

## Who Counts as a Family Member?

### *On the Importance of 'Doing Family' in EU Law*

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#### 4.1 INTRODUCTION

'One of the first mental frameworks which informs the intelligibility of all life',<sup>1</sup> the family seems to be one of those common concepts that are immediately understandable. Ordinary definitions of the family refer to a group of persons united by the ties of marriage, blood, or adoption, forming a single household. These persons are assumed to interact with each other in their respective positions, usually those of spouses, parents, children, or siblings.<sup>2</sup>

Reading sociology and history, however, teaches us that the definition of the family is not as clear as it first seems. The notion of family has changed over time and its definition is the subject of intense controversy. For decades, the image of the family was based on marriage and implied a heterosexual relationship.<sup>3</sup> However, the narrowness of this definition, mainly based on patriarchal principles involving a male breadwinner and female homemaker,<sup>4</sup> has been increasingly criticised. Progressively the definition of family members has evolved, and in national, international, and European Union (EU) law, we find more encompassing conceptions of the family. However,

<sup>1</sup> E. Dubout, 'The European form of family life. The case of EU citizenship' (2020) 5 *European Papers* 3.

<sup>2</sup> See also Chapter 3 by David Archard.

<sup>3</sup> T. H. Hervey, 'A gendered perspective on the right to family life in European Community law' in N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff 1995) 221. The Carpenter case (Case C-60/00 *Carpenter* EU:C:2002:434) is the best example of the EU consolidating the traditional notion of the wife at home.

<sup>4</sup> On the 'male breadwinner family model', see I. Moebius and E. Szyszczak, 'Of raising pigs and children' (1998) 18 *Yearbook of European Law* 125. See also L. Ackers, 'Citizenship, gender and dependency in the EU: Women and internal migration' in K. H. Hervey and D. O'Keeffe (eds), *Sex Equality Law in the European Union* (Wiley 1996) 221.

the controversy is not over, namely because ‘rainbow’ and other atypical forms of family are far from being on an equal footing with the traditional nuclear family.<sup>5</sup>

The purpose of this chapter is not to take a position in this debate, important as it is. Rather, its goal is to address another issue, based on the observation that the definition of ‘family’ is both uncertain and unstable in EU law. In certain parts of EU law, the family circle is limited to the nuclear family, or a slightly enlarged version of the family, while in other cases the family encompasses a broader group of persons. ‘Family’ is also defined on the basis of multiple and varying criteria. Comparing EU legal norms on free movement law, migration law, and private international law, one can only agree with Advocate General Mengozzi that the family is ‘not a uniform category’ in EU law.<sup>6</sup> Admittedly the same applies to national law, as the scope of the family varies according to the objective pursued by the legislator: to organise parental authority, to identify the legal heirs of a deceased person, to determine who are the creditors or debtors of child support, and so on. However, it is neither satisfactory nor convincing to assume that the definition of the family is purely functional in EU law.

It is not satisfactory because a totally fragmented regime does not sit well with the requirements of legal certainty which must guide the drafting and interpretation of EU law. Indeed, depending on whether or not someone is considered a ‘family member’, they may or may not have access to rights granted by EU law and be protected against breaches of other rights.<sup>7</sup> The fact that the holders of rights and obligations are designated without any apparent logic or coherence, sometimes even within the same policy area, can be considered problematic. Most importantly, the conclusion that the EU’s definition of the family is purely functional is unconvincing because it tends to assume that EU law fulfils only a very limited role in family matters,

<sup>5</sup> See A. Tryfonidou, ‘EU Free Movement Law and the children of rainbow families: Children of a lesser god?’ (2019) 38 Yearbook of European Law 220; N. Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU: The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships* (Intersentia 2015) 7–8; J. Rijpma and N. Koffeman, ‘Free movement rights for same-sex couples under EU law: What role to play for the CJEU?’ in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014); D. Kochenov, ‘Gay rights in the EU: A long way forward for the Union of 27’ (2007) 3 Croatian Yearbook of European Law and Policy 469. See also Chapter 2 by Alina Tryfonidou and Chapter 9 by Geoffrey Willems.

<sup>6</sup> Opinion of Advocate General Mengozzi in Case C-423/12 *Flora May Reyes* EU:C:2014:16, para 33.

<sup>7</sup> E. Caracciolo di Torella and A. Masselot, ‘Under construction: EU family law’ (2004) 29 European Law Review 32.

restricted by national traditions and cultures. Of course, there are reasons to believe that the EU's influence on national models of family life is restricted. In the absence of a sufficiently homogeneous social base, the EU would lack a basis for expressing a shared European conception of the family. In addition, the EU does not 'constitute' families:<sup>8</sup> it only recognises the variety of affiliation, and of conjugality that we find in the Member States' legislation,<sup>9</sup> hence building upon the families constructed at national level.<sup>10</sup> However, this reading is contradicted by the different works that, despite reaching opposite conclusions, all agree that EU law influences family patterns in Europe. Whether they argue that EU law 'undermines the family as a legal institution',<sup>11</sup> that the EU creates 'forms of family life',<sup>12</sup> or that the contribution of the Court of Justice of the EU (CJEU) to the protection of rainbow families is too weak,<sup>13</sup> EU law scholars are increasingly united around the idea that the EU's influence on national models of the family is real.<sup>14</sup>

<sup>8</sup> The 'family' is cursorily mentioned in only two treaty provisions: Article 79(2)a and Article 81 of the Treaty on the Functioning of the EU.

<sup>9</sup> In Case T-65/92 *Arauxo-Dumay* EU:T:1993:47, the Court of First Instance held that it 'does not consider that it is competent to widen the judicial interpretation of the specific terms used in the Staff Regulations in order to bring cohabitation within the definition of "marriage", or "cohabitee" within that of "husband" or "wife"' (para 29).

