



# **Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU**

Written by Dr. Neža Kogovšek Šalamon  
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# **Mapping of studies on the difficulties for LGBTI people in cross-border situations in the EU**

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“Mapping of studies on the difficulties for LGBTI people in  
cross-border situations in the EU”

## **FINAL REPORT**

dr. Neža Kogovšek Šalamon, Senior Scientific Associate in Law  
Members of research team: dr. Veronika Bajt, sociologist; Saša Panić, data analyst  
Peace Institute – Institute for contemporary Social and Political Studies

Ljubljana, Slovenia

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## 1. INTRODUCTION

LGBTI persons are among the groups most exposed to discrimination in the European Union. To address this problem, the European Commission published in December 2015 the *List of Actions to Advance LGBTI Equality*, of which this mapping study is a part.<sup>1</sup> The study aims to identify research and studies of the difficulties that LGBTI individuals and their families encounter in their daily lives in cross-border situations and free movement in the EU.

Currently, 14 EU Member States provide marriage for same-sex couples (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). In another 8 Member States, same-sex couples can enter a registered partnership (Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia). At present, 6 Member States provide no legal recognition for same-sex couples (Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia). Member States also have different procedures for transgender and intersex people to get their preferred gender legally recognised.

Due to the differences between EU Member States in legal recognition for same-sex couples, LGBTI individuals and their families may encounter difficulties when travelling, moving to or residing in other EU Member States that different-sex couples do not experience. They may encounter difficulties in such areas as recognition of their relationship, divorce and separation, immigration, children's rights, parental responsibility, reproductive rights, employment benefits and pension, property regimes, taxation, inheritance, recognition and enforcement of rights and obligations, and possibly other areas.

The report maps existing studies and research that have been conducted so far by researchers and scholars working in this field in the European Union. As presented below, substantive research and analysis exists primarily in the field of recognition of marital and partnership status obtained in one EU Member State after moving to another EU Member State. This is because recognition of relationships was subject to discussions for many years culminating with the judgment of the Court of Justice of the European Union (CJEU) in the case *Coman and Others v. Romania*.

Some literature exists in the fields of cross-border situations stemming from ART/IVF procedures, adoption and surrogacy, as well as on issues related to asylum. Very few comprehensive sources that address a cross-border element exist in the fields of property, succession, taxation, inheritance, employment benefits and pensions. One of the possible reasons is that the treatment of LGBTI persons in these fields depends on whether or not their legal status of being a spouse or a registered partner is recognised. However, in this context, an area that needs to be further explored is whether recognition of status also secures the rights deriving from this status. There is also a lack of comprehensive and comparable information from all EU Member States on their respective administrative and judicial practices in the fields of recognition of marital or partnership status, recognition of birth certificates, and documents recognizing parental rights to LGBTI couples obtained by either law, administrative decision or court decision. Hence, the implementation issues would be worthwhile exploring in the future, especially since the CJEU pointed out in the *Coman* judgment that the term "spouse", within the meaning of the directive 2004/38, was gender-neutral.

There is a lack of studies concerning transgender people in cross-border situations in the sense of how the legal gender reassignment/recognition has been received and treated by the authorities in other Member States. The situation of intersex persons is also

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<sup>1</sup> European Commission, *List of Actions to Advance LGBTI Equality*, December 2015, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/lesbian-gay-bi-trans-and-intersex-equality/list-actions-advance-lgbti-equality\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/lesbian-gay-bi-trans-and-intersex-equality/list-actions-advance-lgbti-equality_en), p. 15.

under-researched, as potentially discriminatory practices on the national level are often not yet properly identified, let alone the experience when intersex persons are in cross-border situations. The potential for further research is increased by the fact that some EU Member States already provide for non-binary, third gender or gender-neutral options in public documents (these are Portugal, Germany, Austria and Malta).

Using the methods described in the next section, the researchers prepared summaries of each study and its findings. Legal and sociological sources are presented together, as many of the sources are of an interdisciplinary nature.

Based on the studies identified, an essay was compiled summarising the main findings of the studies and the areas in which further research is needed.

Finally, recommendations were drafted for further research built upon the existing studies and for addressing the existing knowledge gaps.

## **2. METHODOLOGY**

To reach the aim of identifying research findings on issues encountered by LGBTI persons in cross-border situations, the research team mapped the studies on the proposed topic through the following steps. Firstly, they carried out desk research using various internet search engines to obtain information on completed or on-going studies available freely online. For the overview the Google search engine was used. This method does not exclude identification of literature published by commercial academic publishers. However, it is particularly useful for identification of available grey literature produced by non-commercial actors, including, e.g. governments and NGOs, or for identification of open access academic publications as well as other internet-based sources (e.g. articles, comments).

