

## ARTICLE

# Same-sex couples in European private international law – finding a path through the labyrinth

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## 1. Introduction

Globally<sup>1</sup> – and within Europe<sup>2</sup> – domestic laws on formalization of adult relationships are extremely diverse and in transition. Same-sex couples now enjoy a right of marriage in fourteen EU Member States,<sup>3</sup> and in twenty other countries worldwide (including five European countries which are not in the EU).<sup>4</sup> In some other countries, including several European states, both EU and non-EU, registered partnership is offered as the sole means of formalization of same-sex relationships<sup>5</sup> (an offering which is often a step towards marriage equality).<sup>6</sup> In the many remaining countries across the world (including a substantial number of European states<sup>7</sup>) there is, at present, no facility under domestic law for formalization of same-sex relationships (although in some of these countries change may be imminent).<sup>8</sup>

Private international law (PIL) rules have an important role to play in managing this diversity and transition – but it is submitted that EU and national PIL rules have often fallen short in supporting same-sex couples as they move across European borders. This article will explore some of the gaps and ambiguities in

- 1 See Human Rights Campaign, *Marriage Equality Around the World*, at [www.hrc.org/resources/marriage-equality-around-the-world](http://www.hrc.org/resources/marriage-equality-around-the-world).
- 2 See ILGA-Europe, *Rainbow Map*, at <https://rainbow-europe.org/#0/8682/0>.
- 3 Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden.
- 4 Andorra, Iceland, Norway, Switzerland, United Kingdom.
- 5 E.g. in Greece, Italy and Montenegro.
- 6 J.M. Scherpe, 'The Past, Present and Future of Registered Partnerships', in: J.M. Scherpe & A. Hayward (eds.), *The Future of Registered Partnerships: Family Recognition Beyond Marriage?*, Antwerpen-Cambridge: Intersentia 2017, p. 570-577.
- 7 It was reported in January 2023 that there were sixteen ECHR Contracting States not offering any such opportunity of formalization to same-sex couples. This category encompasses six EU Member States (Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia) and ten other non-EU States (including e.g. Albania, Moldova, Serbia, Ukraine). See ECHR 17 January 2023 (*Fedotova v. Russia*), nos. 40792/10, 30538/14 and 43439/14 [65]-[67].
- 8 In *Fedotova v. Russia* [178] the Grand Chamber ruled that Contracting States 'are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship'. See also ECHR 23 May 2023 (*Buhuceanu v. Romania*), no. 20081/19 and others; ECHR 1 June 2023 (*Maymulakhin and Markiv v. Ukraine*), no. 75135/14.

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relevant European PIL frameworks and the potential pitfalls awaiting mobile same-sex couples. There will be a particular focus on EU law and on the PIL rules of the European common law jurisdictions of England and Ireland, but relevant national PIL norms of European civil law systems will also be considered.<sup>9</sup>

Same-sex couples will often encounter barriers to status recognition when they move from a country with gender-neutral marriage laws to a country allowing only different-sex marriage within the domestic legal order<sup>10</sup> (as might be anticipated). However, and perhaps less obviously, similar problems of non-recognition and legal uncertainty may *also* arise in countries which *are* committed to marriage equality at the level of domestic substantive law.<sup>11</sup> Such difficulties may stem from national legislative inertia at the PIL level, from legal compromises and disagreement at the EU, and alternatively (and paradoxically) from a misguided commitment to ‘equality’ – resulting in an overzealous extension of laws designed for different-sex marriage. In this article, in discussing national PIL rules, there will be a particular spotlight on these *unexpected* challenges encountered in European countries which are otherwise generally supportive of same-sex relationships. The article will conclude with a discussion of possible solutions to the PIL problems presented.

The focus here is on adult same-sex couples moving across European borders. While similar challenges undoubtedly arise in navigating PIL frameworks relevant to parent-child relationships<sup>12</sup> (and additional PIL complexities are encountered where there has been an official change of gender<sup>13</sup>) such matters are not examined here.

- 9 While the main focus of the article is on the situation in EU Member States, and while the United Kingdom is no longer an EU Member State, there are still an estimated four million EU nationals living in the United Kingdom. See the Migration Observatory at the University of Oxford, *EU Migration to and from the UK*, at <https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk>. In this context, one would expect that for many years to come there will be significant movement of individuals and couples between the United Kingdom and the EU Member States to which these individuals are affiliated. It is therefore logical to include English law in an examination of the treatment of mobile same-sex couples alongside relevant EU law rules and national rules in EU Member States.
- 10 See L. Vaigé, ‘“Listening to the Winds” of Europeanisation? The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland?’, *Oslo Law Review* 2020 vol. 7, no. 1, p. 46-59.
- 11 See further M. Ní Shúilleabháin, ‘Same-Sex Marriage and the Conflict of Laws – the Unresolved Cross-Border Dimension’, *Law Quarterly Review* 2019a vol. 135, no. 2, p. 374-379.
- 12 On this subject, see e.g. D. Lima, ‘Towards Cross-Border Recognition of Same-Sex Parenthood’, *Cambridge Law Journal* 2022 Vol. 81, no. 2, p. 239-242; L. Bracken, ‘Recognition of LGBTQI+ Parent Families Across European Borders’, *Maastricht Journal of European and Comparative Law* 2022 vol. 29, no. 3, p. 399-406.
- 13 New questions of PIL and cross-border status recognition are arising insofar as different countries are adopting different domestic-law approaches to gender recognition and to the adoption of non-binary gender categories. See further S. Gössl, ‘From Question of Fact to Question of Law to Question of Private International Law: the Question of Whether a Person is Male, Female, Or ...?’, *Journal of Private International Law* 2016 vol. 12, no. 2, p. 261-280; E. Clive, ‘Recognition in England of Change of Gender in Scotland: A Note on Private International Law Aspects’, *University of Edinburgh School of Law Research Paper Series*, WP No 2023/06, available at <https://ssrn.com/abstract=4463935>. Such questions are beyond the scope of this article which is concerned with the transnational treatment of the relationship status of same-sex cisgender couples.

## 2. National PIL rules

### 2.1 Overview

As indicated above, same-sex spouses and registered partners may often be stripped of their marital or partnership status upon moving to a European country strongly committed to a traditional heteronormative view of marriage.

Thus, for example, in Poland, the law of the nationality governs capacity to marry as the 'personal' law, and so it follows that Polish nationals will be deemed incapable of marrying a person of the same-sex whether at home or abroad.<sup>14</sup> Where neither spouse is Polish, and the law of the nationality permits gender-neutral marriage, Polish public policy may nonetheless inhibit recognition in Poland.<sup>15</sup> Same-sex couples who have entered into a registered partnership in another country may be told that they are 'unaffiliated' in the eyes of Polish law.<sup>16</sup>

In countries like Italy and Czechia, where national law provides registered partnership (but not marriage) for same-sex couples, foreign same-sex marriages may be recharacterized and recognized as registered partnerships but not as marriage.<sup>17</sup>

In European countries which have sanctioned same-sex marriage within their domestic legal orders, there is usually no difficulty in accommodating foreign same-sex spouses whose personal law is similarly permissive.<sup>18</sup> However, problems may occur where either or both spouses possess the nationality (or common law domicile<sup>19</sup>) of a prohibitionist legal order. Some continental legal orders have modified their PIL rules to support the right of marriage in such circumstances (allowing the law of the habitual residence to substitute for the law of the nationality, for example). But others have made no adjustment to the traditional PIL rules applicable to marriage, leaving many same-sex couples with a highly precarious legal status.<sup>20</sup>

In the common law systems of England and Ireland, at the time of embracing marriage equality in domestic internal law, there was a concurrent attempt to legislate for the specific circumstances of internationally mobile same-sex spouses – and to alleviate legal uncertainty. However, the statutory language used was highly

14 Vaigé 2020, p. 52.

15 Vaigé 2020, p. 52.

16 *Formela v. Poland*, Communicated Case No. 58828/12 at the ECtHR (20 June 2020).

17 See L. Kříčková, 'Same-Sex Families' Rights and the European Union: Incompatible or Promising Relationship?', *International Journal of Law, Policy and the Family* 2023 vol. 37, no. 1; also ECHR 14 December 2017 (*Orlandi v. Italy*), no. 26431/12 (and others) [98]-[99].