<sup>10</sup> The most radical expression of the Member States' willingness to retain competence for family law is the Declaration on the Charter of Fundamental Rights of the European Union, in which the Republic of Poland declared that 'the Charter does not affect in any way the right of Member States to legislate in the sphere of . . . family law'.

<sup>11</sup> For negative comments on the *Coman* judgment (Case C-673/16 *Coman and others* EU: C:2018:385) and of the V.M.A. ruling (Case C-490/20 *V.M.A. v Stoliczna obshtina, rayon 'Pancharevo'* EU:C:2021:1008), see V. Stehlík, 'The CJEU crossing the Rubicon on the same-sex marriages? Commentary on *Coman* case' (2018) 18 *International and Comparative Law Review* 85. For a discussion on rainbow families' rights in EU countries in relation to right-wing populism, see A. Tryfonidou, 'The impact of right-wing populism on the family rights of sexual minorities in Europe' (2022) EU-POP Working Paper Series 2.

<sup>12</sup> Dubout (n 1).

<sup>13</sup> D. Kochenov and U. Belavusau, 'After the celebration: Marriage equality in EU law post-*Coman* in eight questions and some further thoughts' (2020) 27 *Maastricht Journal of European and Comparative Law* 549.

<sup>14</sup> Scherpe argues that while there is, at present, no comprehensive European family law, elements of an 'institutional European family law' have been created through decisions of the European Court on Human Rights and by the Court of Justice of the European Union as well as other EU instruments. At the same time an 'organic European family law' is beginning to emerge. The laws in many European jurisdictions have developed similarly and have 'grown together', not only as a result of the aforementioned institutional pressures, but also as a result of societal developments, and comparable reactions to medical and societal advances and changes: J. M. Scherpe, *The Present and Future of European Family Law* (Edward Elgar Publishing 2016). See also E. Pataut, 'La famille saisie par l'Union' in E. Bernard, M. Crespo, and M. Ho-Dac (eds), *La famille dans l'ordre juridique de l'Union européenne / Family within*

This chapter takes this idea as a starting point. It aims to show that, under the heterogeneous approach to the family, there is a rationale underpinning the EU's – apparently – variable and unstable approach to the family. It seeks to describe how the notion of 'family member' contained in EU legal provisions reflects the EU's perception<sup>15</sup> of what European society is (and what it should be). The notion of 'doing family', borrowed from sociology, will help to account for the reasoning of the EU legislator and judge. In EU law, there is no unitary definition of *what it is* to be a family member, but EU legal norms often tell us what it means to *act like* a family member. Some people, who cannot claim to have conjugal or parental bonds with rights' holders, are nevertheless referred to as 'family members' on the sole ground that they are *behaving* like family members. In characterising such people as family members, the EU values the family functions they are performing: protecting, caring, educating, and supporting the social integration of their family. However, this chapter will show that 'doing family' is a social fact, an objective social reality: it does not equate to 'feeling like' a member of the family. While the EU does not ignore feelings and the willingness to form a family, it relegates them to second place. This preference for a definition of family that is based on the social functions performed rather than on any self-definition is a political and ethical choice. The Union does not so much value the feeling of belonging to the family as the role that the constitution and preservation of family life plays in the service of European construction.

This chapter is divided into six sections. Sections 4.2 and 4.3 substantiate the idea that family is a variable geometry figure in EU law. Section 4.2 describes the variable scope of the family circle in EU legal instruments, and Section 4.3 shows that 'family' is a missing category of EU law. Thereafter, the chapter seeks to identify the rationale underpinning the delineation of the family members by EU legal norms. Section 4.4 presents the notion of 'doing family', borrowed from the work of David H. J. Morgan,<sup>16</sup> who focused on family practices. It shows the value of this notion for understanding the rationale of the EU approach. Section 4.5 invites nuance in the use of the notion of 'doing family' to describe EU law. The EU values the fact of 'doing family' but, in contrast with Morgan's work, there is no room for the self-definition of family members. Forming a family supposes that its members perform social functions, like providing care or contributing to the social

*the Legal Order of the European Union* (Bruylant 2020). See also Chapter 13 by Jens M. Scherpe.

<sup>15</sup> Caracciolo di Torella and Masselot (n 7).

<sup>16</sup> D. H. J. Morgan, *Family Connections* (Polity Press 1996) 186.

integration of its members. The rationale for this limitative definition of the family is explained in Section 4.6: family is a form of social membership that enables people to be part of a broader community: the European society. EU law models the definition of EU families on the EU project to construct a cohesive society. Section 4.7 concludes that despite the fragmentation of sources and the modulation of family circles, EU law projects a certain representation of the family. Even when unnamed, ‘European families’ exist.

#### 4.2 THE VARIABLE SCOPE OF THE FAMILY CIRCLE

To illustrate the impossibility of accurately describing the ‘European family’, Strumia resorts to the notion of the ‘variable geometry family’. The EU institutions rely ‘on a flexible, pragmatic idea of family that leaves potential room to several models of cohabitation and reciprocal responsibility, and to a variety of underlying bonds, from the biological, to the legal, to the factual and affective’.<sup>17</sup> Apart from the members of the nuclear family – the spouses and children – who are systematically included in the group of ‘family members’, the precise boundary of the family circle is unstable and difficult to assess in EU law.