The desk research was conducted by means of relevant keywords and their different combinations (LGBTI, same-sex couples, same-sex partners, same-gender, rainbow families, intersex, transgender, cross-border, transnational, free movement, Free Movement Directive, Citizens' Rights Directive, Citizen's Directive, Directive 2004/38/EC, difficulties, recognition of partnership, divorce, separation, immigration, children's rights, parental rights, parental responsibility, reproductive rights, adoption, surrogacy, assisted insemination technologies, employment benefits, pension, property, property regimes, tax, taxation, inheritance, recognition, enforcement, rights, obligations, recognition of public documents, recognition of judicial judgments, law, civil law, private law, private international law, legislation and civil legislation).

Secondly, more detailed desk research was carried out by reviewing the literature available in specialised databases, academic journals and monographs. Among others, these information sources included EBSCOhost Academic Search Complete, EBSCOhost eBook Academic Collection, SAGE Journals Online, ScienceDirect, JSTOR, Oxford Academic Journals, ProQuest Central, SCOPUS, Social Sciences Citation Index, SpringerLink, Taylor and Francis Online, Web of Science and Directory of Open Access Journals. In addition, a search through databases of scholars was conducted, such as Academia.edu or ResearchGate, where scholars publish the titles of their completed and ongoing projects.

Thirdly, scholars, practising lawyers, international organisations and NGOs working on LGBTI issues were contacted and asked for information whether they were aware of any relevant studies (including PhD projects) or if they themselves completed or conducted them. The research team used its existing networks of scholars they already cooperate with to obtain this information. One such network is ECSOL – European Commission on Sexual Orientation Law (<http://www.sexualorientationlaw.eu>), which has been previously funded by the European Commission and continues to exist in the form of a mailing list

and a website. The legal researcher involved in this study is a member of this network and maintains regular contacts with other members. The social sciences researchers have their own networks that were also used to gather information. The website of the European network of legal experts in gender equality and non-discrimination was also consulted for available data.

### 3. SUMMARIES OF IDENTIFIED STUDIES

The following sources (studies, monographs and articles) published in the years 2015–2019 were identified and were grouped by field. Exceptionally, older sources have been added only if they have been assessed as significant for this study. First, the studies and sources are listed that cover multiple fields, followed by single-issue sources. The studies are listed in chronological order, starting from the most recent sources. When the sources were published in the same year, they are listed in alphabetical order by the last name of the first author or the name of an institution.

#### 3.1. Multiple Fields

1. Hristev, Hristo; Lyubenova, Denitsa; Dragoeva, Liliya. Free movement of European Union citizens – rights and challenges to same-sex families in the republic of Bulgaria, Center for the study of democracy, Youth LGBT Organisation Deystvie, 2019  
[https://csd.bg/fileadmin/user\\_upload/publications\\_library/files/2019\\_05/LoveMoves\\_Report\\_ENG.pdf](https://csd.bg/fileadmin/user_upload/publications_library/files/2019_05/LoveMoves_Report_ENG.pdf).

“Homophobia and unfair treatment of LGBTI people are still wide-spread in the European Union. Indicators of their level in individual Member States vary and the situation is seemingly better in some countries, but the data show that full equality for this group has not been achieved in any of them. Bulgaria is one of the countries where the situation is most unfavourable. In order to shed light on one of the contributing factors, this analysis presents the results of a study on the application of the Free Movement Directive to LGBTI couples on the territory of the Republic of Bulgaria. The analysis includes a review of the rights guaranteed to EU citizens and an analysis of the measures and deficiencies in the implementation of the Directive in Bulgaria, a review of administrative and judicial practice in the country and data from a national survey of same-sex couples with recognized status in other EU Member States who reside temporarily or live in Bulgaria.” This publication is part of the project “Love Moves: The Rights of Recognized Same-Sex Partners Moving Across the EU (LoveMoves)” funded by the European Union’s Rights, Equality and Citizenship Programme (2014–2020).

2. Sherriff, Nigel; Zeeman, Laetitia et al. Co-producing knowledge of lesbian, gay, bisexual, trans and intersex (LGBTI) health-care inequalities via rapid reviews of grey literature in 27 EU Member States, *Health Expectations: An International Journal of Public Participation in Health Care & Health Policy*, 22 June 2019 (Special issue paper), <https://doi.org/10.1111/hex.12934>.

According to an analysis of Rapid reviews of grey literature, co-produced with LGBTI persons in 27 countries, “LGBTI people faced various inequalities and barriers while accessing health care. Where heterosexuality, binary gender and assumed male/female sex characteristics were upheld as the norm, and where LGBTI people differed from these norms, discrimination could result. In consultations, where LGBTI people feared discrimination and did not disclose their LGBTI status, health professionals lacked the information required for appropriate assessments.” The article does not include the EU cross-border perspective but it is worth including it on the list due to its EU-wide coverage.

3. Tryfonidou, Alina. EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?, *Yearbook of European Law*, 2019, 1–47,

<https://doi.org/10.1093/yel/yez001>.