18 W. Pintens and J.M. Scherpe, 'Same-Sex Marriages', in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar 2017, p. 1604-1609.

19 While status and other personal matters have often been regulated by the law of the nationality (*lex patriae*) in continental legal systems, common law domicile (broadly where a person intends to live permanently or indefinitely) generally determines the 'personal law' in common law countries. See D. McClean and V. Ruiz Abou-Nigm, *Morris: The Conflict of Laws*, London: Thomson Reuters 2021, p. 50.

20 Pintens and Scherpe 2017, p. 1608.

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ambiguous,<sup>21</sup> and while it is now confirmed that foreign same-sex marriages may be recognized as ‘marriage’ (something which was previously impossible),<sup>22</sup> it remains unclear whether a heteronormative domiciliary law (*lex domicilii*) may inhibit recognition.<sup>23</sup>

It follows therefore that a same-sex marriage celebrated in the Netherlands may be denied recognition in Ireland or England, if one of the spouses had a Polish or Russian or Egyptian domicile at the time of the marriage. Even if the spouses lived in the Netherlands for many years after marrying there, and before moving to Ireland or England, the famous ‘tenacity’ of the ‘domicile of origin’<sup>24</sup> could still lead to invalidation under the personal law.

## 2.2 Transition from registered partnership to marriage: PIL problems

English and Irish PIL rules are also problematic in how they managed the transition from registered partnership to full marriage equality.

In England, registered partnership was retained on the domestic statute book even after the coming into force of the Marriage (Same Sex Couples) Act 2013, and foreign registered partnerships are recognized, as before, based on an application of the law of the place of registration<sup>25</sup> (*lex loci registrationis*). However, foreign same-sex marriages which were previously recognized (up until 2013) as registered partnerships<sup>26</sup> (based on *lex loci registrationis*, by definition a favourable law<sup>27</sup>) are now (potentially) exposed to non-recognition under the *lex domicilii*.<sup>28</sup> It is confounding that a legislative policy designed to promote marriage equality could inadvertently lead to a complete loss of status for certain same-sex couples, but that is the inevitable consequence of substituting a choice-of-law rule which supported security and portability of status (*lex loci registrationis*) with the choice-of-law rule traditionally applied to different-sex marriage (*lex domicilii*).<sup>29</sup>

In Ireland (as in other European countries<sup>30</sup>) registered partnership was closed to new entrants (within the domestic legal order) when marriage was opened to same-sex couples.<sup>31</sup> However, the Irish authorities also legislated for the discontinuation of the statutory mechanism for recognition of foreign registered partnerships, and, as things now stand, partnerships registered abroad after 16 May 2016 are not entitled to be recognized as registered partnerships in

- 21 S. 10(1) Marriage (Same Sex Couples) Act 2013 (England and Wales); s. 12(1) Marriage Act 2015 (Ireland).
- 22 *Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam); [2007] 1 F.L.R. 295; *Zappone and Gilligan v. Revenue Commissioners* [2006] IEHC 404; [2008] 2 I.R. 417.
- 23 See further Ní Shúilleabháin 2019a.
- 24 See L. Clayton Helm, ‘Out with the Old and In with the New: Bringing the Law of Domicile into the Twenty-First Century’, *Journal of International and Comparative Law* 2020 vol. 7, no. 1, p. 199-228; R. Fentiman, ‘Domicile Revisited’, *Cambridge Law Journal* 1991 vol. 50, no. 3, p. 445-463.
- 25 Civil Partnership Act 2004, s. 215(1), s. 212(2).
- 26 Civil Partnership Act 2004, s. 212, s. 213, sch. 20.
- 27 Although a *renvoi* is in contemplation: Civil Partnership Act 2004, s. 212(2).
- 28 Civil Partnership Act 2004, s. 212 (1A) (as amended).
- 29 See Ní Shúilleabháin 2019a, p. 376.
- 30 E.g. in Scandinavian countries: Scherpe 2017, p. 576.
- 31 Marriage Act 2015, s. 8.

Ireland.<sup>32</sup> It is possible that foreign registered partnerships (same-sex and different-sex) may now be eligible for recognition as marriage in Ireland,<sup>33</sup> but this is far from clear, and it is equally possible that there is simply no scope for any recognition at all. Insofar as registered partnership is often the *only* formalization option open to same-sex couples in many overseas legal orders, such couples are disproportionately affected by this lacuna in Irish PIL rules.<sup>34</sup>

Similar transitional problems have been encountered in other European states. The EU Parliament, for instance, has recently addressed a complaint concerning non-recognition in Germany of the marriage in the Netherlands of a German man and a Dutch man.<sup>35</sup> At the time of the marriage (in 2011), German law provided for registered partnership but did not yet allow same-sex couples to marry. This right was only enshrined in German domestic law in 2017.

### 2.3 (In)appropriate replication and adjustment of traditional marriage PIL rules

It is submitted that the extension of traditional marriage laws is taken too far when the validity of foreign same-sex marriage is contingent on satisfaction of the personal law of each spouse (whether the *lex domicilii* in a common law country, or the *lex patriae* in a continental state). The reality is that different-sex couples will rarely be affected by impediments under the personal law (provided they are unrelated adults of sound mind).<sup>36</sup> For same-sex couples, however, in a world where most legal orders deny them a right of marriage,<sup>37</sup> the risk of invalidity under the personal law is extremely high. Thus, such an application of the personal law is inconsistent with the general policy of *favor matrimonii*.

In legislating for registered partnership it appeared to be widely understood across Europe that a different choice-of-law rule was required for a status which was not universally accepted (and *lex loci registrationis* was enshrined in many national legal orders as the main choice-of-law rule).<sup>38</sup> However, in moving towards marriage equality, an assimilatory strategy was very often adopted, and it appeared to be assumed that existing PIL norms – designed for traditional different-sex marriage – would be appropriate.<sup>39</sup>

There are further examples – in English and Irish PIL frameworks – of an inappropriate replication of traditional marriage laws – but also of appropriate adjustment.

32 Marriage Act 2015, s. 13.

33 By analogy with the approach taken in Canada in *Hincks v. Gallardo* [2013] ONSC 129.

34 See further M. Ní Shúilleabháin, "Private International Law Implications of "Equal Civil Partnerships", *International and Comparative Law Quarterly* 2019b vol. 68, no. 1, p. 161-173.

35 European Parliament Committee on Petitions, Petition 0402/2020 by Frank Bartz (German) on the Fundamental Rights of LGBT-EU Citizens and their Different Treatment in Different Member States (PE730.153v01-00, 11 March 2022).

36 Ní Shúilleabháin 2019a, p. 374.

37 There are almost 200 countries in the world and only 34 have gender-neutral marriage. So roughly only one in every five or six countries in the world will permit same-sex couples to marry.

38 See P. Wautelet, "Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe – Divided We Stand?", in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, Antwerpen-Cambridge: Intersentia 2012, p. 153-154.

39 Wautelet 2012, p. 145-147; Pintens and Scherpe 2017, p. 1607-1608.

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For instance, in the United Kingdom, section 235(2) Civil Partnership Act 2004 duplicates section 46(2) Family Law Act 1986, restricting recognition for overseas registered partnership dissolutions obtained ‘otherwise than by means of proceedings’. This restriction – as originally laid down in section 46(2) Family Law Act 1986 – was intended to protect migrant female spouses from exposure to overseas informal religious divorce laws where men have privileged access to divorce.<sup>40</sup> Since registered partnership is an entirely secular institution, similar concerns do not arise, and there was no need for a similar restriction in the UK’s civil partnership legislation.<sup>41</sup> Indeed, insofar as registered partnership dissolution is often extra-curial and relatively informal,<sup>42</sup> this legislative restriction (in section 235(2)) may result in an entirely unnecessary denial of status-recognition for ex-registered partners.

In another respect, however, English (but not Irish) law has introduced an entirely appropriate departure from the PIL rules applicable to marriage. In the UK, special legislative provision is made for divorce/dissolution jurisdiction for same-sex couples who have married (or registered a partnership) in England and who have no access to divorce (or dissolution) in their place of residence (*forum necessitatis*).<sup>43</sup> These statutory provisions recognize the need for an adjustment of traditional marriage norms in a world where registered partnership and same-sex marriage are not universally accepted (and where, without a *forum necessitatis*, there may be no access to a competent divorce court). The reality is that *an assumption of ubiquity* underpinned the historical development of PIL rules for marriage, an assumption which is entirely out-of-place in the context of registered partnership and same-sex marriage.

