

Extending rights, responsibilities and status to same-sex families: trends across Europe

by Kees Waaldijk



CHAIRMANSHIP OF **DENMARK**
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1 More legal family formats in more countries

Over the last few decades, Europe has seen a remarkable growth both in the number of countries that offer some legal recognition to informally cohabiting (same-sex) partners, and in the number of countries that allow same-sex couples to enter into marriage or at least into a form of registered partnership.¹

1.1 Survey of a rapid trend

The substantial recognition of same-sex cohabitation dates back to the 1970s, when Sweden and the Netherlands became the first European countries where informally cohabiting same-sex partners were recognised for more than just one or two legal issues. Denmark and Norway followed in the 1980s, and many more countries from the 1990s.² The next step of legal recognition was the introduction of registered partnership, which started in 1989 in Denmark, while the opening up of marriage started in 2001 (in the Netherlands). Both registered partnership and same-sex marriage have become a remarkably fast trend among European countries.

This trend has been the strongest among countries that are part of the European Economic Area (the EEA, consisting of the 28 European Union countries plus Iceland, Norway and Liechtenstein), but it is not limited to these countries.

A new interactive legal database (covering 21 of the 31 EEA countries), makes it possible to describe this trend in much more detail. This database resulted from one of the many research projects in the large EU-funded "FamiliesAndSocieties" project.³ The legal survey focussed on the three main legal family formats that dif-

¹ Many articles and books have been published about these remarkable developments in (European) countries, including: Boele-Woelki & Fuchs 2003, 2012 and 2017, Boele-Woelki, Mol & Van Gelder (Eds.) 2015, Curry-Sumner 2005, Gallo, Paladini & Pustorino (Eds.) 2014, Kollman 2007, Perelli-Harris & Sánchez Gassen 2012, Scherpe & Yassari (Eds.) 2005, Scherpe & Hayward 2017, Waaldijk (Ed.) 2005, Waaldijk & Fassin 2008, Waaldijk 2014, Wintemute & Andenaes (Eds.) 2001. See also Commissioner for Human Rights 2011 and FRA 2015.

² Waaldijk 2017, p. 43. Early examples of legal recognition of same-sex cohabitation concerned migration law (in Sweden and the Netherlands), rent law (in the Netherlands) and inheritance tax (in Denmark and the Netherlands). As regards Denmark, see the chapter by Baatrup & Waaldijk in the report *More or less together* (Waaldijk (Ed.) 2005, p. 67-78).

³ FamiliesAndSocieties – Changing families and sustainable societies: Policy contexts and diversity over the life course and across generations, 2013-2017, see <http://www.familiesandsocieties.eu>. For the main outcomes of this project, see Vono de Vilhena & Oláh 2017.

ferent European countries have been making available – or not – to same-sex and/or different-sex couples (marriage, registered partnership, cohabitation). It used a detailed questionnaire that was completed by legal experts in 21 European countries,⁴ and it published the results in *The LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples*.⁵ This innovative database provides a comprehensive overview of developments regarding more than 60 legal issues for (married, registered or cohabiting) same-sex and different-sex couples, over five decades (1965-2016). It went online in open access early 2017, with information about 23 jurisdictions in 21 countries.⁶ The methodology used for the creation of this database, including the introduction of the term “legal family format”, the definition of the distinction between the concepts of cohabitation and registered partnership,⁷ the selection of 60 closed and 9 open questions, and the definition of the answer codes for the closed questions (“Yes”, “Yes, but”, “No, but”, “No”, “Doubt” etc.), is described in chapter 1 of the report *More and more together*.⁸

For most countries *outside* this sample of 21, it is difficult to know if and since when they give substantial legal recognition to same-sex *cohabitants*. Therefore a complete overview of legal family formats available to same-sex couples in all 47 countries of the Council of Europe can only be given as regards *marriage* and *registered partnership*. Such an overview is given in *Table 1*.⁹

The numbers and percentages in *Table 1* indicate that the LawsAndFamilies sample of 21 countries is fairly representative for the whole group of 31 countries that are part of the EEA. And it will be even more so, once the Estonian partnership legislation will be fully implemented.¹⁰ Within the EEA the only six countries without legislation on same-sex marriage or registered partnership are Latvia, Lithuania, Poland, Slovakia, Bulgaria, and Romania.

The sample of 21 countries is less representative for the whole group of 47 countries that are part of the Council of Europe. Apart from Monaco and San Marino, where partnership legislation is being discussed,¹¹ twelve of the Council of Europe member states outside the EEA have not made registered partnership or marriage available to same-sex couples (Albania, Turkey, four former parts of Yugoslavia, six former parts of the Soviet Union), but Switzerland and Andorra have.

⁴ For the text of the questionnaire, see Waaldijk et al. 2016.

⁵ Waaldijk, K., Digoix, M., Nikolina, N., Zago, G., Damonzé, D., Caporali, A., & Nait Abdellah, K. (Eds.) (2017). *The LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples*. Paris: INED, <http://www.LawsAndFamilies.eu>. This online database does not only contain the interactive legal database and links to the comparative analysis, but also 138 source papers authored by the legal experts (six papers for each of 23 jurisdictions), plus two statistical papers and one sociological paper about same-sex families in European countries.