“EU citizens and—through them—certain of their family members, derive from EU law the right to move between EU Member States and reside in the Member State of their choice. This right is enjoyed by all Union citizens irrespective of their sexual orientation. However, when rainbow families (i.e. families comprised of a same-sex couple and their child(ren)) exercise this right and move to a Member State which does not provide legal recognition to same-sex couples and/or their families, they are faced with the possibility that that Member State will refuse to legally recognize the familial ties among all or some members of the family, as these have been legally established elsewhere. This means that such families are not treated in the same way as the typical nuclear family which has an opposite-sex, married, couple with children as its basis; the familial links among the members of the nuclear family are only very rarely—if ever—legally contested. The question that emerges, therefore, is whether the severance in the host Member State of the legal ties among the members of rainbow families, amounts to a breach of EU law.” The article focuses on the parent–child relationship and examines the question above by taking a child-centred approach.

4. Cooper, Jonathan; Yoshida, Keina; Dunne, Peter; Palmer, Anya. Brexit: The LGBT Impact Assessment. Gay Star News, 2018.

[https://research-information.bristol.ac.uk/files/154151661/PETER\\_DUNNE\\_PURE\\_VERSION.pdf](https://research-information.bristol.ac.uk/files/154151661/PETER_DUNNE_PURE_VERSION.pdf).

This report charts how the UK Government, the EU and the European Court of Human Rights have advanced LGBT rights, and how progress in the UK has been dependent on its relationship with Europe, in particular, the EU. In part two, the report examines the rights LGBT individuals in the UK currently enjoy which Brexit may jeopardise, particularly in the areas of free movement, trans rights, employment rights, relationship rights, asylum and rights guaranteed by the EU Charter.

5. Digoix, Marie; Franchi, Marina; Pichardo Galán; José Ignacio; Selmi, Giulia; de Stéfano Barbero, Matias; Thibeaud, Matthias; Vela, Jose A. M. European rainbow families in the making: practices, norms and the law?, Paris, Ined: Documents de travail n°242, 2018, [https://www.ined.fr/fichier/s\\_rubrique/28459/working\\_paper\\_2018\\_242\\_discrimination\\_equal.citizenship.fr.pdf](https://www.ined.fr/fichier/s_rubrique/28459/working_paper_2018_242_discrimination_equal.citizenship.fr.pdf).

The publication presents results of sociological research conducted in the course of the project “FamiliesAndSocieties – Changing families and sustainable societies: Policy contexts and diversity over the life course and across generations.” Semi-structured interviews were conducted with same-sex interviewees in France, Iceland, Italy and Spain, countries with different social and legal contexts. Central research questions included the legal recognition of relationships, perceptions of how legal framework impacts on interviewees’ relationships and parental projects, as well as perceptions of homophobia and discrimination. The publication presents a short comparative overview of research results. The study contains qualitative information on the cross-border experience of couples, particularly in accessing ART/IVF, intercountry adoption or surrogacy.

6. European Union Agency for Fundamental Rights. Making EU citizens’ rights a reality: National courts enforcing freedom of movement and related rights, Luxembourg, Publications Office of the European Union, 2018, <https://fra.europa.eu/en/publication/2018/free-movement>.

The report is a comparative overview of the application of the Free Movement Directive (2004/38/EC) in the 28 EU Member States. It is based on a review of select national case law and provides insight into how national courts approach the provisions concerning the Union citizenship and freedom of movement. A part of the report is dedicated to the situation of same-sex persons in this context. The report emphasises the existence of a lack of clarity concerning the mutual recognition of same-sex marriages in the EU Member States, which constitutes an obstacle to free movement. If one is unsure as to

whether their same-sex spouse may be able to join their partner in another Member State and/or be considered as spouse, this is likely to discourage individuals from exercising their right to free movement. Selected court cases from some of the EU Member States are discussed in the report. For example, a case of the refusal of a recognition of a birth certificate issued in the UK by Polish authorities is presented in the report as an example of differential treatment based on sexual orientation in the context of same-sex partners' free movement rights. Another presented case is a case of a female couple that married in Sweden and asked Estonian authorities to recognise their marriage. The Estonian court decided that such marriage should be recognised as registered partnership in Estonia. Similarly, the case reported for Poland demonstrated that the Polish court ordered the authorities to interpret the law in such a way to facilitate entry of extended family members to the territory of Poland. In another case, an Italian court found a decision not to issue a residence permit to a same-sex spouse invalid.

7. Karsay, Dodo. Protecting LGBTQI rights in Europe: Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5), 2018, ILGA-Europe, Transgender Europe, OII Europe, <https://tgeu.org/wp-content/uploads/2018/10/COE-Submission-18-TGEU-IE-OII.pdf>.

The report focuses on the implementation status of the Recommendation CM/Rec(2010)5 of the Council of Europe's Committee of Ministers to the Member States on measures to combat discrimination on grounds of sexual orientation or gender identity in 16 participating countries, of which 10 are the EU Member States. The report focuses on the needs and situation of lesbian, gay, bisexual, trans, queer, and intersex (LGBTQI) persons in a number of fields of life (e.g. right to life, security and protection from violence, right to private and family life, right to seek asylum). It covers several issues related to cross-border movements, such as recognition of marriages and collection of data on marriages concluded abroad, differences between law and practice concerning recognition of same-sex marriage or partnership, access to transgender services and ART/IVF abroad and hindering couples from accessing same-sex marriage abroad by refusing to provide the necessary documents by authorities.