### 3. EU PIL rules

#### 3.1 Overview

The EU has embarked on widescale PIL harmonization in family law matters. While there is (as yet) no EU instrument regulating cross-border recognition of marriage or registered partnership, the EU has legislated for divorce jurisdiction and cross-border recognition of divorces (in the Brussels IIter Regulation<sup>44</sup>), for

40 HL Deb 22 April 1986, vol. 473, col. 1082.

41 See M. Ní Shúilleabháin, ‘“A Peculiarly Pointless Line of Division”: Recognition of Proceedings and Non-Proceedings Divorces under the Family Law Act 1986’, in: A. Dickinson & E. Peel (eds.), *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs*, Oxford: Oxford University Press 2021a, p. 290-291.

42 Ní Shúilleabháin 2021a, p. 291 (citing Scherpe and Hayward 2017).

43 Domicile and Matrimonial Proceedings Act 1973 (as amended), s. 5(5A) and Civil Partnership Act 2004, s. 221(1)(c). By contrast, in Ireland under Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s. 140(3) and Family Law (Divorce) Act, s. 39 divorce/dissolution jurisdiction is entirely dependent on ordinary residence or (common law) domicile in Ireland and there is no *forum necessitatis* for same-sex couples.

44 Council Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L178/1.

choice-of-law in divorce (in the Rome III Regulation<sup>45</sup>) – and for jurisdiction, choice-of-law and cross-border judgment-recognition in maintenance and property disputes in the Maintenance Regulation,<sup>46</sup> the Matrimonial Property Regulation<sup>47</sup> and the Registered Partnership Property (RPP) Regulation.<sup>48</sup> Although the Maintenance Regulation is in force in all EU Member States,<sup>49</sup> and Brussels IIter in all Member States apart from Denmark, the other instruments were adopted by way of ‘enhanced cooperation’ and are only in force in a limited number of Member States. Thus, even if mobile same-sex couples were fully eligible for all of these legislative protections, their applicability would be somewhat variable, and would depend on whether the couple’s attachments were to EU Member States which had adopted the full ‘package’,<sup>50</sup> or to EU Member States which have opted out. The reality, however, is that same-sex couples are not guaranteed the same protection under these instruments, even where they are in force in all connected EU Member States.

### 3.2 Same-sex registered partners under EU PIL instruments

As far as same-sex registered partners are concerned, it is widely accepted that such relationships fall entirely outside of the scope of Rome III<sup>51</sup> and the divorce

45 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

46 Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation [2009] OJ L7/1.

47 Council Regulation (EU) No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

48 Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

49 The Maintenance Regulation does not apply directly in Denmark but its provisions are extended to Denmark by a special agreement. See Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2009] OJ L149/80.

50 Only twelve EU Member States are participating in all five instruments – these are Austria, Belgium, Bulgaria, France, Germany, Greece, Italy, Luxembourg, Malta, Portugal, Slovenia and Spain. See W. Schrama, ‘Empowering Private Autonomy as a Means to Navigate the Patchwork of EU Regulations on Family Law’, in: J.M. Scherpe and E. Bargelli (eds.), *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Antwerpen-Cambridge: Intersentia 2021, p. 48. Five EU Member States have participated in Rome III but not the Matrimonial Property and RPP Regulations: Estonia, Hungary, Latvia, Lithuania and Romania. And six EU Member States have participated in the Matrimonial Property and RPP Regulations but not Rome III: Croatia, Cyprus, Czechia, Finland, Netherlands and Sweden.

51 D. Coester-Waltjen, ‘Divorce and Personal Separation’, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar 2017, p. 549; S. Gössl and J. Verhellen, ‘Article 1: Scope’, in: S. Corneloup (ed.), *The Rome III Regulation*, Cheltenham: Edward Elgar 2020, p. 24-25; P. Franzina, ‘The Law Applicable to Divorce and Legal Separation under Regulation (EU) No 1259/2010 of 20 December 2010’, *Cuadernos de Derecho Transnacional* 2011 vol. 3, no. 2, p. 85-129 (at p. 102).

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aspects of Brussels IIter.<sup>52</sup> It is possible, however, that an EU Member State might recognize a foreign registered partnership *as marriage*, and then exercise divorce jurisdiction in the usual way under Article 3 Brussels IIter.<sup>53</sup>

While it is clear that registered partnerships are covered by the RPP Regulation, and by the Maintenance Regulation (insofar as registered partnerships may qualify as ‘family relationships’ under Art. 1(1)<sup>54</sup>), the possibility of local exclusion remains a live concern. Both Regulations provide (in Recital 21<sup>55</sup>) that the existence of the underlying relationship (the incidental question) is to be determined by reference to national law (including national choice-of-law rules).<sup>56</sup> So it seems that individual EU Member States may deny the maintenance or property claims of registered partners, if the forum’s conclusion (applying its own domestic choice-of-law rules) is that the parties are unrelated.<sup>57</sup>

Under the RPP Regulation, Article 9(1) further provides that where a (participating) Member State court with jurisdiction ‘holds that its law does not provide for the institution of registered partnership, it may decline jurisdiction’.<sup>58</sup> Article 9(1) arguably goes further than Recital 21 in jeopardizing the interests of registered partners, insofar as it entails a blunt prioritization of forum law and does not envisage a more sophisticated conflict-of-laws analysis. Even if the foreign registered partnership might be accommodated under domestic choice-of-law

52 See W. Pintens, ‘Article 1: Scope’, in: U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law: Brussels IIter Regulation*, Köln: Otto Schmidt 2023, p. 76-80; Coester-Waltjen 2017, p. 553; R. Espinosa Calabuig, ‘Matrimonial Matters’, in: I. Viarengo and F. Villata (eds.), *Planning the Future of Cross-Border Families: A Path Through Coordination*, Oxford: Hart 2020, p. 59; C. González Beilfuss, ‘Article 1: Scope’, in: C. González Beilfuss et al. (eds.), *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters: A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham: Edward Elgar 2023, p. 18.

53 See *Hincks v. Gallardo* [2013] ONSC 129 where an English civil partnership was recognized as ‘marriage’ in Canada.

54 It is also possible that a registered partnership might qualify as ‘marriage’ under Art. 1(1). See L. Walker, *Maintenance and Child Support in Private International Law*, Oxford: Hart 2015, p. 39, p. 85.

55 See also Art. 1(2)(b) RPP Regulation.

56 On the variety of approaches to determining such incidental questions, see Walker 2015, p. 75-76; S. Gössl, ‘Preliminary Questions in EU Private International Law’, *Journal of Private International Law* 2012 vol. 8, no. 1, p. 63-76; T. Pfeiffer and J. Wittmann, ‘Preliminary Questions’, in: I. Viarengo and F. Villata (eds.), *Planning the Future of Cross-Border Families: A Path Through Coordination*, Oxford: Hart 2020, p. 47-51.

57 See also Arts. 6 and 13 of the Hague Maintenance Protocol (applicable pursuant to Art. 15 Maintenance Regulation): even if the relationship is recognized under the relevant national choice-of-law rules, these provisions allow for a denial of maintenance on the basis of the non-existence of the obligation in other connected legal orders, or on public policy grounds. See Walker 2015, p. 76, p. 86; I. Viarengo, ‘The Enforcement of Maintenance Decisions in the EU: Requiem for Public Policy?’, in: P. Beaumont et al. (eds.), *The Recovery of Maintenance in the EU and Worldwide*, Oxford: Hart 2014, p. 479. It is significant, however, that the Maintenance Regulation provides a broad choice of fora, and allows registered partners to choose the competent court and applicable law by agreement. See Art. 4 of the Regulation and Arts. 7 and 8 Hague Maintenance Protocol.

58 See A. Wysocka-Bar, ‘Enhanced Cooperation in Property Matters in the EU and Non-Participating Member States’, *ERA Forum* 2019, vol. 20, p. 187-200; P. Franzina, ‘Article 9: Alternative Jurisdiction’, in: I. Viarengo and P. Franzina (eds.), *The EU Regulations on the Property Regimes of International Couples*, Cheltenham: Edward Elgar 2020, p. 103-110.



rules, Article 9(1) allows for a refusal of jurisdiction on the basis of the non-existence of registered partnership in domestic (internal) law.

