

# Same-Sex Couples, Free Movement of EU citizens, Migration and Asylum

*Any discrimination based on any ground such as... sexual orientation shall be prohibited.*  
*Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*  
*The right to asylum shall be guaranteed....*  
*Everyone has the right to respect for his or her... family life*  
EU Charter of Fundamental Rights (Articles 21, 45, 18, 7)

## Can someone in a same-sex couple join their partner in another Member State?

An individual who wishes to move to a Member State of the EU, either from another Member State, or from outside the EU, will often have the right to bring their spouse with them. However same-sex couples do not always enjoy this right, even where they have entered a registered partnership or marriage. It is up to each Member State (and not the EU) to decide whether it will allow or recognise same-sex marriages or partnerships.

Article 6(2) of the EU Treaty requires Member States to comply with fundamental rights including the prohibition on sexual orientation discrimination, when they are applying EU law. So although EU law does not oblige Member States to allow or recognise same-sex partnerships or marriages, it does oblige Member States to treat same-sex couples equally to opposite sex couples when they are applying EU law (including the law relating to free movement, migration and asylum).

The rights of same-sex couples depend on their relation to the Member States. EU law divides individuals into three categories: EU citizens moving to another EU Member State, third country nationals, and those seeking international protection.

### A. EU Citizens

The **Free Movement Directive** 2004/38/EC allows an EU citizen, under certain conditions, to move and reside within the EU with their spouse. If the host State treats registered partnerships as equivalent to marriage, then registered partners will have the same rights as 'spouses' under the Directive.

A citizen has the right to stay in another Member State for up to three months. If a citizen wishes to remain longer they must be a **worker, student, or person of independent means**. A citizen can bring their spouse with them to reside in the host Member State, even if the spouse does not fall themselves into one of the categories given above. However, if the host Member State does not recognise same-sex marriages or partnerships then this person only has a right to join their partner if they themselves fall into one of these categories.

A citizen with a same-sex partner, wishing to reside in another EU Member State may find themselves in one of three situations:

1. **Marriages.** If the couple is married in their home State and the host State recognises the validity of same-sex marriages, then the individual will have the right of a spouse, under the Free Movement Directive, to join their partner. Currently, Belgium, the Netherlands, Spain and Sweden enable same-sex couples to be legally married. However, at least 11 Member States (Estonia, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia) do not seem to recognise the validity of same-sex marriages. In these States same-sex spouses will probably not be recognised as 'spouses'.
2. **Registered partnerships.** If the couple has entered into a registered partnership in their home State then an individual may be able to join their partner in the host State as if they were a 'spouse'. However, this depends on how the host State treats registered partnerships.
  - a. Under the Free Movement Directive if the host State's national law treats registered partnerships as equivalent to marriage, then an individual has the right to join their partner as if they were a 'spouse'. 6 Member States allow registered partnerships that have effects equivalent to marriage (Czech Republic, Denmark, Finland, Hungary, Romania, UK).
  - b. If the host State does not treat registered partnerships as equivalent to marriage then the couple will fall under the rules on unregistered ('de facto') partners in a 'durable relationship'. EU law places no obligation on Member States to allow or recognise registered partnerships.
3. **Unregistered (de facto) partnerships.** If the host State does not recognise same-sex marriages or partnerships, or if the couple has simply not formalised their relationship, then they will fall under the rules on unregistered partnerships. Unregistered partners do not enjoy the same right as a spouse to join their partner. Instead the Free Movement Directive obliges Member States to 'facilitate entry and residence' to unregistered partners who are in a 'durable relationship'. This applies equally to same-sex couples and to couples of the opposite sex. This rule is not as clear as the concrete right enjoyed by a 'spouse' to join their partner, and such couples must show proof that the relationship is 'durable'.

## B. Third Country Nationals

The **Family Reunification Directive 2003/86/EC** applies when both individuals are third country nationals (not a citizen of a Member State of the EU). The Family Reunification Directive allows spouses who are third country nationals to be united with third country nationals residing lawfully in the territory of a Member State. However, Member States are not explicitly obliged to extend this right to same-sex registered (or unregistered) partnerships.

## C. Those Seeking International Protection

The **Qualification Directive 2004/83/EC** sets out the conditions in which Member States should offer asylum or international protection to third country nationals. Those at risk of persecution in their home State (including on grounds of sexual orientation) can benefit from this protection. Member States are free to choose whether to allow a same-sex partner to join the partner who is offered protection. Nine Member States allow this, subject to certain conditions (Belgium, Czech Republic, Denmark, Germany, Finland, Luxembourg, Netherlands, Spain, UK). This is not allowed in 14 Member States and the situation is unclear in 4 others.

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This flyer is based on the report "**Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis**" published by the European Union Agency for Fundamental Rights (FRA) in June 2008.

The full report is available at: <http://fra.europa.eu>.

All publications of the European Union Agency for Fundamental Rights can be ordered via its website free of charge.