8. Waaldijk, Kees. *Extending rights, responsibilities and status to same-sex families: trends across Europe*, Ministry of Foreign Affairs of Denmark (for Council of Europe), 2018, <https://openaccess.leidenuniv.nl/handle/1887/70273>.

"This report is in part based on the author's comparative analysis of the LawsAndFamilies Database ([www.LawsAndFamilies.eu](http://www.LawsAndFamilies.eu)) in his 2017 report *More and more together: Legal family formats for same-sex and different-sex couples in European countries*. The report notes clear and rapid trends, among a large majority of the 21 European countries surveyed, of offering same-sex couples the opportunity to formalise their relationship as marriage and/or as registered partnership, and of attaching more and more rights and responsibilities to the cohabitation, the registered partnership and/or the marriage of two people of the same sex. It concludes that the consensus among these countries is particularly strong as regards: legal protections for times of death (such as: tenancy continuation, wrongful death compensation, inheritance, inheritance tax exemption, survivor's pension); legal protections for times of other great sadness (such as: next of kin provisions, protection against domestic violence, leave from work in case your partner or your partner's parent is in need of care); the right to come and live in the same country as your partner; the possibility to take (at least some) responsibility for your partner's children. The high levels of consensus on these particular issues may assist the European Court of Human Rights in narrowing the freedom that countries have had in deciding what rights and responsibilities to make available to same-sex couples."

9. Boele-Woelki, Katharina; Fuchs, Angelika (eds.). *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition).

The book focuses on the issue of the recognition of same-sex relationships in the EU through exploring the relevant EU legislation, the CJEU and ECtHR case law, as well as the current national developments. The first part of the book describes the situation regarding the formalisation of same-sex relationships in all EU Member States. It registers progress in many countries, the exception being the six Eastern European jurisdictions failing to provide a legal framework for formalisation of same-sex relationships. The second part of the book discusses parenthood and children's rights, including adoption, surrogacy, multiple parenting, as well as other parenting rights for same-sex couples, transsexual and transgender people. The third part explores gender identity and human rights, the EU legislation prohibiting discrimination on the grounds of sexual orientation, as well as the situation of the LGBT persons in the context of migration, including asylum. Finally, the "book ends with a lively debate on the right to change one's legal sex and raises the fundamental question of whether we still need sex as a legal category."

10. Naldini, Manuela; Long, Joëlle. Geographies of Families in The European Union: A Legal and Social Policy Analysis, *International Journal of Law, Policy and the Family*, Vol. 31, No. 1, April 2017, 94–113, <https://doi.org/10.1093/lawfam/ebw017>.

"The social and legal changes in the geographies of families in Member States encourage the European Union to reconsider its traditionally prudent approach to family law. Indeed, the free movement of people, an essential characteristic of European citizenship, requires legally established family statuses to be 'portable' abroad. Furthermore, the variety of national regulations favours marriage and reproductive mobility, thus forcing domestic and European legislatures and courts to challenge the definitions of family found in the law and in social policy in the name of the right to family life and the principle of non-discrimination. Hence, this article starts by discussing the various notions of family that emerge from domestic laws and social policies in six EU Member States with different legal, cultural, and social backgrounds (Italy, Spain, Denmark, the Netherlands, Croatia, and Hungary). It then delineates the role of Europe and the social and legal interactions between Member States in the construction of a definition of family. Finally, it concentrates on cross-border reproductive care, a case study that allows for shedding light on the convergences among countries, as well as the role of Europe as a supra-national institution and as a space in which family models circulate and spread. The main conclusion is that a multilevel analysis of the notion of family shows the circularity of interactions top-down and bottom-up between Europe and individual States, as well between society and law."

11. Waaldijk, Kees et al. (eds.). The LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples, Paris: INED, 2017, [www.LawsAndFamilies.eu](http://www.LawsAndFamilies.eu).

This database is a result of the research project *FamiliesAndSocieties – Changing families and sustainable societies: Policy contexts and diversity over the life course and across generations*, coordinated by Stockholm University and funded through the EU's Seventh Framework Programme (FP7/2007-2013). Currently, it is perhaps the leading source of data on the aspects of legal family formats for same-sex and different-sex couples in the EU. The project started on 1 February 2013 and completed on 31 January 2017. The legal survey involved 19 EU Member States, Iceland and Norway. The database includes data on legal developments up to around 2016 concerning marriage, registered partnership, and cohabitation for same-sex and different-sex couples. It consists of six sections related to the aforementioned types of relationships with comparative information on formalisation, income and troubles, parenting, migration, splitting up, death. It includes comparative information on recognition of foreign adoption decisions per country (for joint and second-parent adoptions) and information on whether or not same-sex partners can invoke family reunification rights in the context of migration law. National sections are available at <https://www.lawsandfamilies.eu/en/legal-project/data/#r25293>.