Clearly Article 9(1) of the RPP Regulation may lead to a denial of protection.<sup>59</sup> However, it is significant that Article 9 (in its subsequent provisions) goes on to provide for alternative jurisdiction elsewhere.<sup>60</sup> Also Recital 36 RPP Regulation indicates that the use of Article 9(1) should be exceptional, and it is emphasized (in Article 9(1) and Recital 36) that a court declining jurisdiction under Article 9(1) must do so ‘without undue delay’.<sup>61</sup> Thus, some safeguards are included for the protection of affected registered partners.<sup>62</sup>

It is also tolerably clear that a judgment determining the maintenance or property rights of registered partners is entitled to recognition and enforcement under these instruments, even in those Member States which do not recognize the underlying status.<sup>63</sup> This flows from the absence of any public policy defense under the Maintenance Regulation<sup>64</sup> and from Article 22 which provides that ‘[t]he recognition and enforcement of a decision on maintenance ... shall not in any way imply the recognition of the family relationship ... underlying the maintenance obligation which gave rise to the decision’.<sup>65</sup> This distinction between recognition of a judgment and recognition of the underlying relationship is echoed in Recital 63 to the RPP Regulation. Furthermore, while the RPP Regulation *does* allow for review on public policy grounds,<sup>66</sup> Article 38 (and Recital 53) explicitly require any such review to comply with the prohibition on discrimination under Article 21 of the Charter on Fundamental Rights.<sup>67</sup>

59 Dougan argues however that Art. 9(1) may be beneficial where otherwise the court might give a decision on the merits denying property relief, with *res judicata* effects, and thus hindering the possibility of relief in other EU Member States. See F. Dougan, ‘Property Relations of Cross-Border Same-Sex Couples in the EU’, in: L. Ruggeri et al. (eds.), *The EU Regulations on Matrimonial Property and Property of Registered Partnerships*, Antwerpen-Cambridge: Intersentia 2022, p. 219-244 (at p. 232 *et seq.*).

60 C. Kohler, ‘Unification of Private International Law in Family Matters in the European Union: Cultural Issues’, in: I. Viarengo and F. Villata (eds.), *Planning the Future of Cross-Border Families: A Path Through Coordination*, Oxford: Hart 2020, p. 17; Franzina 2020, p. 105.

61 Rec. 36 requires the courts utilizing Art. 9(1) to ‘act swiftly’.

62 The RPP Regulation also protects registered partners who registered their partnership in a participating EU Member State, by allowing them to choose the law and courts of that Member State. See Art. 7(1) and Art 22(1)(c).

63 *E.g.* in Bulgaria which is bound by both the Maintenance Regulation and the RPP Regulation, but does not have registered partnership (or same-sex marriage) on its own domestic statute book (see *Fedotova v. Russia* [67]). If a Bulgarian court determined that the underlying registered partnership was not entitled to recognition under Bulgarian choice-of-law rules, the property or maintenance judgment (pronounced in another participating Member State) would still have to be recognized and enforced in Bulgaria. See Dougan 2022, p. 240.

64 Art. 17(1). See Walker 2015, p. 124 and L. Vaigé, *Cross-Border Recognition of Formalized Same-Sex Relationships: the Role of Ordre Public*, Antwerpen-Cambridge: Intersentia 2022, p. 316-317; P. Torremans (ed.), *Cheshire, North & Fawcett Private International Law*, Oxford: Oxford University Press 2017, p. 1082.

65 Also Rec. 25.

66 Art. 37.

67 Dougan 2022, p. 240.

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### 3.3 Same-sex spouses under EU PIL instruments

#### 3.3.1 Same-sex spouses under Brussels IIter: an introduction

Brussels IIter does not include a recital akin to that laid down in Recital 21 of the Maintenance and RPP Regulations and so it is widely accepted that the words ‘marriage’, ‘matrimonial matters’ and ‘spouses’ will have an *autonomous* EU meaning where they are used in the Brussels IIter Regulation.<sup>68</sup> There are, however, conflicting signals as to the nature of that autonomous interpretation and whether it includes same-sex spouses.

On the one hand, this Regulation (adopted in 2019) enshrines a principle of continuous interpretation<sup>69</sup> with respect to its predecessor instruments, the Brussels IIbis Regulation<sup>70</sup> (adopted in 2003), the Brussels II Regulation (adopted in 2000)<sup>71</sup> and the Brussels II Convention (adopted in 1998).<sup>72</sup> At that time (in 1998) no country in the world had yet legislated for same-sex marriage, and so it must be assumed that the drafters had only different-sex marriage in mind in adopting the Brussels II Convention. Thus, the principle of continuous interpretation leans against a broader inclusive interpretation. It had been suggested, in advance of its adoption in 2019, that the Brussels IIter Regulation should explicitly define ‘matrimonial matters’ or ‘marriage’ in gender-neutral terms.<sup>73</sup> But while the Annexes which previously used gendered language (referring to ‘husband’ and ‘wife’) are now gender-neutral (referring to ‘spouses’),<sup>74</sup> it was clear, in the negotiations on Brussels IIter, that there was no unanimity (as required under Art. 81(3) TFEU) on the inclusion of same-sex spouses. On the contrary, it appears that there was profound disagreement on this matter, to the extent that it became impossible to agree on any reform of matrimonial jurisdiction.<sup>75</sup>

Thus, there are some grounds for assuming a *narrow* autonomous definition of ‘spouses’, ‘marriage’ and ‘matrimonial matters’ under Brussels IIter – an interpretation which does *not* include same-sex spouses.

On the other hand, however, it is significant that some EU Member States (e.g. the Netherlands<sup>76</sup>) are of the view that divorce proceedings taken by same-sex spouses

68 See Pintens 2023, p. 73; Coester-Waltjen 2017, p. 548; Pintens and Scherpe 2017, p. 1606; M. Ní Shúilleabháin, *Cross-Border Divorce Law: Brussels IIbis*, Oxford: Oxford University Press 2010, p. 105-119.

69 Rec. 90 Brussels IIter.

70 Regulation 2201/2003 [2003] OJ L338/1.

71 Regulation 1347/2000 [2000] OJ L160/19.

72 [1998] OJ C221/1.

73 See e.g. T. Kruger and L. Samyn, ‘Brussels II bis: Successes and Suggested Improvements’, *Journal of Private International Law* 2016, vol. 12, no. 1, 132, p. 137-138.

74 Compare Annex I Brussels IIbis with Annex II Brussels IIter.

75 EU Commission, ‘Impact Assessment: Proposal for a Council Regulation on Jurisdiction, the Recognition and the Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast)’, *SWD (2016) 207 final*, p. 23, 28-29, 31.

76 A. Van Hoek et al., ‘The Netherlands’, in: P. Beaumont et al. (eds.), *Cross-Border Litigation in Europe*, Oxford: Hart 2017, p. 401.

are covered by Brussels IIter.<sup>77</sup> In its LGBTIQ Equality Strategy, the EU Commission also appears to assume that divorces of same-sex spouses are eligible for recognition under Brussels IIter.<sup>78</sup>

Insofar as marriage has now been opened to same-sex couples in a majority of EU Member States (14 out of 27) it is arguable that in devising an autonomous interpretation based on the ‘common core’, the CJEU would be justified in adopting a gender-neutral construction of ‘spouse’ under Brussels IIter.<sup>79</sup> This proposition is supported by the principle of non-discrimination on grounds of sexual orientation enshrined in Article 21 of the EU Charter of Fundamental Rights.<sup>80</sup> It is further bolstered by the decision in *Coman*<sup>81</sup> where, in the context of interpreting the Citizens’ Rights Directive and Article 21 TFEU, the CJEU held that the word ‘spouse’ should have an autonomous inclusive meaning (giving the same right of residence to the same-sex spouse). Insofar as Brussels IIter uses the same gender-neutral terminology of ‘spouses’, it may be contended that the *Coman* ruling should apply by analogy in this domain.