⁶ Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, and the United Kingdom (England and Wales, Northern Ireland, Scotland). For a combination of reasons it was not possible to cover all 31 EEA countries, see Waaldijk 2017, p. 12-13.

⁷ José María Lorenzo Villaverde (who as a researcher for this project at Leiden Law School played an important role in developing the questionnaire) contributed to the definition of this distinction, on the basis of his expertise on Spanish legislations, that he gained and developed for his PhD thesis: *The Legal Position of Same-Sex Couples in Spain and Denmark. A Comparative Study of Family Law* (Copenhagen: Faculty of Law of the University of Copenhagen 2015; defended April 2016). See also Waaldijk 2014.

⁸ Waaldijk 2017, p. 7-24.

⁹ For the chronology of years in which countries have made marriage of registered partnership available to same-sex couples, see Waaldijk 2014, p. 44, Carroll & Mendos 2017, p. 68-72, and ILGA Europe 2017.

¹⁰ About the implementation problems regarding the still incomplete Estonian legislation, see Roudik 2016.

¹¹ The Commissioner for Human Rights of the Council of Europe (Nils Muižnieks) has recently pointed out that draft “legislation on registered same-sex partnerships is currently under discussion in San Marino and Monaco” (Human Rights Comment, 21 February 2017, <http://www.coe.int/en/web/commissioner/-access-to-registered-same-sex-partnerships-it-s-a-question-of-equality>). However, it is not certain that the legislation proposed in these two countries will meet the criteria that have been used in the LawsAndFamilies project to distinguish registered partnership from cohabitation (see Waaldijk 2017, p. 10-12).

Table 1**Number and percentage of countries where marriage and/or partnership registration is nationally available to same-sex couples**

("soon" refers to expected legislation in Estonia, Monaco and San Marino)

	Council of Europe (n=47)	European Economic Area (n=31)	LawsAndFamilies Database (n=21)
1985	0	0	0
1990	1	1	0
1995	3	3	2
2000	7	7	6
2005	12	12	9
2010	19	17	14
2017	26	24	18
soon (?)	29	25	18
% in 1990	2%	3%	0%
% in 1995	6%	10%	10%
% in 2000	15%	23%	29%
% in 2005	26%	39%	43%
% in 2010	40%	55%	67%
% in 2017	55%	77%	86%
% soon (?)	62%	81%	86%

Table 1 allows for the conclusion that the number of countries where same-sex couples are allowed to formalize their relationship as marriage or registered partnership, has increased consistently and rapidly over the last 30 years. They now form a clear and still growing majority (55%, soon 62%). Among the EEA countries the majority is already much larger (77%, soon 81%).

1.2 Differences across Europe

Among the countries of the Council of Europe, there appears to be a distinct East-West divide on these issues: Of the 18 member states that do not yet have legislation or plans for introducing registered partnership (let alone for same-sex marriage), all except Turkey are former communist countries in Central or Eastern Europe. It is difficult to predict if and when some of these 18 countries will follow the clear trend among the other 29 member states of the Council of Europe.

However, it should be noted that having a communist past or a Central European geography has not prevented Slovenia, Hungary, Croatia, and the Czech Republic from introducing a form of registered partnership. Furthermore, also Estonia has passed legislation to this effect (see above), and the LawsAndFamilies database shows that there is a beginning of legal recognition of same-sex couples also in

Poland,¹² Bulgaria¹³ and Romania.¹⁴ The gap in levels of recognition between Romania, Bulgaria and Poland on the one hand and almost all other surveyed countries on the other hand, seems very large. It should be borne in mind, however, that the level of recognition in these three countries in 2015/2016 is very similar to what it was for Greece, Italy and Malta in 2006, three countries that have recently increased their level of substantive legal recognition of same-sex couples considerably.¹⁵ And outside the *LawsAndFamilies* sample there may be more examples of countries beginning to offer such recognition.¹⁶ Furthermore, the Romanian Civil Code, by referring to EU legislation in its article 277, may have an opening for the recognition of foreign same-sex marriages as regards free movement.¹⁷ All this is extra relevant, because the European Court of Human Rights takes legal developments in a country into account, when considering whether the non-availability in that country of a "specific legal framework providing for the recognition and protection of [...] same-sex unions" amounts to a human rights violation.¹⁸

1.3 Marriage, registered partnership, cohabitation

Same-sex *marriages* are now possible in 15 member states of the Council of Europe. In seven of those 15 countries, same-sex marriage has now replaced the possibility of same-sex partnership registration (the five Nordic countries, Ireland, Germany). In another seven countries it exists alongside the possibility of *partnership registration* (Netherlands, Belgium, Spain, France, United Kingdom, Luxembourg, Malta).¹⁹ As of 2019, Austria will join the latter group.²⁰ Only in Portugal marriage was opened up to same-sex couples without earlier legislation on registered partnership. In Portugal, and in most other countries that now allow same-sex marriages and/or registered partnerships, same-sex *cohabitants* already had gained some legal recognition *before* marriage or partnership registration became legal possibilities.²¹

¹² In Poland there is recognition regarding social benefits (question 2.2 in the *LawsAndFamilies* questionnaire, Waaldijk et al. 2016), next of kin (question 2.6) and tenancy continuation (6.1), and limited or indirect recognition regarding surname (1.13) and immigration (4.1 and 4.3), while there appears to be legal doubt as regards domestic violence (2.7), criminal procedure (2.8) and wrongful death (6.6). For details about Poland, see Pudzianowska 2017 and Smiszek 2017.

