground[69].

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65 Professor Durán shares this view in her recent paper on the ruling, A. Durán Ayago, "De la identidad de género a la libre circulación en la Unión Europea. Un paso más en la buena dirección al albur de la STJUE de 4 de octubre de 2024, C-4/23, Mirin", *Cuadernos de Derecho Transnacional*, March 2025, Vol. 17, No. 1, pp. 1260-1269, p. 1268. In it, Professor Durán, a true expert on the subject, points out that, "Having already taken this step in the judgment we are discussing, the CJEU consolidates its jurisprudence regarding the principle of mutual recognition, giving it new material impetus based on the fundamental rights contained in the Charter of Fundamental Rights of the European Union, pending the eventual incorporation of this progress into European legislation".

66 For this purpose, the method of recognition is adopted, which dispenses with the conflict rule to accept the change of gender as P. Blanco-Morales Limones points in "Derecho de la persona…" *op. cit.,* p. 973.

67 D. Menicini shares the same opinion, "Identidad de género y libre circulación en la UE: el alcance garantista de la sentencia Mirin del TJUE", *Revista de Jurisprudencia de Derecho Internacional Privado* (RJDipr), No. 2, 1st semester 2025, pp. 87-95, p. 94. Regarding the Mirin case, see also A. Lara Aguado, *La identidad de las personas transgénero, transexuales e intersex en situaciones de movilidad internacional*, Aranzadi, Pamplona, 2025, pp. 90-100.

68 P. Jiménez Blanco, "La identidad de género en la movilidad transfronteriza: vertientes personal y familiar", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 985-999, p. 999.

69 Regarding the facts, Mr. Jakub Cupriak-Trojan, who holds dual Polish and German nationality, and Mr. Mateusz Trojan, a Polish national, married in Berlin, Germany, on June 6, 2018. The court notes that the referral order indicates that, at the time the request for a preliminary ruling was submitted, they were residing in Germany but intended to move to Poland and reside there as a married couple. After their marriage, Mr. Cupriak-Trojan added his husband's surname to his own, in accordance with German

Before turning to the next section of the analysis of the judgment as a whole, we will initially examine the Advocate General's conclusions published on April 3rd of 2025[70]. That Opinion reflects the CJEU case law discussed in this article, which recognizes marriages and parent-child relationships only for the purposes of freedom of movement, while reserving full protection for the right to identity in all other contexts, thereby confirming that the Court's current jurisprudence affords lesser recognition to marriage than to personal identity.

Having acknowledged this state of affairs, the Advocate General goes a step further when, in paragraph 36, after referring to the ECtHR's case law in *Fedotova* and other cases, he observes that, within the Union, it is for Member States which do not provide for, or even prohibit, same-sex marriage in their national law to establish appropriate procedures for the recognition of unions contracted as such in another Member State. He recalls that the Court of Justice has already held that such an obligation of recognition does not encroach upon national identity or undermine the public policy of the Member State concerned. In this way, the Opinion was already laying the foundations for the judgment ultimately delivered on 25 November and for the development in the law that it represents.

Polish national identity cannot be invoked to deny recognition of the rights to personal and family privacy already enjoyed by these Union citizens in Germany. If national identity limits these rights, it must evolve and be modified in its practical interpretation. With this position, the Advocate General had already invited the Court of Justice to require Member States to recognize the legal effects of same-sex marriages, even if they do not recognize the institution of marriage itself, and even if such recognition requires legislative evolution. Regarding this potential obligation of legislative evolution, if their national identity conflicted with European law, the Advocate General considered the means available to Poland to prove the identity of the spouses and their marital status. Since the Polish government itself stated that the only way to do so was by registering the marriage, he proposed that the Court do