Thus, while recent developments have strengthened the case for a broad inclusive definition of ‘spouses’ (and ‘marriage’ and ‘matrimonial matters’) under Brussels IIter, the matter is not beyond doubt, and same-sex spouses have no assurance that they are entitled to benefit from this instrument as ‘spouses’.

### 3.3.2 Same-sex spouses under Rome III

While it is clear that Rome III has a wide scope and does not exclude same-sex spouses,<sup>82</sup> the Regulation itself declares that it does not apply to matters of ‘existence, validity or recognition of a marriage’ even if this arises as a preliminary question within the context of a divorce action (Art. 1(2)(b) Rome III). As under Recital 21 to the Maintenance and RPP Regulations, Recital 10 of Rome III provides that ‘[p]reliminary questions such as ... the validity of the marriage ... should be determined by the conflict-of-laws rules applicable in the participating Member State concerned’. While Recital 10 envisages a *lex causae* approach to the preliminary question (and the possible deployment of Rome III in dissolving a same-sex marriage in participating Member States with heteronormative marriage laws),

77 Even though there is no indication in the text of the Brussels IIter Regulation that the existence of a ‘marriage’ should depend on national law, there is *some* support for this approach, and Lazić suggests that in practice Member States with gender-neutral marriage laws often tend to apply Brussels IIter (then Brussels IIbis) to the divorces of same-sex spouses, while EU Member States with a heteronormative view of marriage do not. See V. Lazić et al., ‘Recommendations to Improve the Rules on Jurisdiction and on the Enforcement of Decisions in Matrimonial Matters and Matters of Parental Responsibility in the European Union’, 2018a, p. 4 available at [www.asser.nl](http://www.asser.nl) Lazić 2018a.

78 See EU Commission, LGBTIQ Equality Strategy COM (2020) 698 final, p. 17: ‘EU legislation on family law applies in cross-border cases or in case with cross-border implications, and it covers LGBTIQ people. This includes rules to facilitate Member States’ recognition of each other’s judgments on divorce.’

79 Pintens and Scherpe 2017, p. 1606; González Beilfuss 2023, p. 16.

80 [2000] OJ C364/1.

81 Case C-673/16, *Coman v. Inspectoratul General pentru Imigrări*, ECLI:EU:C:2018:385.

82 Gössl and Verhellen 2020, p. 26; Franzina 2011, p. 101-102.

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Article 13 (and Recital 26) – with clear echoes of Article 9(1) of the RPP Regulation<sup>83</sup> – seem to allow a prioritization of the internal laws of the forum, and the forum’s domestic prohibition of same-sex marriage.<sup>84</sup> Article 13 is more generally worded but it is widely recognized as being concerned with same-sex marriage<sup>85</sup> – and it provides that ‘[n]othing in this Regulation shall oblige the courts of a participating Member State whose law ... does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce’. Recital 26 explains that ‘[w]here this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State’.

Article 13 Rome III (and Recital 26) can be criticized for their apparent facilitation of a blunt *lex fori* approach instead of a more sophisticated *lex causae* approach (as envisaged by Recital 10).<sup>86</sup> Even more problematic, however, is the interaction of Rome III and Brussels IIter (if Brussels IIter applies to same-sex spouses). As has been seen, Article 9(1) of the RPP Regulation envisages a similar *lex fori* approach to Article 13 Rome III, but crucially Article 9 also ensures the availability of alternative fora, a protection which is entirely absent in the context of Article 13 Rome III and Brussels IIter.<sup>87</sup> In the absence of any provision for choice-of-court or *forum necessitatis* under Article 3 Brussels IIter, the court entitled to deny a divorce under Article 13 Rome III may be the only court with jurisdiction to pronounce divorce.<sup>88</sup> Thus, same-sex spouses may find that their marriage is indissoluble.<sup>89</sup>

Article 13 does not *compel* any prioritization of the forum’s policy on marriage equality (this is at the discretion of the forum),<sup>90</sup> and in time the CJEU may insist on a narrow teleological interpretation of Article 13 Rome III<sup>91</sup> (and indeed, as discussed below, it might authorize recourse to *forum necessitatis* under Brussels IIter where otherwise there would be no available divorce forum). A narrow interpretation of Article 13 Rome III would derive support from Article 21 of the EU Charter of Fundamental Rights insofar as it prohibits discrimination on grounds of sexual orientation (a prohibition which is required to be observed in the

83 While Art. 9(1) RPP Regulation is a jurisdiction rule, and Art. 13 Rome III is concerned with choice-of-law (and not jurisdiction), where they are invoked, they will both result in a denial of relief in the chosen forum.

84 Rome III is in force in four EU Member States which do not allow for any formalization of same-sex relationships: Bulgaria, Latvia, Lithuania and Romania (see *Fedotova v. Russia* [67]).

85 C. Chalas, ‘Article 13: Differences in National Law’, in: S. Corneloup (ed.), *The Rome III Regulation*, Cheltenham: Edward Elgar 2020, p. 168; Coester-Waltjen 2017, p. 549.

86 Chalas 2020, p. 167-171.

87 Kohler 2020, p. 18.

88 See Chalas 2020, p. 173-174. If, for example, both spouses are currently resident in the forum invoking Art. 13 Rome III, and they do not have a shared nationality, then no other Member State will have jurisdiction under Art. 3 Brussels IIter. If Art. 3 Brussels IIter allowed for *forum necessitatis* in the event that there was no other available divorce forum, then Art. 13 Rome III would not be quite as problematic.

89 Franzina 2011, p. 126-127.

90 Franzina 2011, p. 126; Chalas 2020, p. 171.

91 M. Tolani, ‘Article 13: Differences in National Law’, in C. Althammer (ed.), *Brussels IIa; Rome III*, München: C.H. Beck 2019, p. 377.

application of the Rome III Regulation according to Recital 30).<sup>92</sup> However, it is noteworthy that the recitals to Rome III do not expressly emphasize the exceptionality of Article 13 (as the recitals to the RPP Regulation do with respect to Art. 9).

The above discussion of Rome III has focused on the situation of a heteronormative forum law. A different question of interpretation arises where the domestic law of the forum allows for gender neutral marriage and divorce, but the governing divorce law (designated by Art. 5 or Art. 8 Rome III) does not. In such circumstances, Articles 10 and 12 Rome III may allow for the grant of divorce to same-sex spouses even if the governing law only caters for different-sex divorce.<sup>93</sup> Article 12 allows for a refusal to apply a foreign law where this would be ‘manifestly incompatible with the public policy of the forum’ and Article 10 allows for recourse to forum law where the applicable law makes ‘no provision for divorce’. Alternatively (and perhaps preferably) it is suggested that there is no need for recourse to Articles 10 or 12 in these circumstances. Rather, the forum court should apply its own domestic choice-of-law rules to determine the validity of the marriage, and then, assuming it to be valid, apply the divorce rules laid down under the governing law designated by Rome III (adapting those rules to the situation of a same-sex marriage as necessary).<sup>94</sup>

### 3.3.3 Access to divorce in EU Member States not participating in Rome III

For same-sex spouses seeking to divorce, the situation in the nine EU Member States not participating in Rome III is also unclear.<sup>95</sup> Even if (as suggested above) Brussels IIter must be interpreted as extending to all spouses, irrespective of gender, it does not necessarily follow that these nine Member States must grant divorces to same-sex spouses. Even in the absence of a provision like Article 13 Rome III, there is a degree of domestic autonomy in determining subject-matter jurisdiction, and it has long been understood that the conferral of personal jurisdiction under Article 3 Brussels IIter does not create any obligation to provide the full range of relief encompassed by that provision.<sup>96</sup> Of course, powerful non-discrimination arguments can be advanced in favour of equal access to divorce,

92 See Chalas 2020, p. 173-176 arguing that a narrow interpretation of Art. 13 Rome III (and/or a *forum necessitatis* under Brussels IIter) is required for the satisfaction of Art. 21 Charter and for the purposes of facilitating the free movement of persons within the EU (as referenced in Rec. 1 and Rec. 29 Rome III).

93 See Franzina 2011, p. 122-123 for a discussion of the possible application of Art. 10 Rome III. Since then, however, the CJEU has indicated (in a different context) that Art. 10 Rome III should be interpreted narrowly. See Case C-249/19, *JE v. KF*, ECLI:EU:C:2020:570 [23].