Several factors generate this instability. Time is the primary factor of variation. Since the 1950s, the definition of the family circle has evolved, espousing some of the social and legal changes in the Member States. This is visible in free movement law. Regulation 1612/68<sup>18</sup> on workers’ mobility restrictively defined the family as being composed of the sole ‘spouse’, children, and the dependent relatives in the ascending line of the worker and *his*<sup>19</sup> ‘spouse’. Three decades later, the 2004/38 Directive<sup>20</sup> included in the family circle the ‘partner’ with whom the Union citizen (a man or a woman) has contracted a registered partnership. Following the same logic, siblings and relatives who were not mentioned in the 1990 Dublin Convention<sup>21</sup> have

<sup>17</sup> F. Strumia, ‘The family in EU law after the SM ruling: Variable geometry and conditional deference’ (2019) 4 *European Papers* 389.

<sup>18</sup> Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

<sup>19</sup> On the use of the masculine pronoun in different provisions of EU law, see V. Paskalia, *Free Movement, Social Security and Gender in the EU* (Hart Publishing 2007).

<sup>20</sup> 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 [2004] OJ L158/77.

<sup>21</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention [1997] OJ C 254/1.

been counted as members of the (extended) family by ‘Dublin III’ Regulation 604/2013.<sup>22</sup> The proposal for an Asylum and Migration Management Regulation confirms that the EU institutions are willing to retain this broad definition of the family circle.<sup>23</sup>

However, change over the course of time is not the only source of complexity. Even when adopting a static rather than a dynamic reading of the norms dealing with family life, it is hard to form a clear picture of the family. The fragmentation of legal sources is a second factor preventing the emergence of a uniform category of family in EU law. The perimeter of the family varies significantly from one text to another, even within one and the same policy field. A typical example is that of unmarried partners. Directive 2013/33 on the reception of applicants for international protection<sup>24</sup> is inclusive: its Article 2(c) designates as a family member ‘the spouse of the applicant or his or her unmarried partner in a stable relationship’. Accordingly, Article 2(g) of the Dublin Regulation mentions the unmarried partners engaged in a durable relationship. Yet other texts, like the Family Reunification Directive<sup>25</sup> and the EU Citizens’ Directive, are far less inclusive. They rely on a distinction between two groups of people, one named ‘family members’ which corresponds to the (slightly extended) traditional nuclear family, and the other one composed of people having other types of family ties. Unmarried partners fall into this second group.<sup>26</sup> The same logic applies for siblings and relatives. In most EU legal instruments, they are not included in the family circle. Article 6 of the Dublin III Regulation is an exception: it refers to a heterogeneous group composed of ‘family members, siblings or relatives’ of the unaccompanied minors. ‘Relatives’ are defined by Article 2(h) as ‘the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State’.

<sup>22</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

<sup>23</sup> Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final.

<sup>24</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

<sup>25</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

<sup>26</sup> In the Family Reunification Directive, the unmarried partner is not deemed to belong to the group of people who can rely on Article 4 which holds that Member States ‘shall’ authorise the entry and residence of the sponsor’s spouse. See also Chapter 8 by Albertina Albers-Llorens.

These lists of family members may appear to have been composed at random and without any logic because the links between family members are very diverse. Parental and conjugal ties are predominant, but often EU law also recognises as family members people who interact from other circles and relationships. A recent example is that of the Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine.<sup>27</sup> In addition to the spouse, the unmarried partner in a stable relationship, and minor unmarried children, Article 2 of the Decision designates as persons who shall be considered to be part of a family ‘other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced persons, and who were wholly or mainly dependent on the sponsor’. The ‘other close relatives’ is a vague category that serves to include, within the scope of the family, persons not having any predetermined legal family links but who depend on the sponsor. It will be remembered (from the previous paragraph) that the same category is mentioned in the Dublin Regulation but there ‘relatives’ refers to a different category of people: ‘the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State’ (Article 2(h)).

These examples, which attest to the categorical diversity of family in EU law, point to a third factor of variation in the definition of the family: the objective of the law. The family circle is defined according to the purpose of the EU norm under consideration. When the legislator’s objective is to confer a legal status and to grant rights to individuals, the family circle tends to be narrowly defined. This is particularly apparent in the norms that distinguish between two categories of family members, who are accorded distinctive rights and treatment. Following its Article 3(1), the EU Citizen’s Directive, which confers several important rights, ‘shall apply’ to the ‘family’ which is composed (under Article 2) of the spouse and registered partner, children, and ascendants in direct line. In contrast, under Article 3(2), the host Member States are only required to ‘facilitate’ entry and residence for the ‘other family members’ who are the persons not falling under the definition of Article 2 who are dependants or members of the household of the Union citizen. Accordingly, and despite the fact that he/she is not even named a ‘family member’, the ‘partner with whom the Union citizen has a durable relationship, duly attested’ is mentioned in Article 3(2)(b) as a person who ‘may enjoy’ facilitated access to entry and residence. The legislator has opted for the same approach

<sup>27</sup> Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

to family in concentric circles in the Family Reunification Directive. It distinguishes between a 'first family circle' including the sponsor's spouse and the minor children of the sponsor and spouse, composed of persons who have a right of entry and residence in the host State; and a 'second family circle' comprising first-degree dependent relatives in the direct ascending line of the sponsor or spouse, and adult unmarried children of the sponsor or spouse, composed of persons whose entry and residence is dependent on the host State being willing to welcome them.

These examples also show that the delineation of the family varies depending on the degree of harmonisation the legislator seeks to achieve. When adopting the EU Citizen's Directive, the legislator clearly sought to limit the Member States' discretion; hence the compilation of a rather precise and closed list of family members. In contrast, in the field of social security, preference was for a margin of appreciation left to national authorities. Logically, Article 1 of Regulation 883/2004<sup>28</sup> defines the 'member of the family' as '(i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided ...'.