¹³ In Bulgaria there is recognition regarding wrongful death (6.6), and limited or indirect recognition regarding social benefits (2.2) and second-parent adoption (3.9), while there appears to be legal doubt as regards criminal procedure (2.8) and immigration (4.1). For details about Bulgaria, see Furtunova 2017 and Katchaunova 2017.

¹⁴ In Romania there is recognition regarding care for partner or parent (2.4 and 2.5), while there appears to be legal doubt as regards next of kin (2.6) and domestic violence (2.7). For details about Romania, see Cojocariu 2017.

¹⁵ See Waaldijk 2017, p. 22-24.

¹⁶ For example, it has been suggested by Cvejić Jančić (2010, p. 81), that legal protection against domestic violence in Serbia may be applicable to same-sex partners, too.

¹⁷ For a brief discussion of art. 277 of the Romanian Civil Code, see Ionescu 2017 (question 4.4). See also the case of *Coman and Others*, now pending in the Court of Justice of the European Union (Case C-673/16; see the Opinion of Advocate General Wathelet delivered on 11 January 2018, arguing strongly in favour of reading the term "spouse" in Directive 2004/38 as including a married partner of the same sex).

¹⁸ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/1, par. 179-185.

¹⁹ However, in Spain registration is only available in parts of the country, and in the United Kingdom same-sex marriage is not available in Northern Ireland. In most countries in this group (all but the UK), partnership registration is also available to different-sex couples; from 2019, this will also be the case in Austria.

²⁰ The Austrian Constitutional Court ruled on 4 December 2017 that same-sex couples can marry from January 2019 (see <http://www.sexualorientationlaw.eu/documents/national-high-courts/austria>, also for an unofficial English translation of the ruling). The Court also ruled that from 2019, partnership registration will also be available for different-sex couples.

²¹ See the *LawsAndFamilies* Database, and Waaldijk 2017, p. 43.

Another 11 member states offer same-sex couples only the option of *partnership registration* (Andorra, Croatia, Cyprus, Czech Republic, Greece, Hungary, Italy, Liechtenstein, Slovenia, Switzerland, and until 2019 Austria). This group may soon be joined by Estonia, Monaco and San Marino (see paragraph 1.1 above).

Where same-sex *marriage* is available, the legal consequences of such marriages are the same or almost the same as those of different-sex marriages. Most exceptions are found in the field of parenting, and in a few jurisdictions with respect to survivor's pensions.²² The recognition of same-sex marriages abroad may be more limited, but even there recognition is growing.²³ Non-recognition of foreign same-sex marriages may be a violation of human rights,²⁴ and possibly of EU law.²⁵

Where the legal recognition of same-sex couples is offered by way of *registered partnership*, mostly the legal consequences are similar to those of marriage. Most exceptions concern parenting, migration, citizenship, and/or surnames, while there are also some exceptions in other areas, including income tax, property, inheritance, care leave and survivor's pensions.²⁶ Because exceptions in the latter two areas relate to employment, they most probably amount to violations of EU law, in particular of the Employment Equality Directive 2000/78/EC.

The trend of extending legal consequences of marriage to *cohabitation* is less uniform and somewhat slower. In many areas of law one or more jurisdictions distinguish between same-sex and different-sex cohabitants, in particular as regards parenting, care leave, domestic violence, testifying in criminal procedures, immigration, inheritance tax, and property after death.²⁷ Almost all exclusions of same-sex cohabitants from rights enjoyed by different-sex cohabitants will amount to violations of the well-established *Karner* case law of the European Court of Human Rights.²⁸ And whenever they relate to employment (care leave, pensions) they could also amount to violations of the EU's Employment Equality Directive 2000/78/EC. Exclusion of same-sex partners from immigration may violate Directive 2004/38/EC on free movement, Directive 2003/86/EC on family reunification and Directive 2011/95/EU on asylum.²⁹

²² See Waaldijk 2017, p. 28-40.

²³ See Waaldijk 2017, p. 114-122

²⁴ See ECtHR, 14 December 2017, *Orlandi and others v. Italy*, App. No. 26431/12, 26742/12, 44057/12 and 60088/12.

²⁵ See the case of *Coman and Others*, now pending in the Court of Justice of the European Union (Case C-673/16; see the Opinion of Advocate General Wathelet delivered on 11 January 2018, arguing strongly in favour of reading the term "spouse" in Directive 2004/38 as including a married partner of the same sex).