94 B. Heiderhoff, ‘Article 10: Application of the Law of the Forum’, in: S. Corneloup (ed.), *The Rome III Regulation*, Cheltenham: Edward Elgar 2020, p. 130. But see also Chalas 2020, p. 171 expressing doubt as to this approach.

95 Nine EU Member States (Croatia, Cyprus, Czechia, Finland, Ireland, the Netherlands, Poland, Slovakia and Sweden) are bound by Brussels IIter but not participating in Rome III. (While there is a tenth EU Member State – Denmark – outside of Rome III, Denmark is not bound by Brussels IIter either, and so is left out of account here).

96 Ní Shuilleabháin 2010, p. 103-104.

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but the EU Charter of Fundamental Rights is not directly applicable in a realm of domestic competence.<sup>97</sup>

In practice it seems that, of the nine Member States not participating in Rome III, those having gender-neutral marriage domestically will exercise Article 3 jurisdiction to grant a divorce to same-sex couples, while those with heteronormative internal laws will not.<sup>98</sup> It follows that in this situation (as under Art. 13 Rome III) domestic laws may result in a denial of divorce in the only forum (or fora) with competence under Article 3 Brussels IIter.

### 3.3.4 *Same-sex spouses under Brussels IIter and Rome III: some final remarks*

Although it is counterintuitive, a narrow exclusionary interpretation of ‘spouses’ and ‘matrimonial matters’ (under Brussels IIter) might arguably be more advantageous to same-sex spouses as things stand at present. As already discussed, Article 3 Brussels IIter does not make provision for *forum necessitatis* or choice-of-court agreements (or for jurisdiction based on the place of celebration of marriage) and as such is ill-adjusted to the needs of same-sex spouses. In this context, Member State authorities, who are concerned to protect same-sex spouses, can provide better jurisdictional access if they have full legislative autonomy and are not inhibited by obligations of non-derogation from EU law.<sup>99</sup> This is true of EU Member States participating in Rome III and those nine not participating.

However, the opportunity for domestic action (and for the framing of appropriate jurisdictional norms at the domestic level) does not of itself guarantee such legislative action, and if same-sex spouses are excluded from the Brussels IIter Regulation, they may be left to rely on antiquated domestic rules of jurisdiction, dating from before the adoption of the Brussels II Regulation in 2000, and framed for the needs of different-sex spouses. For instance, in Ireland, if same-sex spouses are excluded from Brussels IIter, they must fall back on jurisdiction based on domicile or ordinary residence in Ireland,<sup>100</sup> and (in contrast to the position in England – discussed above) there is no special jurisdiction for those same-sex couples who married in Ireland but live and are domiciled in countries which do not recognize the marriage.

If same-sex spouses are entirely outside of the scope of Brussels IIter, they will also suffer significant discrimination in the domain of divorce recognition. While other divorcees will enjoy the benefits of automatic recognition within the EU, same-sex spouses will have to fall back on traditional national rules of recognition, which are

97 See Art. 51(1) Charter: EU Member States are bound by the Charter ‘only when they are implementing Union law’.

98 See V. Lazić et al., ‘Annex to the Guide for Application of the Brussels IIbis Regulation’, 2018b, p. 53-57 available at [www.asser.nl](http://www.asser.nl).

99 See Art. 6(1) Brussels IIter: EU Member States are only permitted to apply domestic (home-grown) rules of divorce jurisdiction if no court of a Member State has jurisdiction pursuant to Art. 3, 4 or 5. Even if the court with personal jurisdiction declines to exercise that jurisdiction (at the request of a same-sex spouse), the preclusive effects of Art. 6 probably still apply in other Member States (if the matter falls within the scope of Brussels IIter).

100 Family Law (Divorce) Act 1996, s. 39.

often much more restrictive.<sup>101</sup> Again, this raises the possibility of same-sex spouses experiencing significant problems of status-recognition even if they are moving between EU Member States which have guaranteed marriage equality at the domestic substantive level – e.g. between France and Ireland.

Brussels IIter is not due for review until 2032,<sup>102</sup> so, in the medium term, there is no prospect of any EU legislative solution to the jurisdictional problems outlined (even if political disagreement were not an obstacle). It is possible, however, that in addition to the adoption of a broad inclusive (autonomous) interpretation of ‘spouses’ under Brussels IIter (and a narrow teleological interpretation of Art. 13 Rome III), the CJEU might *also* authorize the invocation of *forum necessitatis* in reliance on the Charter of Fundamental Rights. It has been suggested at domestic court level<sup>103</sup> in the context of the non-availability of divorce in Malta (before 2011) that where the only competent court could not pronounce a divorce, other EU Member States might exercise an emergency jurisdiction and grant a divorce, even if on the face of it this was not permissible under Brussels IIbis. This idea of an ‘exceptional’ *forum necessitatis*, beyond what is permitted under the strict wording of Brussels IIter, and ‘in order to prevent a denial of justice’ is also supported by a comment in a recent opinion of an Advocate General.<sup>104</sup> Judicial intervention along the above lines would significantly improve the treatment of same-sex spouses under Brussels IIter and Rome III.

### 3.3.5 *Same-sex spouses under the Maintenance and Matrimonial Property Regulations*

Same-sex spouses are in a broadly similar position to same-sex registered partners where maintenance and property are concerned (see the discussion of registered partners above).<sup>105</sup> The recitals to the Maintenance and Matrimonial Property Regulations reserve the question of recognition of the marriage to national law (including national choice-of-law rules) and so same-sex spouses may find that

101 See Lazić 2018b, p. 99-107.

102 Art. 101 Brussels IIter.

103 See M. Ní Shúilleabháin, ‘Article 3: General Jurisdiction’, in: U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law: Brussels IIter Regulation*, Köln: Otto Schmidt 2023, p. 106 and 116. See also P.M.M. Mostermans, ‘The Impact and Application of the Brussels II Bis Regulation in the Netherlands’, in: K. Boele-Woelki and C. González Beilfuss (eds.), *Brussels II bis: Its Impact and Application in the Member States*, Antwerpen-Oxford: Intersentia 2007, p. 229-230, discussing the judgment of the Court of Appeal of The Hague, 21 December 2005, NIPR 2006, 101; and see also the decision of the German Federal Supreme Court (*Bundesgerichtshof*) of 20 February 2013, XII ZR 8/11 (summarized in the EUFAMS database at [www.eufams.unimi.it](http://www.eufams.unimi.it)).

104 Advocate General Sánchez-Bordona in Case C-289/20 *IB v. FA* ECLI:EU:C:2021:561 [100] (a case on divorce jurisdiction under Brussels IIbis).

105 Art. 6 Hague Maintenance Protocol allows for the preferential treatment of those creditors classified as ‘spouses’ by comparison with those classified as ‘registered partners’. See further Walker 2015, p. 85-86.

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they are viewed as legal strangers (and not as spouses with maintenance and property rights) in their chosen forum.<sup>106</sup>

Article 9(1) of the Matrimonial Property Regulation broadly echoes Article 9(1) of the RPP Regulation in allowing a participating Member State court to decline jurisdiction if it finds that ‘under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings’.<sup>107</sup> Unlike Article 9(1) RPP Regulation which took a *lex fori* approach (allowing a court to decline jurisdiction if registered partnership does not exist in forum law), Article 9(1) of the Matrimonial Property Regulation clearly envisages a role for the choice-of-law rules of the forum, and therefore a more nuanced approach which might often allow for the resolution of same-sex spouses’ matrimonial property disputes in a Member State which does not itself have gender-neutral marriage. Even if the forum’s internal policy is to confine marriage to different-sex couples, the forum may still recognize the foreign marriage under its choice-of-law rules, and accept jurisdiction under the Matrimonial Property Regulation. Furthermore (as under the RPP Regulation), same-sex spouses will have other jurisdictional options in the event that a participating EU Member State declines jurisdiction under Article 9(1). Thus, under the Matrimonial Property Regulation, by comparison with the situation under *Brussels IIter*, there is not an equivalent risk of same-sex spouses being left without any access to an available forum.

In EU Member States which recognize foreign same-sex marriage as registered partnership, it is possible that the RPP Regulation instead of the Matrimonial Property Regulation will be applied to spousal property.<sup>108</sup> Insofar as the applicable law rules differ as between the two instruments,<sup>109</sup> this could substantially affect the outcome.<sup>110</sup> This possibility of recharacterization increases the uncertainty and complexity for same-sex spouses seeking to determine their property rights.