law. Following the decision of the Kierownik Urzędu Stanu The Civil Registry Office of Warsaw, Poland, adopted at the request of Mr. Cupriak-Trojan, whose surname was changed upon marriage, is the same in Poland. Thus, in his civil registry entry, his surnames already reflect those of a person married to someone of the same sex. Both requested that their German marriage certificate be transcribed in the Polish civil registry, and by decision of August 8, 2019, the Civil Registry Office of Warsaw, where the birth certificates of Mr. Cupriak-Trojan and Mr. Trojan are held, denied the request. He considered that transcribing this certificate would be contrary to the fundamental principles of the Polish legal system. This decision was subsequently upheld by higher courts. The Voivode of Mazovia argued that Polish law did not permit same-sex marriage, and the registry had two fields, one for male and one for female. The appeal against this decision was dismissed by the Warsaw Voivodeship Administrative Court in a judgment dated July 1, 2020, which stated that neither the Polish Constitution nor Polish law allows for the coexistence of same-sex and opposite-sex marriages within the national public order. The court in question also held that refusing to transcribe the marriage certificate did not infringe Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (hereinafter referred to as 'ECHR'), in conjunction with Article 12 of that Convention, nor Article 21(1) TFEU, since the main proceedings concerned a matter of civil status unrelated to the right to move and reside within a Member State. In response to the new appeal, the Polish Supreme Court referred a question for a preliminary ruling, citing the possible infringement of Article 20 TFEU, as well as Articles 7 and 21 of the Charter of Fundamental Rights of the European Union.

70 Conclusions of Advocate General De la Tour of 3 April 2025, ECLI:EU:C:2025:235.

what it ultimately did: impose this registration obligation on Poland[71]. Thus, in his conclusions, Advocate General De la Tour did evolve from the CJEU's position in the *Coman* judgment regarding the effects of these marriages, and he paved the way for the Court when he stated that the Member State of origin of a Union citizen should recognize the legal effects of a marriage celebrated by that citizen in another Member State with a person of the same sex, even if the purpose is not to obtain a derivative right of residence, an identity document, or a passport from the first Member State. Each Member State remains free to determine the procedures through which same-sex couples are granted official recognition, thereby securing their social existence and legitimacy, but those rights must, in any event, be guaranteed.

(E) CITIZENS' RIGHTS RECOGNIZED IN THE EU AFTER THE *MAZOWIECKI* RULING

The *Mazowiecki* case arose from the desire of two Polish citizens married in Germany to enjoy in Poland the same set of rights they had in Germany should they establish their residence there in the future[72]. Although the case has its origin in freedom of movement and residence, its core complaint concerns the lack of recognition of family rights under the CJEU's earlier approach in *Coman*. The two Polish citizens could live without problems in Poland, as they were Polish nationals, but their personal status as spouses was not acknowledged there. Accordingly, any analysis of the *Mazowiecki* judgment should focus not only on freedom of movement, but on the rights that must accompany that freedom if articles 7 and 21 of the Charter of Fundamental Rights of the European Union are not to be violated. This is precisely the debate we have highlighted throughout this paper. This is why the analysis must first examine the rights that should be recognized for nationals of Member States who have already formed a family outside their country. Following this, we will reflect on the progress that this recognition represents in the exercise of the right to freedom of movement in the EU and will conclude by reflecting on how this affects national identity.

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71 If there were another way to prove it, this obligation would not be imposed, since they could assert their rights in another way. Paragraph 45 states that, "Since there are no alternative solutions in Poland, such as the submission of any other official document (58) that can be recognized by the Polish administrative services, the obligation to transcribe the foreign marriage certificate in a Civil Registry is imposed on that Member State". It follows, paragraph 46, that the obligation to register a marriage certificate issued in one Member State in a Civil Registry cannot, in my opinion, be imposed on any other Member State if the marriage is effective without the need to carry out this formality".