It is clear from these examples that the definition of family – and the protection of family life – is often instrumental to achieving other objectives. This is not a novelty. Caracciolo di Torella and Masselot have argued that 'the regulation of the family has not been an end *per se*, but has been subsidiary to the successful completion of the "main building", namely the European Community (EC) common market. As a result, both soft law and binding measures were a bundle of *ad hoc* measures which did not support a coherent approach within this area.'<sup>29</sup> Given the multiple objectives pursued by the EU institutions in the different areas of EU law, the prospect of a clear and a priori definition of the family common to the different branches of EU law appears somewhat illusory.

#### 4.3 THE FAMILY: A MISSING CATEGORY OF EU LAW?

It is not unreasonable to affirm that 'family' is an elusive category of EU law. Terminology confirms this idea. In the different secondary law instruments that organise family life, in particular in social law, free movement law, or private international law, the entity 'family' is rarely mentioned as such. The

<sup>28</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

<sup>29</sup> Caracciolo di Torella and Masselot (n 7).



preferred terms of the norms are ‘family links’, ‘family relations’, or ‘family members’, leading some scholars to consider that European law is constructed on the basis of, and for, individuals alone.<sup>30</sup> Some go as far as concluding that the ‘European family’ does not exist, at least in its traditional sense of a social institution.<sup>31</sup>

This description fits well with the analysis of free movement law, a domain in which the logic is ‘of dissuasion or deterrence’.<sup>32</sup> Free movement law, Advocate General Bobek argues, is built on the premise that the Union citizen will be discouraged from moving, ‘as those personally *close* to him will be barred from joining him’.<sup>33</sup> Given that social perceptions are changing and that there is an increasing range of forms of cohabitation, the definition of the persons who are ‘close’ to the Union citizen is not – and cannot be – defined *a priori*. Sometimes, the deterrence effect is even stronger with regard to a partner under Article 3(2) of Directive 2004/38 than it is with regard to some family members listed in Article 2. This is why Advocate General Bobek adds: ‘I am simply suggesting that with regard to who is effectively “close” to a person, formal box-based generalisations are hardly appropriate.’<sup>34</sup>

It may be the same reluctance vis-à-vis ‘formal box-based generalisations’ that guided the legislator when adopting Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.<sup>35</sup> The text does not specify who are the persons holding parental responsibility and having the rights of access to the child defined in Article 2(10). Whether certain persons, such as grandparents, can be considered family members and have rights of access to their grandchild is not explained. This lack of clarity results from the negotiations of the time.<sup>36</sup> The legislator, pondering who may exercise parental responsibility, considered several options: limiting the persons concerned to one of the parents of the child or, conversely, imposing no limitations on

<sup>30</sup> H. Fulchiron, ‘Un modèle familial européen?’ in H. Fulchiron and C. Bidaut-Garon (eds), *Vers un statut européen de la famille* (Dalloz 2014).

<sup>31</sup> S. Barbou des Places, ‘La famille du ressortissant d’Etat tiers: Une famille désinstituée?’ in H. Fulchiron (ed), *La famille du migrant* (Lexis Nexis 2020). See also Chapter 3 by David Archard.

<sup>32</sup> Opinion of Advocate General Bobek in Case C-89/17 *Banger* EU:C:2018:225. See also Chapter 7 by Michael Bogdan.

<sup>33</sup> Opinion of Advocate General Bobek in Case C-89/17 *Banger* EU:C:2018:225, para 37.

<sup>34</sup> Ibid.

<sup>35</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1.

<sup>36</sup> See Opinion of Advocate General Szpunar in Case C-335/17 *Valcheva v Babanarakis*: C:2018:242.

specific persons whatsoever. Ultimately, the legislator opted not to provide for a limitation of the range of persons who may exercise parental responsibility. For Advocate General Szpunar, we can even infer from the legislator's silence that its goal was to extend the scope of Regulation 1347/2000.<sup>37</sup> The legislator contemplated all decisions concerning parental responsibility and rights of access 'irrespective of the nature of the persons who may exercise those rights'<sup>38</sup> and without excluding grandparents. There is no predetermination of what family could mean because flexibility was the preferred option. The legislator thus achieved the paradoxical outcome that, in a text governing parental responsibility, there is no trace of a definition, or even a conception, of the family.

The semantics employed by the different texts of EU law bring to light the conceptual confusion surrounding the notion of family. Different terms ('family members', 'other family members', 'relatives', 'other relatives', 'siblings', 'siblings and parents', 'parents') coexist to describe the persons having ties with the EU citizens or sponsors or person to be taken care of, often in an inconsistent manner. True, the rationale is to modulate the rights granted to the different categories of persons. But this mode of presentation and naming creates a conceptual ambiguity: Is it coherent to talk about a 'family' when some people are not even titled 'family members'<sup>39</sup> and others, named 'other family members', remain outside the scope of the provision that defines 'the family'?

Practical problems also arise from the inconsistent reference to the notion of 'family members'. The *Banger* case<sup>40</sup> illustrates the difficulties arising from the inconsistency in Directive 2004/38. Article 3(2) of the Directive grants a facilitation regime of mobility for the unmarried partner with whom the EU citizen has a durable and duly attested relationship but does not set out the specific procedural guarantees that shall accompany its implementation. Therefore, the judicial guarantees to be applied to unmarried partners, who are not on the list of 'family members' in Article 2, remain unclear. A difficulty emerged because Article 15 of the Directive on procedural guarantees refers to Union citizens and their 'family members' with no other indication. Both the

<sup>37</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/1, which was limited to disputes concerning parents.

<sup>38</sup> *Ibid*, para 65.

<sup>39</sup> This is the case of siblings and 'other relatives' who play an important part in the Dublin mechanism.

<sup>40</sup> Case C-89/17 *Banger* EU:C:2018:570.