²⁶ See Waaldijk 2017, p. 28-40.

²⁷ See Waaldijk 2017, p. 28-40.

²⁸ ECtHR, 24 July 2003, *Karner v. Austria*, App. No. 40016/98. For a list of the many judgments repeating this principle, see Waaldijk 2014, p. 51.

²⁹ See the 2015 FRA report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU*, especially p. 79-96, and see Waaldijk 2014, p. 49.

2 More rights and responsibilities in more countries

Knowing which of the three legal family format(s) have been made available to same-sex couples and when, is therefore only part of the story. For practical legal purposes it is often less important to know by *which legal family format* a right or responsibility has become applicable to same-sex partners. More important to know is *which substantive rights and responsibilities* are now available to same-sex partners, and thereby no longer the exclusive privilege of different-sex couples.

2.1 Measuring the "same-sex legal recognition consensus" for 26 issues

The data in the LawsAndFamilies Database make it possible to track this development for many of the rights and responsibilities included in the questionnaire used to create this database.³⁰ For tracking this development some of the 69 questions in the questionnaire seemed less useful. In fact, only 26 of the 69 questions have been used to assess the substantive legal recognition of same-sex couples.³¹ These 26 questions all tell us something about the degree to which countries recognise same-sex partners by making substantive rights and responsibilities available to them. These 26 questions have been brought together in the four tables below. In these *tables 2, 3, 4 and 5* the questions are ranked according to the "same-sex legal recognition consensus" for 2015/2016 (that is: for the most recent year for which the questions have been answered). This quantitative indicator is introduced to assess if there is common ground between European countries about what rights and responsibilities should at least be made available to same-sex couples.

The European Court of Human Rights has spoken repeatedly about the "core rights relevant to a couple in a stable committed relationship".³² And the Court has indicated many times that in considering whether or not a restriction, exclusion or distinction is justifiable under the European Convention of Human Rights, it would look at comparative studies of the situation in the member states of the

³⁰ For the text of the questionnaire, see Waaldijk et al. 2016.

³¹ For the various reasons for excluding the other questions from this analysis, see Waaldijk 2017, p. 44-45.

³² ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11, par. 174 (see also par. 172 and 185 of that judgment). In its later judgment in the case of *Taddeucci & McCall v. Italy*, the Court spoke of "certain essential rights" (ECtHR, 30 June 2016, App. No. 51362/09, par. 83 and 95).

Council of Europe.³³ This so-called "consensus analysis" gives extra importance to the data in the LawsAndFamilies Database, and to the assessment of the "same-sex legal recognition consensus" for each of the selected 26 questions.

The *same-sex legal recognition consensus* for a year is a percentage that indicates how many of the surveyed jurisdictions have started to recognise same-sex partners by giving them full or limited access to a specific substantive right or responsibility. So in the following four tables it does not matter *how* a right or responsibility becomes available (through marriage, through registered partnership, through cohabitation, or through two or three of these legal family formats).³⁴

2.2 Conclusions about the different levels of "same-sex legal recognition consensus"

The following conclusions can be drawn from the four tables above:

Firstly, among the 21 countries surveyed, the consensus on legal recognition for same-sex couples has increased considerably over the last 10 years for each of the 26 selected substantive rights and responsibilities (an increase of at least 20 percent points for each).

Cynically, but maybe not surprisingly, the issue with the highest *same-sex legal recognition consensus* (already in 2006) is the possibility of loss or reduction of social benefit because of the income of one's partner (question 2.2).

Most of the rights and responsibilities with the highest consensus, however, are about situations where one of the partners dies (tenancy continuation, wrongful death compensation,³⁵ survivor's pension, inheritance, inheritance tax exemption), or where the partners are hit by other seriously "*bad times*" (accident, illness, domestic violence,³⁶ criminal prosecution,³⁷ splitting up). It seems that a very large majority of countries now take the position that it would be unfair or non-compassionate to exclude same-sex partners from legal protections designed for such sad times. At the same time, it seems that many countries would make some of these protections (survivor's pension, inheritance, alimony, inheritance tax exemption) only available to same-sex partners in the context of a formally registered partnership or marriage. This is probably so because of reasons of legal certainty.

The very high consensus as regards residence entitlement for a foreign same-sex partner (questions 4.1 and 4.3), however, cannot be explained directly by the sadness factor. Probably here the common rationale is also one of compassion: without such a residence entitlement the two partners would not even be able to live together in the same country and to have family life.³⁸

About the other issues, the consensus is more limited (see *Table 5*). Here the "sadness" factor may seem less prominent. The issues with the lowest "same-sex legal recognition consensus" have all in common that they are about *sharing* live in "*good times*" – sharing each other's name or citizenship, sharing properties or tax advantages, and sharing responsibility for children. The right to use your part-

³³ See for example ECtHR, 19 February 2013, *X and others v. Austria*, App. No. 19010/07, par. 54; and ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09, par. 88 and 97. In fact, in its judgment of 24 June 2010 in the same-sex marriage case of *Schalk & Kopf v. Austria* (App. No. 30141/04), the Court devoted eight paragraphs to a description of the "state of relevant legislation in Council of Europe member States" (par. 27-34), and based the last four of these paragraphs apparently (although not explicitly) on the report *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners – a comparative study of nine European countries* (Waldijk (Ed.) 2005), which introduced the methods and many of the questions that have now been used for the LawsAndFamilies Database.