72 Paragraph 50 of the ruling states that "the referring court has doubts about the consequences that such a refusal may have on the spouses' ability to continue in Poland the family life developed or established in Germany through their marriage". This is because the spouses have already raised this point in the proceedings. "On this matter, and without prejudice to the findings of that court, the spouses have pointed out, in their observations submitted to the Court of Justice, that, for a period of time while Mr. Trojan lived and worked in Poland, Mr. Cupriak-Trojan was unemployed and lacked public health insurance coverage, which he would have had had the effects of his marriage been recognized in Poland". On the other hand, "another application linked to rights obtained through marriage, such as the application to update Mr. Cupriak-Trojan 's surname in the Property Registry, was accepted by a Polish court for one of his properties, but was denied by another Polish court for another property, on the grounds that such an application could not be based on a same-sex marriage certificate".

(1) Recognized rights

In its request for a preliminary ruling, the Polish court itself stated that it might be justified to interpret articles 20.2.a) and 21.1 TFEU as meaning that a refusal of transcription similar to that at issue in the main proceedings constitutes an infringement, by the Member State concerned, of the right of Union citizens whose marriage is registered in the civil registry of another Member State to lead a family life as married persons and is indicative of discrimination on grounds of sex and sexual orientation[73]. It would follow that such a refusal would prevent those people from fully exercising their right to move and reside freely in that Member State (paragraph 34), and it was in this context that the court referred the question for a preliminary ruling[74]. As is apparent, the Polish court did not regard the *Coman* doctrine as sufficient to satisfy the requirements of article 7, on the right to respect for private and family life, and article 21, on non-discrimination, of the Charter of Fundamental Rights of the European Union[75].

It is at this point that, in order to move beyond its own *Coman* and *Pancharevo* case law, the CJEU turns to the ECtHR's reasoning in *Fedotova* to interpret a request made by two individuals who do not require the procedure in order to exercise their freedom of movement, giving concrete expression to its commitment to judicial dialogue between the two courts[76]. This allows a standard of protection that differs from that set out in the Charter of Fundamental Rights of the European Union only insofar as the application of the right does not fall below the level of protection guaranteed by the Charter. However, it does not authorize the creation of a dual standard of protection where common guarantees already exist within the Union. This constitutes a double standard of protection when common guarantees already exist within the Union. In the present case, we are dealing with related rights: personal and family privacy (article 8 of the ECHR and article 7 of the Charter of Fundamental Rights of the European Union) and non-discrimination (article 14 of the ECHR and article 21 of the Charter of Fundamental Rights of the European Union)[77].

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73 Paragraphs 16 and 17 of the appeal document, cited in paragraph 34 of the judgment.

74 The question was as follows: Should Articles 20(2)(a) and 21(1) TFEU, in conjunction with Articles 7 and 21(1) of the Charter and Article 2(2) of Directive 2004/38, be interpreted as not allowing the competent authorities of a Member State to refuse to recognize and record in the national civil status register a marriage certificate entered into between a national of that State and another Union citizen (of the same sex) in another Member State under the law of the latter, thereby preventing these two persons from residing in the first Member State with that civil status and with the same surname, because the law of the host State does not recognize same-sex marriages?

75 The Polish Supreme Court itself stated in its brief requesting a preliminary ruling that the national courts have not yet carried out an in-depth examination of these questions in the context of freedom of movement and residence in light of the fundamental rights enshrined in Articles 7 and 21(1) of the Charter (paragraphs 12 to 15 of the brief, cited in paragraph 32 of the judgment).

76 G. Esteban de la Rosa, "Diálogo entre tribunales y protección de los derechos fundamentales en el ámbito europeo", *RGDE*, Vol. 31, 2013, pp. 1-35, p. 34.

77 Paragraph 64 of the judgment, in which it defends the existence of the same threshold of protection for the rights it cites as the *Mirin* judgment: "In this respect, with regard to respect for private and family life guaranteed in Article 7 of the Charter, it is clear from the Explanations on the Charter of Fundamental Rights (OJ 2007, C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and scope as those guaranteed by Article 8 of the ECHR, the

From this, he derives an argument that goes beyond the *Coman* doctrine, notwithstanding its citation in paragraph 65, by emphasizing that the case law of the ECHR confirms that the relationship between a same-sex couple falls within the notions of "private life" and "family life" in the same way as that of a different-sex couple in an equivalent situation. Consequently, since the ECtHR has imposed on all States Parties to the Convention, including Poland, a positive obligation to establish a legal framework for the recognition and protection of same-sex couples.