12. Waaldijk, Kees (ed.). More and more together: Legal family formats for same-sex

and different-sex couples in European countries – Comparative analysis of data in the LawsAndFamilies Database, FamiliesAndSocieties Working Paper 75, 2017, available at: <http://www.familiesandsocieties.eu/wp-content/uploads/2017/04/WorkingPaper75.pdf>.

Based on the national research findings, as included in the aforementioned LawsAndFamilies Database, the paper provides a comparative analysis of legal and other data on same-sex and different-sex families in different types of relationships (marriage, registered partnership and cohabitation). The author presents the database and the methodology of the legal survey, followed by an overview and analysis of the main national results of the survey in light of European minimum standards. Five comparative case studies on specific legal issues are also included (statutory protection against domestic violence, the right to refuse to testify against a partner in criminal procedures, the evolution of parenting rights, recognition of foreign same-sex marriages and registered partnerships and compensation for wrongful death). The paper also includes an outline of sociological research conducted in the course of the project (see below for more information).

13. Belavusau, Uladzislau; Kochenov, Dimitry. On the 'Entry Options' for the 'Right to Love': Federalizing Legal Opportunities for LGBT Movements in the EU, San Domenico di Fiesole, European University Institute (EUI Working Paper LAW 2016/09), 2016, <http://cadmus.eui.eu/handle/1814/40368>.

"The paper unfolds litigation opportunities for LGBT plaintiffs embedded in EU law. It explores both established tracks and future prospects for fostering the EU's (at times half-hearted) goodbye to heteronormativity. The paper demonstrates how American federalism theories can pave the way for the 'right to love' in the European Union, whose mobile sexual citizens are equally benefiting from the 'leave' and 'entry options', requiring more heteronormative states to comply with the approaches to sexuality adopted by their more tolerant peers. The relevance of this normative framework based on federal 'entry options' for the EU is further exemplified by a recent judgment of the US Supreme Court in *Obergefell v. Hodges* (2015). The strategy of activating EU law in litigation for mobile couples could in the medium- to short-term perspective spill over the recognition of various forms of legal unions for gay and lesbian couples all over the Union, promoting tolerance, equality and respect. The paper reveals that Citizenship Directive 2004/38/EC and *actio popularis* at the national level offer two major federal keys for activating this anticipated sexual emancipation via EU law."

14. Bracken, Lydia. Strasbourg's Response to Gay and Lesbian Parenting: Progress, then Plateau?, *International Journal of Children's Rights*, Vol. 24, No. 2, 2016, 358–377, <https://doi.org/10.1163/15718182-02402012>.

"This article examines the advancement of parenting rights for gay and lesbian persons as established through the case law of the European Court of Human Rights. It notes that, after many years of progress, this advancement has seemingly now reached a plateau. In particular, although the Court has previously been effective in ending discrimination against single gay and lesbian parents, it has been reluctant to find that discrimination against same-sex couples seeking access to joint parenting rights is contrary to the European Convention on Human Rights (ECHR). This article examines this plateau and it questions whether consideration of the rights and interests of children could be used to overcome it. It is argued that this consideration may ultimately demand that joint parenting opportunities are made available."

15. Digoix, Marie; Franchi, Marina; Pichardo Galán, José Ignacio; Selmi, Giulia; de Stéfano Barbero, Matias; Thibeaud, Matthias & Vela, Jose A. M. Sexual orientation, family and kinship in France, Iceland, Italy and Spain, FamiliesAndSocieties Working Papers Series n°54, 2016, <http://www.familiesandsocieties.eu/wp-content/uploads/2016/08/WP54Digoixetal2016.pdf>.

The publication reports on results of sociological research conducted in the course of the project *FamiliesAndSocieties – Changing families and sustainable societies: Policy*

*contexts and diversity over the life course and across generations.* Semi-structured interviews were conducted with same-sex interviewees in France, Iceland, Italy and Spain, countries with different social and legal contexts. The core research questions included the legal recognition of relationships, perceptions of legal framework impact on interviewees' relationships and parental projects, as well as perceptions of homophobia and discrimination. The publication provides country-by-country research findings. The study contains qualitative information on the cross-border experience of couples, particularly in accessing ART/IVF, intercountry adoption or surrogacy.

16. European Union Agency for Fundamental Rights, Professionally speaking: challenges to achieving equality for LGBT people, Luxembourg, Publications Office of the European Union, 2016, <https://fra.europa.eu/en/publication/2016/professional-views-lgbt-equality>.