³⁴ For the exact methodology for calculating the "same-sex legal recognition consensus", and for the actual calculations for each of the 26 questions, see Waldijk 2017, p. 44-46 and 57-66.

³⁵ For a comparative analysis of the data regarding wrongful death compensation, see Damonzé 2017.

³⁶ For a comparative analysis of the data regarding domestic violence protection, see Damonzé 2017.

³⁷ For a comparative analysis of the data regarding testifying in criminal procedures, see Zago 2017.

³⁸ A good example of this is the case of *Taddeucci & McCall v. Italy*, where the ECtHR required Italy to provide a residence entitlement; see its judgment of 30 June 2016, App. No.51362/09.

Table 2

Nine legal rights and responsibilities, which in many countries became available to same-sex partners already before the introduction of registered partnership, and for which in 2015/2016 the "same-sex legal recognition consensus" was the highest (out of 26 selected substantive questions)

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
2.2 – Loss or reduction of social benefit	When one partner (long-term unemployed or even never having been employed at all) would be entitled to a basic social benefit, will the income of the other partner then be taken into consideration and will it possibly result in loss or reduction of this entitlement?	71%	93%
6.1 – Tenancy continuation	When the partner who holds the rental contract dies, does the other partner then have a right to continue to rent the home?	63%	93%
2.6 – Next of kin	In case of accident or illness of one partner, is the other partner considered as next of kin for medical purposes (even without power of attorney)?	53%	89%
4.1 – Residence for partner of national citizen	When one partner is a residing national citizen, while the other is a foreigner from another continent, will the foreign partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside. As to the meaning of 'residing', see section c of the Guidance.)</i>	57%	88%
2.7 – Domestic violence protection	When one partner uses violence against the other partner, does specific statutory protection apply?	57%	86%
2.8 – Testifying in criminal procedure	In case of a criminal prosecution against one partner, can the other partner then refuse to testify against the partner who is being prosecuted?	57%	86%
6.6 – Wrongful death compensation	In case of wrongful death of one partner, is the other partner then entitled to compensation from the wrongdoer?	57%	86%
4.3 – Residence for partner of (non-EU) foreigner	When both partners are foreigners from another continent, and one of them is residing in the country, will the other partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside.)</i>	50%	86%
2.4 – Leave to care for partner	In case one partner is in need of care, does the other partner then have a statutory right to paid or unpaid leave to give that care?	61%	83%

Table 3

Three legal rights and responsibilities with a high "same-sex legal recognition consensus" in 2015/2016, but which rarely became available to same-sex partners before the introduction of registered partnership

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
6.5 – Survivor's pension	When one partner dies while being employed, is the surviving partner then normally entitled to a survivor's pension? <i>(For example on the basis of statutory law, and/or of a collective labour agreement or arrangements of the employer.)</i>	50%	88%
5.10 – Alimony	In case the partners split up, do statutory rules on alimony apply?	48%	86%
6.3 – Inheritance	When one partner dies without testament, is the other partner then an inheritor?	43%	86%

Table 4

Four legal rights and responsibilities with a high "same-sex legal recognition consensus" in 2015/2016, but for which this is in part due to the fact that in a large minority of countries they are also not applicable to married different-sex partners

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
3.7 – Parental leave for partner	When only one partner is the legal parent of a child, does each partner then have a statutory right to paid or unpaid parental leave?	54% (7 out of 13)	92% (12 out of 13)
3.5 – Parental authority for partner	Is joint parental authority/responsibility possible for the couple, while only one of the partners is the legal parent of the child?	67% (8 out of 12)	92% (11 out of 12)
6.4 – Inheritance tax exemption	Is the surviving partner exempted from paying inheritance tax (or required to pay less than a mere friend would have to pay)?	50% (9 out of 18)	88% (14 out of 16)
2.5 – Leave to care for parent of partner	In case the parent of one partner is in need of care, does the other partner then have a statutory right to paid or unpaid leave to give that care?	50% (8 out of 16)	88% (14 out of 16)

Table 5

The ten rights and responsibilities with in 2015/2016 the lowest "same-sex legal recognition consensus" (out of 26 selected substantive questions)