It clearly states that, if this is not respected, the affected individuals are unable to organize fundamental aspects of their private and family life, violating article 7 of the Chapter of Fundamental Rights of the European Union. The legal framework in question has been devised to govern the situation of those who have lawfully married abroad and wish to have that marriage recognized in Poland. As can be seen, this represents a departure from the *Coman* doctrine. The solution is, in fact, straightforward and had already been advocated in the legal doctrine[78]. Freedom of movement cannot be granted in addition to any other rights. The State is required to acknowledge the catalogue of rights identified by the ECHR, failing which same-sex couples are left without protection and subject to discrimination[79].

This form of recognition of rights achieves an assimilation of family law, which seeks the enjoyment of these rights, although it allows States, as we will see later, a certain margin of discretion. It has been argued that the distinction between the possible forms of recognition is ambiguous and, to some extent, inconsistent. Since matters relating to identity (such as name or gender reassignment) and to family status (such as marriage and parentage) both fall within Member State competence, failure to accord recognition to either in a manner equivalent to that in other States may place Union citizens at a serious disadvantage, potentially infringing their rights under article 21 TFEU[80]. In any case, this form of recognition is regarded here as compatible with the national identity, a point that will be examined in section 3.

(2) Full freedom of movement

This approach enables spouses to move freely within their State of origin while retaining their acquired rights. At the same time, it should be stressed that a consistent

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latter being the minimum threshold of protection (to that effect, the judgment of 4 October 2024, *Mirin*, C 4/23, EU:C:2024:845, paragraph 63 and the case law cited therein)".

78 A. Durán Ayago, *Derechos Humanos y método de reconocimiento de situaciones jurídicas hacia la libre circulación de personas y familias*, Aranzadi, Cizur Menor, 2023.

79 Paragraph 66 of the judgment: "The Court also noted that, by refusing to register such marriages in any way, the Polish authorities have left these individuals in a legal limbo and have failed to meet the fundamental needs for recognition and protection of same-sex couples in stable relationships. Consequently, the Court held that none of the grounds of public interest invoked by the Polish Government outweigh the interest of these individuals in having their relationships duly recognized and protected by law. It concludes by stating in paragraph 67 that this failure to recognize such relationships is contrary to Article 7 of the Charter of Fundamental Rights of the European Union".

80 L. Helga, "Skirting the Fault Line? AG Richard de la Tour's Opinion in the Wojewoda *Mazowiecki* case: EU law requires registration of same sex marriages only when no alternatives exist", published in EU Law Analysis on April 30, 2025, following the Advocate General's conclusions. https://eulawanalysis.blogspot.com/2025/04/skirting-fault-line-ag-richard-de-la.html.

application of this approach to all family situations ought, in the future, to secure the full enjoyment of freedom of movement throughout the Union. This would not necessarily require identical legal institutions, but it would demand equivalence in substantive rights. Logically, this should be extended to other family structures.

If the law of the Member States must recognize an equivalent family status for spouses in same-sex couples, then, by applying this doctrine together with the *Mirin* case law to future situations involving children in circumstances akin to *Pancharevo*, it follows that children must likewise be guaranteed that freedom of movement will, in the future, be genuinely complete[81]. The Court cites this very clearly in the *Mazowiecki* judgment, definitively abandoning the *Coman* doctrine, when it emphasizes that "the practical effect of the rights conferred on the Union citizen concerned by article 21.1 TFEU requires that the family life that this citizen has maintained in that Member State can continue upon his return to the Member State of which he is a National"[82].

