

# Recent CJEU Case-Law on the Civil Status of LGBT Persons under EU Free Movement Law: *Cupriak-Trojan and Trojan and Shipova*

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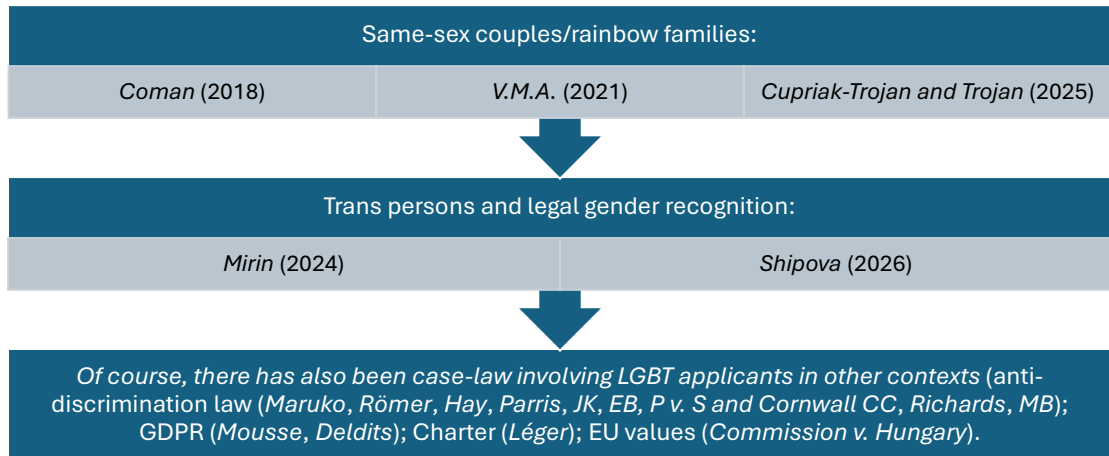
## CJEU LGBT FREE MOVEMENT CASE-LAW: THE UNDERLYING PROBLEM

- Civil status matters - including marriage, family relationships and legal gender recognition – fall within the **competence of the Member States**.
  - Thus, EU law does not harmonise these fields.
- As a result, **national rules diverge** significantly, especially regarding:
  - Same-sex marriage;
  - Legal recognition of same-sex relationships;
  - Legal recognition of same-sex parenthood;
  - Legal gender recognition
- Key question: If when Member States regulate these matters they impede the exercise of free movement rights, can EU law interfere?

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# CJEU LGBT FREE MOVEMENT CASE-LAW TO DATE



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## ***Cupriak-Trojan and Trojan (2025)***

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# CUPRIAK-TROJAN AND TROJAN - FACTS

## Facts and legal issue:

- Two Polish nationals (one, a dual Polish-German national)
- Marriage lawfully concluded in Germany while the couple was resident there
- Request for transcription of German marriage certificate in Poland
- Refusal by Polish authorities since contrary to Polish public order (Poland has not extended marriage to same-sex couples, nor does it provide for the legal recognition of same-sex relationships in any way).

Key question: Does EU law require the recognition of a same-sex marriage lawfully concluded by two Union citizens (who are nationals of the MS where recognition is sought) concluded in another MS?

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## CUPRIAK-TROJAN AND TROJAN - DECISION

The Court held that Articles 20 and 21(1) TFEU, read in the light of Articles 7 and 21 of the Charter, require recognition of the marriage.

- Refusal of recognition creates '**serious inconvenience**', capable of deterring the exercise of free movement rights.

The problem in *Cupriak-Trojan and Trojan* was that a couple could be married in one Member State, while being considered legal strangers in another.

- Issue: **continuity of family status** across borders – one of the rights attached to free movement is the right 'to lead a normal family life'.

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# CUPRIAK-TROJAN AND TROJAN – DECISION

## Recognition vs Transcription

The Court appears to accept that **transcription** of the marriage certificate is not always required

- It is only required under EU law only where it is the only means of ensuring recognition (as was the case in Poland).



Yet, through the Court's ruling it is also made clear that 'recognition' must mean more than presentation of a marriage certificate from another Member State

Such an approach would leave recognition uncertain and dependent on administrative discretion.

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What does 'recognition' mean?

Recognition as a marriage?  
Recognition 'in some form' (as per ECtHR case-law)?  
• Should recognition be automatic?



How far does the obligation extend?

Marriage concluded in *third States*?  
Situations where there is no free movement *within the EU*?