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
4.7 – Citizenship	Does a relationship of this type make it easier for a foreign partner to obtain citizenship?	48%	81%
1.12 – Statutory contract	Are there specific statutory rules regarding such a contract? <i>(See question 1.11 about the possibility for the partners to make a contract to organise their relationship.)</i>	48%	81%
2.1 – Lower income tax	Can a relationship of this type result in lower income tax than for two individuals without a partner?	47%	80%
5.9 – Property at dissolution	In case the partners split up, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship?	50%	80%
6.2 – Property at death	When one partner dies, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship? <i>(In other words: would the surviving partner be deemed to own 50% of these possessions, while the other 50% are subject to relevant rules of inheritance law?)</i>	50%	80%
1.13 – Surname	Can (or must) one partner use or have the surname of the other partner?	48%	79%
3.9 – Second-parent adoption	When only one partner is the legal parent of a child, does the other partner then have the possibility of becoming the child's second parent by way of adoption?	33%	74%
3.1 – Assisted insemination	Is it legally possible in this type of relationship to become pregnant through medically assisted insemination using sperm of a donor?	43%	63%
3.10 – Joint adoption	Can partners jointly adopt a child?	21%	55%
3.4 – Legal parenthood	When one partner gives birth, will (or can) the other partner then also become legal parent of the child, without having to go through adoption? <i>(For example automatically, or by way of recognition/acknowledgement.)</i>	7%	38%

ner's surname, for example, is a symbolic classic in traditional marriage law, but apparently too controversial for full inclusion in the registered partnership laws of Austria, Belgium, Czech Republic, Finland, France, Hungary and Slovenia.³⁹ Maybe in some countries it was or is still too difficult to think of such a right outside the context of marriage.

Medically assisted insemination (question 3.1) and the different ways for a child to have two legal parents of the same sex (questions 3.4, 3.9 and 3.10) are even more controversial. Nevertheless, also regarding these parenting issues, the consensus has been growing considerably over the last ten years.⁴⁰ Interestingly, if you combine the information regarding the questions 3.5 (parental authority), 3.7 (parental leave) and 3.9 (second-parent adoption), there now seems to be a near-consensus that same-sex partners should at least be allowed to take *some* responsibility for each other's children. In only three of the 21 countries none of these three possibilities exists – precisely the three countries in this survey that still have not introduced any form of registered partnership (Bulgaria, Poland and Romania).

Overall, there is broadly growing consensus, which may inspire more countries to broaden their legal recognition of same-sex families. And it could provide the European courts with extra arguments to require European countries to make a core minimum of specific rights and responsibilities available to same-sex families.

³⁹ See the answers to question 1.13 in Graupner 2017, Borghs 2017, Otáhal 2017, Hiltunen 2017, Kouzmine 2017, Polgari 2017, and Kogovsek Salamon 2017.

⁴⁰ For a comparative analysis of the data regarding several parenting issues, see Nikolina 2017.

3 Conclusions and recommendations

3.1 Two clear trends

There is a clear and rapid trend, among a large majority of the 21 countries surveyed, of offering same-sex couples the opportunity to formalise their relationship as marriage and/or as registered partnership. The absence of any such opportunity in three of these 21 countries – and in circa 20 of the 47 Council of Europe countries – may well be against recent case law of the European Court of Human Rights.⁴¹

And there is a clear and rapid trend among the 21 countries surveyed of attaching more and more rights and responsibilities to the cohabitation, the registered partnership and/or the marriage of two people of the same sex. This trend, too, has been strengthened by case law of the European Court of Human Rights, by some EU legislation, and by case law of the Court of Justice of the EU.⁴² And it has been encouraged by the recommendations and studies of other bodies of EU and Council of Europe.⁴³

Both these trends reflect the recognition – as articulated by the European Court of Human Rights – that same-sex couples are covered by the right to respect for family life.⁴⁴ And that they are “in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship”,⁴⁵ and “have the same needs in terms of mutual support and assistance as different-sex couples”.⁴⁶ Both trends also show the growing awareness in European countries that there should be no discrimination based on anyone’s sexual orientation (or on the sex of anyone’s partner). This is especially so as regards the “right

⁴¹ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/1; and ECtHR, 14 December 2017, *Orlandi and others v. Italy*, App. No. 26431/12, 26742/12, 44057/12 and 60088/12.

⁴² For an overview of the case law the European courts and an inventory of relevant EU legislation, see Waaldijk 2014, p. 48-55. See also Crisafulli 2014 and Orzan 2014.

⁴³ See for example the comprehensive reports by the Council of Europe’s Commission for Human Rights (2011) and by the EU Agency for Fundamental Rights (FRA 2015).

⁴⁴ ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 94.

⁴⁵ ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 99; see also ECtHR, 7 November 2013, *Vallianatos v. Greece*, App. No. 29381/09, 32684/09, par. 78.