And recognition is complete because the Court requires that this freedom be exercised in a manner that respects freedom of movement and residence without giving rise to serious administrative, professional or private difficulties[83]. That is to say, it insists on the recognition of the family rights that make such freedom effective. In fact, the Court seems to be referring to Coman and Hamilton when it points out that not recognizing these rights forces them to live as single people upon returning to their Member State of origin[84], which is precisely what would have occurred had they been able to resettle in Romania. The debate that follows this recognition concerns the means of securing such full freedom of movement, and the answer lies in the adaptation of national legislation and, therefore, of the national identity to this requirement.

(3) Adapting the national identity?

Once the Court accepts that the *Coman* doctrine on respect for national identity and the application of the public policy of the Member State is insufficient to avoid violating articles 7 and 21 of the Charter of Fundamental Rights of the European Union, it addresses how full freedom of movement should be achieved. To balance this with national identity, the Court agrees with the ECHR that national identity protects the State's right to shape or not shape the formation of an institutionalized family by regulating marriage. Accordingly, the Court makes clear that it cannot require a Member State to introduce same-sex marriage as such, since this would infringe that State's

81 Let us remember the fact that Coman has not yet been able to reside in Romania and that Pancharevo will reside in Bulgaria with a mother and another "ancestor".

82 "The practical effect of the rights conferred on those citizens by article 21.1 TFEU requires, all the more so, that those citizens be able to continue in the Member State of their origin the family life they have developed or consolidated in the host Member State, in particular through marriage". Paragraphs 44 to 46 of the judgment.

83 And to that end he cites the *Mirin* ruling, not the Coman case.

84 Paragraph 55: "Thus, the lack of recognition of such a marriage in the Member State of origin entails a concrete risk that the organization of family life of those same citizens will be seriously hampered when they return to their Member State of origin, since, in numerous actions of daily life, in both the public and private spheres, it will be impossible for them to assert their marital status, which, however, has been legally established in the host Member State".

exclusive competence in this field. It also makes clear, however, that a Member State is not at liberty to determine, as it sees fit, how the TFEU provisions on freedom of movement and residence apply within its territory when it comes to recognizing, as noted above, the essential family privacy rights flowing from a person's civil status and already enjoyed in another Member State.

To this end, the Court holds, in line with the ECtHR's case law, that the State enjoys a margin of appreciation and freedom as to the means by which, in its domestic legal order, it gives effect to the core legal consequences of a marriage concluded in another Member State. The crucial point, however, is that those rights must indeed be recognized. A Member State that does not itself provide for same-sex marriage is therefore required to establish suitable procedures for recognizing such a marriage when it has been entered into by two Union citizens exercising their freedom of movement and residence under the law of the host Member State[85]. These rights, specifically, include taxation, property, labor rights, healthcare and inheritance rights. Only in this way can a strict conception of national public policy be given practical effect, since public policy can only be invoked in the event of a real and sufficiently serious threat affecting a fundamental interest of society[86]. Such public policy may in no case infringe upon the essential rights of European integration, as appears to have occurred thus far in the *Coman* case[87].

The Court states that, because Poland itself admitted that the only way to secure these rights is to register the marriage in the Polish civil register, Poland must carry out that registration[88]. This requirement already operates, in practice, as a condition for same-sex couples. At the same time, the Court clarifies an important point: although Member States have some discretion in deciding how to recognize the rights arising from such marriages, if changing national law becomes necessary to make that recognition effective, they are obliged to do so. Protecting the fundamental rights guaranteed by the Charter therefore requires adjusting the national identity, even by amending domestic legislation, without this implying a general duty to introduce marriage as an institution in every situation[89].

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85 Paragraph 69 of the judgment: "In this respect, it should be noted that the choice of means of recognizing marriages entered into by Union citizens in the exercise of their freedom of movement and residence in another Member State falls within the margin of appreciation available to Member States in the exercise of their competence, referred to in paragraph 47 of this judgment, concerning rules relating to marriage. In this respect, the transcription of marriage certificates in the Civil Registry of Member States is merely one means among others to allow such recognition. However, it is necessary that these means not render impossible or excessively difficult the application of the rights conferred by article 21 TFEU".