### 3.4 Negative integration and *Coman*

Beyond the legislative initiatives described above, EU law may be embarking on a programme of indirect harmonization using ‘negative integration’ and the free movement doctrine laid down in Article 21 TFEU. Aside from insisting on a gender-neutral interpretation of ‘spouse’ (and the extension of a right of residence for the same-sex spouse of an EU citizen), the Court of Justice in *Coman* also

106 Rec. 21 Maintenance Regulation (and Walker 2015, p. 75-77); also Rec. 17 and Rec. 21 Matrimonial Property Regulation. In contrast to Rec. 21 RPP Regulation and Rec. 21 Matrimonial Property Regulation which explicitly envisage the use of national choice-of-law rules in determining the incidental question, Rec. 17 Matrimonial Property Regulation refers only to the use of ‘national laws’ in defining ‘marriage’. However, it is suggested in the literature that Rec. 17 should be understood as referring to forum law, including forum choice-of-law rules: Dougan 2022, p. 223 *et seq.*

107 See also Rec. 38.

108 See Dougan 2022, p. 223 *et seq.* discussing the implications of such ‘downgrading’ in Italy and Croatia.

109 Compare Art. 26 Matrimonial Property Regulation, giving priority (in the absence of a choice-of-law agreement) to the law of the first common habitual residence, with Art. 26 RPP Regulation, giving priority to the law of the place of creation.

110 For a worked example, see Dougan 2022, p. 233 *et seq.*



appeared to be laying the foundations for a new doctrine of cross-border marriage recognition.<sup>111</sup> In *Coman*, the court referred repeatedly to previous case law requiring the disapplication of choice-of-law rules inhibiting cross-border recognition of surnames,<sup>112</sup> and appeared to suggest that Article 21 TFEU might similarly compel the elimination of choice-of-law barriers to marriage recognition.<sup>113</sup> The parameters of this emerging (tentative) doctrine are highly unclear, however, and many questions remain to be resolved, for example, as to whether it applies to those who have married outside the EU, as to its application to registered partners, and as to whether an obligation of cross-border recognition is dependent on previous residence in another Member State.<sup>114</sup>

#### 4. Looking to the future: finding solutions

##### 4.1 Solutions at the EU level

As indicated above, judicial activism on the part of the CJEU, and dynamic interpretation of Brussels I<sup>ter</sup> and Rome III may pave the way for the better protection of mobile same-sex couples within the EU.

There has also been some discussion of the possibility of EU legislation supporting cross-border marriage (and registered partnership) recognition. This idea was first raised by the EU Commission in a Green Paper in 2010.<sup>115</sup> More recently, in its 2020 LGBTIQ Equality Strategy, the Commission committed to exploring ‘possible measures to support the mutual recognition of same-gender spouses and registered partners’ legal status in cross-border situations’.<sup>116</sup>

If it were possible to adopt such an instrument (with widespread support), it would clearly mark a very significant step forward in safeguarding the interests of mobile same-sex spouses and registered partners. A legislative solution would provide a much higher degree of legal certainty than any negative integration doctrine built on a case-by-case basis.<sup>117</sup> Aside from ensuring the portability of the status itself, such a measure would also soothe some of the difficulties arising under the other EU instruments (on maintenance and property for example) where validity of the

111 See further M.Ní Shúilleabháin, ‘Cross-Border (Non-) Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law’, in: J.M. Scherpe and E. Bargelli (eds.), *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Antwerpen-Cambridge: Intersentia 2021b; also Kohler 2020, p. 8-9.

112 See *Coman*, paras. 37-38 referring to Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539 and Case C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559.

113 Ní Shúilleabháin 2021b, p. 19. Muir Watt had previously referred to *Garcia Avello* as establishing a ‘methodological revolution’ in the European conflict of laws, entailing a ‘unilateral recognition of foreign situations or relationships without reference to the forum’s choice of law principles’. See H. Muir Watt, ‘European Federalism and the “New Unilateralism”’, *Tulane Law Review* 2008 vol. 82, no. 5, p. 1983-1998, at p. 1985.

114 Ní Shúilleabháin 2021b, p. 25 ff.

115 EU Commission, *Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records COM (2010) 747 final*.

116 COM (2020) 698 final, p. 15.

117 Ní Shúilleabháin 2021b, p. 32 ff.

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marriage or registered partnership arises as a preliminary question.<sup>118</sup> It is noteworthy that in the USA, the recent Respect for Marriage Act 2022, provides not only for ‘full faith and credit’ for same-sex marriages celebrated in other US states, but also prohibits any denial of rights and claims arising from such a marriage. Thus, section 4 of the 2022 Act seeks to ensure not only the recognition of the status per se, but also the enjoyment of the practical incidents of that status.<sup>119</sup>

While the EU Commission has expressed its support for such legislation, an EU-wide instrument on marriage and registered partnership recognition seems a remote prospect at present. In circumstances where complaints have been filed against Romania and Hungary for non-implementation of the *Coman* obligation to ensure a right of residence for same-sex spouses,<sup>120</sup> unanimity (as required under Art. 81(3) TFEU) seems politically impossible. Thus, it follows that any such instrument would have to be adopted by way of enhanced cooperation, and without uniform effectiveness across the EU, it is questionable as to whether legislative intervention would really be worthwhile.<sup>121</sup>

#### 4.2 Solutions at the national level

Even if progress is slow at the EU level, much can be achieved at the level of national law, and the European Court of Human Rights (ECtHR) has developed obligations under Article 8 ECHR which will ease the diversity and fragmentation of national laws, and support the appropriate adjustment of national PIL rules.

While the Strasbourg court has yet to recognize that same-sex couples enjoy the same right of marriage under Article 12 ECHR, it was confirmed by the Grand Chamber of the ECtHR in *Fedotova v. Russia* that Article 8 ECHR (the right to respect for family life) requires Contracting States to facilitate formalization of same-sex relationships (so at least an opportunity for registered partnership).<sup>122</sup> In time, this should encourage some harmonization of national laws, and bring about a reduction in the substantive divergencies which inhibit mobility.

With echoes of the CJEU in *Coman*, the ECtHR has also begun to (tentatively) develop obligations of cross-border marriage recognition under Article 8 ECHR. In *Orlandi v. Italy*, the Italian authorities were found to have violated the right to respect for family life in denying any status recognition to same-sex couples who

118 Although problems might still persist where the pre-existing EU instruments allow Member States to prioritize the internal forum policy on marriage/registered partnership.

119 See the discussion of the meaning of s. 4 in D. Laycock et al., ‘The Respect for Marriage Act: Living Together Despite our Deepest Differences’, *University of Illinois Law Review* 2023 (forthcoming), currently available at <https://ssrn.com/abstract=4394618>.

120 ILGA-Europe, ‘Complaint Filed with EC Against Lack of Free Movement for Same-Sex Couples in Hungary’, 7 June 2022, see [www.ilga-europe.org/news/complaint-filed-with-ec-against-lack-of-free-movement-for-same-sex-couples-in-hungary/](http://www.ilga-europe.org/news/complaint-filed-with-ec-against-lack-of-free-movement-for-same-sex-couples-in-hungary/). See also *Coman v. Romania*, Communicated Case No. 2663/21 at the ECtHR (9 February 2021).

121 Ní Shúilleabháin 2021b, p. 33.

122 ECHR 17 January 2023 (*Fedotova v. Russia*), nos. 40792/10, 30538/14 and 43439/14. See also ECHR 23 May 2023 (*Buhuceanu v. Romania*), no. 20081/19 and others; ECHR 1 June 2023 (*Maymulakhin and Markiv v. Ukraine*), no. 75135/14.

had married abroad.<sup>123</sup> Although there is significant uncertainty as to the precise nature of the obligation articulated in *Orlandi*,<sup>124</sup> this case (which appears to expand on previous ECtHR jurisprudence requiring cross-border status recognition)<sup>125</sup> can be used in national courts to challenge obstructive PIL rules and to influence the direction of judge-made law and the interpretation of national legislation affecting cross-border mobility.<sup>126</sup> Additional complaints concerning non-recognition of overseas same-sex marriages and registered partnerships are currently pending before the ECtHR,<sup>127</sup> and so the Strasbourg court will soon have further opportunities to develop the ideas presented in *Orlandi*.