Commission and the UK government argued that the notion of Union citizens and their ‘family members’, which is legally defined in Article 2(2) of the Directive, does not include extended family members. Advocate General Bobek and the Court took another position. The Advocate General noted that the notion of ‘family members’ does not appear to be used consistently in the provisions of Directive 2004/38.<sup>41</sup> Since under Article 15 procedural safeguards shall apply ‘to all decisions restricting free movement of Union citizens and their family members’ without referring to Article 2, it is not unreasonable to consider that the procedural guarantees to apply to family mobility should not vary according to the type of conjugal bond. Following the same logic, the Court held that the procedural safeguards provided in Article 31(1) of Directive 2004/38 are applicable to the persons envisaged in Article 3(2)(1) of the directive. This approach must be welcomed insofar as procedural guarantees are accorded to members of the extended family. Yet it is not unreasonable to question the Court’s logic, which assumes that a unitary category of family exists, despite the distinction that Directive 2004/38 makes among family members. At this stage, the legitimate question to be asked is whether the Court and the other EU institutions have a vision of the ‘EU family’ in mind. Is there a rationale underpinning their approach? These questions can be answered in the affirmative, provided that due consideration is given to the notion of ‘doing family’.

#### 4.4 DEFINING FAMILY MEMBERS AS THOSE WHO ‘DO FAMILY’

Until now, the family has been described in this chapter as a category without substance. It is now time to take a new lens: instead of *who is in* the family or *what is a* family, we might instead ask *what makes* a family.<sup>42</sup> For Morgan,<sup>43</sup> family is a facet of social life: it represents a quality rather than a thing. Morgan’s work is useful for our analysis because he has shifted sociological analyses from family as a structure to which individuals belong, toward understanding families as sets of activities, which take on a particular meaning, associated with family. This line of reasoning is insightful because it has proven to be quite impossible to find a unitary family structure in EU law. In EU legal norms, in contrast, one can identify different traces of ‘family activities’ and ‘family practices’. It appears from various legal provisions that the EU recognises situations in which individuals ‘behave’ and ‘act as family’

<sup>41</sup> Opinion of Advocate General Szpunar in *Valcheva v Babanarakis* (n 36), para 87.

<sup>42</sup> See also Chapter 9 by Geoffrey Willems.

<sup>43</sup> Morgan (n 16).

members. Often the individuals are granted rights when, or because, they perform one of the main social functions which are generally assigned to the family: to provide care, protection, and education, and to contribute to the social integration of its members.

True, the social functions generally assigned to the family are not valued equally. ‘Doing family’, in EU law, relates primarily to performing a caring function. The Court formulated this idea implicitly in the *Valcheva* case. Having noted that the legislator had left it undecided who could be a ‘holder of parental responsibility’, the Court then provided a defining criterion of ‘parents’: they are the persons ‘with whom it is important for the child to maintain a personal relationship’.<sup>44</sup> In so judging, the Court has not emphasised a specific type of bond which would define a parent; a case-by-case analysis will be required to identify who the ‘parents’ are. Nevertheless, the Court has chosen to emphasise the importance of bonds in the interest of the minor.

In most free movement and migration norms, the caring function plays a more explicit role. Article 3(2) of the EU Citizen’s Directive defines as ‘other family members’ the persons who ‘are dependent or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen’. The same logic guides the Dublin III Regulation, the Asylum Directives,<sup>45</sup> and the 2015 Relocation Decision:<sup>46</sup> people with no biological bonds and who are not *de jure* family members are nevertheless referred to as family members when they provide, or need, care. The most explicit provision is Article 4(2) of the Family Reunification Directive, which allows the Member States to authorise the entry and residence of: the first-degree relatives in the ascending line of the sponsor or his/her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin; the adult unmarried children of the sponsor or spouse, where they are objectively unable to provide for their own needs on account of their state of health; the unmarried minor children as well as the adult unmarried children of the partner, when these children are objectively unable

<sup>44</sup> Case C-335/17 *Valcheva v Babanarakis* EU:C:2018:359, para 33.

<sup>45</sup> Directive 2013/33/EU (n 24); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

<sup>46</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

to provide for their own needs on account of their state of health. The same logic guided the Council when adopting Implementing Decision 2022/382 which triggers the application of the Temporary Protection Directive for people from Ukraine.<sup>47</sup> In this text, the family includes the ‘other close relatives’ who lived together as part of the family unit ‘and who were wholly or mainly dependent on the sponsor’.

The notions of ‘need’ and ‘care’ take on such importance in EU law that they have even led the Court, in the *Depesme and Kerrou* case,<sup>48</sup> to redefine the notion of ‘children’ and ‘parent’, despite the strict meaning of the notions under Regulation 492/2011.<sup>49</sup> Ms Depesme, Mr Kauffmann, and Mr Lefort each lived in a reconstituted family unit – living in France and Belgium – consisting of a biological mother and a stepfather. Each of them applied for a study grant on the basis that their stepfathers had worked in Luxembourg continuously for more than five years. Yet the Luxembourgish authorities refused their applications on the grounds that they were not legally the ‘children’ of frontier workers but merely the ‘stepchildren’. The Luxembourgish government argued that the concept of ‘child’ had to be interpreted restrictively.<sup>50</sup> Following the AG, the Court confirmed the social value of providing maintenance and care. It held that the parent–child relationship has to be defined not in legal but in ‘economic terms’, in that the child of a step-parent with the status of migrant worker can claim a social advantage where the step-parent contributes to the child’s maintenance. The centre of gravity of the judgment is not about membership or legal linkages, it is about performing a family role, day after day. ‘Doing family’ is a notion that comes in via the court’s application to complement de jure family bonds.