Is it necessary for there to be a link with the MS where the marriage was concluded? (e.g. (genuine) residence)



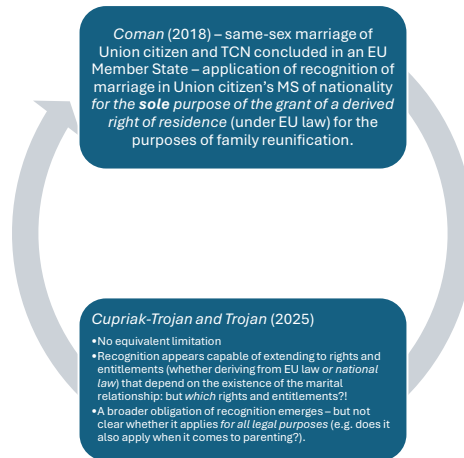
For what purpose(s) should the marriage be recognised? (see next slide)

CUPRIAK-TROJAN  
AND TROJAN – WHAT  
IS LEFT UNCLEAR

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## CUPRIAK-TROJAN AND TROJAN AS A SEQUEL TO COMAN (2018)



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# SHIPOVA (2026)

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## SHIPOVA - FACTS

Bulgarian trans woman

Resident in Italy with partner where diagnosed with gender dysphoria and receives hormonal therapy (but no gender affirmation surgery) – no legal gender recognition in Italy

She applied to the Bulgarian authorities to change her legal gender in birth certificate and identity documents

Bulgarian authorities refused – no legal gender recognition procedure & 'sex' - according to Constitutional Court – understood only in its biological sense.

Key question: can EU law require a mechanism enabling a trans Union citizen's lived gender identity to be reflected in official documents?

• Difference with *Mirin*?

• *Mirin*: cross-border recognition of change in legal gender *already* established in another MS

• *Shipova*: application to have lived gender identity reflected in identity documents *for the first time*.

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## SHIPOVA - DECISION

Article 21 TFEU together with Article 4(3) of Directive 2004/38, read in the light of Article 7 of the Charter, preclude national legislation that does not permit the identity documents of a Union citizen to reflect their lived gender identity.

• In MSs where identity documents can only reproduce data contained in the birth certificate (like Bulgaria), if the only way to reflect the lived gender identity in identity documents is through the change also of the birth certificate, then EU law (also) requires this (→ legal gender recognition - already an obligation under the ECHR).

Key reasoning: a discrepancy between a Union citizen's lived gender identity and that person's identity documents creates 'serious inconvenience' capable of hindering the exercise of free movement rights.

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## SHIPOVA - DECISION

The case that bears the strongest resemblance to *Shipova* is *V.M.A.*

The obligation imposed on Member States, was confined to the issuance of identity documents and was designed simply to ensure the effective exercise of free movement rights.

- Since such documents are indispensable for the exercise of free movement rights, and without them a Union citizen's access to free movement is effectively foreclosed, the Court regards both the refusal to issue them (*V.M.A.*) and their issuance in a form which causes 'serious inconvenience' for the Union citizen concerned every time they are used (*Shipova*), as obstacles to free movement and, therefore, as contrary to EU law.

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## SHIPOVA: WAS THERE A (SUFFICIENT) CROSS-BORDER ELEMENT?

- Purely internal rule established in *Saunders* (1979)
  - Requirement of a 'cross-border element'.
  - What is a 'cross-border element'?
    - Traditionally, the Court has asked whether there has been movement from one Member State to another *and* whether the denial of the right derived from EU law is liable to have a deterrent effect on the exercise of that movement.
- In *Shipova* there is an exercise of free movement rights – however, case has been criticised for 'comparatively thin' or 'relatively weak' cross-border element.
- In my view the cross-border element is in reality uncontroversial because the refusal to issue identity documents *that accurately reflect a trans person's gender identity* affects **access to free movement itself**. Since **identity documents are essential for proving Union citizenship and exercising the rights attached to it**, documents that misrepresent a person's identity are functionally equivalent to having no valid identity documents at all. As a result, the inability to obtain accurate identity documents constitutes a **direct obstacle** to the exercise of free movement rights.
- Thus, the mere inability to acquire identity documents which reflect a trans Union citizen's gender identity constitutes (potentially) an obstacle to free movement.

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## SHIPOVA: WHAT KIND OF CROSS-BORDER MOVEMENT SUFFICES FOR BRINGING THE SITUATION WITHIN THE SCOPE OF EU LAW?