⁴⁶ ECtHR, 7 November 2013, *Vallianatos v. Greece*, App. No. 29381/09, 32684/09, par. 81. About such “affirmative eloquence”, see Waaldijk 2014, p. 54-55.

to establish and develop relationships with other human beings".⁴⁷ This right can be called the "right to relate".⁴⁸ It has been recognised by the European Court of Human Rights as an important aspect of the right to respect for private life.⁴⁹

The LawsAndFamilies survey also suggests a core minimum of substantive rights and responsibilities that should at least be made available to same-sex partners (be it through cohabitation, through registered partnership, or through marriage). That same-sex couples should at least have access to a minimum of rights, has been indicated repeatedly by the European Court of Human Rights.⁵⁰ Among the 21 countries surveyed, the *same-sex legal recognition consensus* has increased considerably over the last 10 years. It grew for *each* of the 26 substantive rights and responsibilities that have been analysed here (see *Tables 2, 3, 4 and 5* above). More specifically, this analysis suggests that a core minimum of rights and responsibilities would consist *at the very least* of legal protections for times of death and other great sadness, plus the right to be able to live in the same country, and the right to take some responsibility for each other's children.

In Western Europe now all countries surveyed allow same-sex couples to marry or to register as partners, and in all these countries these legal family formats trigger a broad range of legal consequences. In Central and Eastern Europe, the picture is more mixed, with three of the surveyed countries allowing neither same-sex marriages nor registered partnerships (Poland, Bulgaria, Romania). However, these three countries already provide some legal recognition to same-sex couples (see paragraph 1.2 above).

The LawsAndFamilies project has revealed many points and areas where legal recognition is failing the needs and desires of people in same-sex relationships, and falling short of the fundamental right to non-discriminatory respect for family life (see above). The project has also highlighted the great *social* importance of legal recognition for same-sex families – both practically and symbolically.⁵¹

3.2 Role of the Council of Europe and its European Court of Human Rights

The Council of Europe should therefore encourage the political, administrative and judicial bodies of the member states to:

- reform any laws that (without convincing justification) still exclude same-sex (or unmarried) partners or their children from any right, responsibility or status;
- explicitly include a wider variety of families when introducing any new laws; and
- recognise more fully any foreign family status of same-sex couples and their children.

The national authorities should feel spurred on by the growing body of case law of the Court of Justice of the EU and of the European Court of Human Rights requiring equal treatment of same-sex and different-sex couples and their children. The many good practices of inclusive legal recognition documented in the LawsAndFamilies Database may help to inform and inspire the national authorities in this. These examples and trends will also be useful to the non-governmental organisations influencing them.

⁴⁷ This right was first articulated by the European Commission of Human Rights, 18 May 1975, *X v. Iceland*, App. No. 6825/74.

⁴⁸ Waaldijk 2013.

⁴⁹ See for example ECtHR, 22 January 2008, *EB v. France*, App. No. 43546/02, par. 43 and 49.

⁵⁰ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11, par. 172, 174 and 185; ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09, par. 83 and 95.

⁵¹ Digoix et al. 2016 and 2017, Cortina & Festy 2014a and 2014b, Waaldijk 2017, p. 154-158.

Where appropriate, the bodies of the Council of Europe and the European Union could cooperate in this field. For example, it would be very useful to add legal data on more and more countries (in the EU, in the Council of Europe, and beyond) into the interactive LawsAndFamilies Database over the coming years, and to periodically update the legal data that are already there.⁵²

Meanwhile the *European Court of Human Rights* will no doubt continue to take into account the "rapid evolution of social attitudes towards same-sex couples",⁵³ and the growing "consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships".⁵⁴ In this respect it can feel supported by the broadly growing consensus and clear trends documented in the LawsAndFamilies Database.

As has been shown (in paragraph 2 above), the consensus among the countries surveyed is particularly strong as regards:

- legal protections for times of death (such as: tenancy continuation, wrongful death compensation, inheritance, inheritance tax exemption, survivor's pension);
- legal protections for times of other great sadness (such as: next of kin provisions, protection against domestic violence, leave from work in case your partner or your partner's parent is in need of care);
- the right to come and live in the same country as your partner;
- the possibility to take (at least some) responsibility for your partner's children.

The high levels of consensus on these particular issues, may assist the European Court of Human Rights in narrowing the freedom that countries have had in deciding what rights and responsibilities to make available to same-sex couples.⁵⁵ And the high levels of consensus found here, may assist the court in defining the "core rights relevant to a couple in a stable committed relationship".⁵⁶ Such a *core minimum of substantive rights* can be important in several ways. It can help the European Court to decide on:

- the range of protections and benefits that should – at the very least – be made available to same-sex couples in all European countries (even in countries where same-sex couples are still not allowed to formalise their relationship as marriage or registered partnership; and even in countries where these protections and benefits are only available to *married* different-sex partners);⁵⁷
- the range of protections and benefits that should – at the very least – be attached to any form of registered partnership that has been or will be introduced in European countries that do not allow same-sex couples to marry;⁵⁸
- the (probably wider) range of protections and benefits for which the foreign family status of same-sex couples should always be recognised in all European countries.⁵⁹

⁵² The editors of the LawsAndFamilies Database (<http://www.LawsAndFamilies.eu>) are open for suggestions, proposals and offers. It would be possible to reduce the total number of questions in the questionnaire (as long as the 26 selected questions on substantive rights and responsibilities are included), as well as the number of years for which legal experts would have to answer the questions.