On closer inspection, it appears that this conception has been at work for many years. Already in the *Carpenter* case, the Court had the concept of care

<sup>47</sup> Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

<sup>48</sup> Case C-401/15 *Depesme and Kerrou* EU:C:2016:955.

<sup>49</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

<sup>50</sup> *Depesme and Kerrou* (n 48), para 51. In contrast, Advocate General Wathelet argued that ‘a strictly legal definition’ of the parent–child relationship in the context of Article 7 of Regulation 492/2011 (n 49) would be inappropriate, considering the interpretation of ‘family life’ as protected by Article 7 of the Charter and Article 8 of the ECHR which has departed from the criterion of ‘parental relationship’, recognising the possibility of ‘de facto family ties’: Opinion of Advocate General Wathelet in Case C-401/15 *Depesme and Kerrou* EU:C:2016:430, para 59.

play a decisive role.<sup>51</sup> Accordingly, in *Ibrahim* and *Teixeira*,<sup>52</sup> the Court conferred a right of residence on a mother of a child in education on the basis of her being the primary carer for the child. In *Teixeira*, the Court even considered that the right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker ends, in principle, when the child reaches the age of majority unless the child continues to need the presence and care of that parent to pursue and complete his/her education.<sup>53</sup> Later, in *Alarape*,<sup>54</sup> the Court confirmed the possibility of the primary carer remaining on national soil as long as the child needs care. In so judging, the Court went beyond the limits of EU secondary law, which did not ground a right of residence on the sole fact of being a mother.<sup>55</sup> ‘Acting like a parent’ is what the Court takes into consideration. It serves either to replace – as in *Depesme and Kerrou* – or to complement – as in *Alarape* – de jure family ties.

In sum, when looking at EU secondary law and at CJEU case law through the lens of ‘doing family’, a more coherent picture of the family emerges. The ‘family members’ remain identified by the conjugal or kinship bonds they share with EU citizens or migrants. The extended family members, whether named ‘other family members’, ‘other relatives’, ‘relatives’ or unnamed altogether, are mainly identified by the family functions they fulfil or benefit from actively caring and protecting, or passively needing care and protection. This approach, however, is an objective social reality and ‘doing family’ should not be confused with ‘feeling like a family’.

#### 4.5 ‘DOING FAMILY’ AS AN OBJECTIVE SOCIAL REALITY

When the *Coman* judgment<sup>56</sup> was handed down by the Court, very contrasting comments were made by EU legal scholars. Since the Court held that the mobility rights conferred by the EU citizenship Directive shall be granted to the same-sex spouse of an EU citizen, even without the requirement that the host Member State has established same-sex marriage, the judgment has been

<sup>51</sup> Case C-60/00 *Carpenter* EU:C:2002:434.

<sup>52</sup> Case C-310/08 *Ibrahim* EU:C:2010:1065, and Case C-480/08 *Teixeira* EU:C:2010:83.

<sup>53</sup> *Teixeira* (n 52), para 87.

<sup>54</sup> Case C-529/11 *Alarape* EU:C:2013:290.

<sup>55</sup> On caregiver’s right of residence in free movement law, see K. Hyltén-Cavallius, ‘Who cares? Caregivers’ derived residence rights from children in EU free movement law’ (2020)

57 Common Market Law Review 399.

<sup>56</sup> *Coman and others* (n 11). See also Chapter 2 by Alina Tryfonidou, Chapter 7 by Michael Bogdan, and Chapter 9 by Geoffrey Willems.

described as bold and progressive.<sup>57</sup> It was indeed legitimate to infer from the judgment that the Court was willing to interpret broadly the concept of EU citizens' family members,<sup>58</sup> and that the EU was progressively accepting new forms of families. However, a far less enthusiastic reading of the case emerged from sceptical scholars who denied that the Court had transformed the definition of family members. The outcome, they argue, was 'simply mandated by the language of the relevant legal provisions' since their inception, given that the term 'spouse' was 'purposefully gender-neutral in the Directive 2004/38'.<sup>59</sup> When families composed of a same-sex couple move to a Member State that does not recognise same-sex couples, they remain confronted with the possibility that the Member State will refuse to legally recognise the familial ties among the family members as these have been legally established elsewhere. The *Coman* ruling indeed creates an obligation to recognise such marriages but 'for the sole purpose of granting a derived right of residence to a third-country national'.<sup>60</sup>

This critical reading rightly underlines that even in *Coman*, a judgment that enshrines a more liberal view of the family, the family remains defined by stringent objective criteria. The Court in no way promotes a definition of the family that is self-defined or 'rooted in individual biographies'.<sup>61</sup> This contrasts with Morgan's approach which inferred from the notion of 'doing family' that social actors creatively constitute their own social world and that 'an individual's understanding of "my family" is subject to change over time'.<sup>62</sup> Morgan emphasises the fluidity, the diversity, and the multifacetedness of the family. Here lies the limit of Morgan's theory for the analysis of EU law. In EU secondary law and in CJEU case law, 'doing family' and 'feeling part of a family' are two separate things. 'Doing family' remains limited to performing a set of activities or actions: it is a matter of how people behave, not how they feel, how they think of themselves as a social group, or how they love.

In CJEU case law, the motivations or the reasons for 'doing family' are irrelevant. This appears clearly from the *Reyes* case,<sup>63</sup> in which the Court decided that for a twenty-one-year-old daughter of a Union citizen to be

<sup>57</sup> See D. Kochenov and U. Belavusau, 'Same-sex spouses: More free movement, but what about marriage? *Coman*' (2020) 57 Common Market Law Review 227.

<sup>58</sup> G. Milios, 'Defining "family members" of EU citizens and the circumstances under which they can rely on EU law' (2020) 39 Yearbook of European Law 293.