86 S. Álvarez González, "¿Matrimonio de personas del mismo sexo…", *op. cit.*, p. 3.

87 On the *Coman* case and Romanian public policy in matters of family relations, N. Anitei, "El orden público en el derecho internacional privado rumano en materia de relaciones familiares", *Cuadernos de Derecho Transnacional* (March 2022), Vol. 14, No. 1, pp. 956-976.

88 Paragraph 71. To this end, it argued that "although, in principle, marriage certificates issued abroad may produce probative effects equivalent to Polish marriage certificates, in practice, it is excessively difficult, if not impossible, for such certificates to confer rights, given that, if such certificates are not transcribed in the Polish Civil Registry, their recognition is subject to the discretion of the administrative authorities and, consequently, may be subject to divergent decisions by those authorities".

89 Paragraph 76. In important textual content: "Finally, it should be pointed out that both articles 20 TFEU and 21.1 TFEU, as well as Articles 7 and 21.1 of the Charter, are sufficient in themselves and do not need to be supplemented by provisions of Union or national law to confer on individuals rights enforceable as such. Consequently, if the referring court were to conclude that it is not possible to interpret its national

Despite uncertainties about how the *Mazowiecki* doctrine relates to the national identity, the latter does not extend to regulating marriage itself, but it does require recognizing all rights flowing from marriage, including for same-sex couples. A line of scholarship, which this article follows, maintains that this freedom as to means reflects a balance between the division of competences between the EU and the Member States, while also safeguarding the fundamental rights of same-sex couples[90]. Another line of scholarship finds this reasoning unpersuasive, since it is hard in practice to draw a clear line between the transcription of changes in personal identity and those concerning civil status. In both situations, serious drawbacks can arise. Family ties are closely connected to the applicants' personal and social identity as homosexual individuals who seek to have their relationships recognized and protected by law. The solution adopted by the Court overlooks the problematic practical effects of mere recognition without transcription[91]. In any case, the Polish government itself reacted after the conclusions of the General Assembly and before knowing the sentence, and in October 2025 presented in Parliament a proposed law to approve a law on civil unions. Although it does not seem to respond to all the rights included in the *Mazowiecki* ruling, is a first step in the right direction[92].

As Professor Espiniella Mendéndez so aptly pointed out before even knowing the Advocate General's conclusions, anticipating the current situation, "it seems necessary that States opposed to same-sex marriage must mitigate their public policy: either through the transposition of institutions and assimilation of marriage to a de facto union that must be protected in the host State; or through the recognition of minimum effects that allow the exercise of the fundamental freedom of movement. One can even imagine a future judgment by the CJEU in the JC-T and MT case concluding that the portability of the civil status of same-sex marriage is directly linked to the free movement of people"[93].

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law in conformity with Union law, it would be obliged to ensure, within the scope of its powers, the legal protection for individuals that derives from those provisions and to act to ensure their full effectiveness by, where necessary, not applying the relevant national provisions (to that effect, the judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 78 and 79, and of June 3, 2025, *Kinsa*, C 460/23, EU:C:2025:392, paragraph 72)".

90 M. Pascua, "AG De La Tour's Opinion in Wojewoda Mazowiecki on Poland's Refusal to Transcribe a Same Sex Marriage Certificate", published in EAPIL on April 22, 2025, following the AG's conclusions. https://eapil.org/2025/04/22/ag-de-la-tours-opinion-in-wojewoda-mazowiecki-on-polands-refusal-to-transcribe-a-same-sex-marriage-certificate/ .

91 F. Rusticia, "One Step Ahead and Two Sideways in AG de la Tour's Opinion in Wojewoda Mazowiecki", published in EAPIL on April 25, 2025, following the conclusions of the AG. Available at https://verfassungsblog.de/c-713-23-wojewoda-mazowiecki/.