"The fundamental rights of lesbian, gay, bisexual and transgender (LGBT) people are often not respected across the EU. Public officials and other professionals in education, healthcare and law enforcement are entrusted with the duty to ensure that everyone's fundamental rights are protected and promoted. This report examines the drivers and barriers encountered by such frontline officers when doing their work. Drawing on extensive interviews with public officials, teachers, doctors, nurses and law enforcement officers in 19 EU Member States, it analyses their views and experiences, identifying persisting hurdles – such as perceptions of homosexuality as a pathological condition – and encouraging trends – including considerable commitment to improve the situation. In this way, this report provides new evidence on an under-researched topic, namely the efforts of public officials and other professionals in education, healthcare and law enforcement to fulfil the rights of LGBT people." In the cross-border context, the report mentions issues related to transgender people accessing services abroad and difficulties in the coverage of cross-border health services.

17. Titshaw, Scott, Same-Sex Spouses Lost in Translation? How to Interpret 'Spouse' in the E.U. Family Migration Directives, Boston University International Law Journal, Vol. 34, 1 January 2016, 45-112, <https://ssrn.com/abstract=260842>.

"This Article analyzes the word 'spouse' in the European Union's Family Migration Directives in detail, focusing on the treatment of married bi-national same-sex couples. Through these directives, the European Union exercises significant authority over family-based immigration and internal migration, expressly providing immigration rights to the 'spouse' of E.U. citizens and legal residents. However, family law, including the familial status of 'spouses' is governed by individual E.U. member states. While a growing number of member states authorise same-sex marriage, the majority still does not. The Union, therefore, must determine how to treat migrating couples who are legal spouses in one member state, but not in another. This issue echoes the choice the U.S. faced in 1996 and again in 2013: Should federal law determine spousal status based on the law of the jurisdiction where a marriage was celebrated or where the couple resides, or should it create its own independent federal definition? The two U.S. approaches, a federal definition and a place-of-celebration choice-of-law rule, may help Europeans as they develop their own answer. This Article describes and rigorously applies the European Court of Justice's five methods of directive interpretation (textual, systematic, historical, teleological, and comparative analyses) to the directives, concluding that the best interpretations of the directives result in an autonomous definition of 'spouse' that includes same-sex spouses or in a member-state-of-celebration choice-of-law rule. This exercise provides some insight for European courts and scholars about the various paths the E.C.J. may take to interpret the word 'spouse' in the Family Migration Directives. It also provides an introduction to European family-based immigration and an example of the interpretation of directives generally, for judges, attorneys, scholars, and students from outside of the E.U."

18. Koffeman, Nelleke Renate. Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships, Intersentia, Cambridge, November 2015 (dissertation),

<https://openaccess.leidenuniv.nl/handle/1887/36111>.

“Within the European Union there is considerable diversity in morally sensitive issues like legal recognition of same-sex relationships and reproductive matters such as abortion, assisted human reproduction and surrogacy. Cross-border movement within the EU exposes and affects this diversity, as it implies that States are confronted by (the consequences of) one another’s regimes in these areas. This research explores this cross-border dimension. It firstly investigates what – if any – standard-setting is in place in three national jurisdictions (Ireland, Germany and the Netherlands) as well as in the relevant European jurisdictions (EU law and the ECHR) in respect of reproductive matters and legal recognition of same-sex relationships, and how this has developed over time. Subsequently it is analysed how the relevant jurisdictions respond to cross-border movement in these areas and how they interact. While, for example, States sometimes appear to ward off cross-border movement in these areas to protect their national moral standards, in other situations they choose to – or are obliged under European law to – accommodate such mobility in order to protect the interests of vulnerable parties involved. This volume observes and clarifies the dynamics in decision-making regarding these issues, analysing and explaining how various areas and levels of law interact.”

19. Kogovšek Šalamon, Neža. Prihodnost temeljnih pravic v Evropski uniji: Primer svobode gibanja mavričnih družin [The future of Fundamental Rights in Europe: The Case of Freedom of Movement of Rainbow Families], *Delavci in delodajalci*, Vol. 15, No. 1, 2015, 7–32, [http://delavciindelodajalci.com/P/PDF/Delavci\\_in\\_delodajalci\\_1\\_2015\\_XV.pdf](http://delavciindelodajalci.com/P/PDF/Delavci_in_delodajalci_1_2015_XV.pdf).

The article addresses the question of whether same-sex spouses, registered same-sex partners and same-sex life partners are recognised as their family members under EU law and under Slovenian law. The article also discusses the issue of recognition of parental ties either adopted or born through assisted reproduction technologies or surrogacy. It explores whether parental rights that were recognised in one Member State are also recognised in another Member State, which does not allow for the previously mentioned methods of recognition of parental rights. The paper also addresses employment and labour rights (including pensions). The manner in which the European Institutions will address freedom of movement challenges may determine the future status of freedom of movement in EU law. Due to very diverse legal regulations of the legal position of rainbow families in Europe, their exercise of freedom of movement is taking place in a very complex legal environment requiring a particular response. The selection of the approach is quintessential: It could continue to be based on the exclusive jurisdiction of the EU Member States over the family law, while the latter may grant part of their jurisdiction to the EU. Further regulation of this field will be dynamic, concludes the article and outlines the needed approaches.