<sup>59</sup> D. Kochenov and U. Belavusau (n 57).

<sup>60</sup> *Coman and others* (n 11), para 46.

<sup>61</sup> J. Finch, 'Displaying families' (2007) 41 Sociology 65.

<sup>62</sup> Morgan (n 16).

<sup>63</sup> Case C-423/12 *Flora Reyes* EU:C:2014:16.

regarded as being a ‘dependant’ of that citizen, the existence of a situation of real dependence must be established. That status can only be the result of a ‘factual situation’ characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse. The Court underlines that there is no need to determine ‘the reasons’ for that dependence or for the recourse to that support. The same rationale applies in *Depesme and Kerrou*. The national judge sought to clarify the extent to which emphasis had to be placed on the fact that the frontier worker ‘continues to provide for the student’s maintenance’ without necessarily being connected to the student through a legal child–parent relationship, where a sufficient link of communal life can be identified. The Court replied that the status of dependent member of a family is ‘the result of a factual situation, which it is for the Member State and, if appropriate, the national courts to assess’. The status of family member can be evidenced by ‘objective factors’, such as a joint household shared by that worker and the student. It is not necessary to determine the ‘reasons for the frontier worker’s contribution’ to the maintenance of the student or make a precise estimation of its amount. ‘Doing family’ is an objective fact and the willingness to act as a parent is secondary. Such willingness can be inferred from the acts of ‘parents’ but needs to be proved.

Of course, the Court is not unaware of the emotional side to family life but feelings and emotions are not sufficient to ‘constitute’ the family. This is apparent in *Alarape*<sup>64</sup> – a case in which the national judge was asking whether, for a parent to qualify as a ‘primary carer’ so as to derive a right of residence from a child under Regulation 1612/68, it is necessary for that child to be dependent on such a parent, to reside in that parent’s household, and to receive emotional support from that parent. The Court held that determining whether an adult child does or does not continue to need the presence and care of his parent supposes one should:

take into account the particular circumstances and features of the main proceedings which might indicate that the need was genuine, such as, *inter alia*, the age of the child, whether the child is residing in the family home or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education.<sup>65</sup>

Emotional ties are not ignored but they mainly serve to establish the children’s dependency and are not central to the definition of family

<sup>64</sup> *Alarape* (n 54).

<sup>65</sup> *Ibid*, para 30.



ties.<sup>66</sup> In other words, it seems that recognising the importance of ‘doing family’ does not equate to giving individuals the choice to decide for themselves who counts as family members. Rather, because the family is the ‘basic cell’ of European society, its definition is modelled after the EU’s goal to create a cohesive society.

#### 4.6 THE ROLE OF ‘DOING FAMILY’ IN THE DESIGN OF EUROPEAN SOCIETY

Among EU law scholars, the story increasingly told is one of the EU making space for greater individual emancipation and self-determination but leading to a society in which the sense of community and membership is frustrated.<sup>67</sup> This reading is well established among those who believe in the negative influences of the EU on family law. The EU supposedly destabilises the family order, accentuating the tendency towards individualism and the break-up of the family institution. The *Coman* judgment, and the recent *Pancharevo* ruling,<sup>68</sup> may have increased the impression that in promoting subjective rights and overvaluing the interest of the individual at the expense of the socially dominant conception of the family, the Court contributes to the overall phenomenon of relegation of the family as a legal institution.

There is, however, another narrative to be taken seriously. It tells that EU law strives to convert European individuals into members of the social and institutional spheres that prevail in their Member State of residence. The family is one of the ‘collective entities’ which individuals are destined to

<sup>66</sup> See Berneri who regrets the limited application of the concept of ‘emotional dependency’ elaborated in the *Ruiz Zambrano* judgment: C. Berneri, ‘Family reunification between static EU citizens and third country nationals’ (2018) 20 *European Journal of Migration and Law* 289.

<sup>67</sup> See A. Somek, ‘The individualisation of liberty: Europe’s move from emancipation to empowerment’ (2013) 4 *Transnational Legal Theory* 258; A. Somek, ‘Alienation, despair and social freedom’ in L. Azoulai, S. Barbou des Places, and E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016) 5; A. Menendez, ‘Which free movement? Whose free movement?’ in S. Borelli and A. Guazzarotti (eds), *Labour Mobility and Transnational Solidarity in the European Union* (Jovene editore 2019) 7.

<sup>68</sup> In which the Court ruled that a child who has same-sex parents according to a birth certificate drawn up by the host Member State must be issued an identity card or a passport by the Member State of her nationality and must be able to exercise her freedom of movement in the EU with each of her parents. With these judgments, the CJEU is said to have removed at least the most obvious legal barriers that had stood in the way of rainbow families’ free movement. See A. Tryfonidou, ‘The ECJ recognises the right of rainbow families to move freely between EU Member States: The V.M.A. ruling’ (2022) 47 *European Law Review* 534. See also Chapter 9 by Geoffrey Willems.

belong to.<sup>69</sup> Azoulai argues that family membership is of particular importance because it is ‘a proxy for social membership’:<sup>70</sup> families are not ‘mini-societies’ but entities which are central to the construction of a cohesive European society, hence the importance accorded by the EU to situations in which individuals ‘do family’. Caring and protecting, participating in the construction of stable communities are all some of the individual acts that contribute to the construction of a broader social community.