*Orlandi* (and the successor cases) may encourage an *expansive* use of the public policy doctrine in ECHR Contracting States which have embraced marriage equality at the substantive domestic level, where the application of the *lex domicilii* (or *lex patriae*) would otherwise allow for the application of a heteronormative personal law and the non-recognition of a foreign same-sex marriage. Conversely, in those ECHR Contracting States where public policy is routinely used to *deny* recognition to an overseas same-sex marriage or registered partnership, *Orlandi* (and the successor cases) may exert pressure for judicial restraint in deploying this doctrine.<sup>128</sup>

It is also conceivable that national litigation, building on *Orlandi* and highlighting the plight of mobile same-sex couples, will prompt some hasty legislative reforms – at least in those ECHR Contracting States which have legislated for same-sex marriage domestically but have neglected to appropriately adapt their PIL norms. This is what happened in Canada in 2012 when a divorce petition exposed PIL deficiencies and Parliament intervened, to safeguard the marital status of overseas same-sex couples who had married in Canada, and to secure their access to a divorce court in Canada.<sup>129</sup>

Although this is rather less developed in the Strasbourg jurisprudence, anti-discrimination arguments may also be deployed in challenging national PIL rules (or alternatively in procuring a more favourable interpretation). As noted

123 ECHR 14 December 2017 (*Orlandi v. Italy*), nos. 26431/12, 26742/12, 44057/12 and 60088/12. The ECtHR did not insist on recognition qua marriage, but rather it was clear that recognition of a foreign same-sex marriage as an Italian civil union was sufficient to satisfy Art. 8 ECHR (see [194], [205]).

124 See Vaigé 2022, p. 225-226, noting that the case did not focus on broader private international law aspects, but rather on the narrow question of recognition for the purpose of inclusion in a civil registry.

125 E.g. ECHR 28 June 2007 (*Wagner v. Luxembourg*), no. 76240/01; ECHR 3 May 2011 (*Negrepontis-Giannis v. Greece*), no. 56759/08 on cross-border recognition of adoption.

126 In Ireland this is facilitated by the European Convention on Human Rights Act 2003, ss. 2-5.

127 Aside from the complaint in *Coman v. Romania* mentioned above, the following cases are also in the pipeline: *Andersen v. Poland*, Communicated Case No. 53662/20 at the ECtHR (1 June 2022); *AB and KV v. Romania*, Communicated Case No. 17816/21 at the ECtHR (19 October 2021); *Formela v. Poland*, Communicated Case No. 58828/12 at the ECtHR (20 June 2020), *Handzlik-Rosul v. Poland*, Communicated Case No. 45301/19 at the ECtHR (20 June 2020).

128 On both kinds of recourse to public policy (in the pre-*Orlandi* context), see Pintens and Scherpe 2017, p. 1605, 1608.

129 J. Walker, 'Same-Sex Divorce Tourism Comes to Canada', *Law Quarterly Review* 2012 Vol. 128, no. 3, p. 344-346.

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above, it has been contended that Article 21 of the EU Charter of Fundamental Rights compels a narrow interpretation of Article 13 Rome III – and at the UN level it has been accepted that Australian law discriminated on grounds of sexual orientation (in contravention of Art. 26 of the International Covenant on Civil and Political Rights) in failing to provide access to divorce for an Australian resident who had married her same-sex partner in Canada.<sup>130</sup> Where the same PIL rules apply to different-sex and same-sex couples alike, but with much more burdensome consequences for the latter, it is arguable that there is over-inclusion and actionable discrimination as per *Thlimmenos v. Greece*.<sup>131</sup> a failure to treat different situations differently and consequently a violation of Article 14 ECHR taken with Article 8. Aside from human rights arguments, in those European countries in the EU, same-sex spouses may be able to invoke *Coman* to challenge the use (at the national level) of the *lex patriae* (or *lex domicilii*) in cross-border marriage recognition. Insofar as these choice-of-law rules have a disproportionate effect on same-sex spouses and create ‘serious inconvenience’<sup>132</sup> for those couples crossing Member State borders, it may be concluded that their use is incompatible with Article 21 TFEU. It may also be possible to rely on *Coman* to challenge the recharacterization which is currently a feature of some national laws, for example, in Italy, whereby foreign same-sex marriages are recognized as registered partnerships, or where foreign registered partnerships are recognized as marriage (as may be the case in Ireland). Such recharacterization may present an impediment to free movement<sup>133</sup> where the couple has a strong preference for the status originally acquired and is ideologically opposed to the acquisition of the new status.<sup>134</sup> In this context, it is noteworthy that an EU Parliament study has recommended that the EU Commission should ‘support civil-society strategic litigation to extend the scope of the *Coman* ... jurisprudence from covering only a residence permit to other rights or benefits’.<sup>135</sup> In those legal orders where there is strong resistance to the implementation of *Coman* and *Orlandi*, it may still be possible to improve the situation of same-sex couples using classic PIL methodologies. In this vein, Vaigé notes that private international law can accommodate the separate consideration of civil status and the practical benefits associated with a status.<sup>136</sup> Thus, a country which defines marriage as the union of a man and a woman should still be able to extend succession or maintenance rights to a person who married a same-sex spouse

130 United Nations Human Rights Committee, CCPR/C/119/D/2216/2012, 1 November 2017.

131 *Thlimmenos v. Greece* (2001) 31 EHRR 15. In *Thlimmenos*, the applicant complained that restrictions on entry to the profession of chartered accountant were over-broad and inadequately targeted, and the same is arguably true of choice-of-law rules based on the personal law which have radically different consequences for same-sex couples by comparison with different-sex couples (and a much stronger invalidating propensity where the marital status of same-sex couples is concerned).

132 See *Garcia Avello* (cited in *Coman*) at [36].

133 In *Orlandi* (at [194], [205]) it was suggested that recharacterization was compatible with Art. 8 ECHR.

134 See *Wilkinson v. Kitzinger* (No. 2) [2006] EWHC 2022 (Fam) [5]; *Steinfeld and Keidan v. Secretary of State for Education* [2017] EWCA Civ 81 [5].

135 A. Tryfonidou and R. Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU*, PE 671.505, March 2021, p. 10.

136 Vaigé 2020, p. 51, 57.

abroad (without recognizing the status itself). Vaigé also emphasizes the relativity of the public policy doctrine (*ordre public*), and the element of attenuated effect.<sup>137</sup> It follows that there would be no justification for invoking public policy where the question was one of recognition of the same-sex marriage of a non-Polish couple who are in Poland on a temporary basis.<sup>138</sup> Vaigé also highlights the traditional view of Polish law that *ordre public* should not normally be utilized in determining marriage-validity as an incidental question.<sup>139</sup>

## 5. Conclusions

Same-sex spouses and registered partners may encounter a status vacuum, or an altered (recharacterized) status, or an uncertain status, as they move around Europe.

Non-recognition of marital or partnership status may not come as a surprise where the host country is one which adheres to a traditional heteronormative view of marriage and partnership. As has been seen, however, barriers to status-recognition may also arise between European countries which are committed – at the level of domestic substantive law – to marriage equality. Insofar as these latter PIL barriers are more unexpected, they may be even more treacherous: the domestic legal standpoint may generate a false sense of security.

Problems with status recognition extend to divorce and dissolution – and even between EU Member States where Brussels IIter applies there is no guarantee that same-sex spouses enjoy automatic recognition of divorce. Where same-sex spouses or partners reside in a European country outside of the place of celebration (or registration), they may also encounter difficulty in accessing a competent divorce court and in resolving property and maintenance matters. In EU legislation on family aspects of PIL, there was often a prioritization of the interest in securing broad support and a wide EU consensus, and the needs of same-sex spouses and partners were sacrificed in the process.<sup>140</sup>

There is, however, a light at the end of the tunnel: judge-made law (in *Coman* and in *Orlandi* in particular) is forging new obligations of cross-border status recognition, and a burgeoning human rights jurisprudence may ease the path for mobile same-sex spouses and registered partners.

137 Vaigé 2020, p. 58.

138 Vaigé 2020, p. 58.

139 Vaigé 2020, p. 57-58.

140 Dougan 2022, p. 243.