92 October 18, 2025, The Polish government presents a law regulating civil partnerships with many limitations https://www.swissinfo.ch/spa/gobierno-polaco-presenta-una-ley-que-regula-las-parejas-de-hecho-con-muchas-limitaciones/90183734.

93 And he concluded by noting that "The weakening of public policy allows for the construction of feasible solutions from the perspective of private law. Today, the progress in the free movement of decisions regarding marital crises and their economic effects is surprising, especially compared to the lack of concern regarding the free movement of marriages as part of the portability of civil status". A. Espiniella Menéndez, "El matrimonio igualitario desde las lógicas del Derecho internacional privado", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 617-632, p. 632.

(F) CONCLUSIONS

The debate between the exercise of the European right to freedom of movement and residence for all persons wishing to maintain their family status in all Member States and the national identity of countries that do not recognize same-sex marriage or parentage has been a long one. The first precedent dates back to the 2000s, when the CJEU affirmed that national law must yield to the different regulations governing the right to a name, given its implications for respecting identity in situations of international mobility. National law only prevailed when the name had noble connotations, as this affected the constitutional rights of countries that prohibited any reference to nobility.

Throughout the 2010s and up to 2022, this line of case law was extended to same-sex marriages and same-sex parentage. Member States that did not recognize these institutions were nonetheless required by the CJEU to acknowledge them, but only for the limited purpose of allowing the exercise of freedom of movement. Under this approach, however, once a family moved to a Member State that did not recognize that relationship, their marital or parental status could again be denied. For around a decade this produced a two-tier system of free movement: people could, in theory, move freely across the EU, yet their family status was accepted in some States and rejected in others. This doctrine undermined the right to privacy and family life in article 7 and the prohibition of discrimination in article 21 of the Charter of Fundamental Rights of the European Union.

In 2023 and 2024, this doctrine started to shift. From that date onward, the ECtHR required States to recognize the same-sex couples' rights as those of heterosexual couples. While not related to freedom of movement, which is not protected by the ECHR, the Court affirmed that States signatory to the Convention are obliged to recognize a similar set of family, property, social, and employment rights for heterosexual marriages and same-sex couples. Within the margin of appreciation for States, the manner of recognition is open and does not require the recognition of same-sex marriage. However, the family status they enjoy must be similar. In this context, the CJEU required a Member State that did not recognize gender transition in its domestic law to register a person who had undergone gender transition in another Member State, even if it had to amend its own law to do so. This is the only way to respect their right to their own identity.

Following this entire process, the *Mazowiecki* judgment of 25 November 2025 consolidates these two doctrines. It requires Member States that do not recognize same-sex marriage to respect the essential family rights of these families that they have already enjoyed in another Member State. These rights are similar to those protected by the ECHR, including family, property, social, and employment rights. If adapting their domestic law to achieve this requires them to do so, they are obliged to do so. And if the only way to do so is by registering the marriage celebrated in a third State, they must transcribe the marriage certificate from that third State into their national registers. This is the only way for same-sex couples to exercise their freedom of movement and their rights to privacy and family life and non-discrimination under the Chapter of Fundamental Rights of the European Union.

While the *Mazowiecki* is framed around the full enjoyment of the right to freedom of movement and residence, its potential far-reaching effects is clear. If the law of a Member

State is required to recognize the family rights of rainbow families already fully enjoyed in another Member State, it is reasonable to expect that, in time, these rights will have to be extended to the wider population. Otherwise, the State would fail to respect the right to non-discrimination of those residents who have not exercised their free-movement rights. Member States will not be compelled to regulate marriage or full parentage, but they should establish legal institutions that grant a similar set of rights, and therefore family status, in these cases. This will be the moment when European law, defending identity, personal and family privacy, diversity and freedom, and non-discrimination on any grounds, will arrive like a breath of fresh air in the national law of all Member States.