20. Casonato, Carlo; Schuster, Alexander (eds.). RIGHTS ON THE MOVE: Rainbow families in Europe, Conference proceedings, University of Trento, 16–17 October 2014, [http://eprints.biblio.unitn.it/4448/1/Casonato-Schuster-ROTM\\_Proceedings-2014.pdf](http://eprints.biblio.unitn.it/4448/1/Casonato-Schuster-ROTM_Proceedings-2014.pdf).

“These proceedings, written in several languages, are the outcome of an international two-day conference that was held at the University of Trento on 16-17 October 2015. The conference and the publication are part of the EU-funded project ‘Rights on the Move – Rainbow Families in Europe’ coordinated by the University of Trento ([www.rightsonthemove.eu](http://www.rightsonthemove.eu)).” The proceedings include several interesting papers on the free movement rights of LGBTI persons, recognition of marriages and partnerships concluded abroad, cross-border access to ART, difficulties with registering children born abroad to LGBT couples via either IVF or surrogacy and access of persons to cross-border health care.

21. Gasparini, Alessandro; La Torre, Cathy; Gorini, Silvia; Russo, Monica. Homophobia in the Italian Legal System, in: Luca Trappolin, Alessandro Gasparini, Robert Wintemute (eds.): *Confronting Homophobia in Europe. Social and Legal Perspectives*, Hart Publishing, 2011, <https://www.bloomsbury.com/au/confronting-homophobia-in-europe->

[9781849462754/](#).

"Homophobia exists in many different forms across Europe. Member States offer uneven levels of legal protection for lesbian and gay rights; at the same time the social meanings and practices relating to homosexuality are culturally distinct and intersect in complex ways with gender, class and ethnicity in different national contexts. The essays in this volume illustrate the findings of a European project on homophobia and fundamental rights in which sociologists and legal experts have analysed the position in four Member States: Italy, Slovenia, Hungary and the UK. The first part of the book investigates the sociological dimensions of homophobia through qualitative methods involving both heterosexual and self-defined lesbian and gay respondents, including those in ethnic communities. The aim is to understand how homophobia and homosexuality are defined and experienced in the everyday life of participants. The second part is devoted to a legal analysis of how homophobia is reproduced 'in law' and how it is confronted 'with law'. The analysis examines statute and case law; 'soft law'; administrative practices; the discussion of bills within parliamentary committees; and decisions of public authorities. Among the areas discussed are 'hate crimes' and 'hate speech'; education at all levels; free movement, immigration and asylum; and cross-border reproductive services."

### 3.2. Marriage/Partnership Recognition

22. Rijpma, Jorrit J. You Gotta Let Love Move, ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General pentru Imigrări, *European Constitutional Law Review*, 2019, 1–16, <https://doi.org/10.1017/S1574019619000130>.

The article provides an analysis of the ECJ's decision in the *Coman* case. According to the author, "EU is not a human rights organisation and its Court of Justice, despite protecting fundamental rights within the EU legal order, is not a human-rights tribunal. Nor is the EU a federal state and its Court, despite fulfilling many similar functions, is not a Constitutional Court. In consequence, the *Coman* case is not, and could never have been, Europe's Obergefell, the US Supreme Court case that opened up civil marriage to same-sex partners in all US states. The European Court of Justice should be applauded for the consistent and non-discriminatory application to all EU citizens, irrespective of sexual orientation, of its own case law on the fundamental freedom of movement. This has allowed the Court to arrive at an answer that is satisfactory from a fundamental rights perspective without taking a more controversial fundamental rights approach. At the same time, fundamental rights are an integral part of the EU legal order. The Court might have strengthened its argument whilst remaining within the boundaries of its jurisdiction, stating more explicitly that respect for fundamental rights would not have yielded any other outcome."

23. Tryfonidou, Alina. The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, *Feminist Legal Studies*, 2019, <https://link.springer.com/article/10.1007%2Fs10691-019-09397-z>.

"In the *Coman* case, the European Court of Justice was asked whether the term 'spouse'—for the purposes of EU law—includes the same-sex spouse of an EU citizen who has moved between EU Member States. The ECJ answered this question affirmatively, holding that a refusal to recognise a same-sex marriage and the resultant refusal to grant family reunification rights to a Union citizen who moves to another Member State, would constitute an unjustified restriction on the right to free movement that Union citizens enjoy under EU law. This case comment analyses the judgment, arguing that the Court's pronouncement is a very welcome first step towards marriage equality at a cross-border level in the EU. At the same time, following the delivery of this ruling, a lot of questions have arisen and gaps in the protection of same-sex couples persist, and these are also analysed in this piece."

24. Tryfonidou, Alina. *An analysis of the ECJ ruling in Case C-673/16 Coman – The right*

of same-sex spouses under EU law to move freely between EU Member States, NELFA, 2019, <http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf>.