⁵³ ECtHR, 22 July 2010, *PB & JS v Austria*, App. No. 18984/02, par. 29. For an overview of such social attitudes, see Waaldijk 2017, p. 156-158.

⁵⁴ ECtHR, 28 September 2010, *JM v United Kingdom*, App. No. 37060/06, par. 50.

⁵⁵ See ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 98 and 109; and ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09, par. 88.

⁵⁶ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11, par. 174 (see also par. 172 and 185 of that judgment). In its later judgment in the case of *Taddeucci & McCall v. Italy*, the Court spoke of "certain essential rights" (ECtHR, 30 June 2016, App. No. 51362/09, par. 83 and 95).

⁵⁷ Following the case law started in ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09.

⁵⁸ Completing the case law started in ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11.

⁵⁹ Building on the case law started in ECtHR, 14 December 2017, *Orlandi and others v. Italy*, App. No. 26431/12, 26742/12, 44057/12 and 60088/12.

Thereby the European Court of Human Rights would give much needed guidance to those countries that are only starting or considering to legally recognise same-sex couples and their children.

3.3 Good practices beyond the consensus: fuller recognition of same-sex parenting

Some countries have already gone beyond the emerging consensus. This is in particular true for the field of parenting, where (as shown in paragraph 2 above) legal recognition of same-sex partners is more controversial and consensus more limited.

In quite a few countries, same-sex couples can now take *full* responsibility for each other's children. This started around the turn of the century, when first Denmark in 1999, and later a large minority of European countries,⁶⁰ extended the possibility of *second-parent adoption* – so that it is now possible there to adopt the child of your same-sex partner. And such adoptions of course trigger a whole range of legal rights and responsibilities between the child and the adoptive second parent.

A slightly smaller, but also growing group of European countries (starting with the Netherlands in 2001) has gone further by also allowing *joint* adoptions by same-sex couples.⁶¹ And in a similar group of European countries it is legally possible for a woman in a same-sex relationship to become pregnant through medically assisted *insemination*.⁶² The result is that in most of these countries same-sex couples now are allowed to create a family with children, *and* to formalise their relationship to these children.

However, in many countries this formalisation of parentage can only be done through adoption, typically involving time, money, a court procedure and an examination by the child welfare authorities. This is different in different-sex families, because there the relationship between child and father (even when he is not the biological father) is mostly created simply by the legal presumption of paternity (if the couple is married) or by recognition/acknowledgment of the child by the father.⁶³ In some countries this major difference between heterosexual and lesbian families has started to disappear. In 2003 Sweden became the first European country where, when a woman gives birth to a child, her female partner can also become a legal parent of that child from the moment of birth (without having to go through an adoption procedure).⁶⁴ Although the conditions and procedures differ somewhat from country to country, such a possibility now exists already in a sizeable minority of European countries.⁶⁵

An interesting aspect of the progress in the field of parenting is, that the first legal step towards equality between same-sex and different-sex families differs from country to country. In some countries (including Greece, Ireland, Netherlands and the United Kingdom) it started with not prohibiting medically assisted insemination of women in same-sex relationships. In a few other countries a first step was to allow the same-sex partner of a parent to take parental leave (as in Austria, Hungary and Norway), or to share in the parental authority over the child (as in Finland, France and Germany), or to apply for second-parent adoption (as in Italy and Slovenia). In a few countries (Belgium and Malta) a first step included both joint and second-parent adoption, while in at least one country (Portugal) almost all aspects of same-sex parenting became legal simultaneously.⁶⁶

⁶⁰ See Carroll & Mendos 2017, p. 73-77; Nikolina 2017, p. 104-107; Waaldijk 2017, p. 63.

⁶¹ *Idem*.

⁶² Waaldijk 2017, p. 62.

⁶³ Nikolina 2017, p. 102-104.

⁶⁴ Ytterberg 2017; Waaldijk 2017, p. 63.

⁶⁵ Nikolina 2017, p. 103; Waaldijk 2017, p. 63.

⁶⁶ See Waaldijk 2017, p. 62-63. For details, see the 23 papers on parenting issues in the LawsAndFamilies Database.

In some countries the recognition of same-sex parenting started well *before* same-sex marriages were allowed (as in Austria, Germany, the Netherlands, Sweden and the UK), while in other countries such recognition largely came *with* (as in France, Ireland and Norway) or even *after* the opening up of marriage to same-sex couples (as in Belgium and Portugal).⁶⁷ And in a number of countries (including Finland, Germany, Scotland and Slovenia) the recognition of *foreign* adoptions by same-sex partners preceded legislation allowing such adoptions to happen within the country itself.⁶⁸

All this means that there is a range of options for those European countries that are only starting to consider the legal recognition of same-sex parenting. In different ways these countries can begin to appreciate the capacity of same-sex couples to bring up children – and to acknowledge the reality of children growing up in rainbow families.

⁶⁷ See Waaldijk 2017, p. 43, 62-63.

⁶⁸ On recognition of foreign adoptions, see questions 4.8 and 4.9 in the LawsAndFamilies Database.

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