- *Coman, V.M.A., Mirin, and Cuprian-Trojan and Trojan* – legal status was established/changed in another Member State where the Union citizen had ‘genuine residence’ (*Coman*) or was resident on a long-term basis (*V.M.A., Mirin, & Cuprian-Trojan and Trojan*).
- In *Shipova* the applicant was resident on a long-term basis in another Member State.
- Is long-term residence *necessary* for the obligation to apply?
  - No – whereas in cross-border recognition cases, free movement provides the jurisdictional link that supports the obligation to recognise a status lawfully acquired in another Member State, *Shipova* does not concern the recognition of a foreign-created status. The alleged restriction lies in the potential obstacles that may arise *whenever* a Union citizen seeks to exercise free movement rights. The focus therefore shifts from the existence of a genuine connection with another Member State (and the continuity of a status established in that Member State) to the exercise of free movement itself. In this respect, the obstacle identified in *Shipova* is more direct than that found in the recognition case-law, since it materialises *whenever a Union citizen seeks to move across borders, whether on a temporary or a permanent basis*.

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## SHIPOVA: A PRINCIPLE THAT APPLIES EVEN IN SITUATIONS THAT *APPEAR* CONFINED WITHIN A SINGLE MS?

The refusal to issue an accurate identity document capable of being used by Union citizens when exercising their free movement rights constitutes a direct obstacle to free movement, even where the exercise of those rights is only potential.

The **directness of the measure**, and its **impact on access** to the right to free movement itself, means that there is virtually no case that falls outside the protection offered by the *Shipova* principle.

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# SHIPOVA: A MISSED OPPORTUNITY FOR USING (ALSO) A DISCRIMINATION-BASED APPROACH?

Court used Articles 21 TFEU and 4(3) of Dir. 2004/38 as the main legal bases – read in the light of (only) Art. 7 of the Charter

The case could nonetheless also be understood as involving discrimination based on gender identity.

Only trans persons face situations where the gender marker on official documents does not reflect their gender identity – cis persons generally receive documents that do.

- A system that simply reproduces the gender assigned at birth treats trans and cis persons formally equally, but ignores their materially different circumstances, resulting in discrimination.
- The inability to obtain identity documents matching one's gender identity may therefore constitute differential treatment based on gender identity.

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## SHIPOVA: MOVING BEYOND MEDICALISATION AND (POTENTIALLY) THE GENDER BINARY?

### • Beyond medicalisation –

- The ECJ in *Shipova* expressly confirmed that legal gender recognition cannot be made conditional on gender-affirming surgery or other medical interventions.
- Building on *Deldits*, the Court reinforced that official records must accurately reflect an individual's lived gender identity, regardless of surgical status.

### • Beyond the gender binary?

- While *Shipova* concerned recognition within the male/female binary, the Court's focus on 'lived gender identity' is not explicitly limited to binary identities.
- Combined with *Mousse*, which recognised protection for non-binary individuals under EU law, *Shipova* may provide a foundation for future challenges to binary-only legal gender recognition.
- After all, the Court's free movement rationale (also) suggests that *any* mismatch between lived gender identity and official documents – whether for binary or non-binary persons – can create barriers to free movement.

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# CONCLUSIONS

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## COMMON THEMES EMERGING FROM *CUPRIAK-TROJAN* AND *TROJAN* AND *SHIPOVA*

- Despite involving different aspects of civil status, both judgments confirm that:
  - EU free movement law is increasingly shaping national civil status law.
    - 'step-by-step', incremental, approach
  - EU law intervenes where national rules create obstacles to free movement
    - Such obstacles can arise through 'serious inconvenience' suffered by Union citizens when exercising free movement rights
      - Either because there is no continuity of a status lawfully established in another MS
      - Or because their identity documents do not reflect their lived gender identity and as a result there are direct obstacles to the exercise of free movement
  - Fundamental rights considerations come only at the justification stage of the assessment – i.e. these are primarily free movement cases
    - The Court is reluctant to engage in a discrimination assessment

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# THE EVOLUTION OF THE CJEU LGBT FREE MOVEMENT CASE-LAW

- **First phase** (*Coman & V.M.A.*): Recognition of family status for specific purpose (access to rights derived from EU law) in order to ensure there is no obstacle to free movement
- **Second phase** (*Mirin & Cupriak-Trojan and Trojan*): continuity of civil status acquired in another MS
- **Emerging third phase** (*Shipova*): using free movement law to secure access to legal recognition itself

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## Thank you!

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