Different factors support this social membership narrative. It can be observed that in various provisions and judgments, family members are encouraged to play two main roles that are decisive for the cohesion of European society. The first role is to provide material and emotional support to the most fragile and vulnerable members of the society. This aspect is central in the rules on the family reunification of refugees. Special attention is given to the possibility for refugees to recreate a family: being vulnerable people, they need to enjoy a sphere of solidarity. This is why, in the *TB* case,<sup>71</sup> and in the *A.S.* case,<sup>72</sup> the Court has restated the importance of family reunification as a necessary way of making family life possible, ‘which is of particular importance for refugees on account of the reasons which obliged them to flee their country’.<sup>73</sup> Children being fragile and vulnerable individuals, the Court also values the role of their caregivers. As mentioned earlier, this led the Court in *Depesme*, *Teixeira* or *Chavez Vilchez* to characterise the

<sup>69</sup> L. Azoulai, ‘The European individual and collective entities’ in L. Azoulai, S. Barbou des Places, and E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016).

<sup>70</sup> *Ibid.*

<sup>71</sup> Case C-519/18 *Bevándorlási és Menekültügyi Hivatal (TB)* EU:C:2019:1070. The Court held that Article 10(2) of Council Directive 2003/86/EC must be interpreted ‘as not precluding a Member State from authorizing the family reunification of a refugee’s sister only if she is, on account of her state of health, unable to provide for her own needs, provided that: – first, that inability is assessed having regard to the special situation of refugees and at the end of a case-by-case examination taking into account all the relevant factors, and; – secondly, that it may be ascertained, having regard to the special situation of refugees and at the end of a case-by-case examination taking into account all the relevant factors, that the material support of the person concerned is actually provided by the refugee, or that the refugee appears as the family member most able to provide the material support required.’: para 77.

<sup>72</sup> Case C-550/16 *A. and S.* EU:C:2018:248. The Court held that Article 2(f) of Directive 2003/86, read in conjunction with Article 10(3)(a), must be interpreted as meaning that a third-country national who is below the age of eighteen at the time of entry into the territory of a Member State and of the introduction of asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a ‘minor’ for the purposes of that provision.

<sup>73</sup> Case C-129/18 *SM* EU:C:2019:248, para 32. Here the court borrows from the text of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

stepfather as a ‘parent’ despite the absence of legal links, solely on the basis of the assistance provided. In the *SM* case,<sup>74</sup> the Court also decided that a child under a legal guardianship system such as Algerian *kafala*, although cannot be regarded as a ‘direct descendant’ of a Union citizen for the purposes of Directive 2004/38, can be defined as one of the ‘other family members’ referred to in Article 3(2)(a).<sup>75</sup> The words employed in Article 3(2)(a) are indeed capable of covering the situation of a child placed with citizens of the Union under the *kafala* system ‘in respect of whom those citizens assume responsibility for its care, education and protection’. In these different cases, the family was always conceived as the social entity best suited to provide protection and adequate care for the most fragile individuals.

Family members are called on to perform a second social function: to contribute to the stability of social relations. *Coman* is an interesting example because the argument which grounded the judge’s decision to grant same-sex spouses the right to move in the EU is the importance of protecting the family life that was created ‘or strengthened’ in another Member State. In so doing, the Court emphasises the individual’s need for stability, a social reality that is expected to benefit both individuals and society. In other cases, the Court values the actions taken by ‘family members’ which ensure the continuity of children’s education and integration in the host society. This is noteworthy in cases in which mothers (as in *Chavez Vilchez*) or stepfathers (as in *Depesme*) stand in for the children’s defaulting father by paying for maintenance and education in his stead. These persons deserve to be called ‘family members’ because giving children the opportunity to attend school and pursue further education is ‘a condition for the best possible integration of children of migrant workers in the social life of the host member State,’ Advocate General Kokott explained<sup>76</sup> The mother–child or stepfather–stepchild tie is not reducible to a form of universal human relation, based on legal ties or on feelings. It is based on specific relational links that contribute to the European project of creating a cohesive society. ‘Family members’ can thus be described as the active persons whose presence and care are required for the purposes of integration and stability. They are defined by the specific role they are destined to play in the common interest. Being a family member is a role given to the individual as part of broader relations with others embedded in European society. Performing useful social functions is what makes a family in EU law.

<sup>74</sup> Case C-129/18 *SM* EU:C:2019:248.

<sup>75</sup> See further Chapter 7 by Michael Bogdan.

<sup>76</sup> Opinion of Advocate General Kokott in Case C-480/08 *Teixeira* EU:C:2009:642, para 62.

## 4.7 CONCLUSION

It is very tempting to believe that EU law fulfils only a limited role in family matters, restricted by national traditions and cultures. There are good reasons to believe that the (possible) influence of the EU on national models of family life is limited. In the absence of a general EU competence clause, there can be no real family law. In the absence of a sufficiently homogeneous social base, the EU would lack a basis for expressing a shared European conception of the family. In other words, the EU would not substitute its own value and representation.

However, this chapter has revealed that this description fails to account for the power of the EU's language which contributes to modelling 'the way we live and conceive our lives'.<sup>77</sup> It has been shown that despite the apparent variable geometry of the family, and the absence of a uniform category of 'family', the way in which the EU characterises a person as a 'family member' obeys a form of logic and expresses a certain rationality. Despite the fragmentation of sources and the modulation of family circles, rights and obligations are not randomly distributed; EU law projects a certain representation of the family. We have observed that in addition to the *de jure* family members, other persons are counted as family members on the basis of their 'behaving' like family members. Even when unnamed, European families exist: they are the groups of people who are assumed to perform – or asked to prove that they do perform – different functions, like education, care, protection, and socialisation. These roles are central because they contribute to a broader ambition – participating in the cohesion of the whole of European society, which is composed not of isolated individuals, but of social groups related by strong human bonds, and not only economic ties. This can be viewed as a limited contribution to the emergence of European society or, on the contrary, as the sign that EU integration is progressively taking on a more human face.

<sup>77</sup> Dubout (n 1).