The report was written for NELFA – Network of European LGBTIQ\* Families Associations. It includes an analysis of the *Coman* case, explaining its overall importance while highlighting the gaps in protection that persist even after the Court’s judgment. The author states that *Coman* is clearly a landmark ruling of great constitutional importance, which changes the legal landscape for the recognition of same-sex marriages within the EU. It is, also, a ruling, which is hugely significant at a symbolic level, as through it the EU’s top court clearly indicated that same-sex marriages are equal to opposite-sex marriages for the purposes of EU free movement law.

25. Spalding, Amanda. Where Next After Coman?, *European Journal of Migration & Law*, Vol. 21, No. 1, 2019, 117–139, <https://doi.org/10.1163/15718166-12340044>.

“This article considers the impact of the recent judgment of the Court of Justice of the European Union in Case C-673/16 *Coman and Others* in which same-sex marriages were found to fall under the definition of ‘spouse’ in the Citizenship Directive. In light of recent societal and case law developments in Europe it is possible that *Coman* may come to be an important foundational case which will form part of the groundwork for the CJEU to advance the rights of unmarried couples in the EU migration context. This article examines the current position of unmarried [different-sex and same-sex] couples (including registered or civil partners) under EU migration legislation as well as recent developments under the European Convention of Human Rights to argue that there are clear indications that EU migration laws need to be adapted to better suit a wider range of relationships than marriage.”

26. Godzisz, Piotr; Knut, Paweł (eds). LGBTI rights in Poland: Measures to combat discrimination and violence on grounds of sexual orientation, gender identity and sex characteristics, 2018, [https://tgeu.org/wp-content/uploads/2018/10/COE-Report-Oct18-poland\\_1.pdf](https://tgeu.org/wp-content/uploads/2018/10/COE-Report-Oct18-poland_1.pdf).

“Polish legal system does not regulate the rights and obligations of unmarried couples, including same-sex unions.” While rights of same-sex partners have been asserted in some court cases, “the legal protection of same sex-partners still remains full of holes.” Also, “Polish law does not provide the institution of registered partnerships. Moreover, national legislation does not recognize such partnerships even when they were concluded abroad.”

27. Gyeney, Laura. Same sex couples’ right to free movement in light of Member States’ national identities: The legal analysis of the Coman case, *Iustum Aequum Salutare*, Vol. 14, No. 2, 2018, 149–171, [http://ias.jak.ppke.hu/hir/ias/20182sz/11\\_GyeneyL\\_IAS\\_2018\\_2.pdf](http://ias.jak.ppke.hu/hir/ias/20182sz/11_GyeneyL_IAS_2018_2.pdf).

The article provides an analysis of the *Coman* case shortly before the ECJ delivered its judgement. The author notes that the case involves the application of EU law (i.e. the rights of EU citizens to free movement and residence) to a highly sensitive area, namely family law and the definition of marriage, traditionally regulated by Member States. According to the author, the definition of marriage is, undoubtedly, an expression of the national identity of a country. Whatever the ECJ judgement, it would be subject to the crossfire of significant criticism, the author maintained. In such a context, the author suggests that the EU legislator should decide on the issue rather than the Court.

28. Hall, Colten W. Sound the Shofar in Luxembourg: Cross-Border Recognition of Same-Sex Spouses in the European Union and Israel’s Ben Ari v. Director of Population Administration, *Indiana International & Comparative Law Review*, Vol. 28, No. 2, 2018, <https://doi.org/10.18060/7909.0060>.

This is another article discussing the *Coman* case before the ECJ delivered its judgment. The author argues that the ECJ should turn for inspiration to, among other things, the decision by the Israeli Supreme Court acting in its capacity as the High Court of Justice in the *Ben Ari v. Director of Population Administration*. The case could serve as an example for balancing Member States' exclusive competence regarding family law with the obligation to ensure the exercise of fundamental rights of all EU nationals.

29. Romito, Angela Maria. The Rights of same sex couples under European and Italian Law (I), *Bulletin of the Transilvania University of Braşov*, Vol. 11 (60), Special Issue No. 2, 2018, 161–166, [http://webbut.unitbv.ro/bulletin/Series%20VII/2018/TILC/21\\_Romito\\_TILC\\_2018.pdf](http://webbut.unitbv.ro/bulletin/Series%20VII/2018/TILC/21_Romito_TILC_2018.pdf).

"The article aims to illustrate the legal trend on the same sex couple's rights in the European area. Starting with an analysis of the increasing urge of a legal recognition of same sex relations this article will first highlight the rising interest within the European boundaries to guarantee some form of legal protection at the international level in the ECHR system and in the EU legal system as well; secondly it will briefly present the leading cases ruled by the Court of ECHR, the ones ruled by the CJEU, and finally the ones ruled by Italian courts. Hence it will focus on the Italian legal system, and the Cirinnà Bill adopted in 2016. In the conclusion, the article draws some critical concluding remarks regarding the actual outcomes." It also addresses cross-border situations related to the recognition of marriages concluded abroad.

30. Davis, Stuart M. Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU, University of Reading (dissertation), March 2015, <http://centaur.reading.ac.uk/58783/>.

The thesis uses "legal arguments to demonstrate a requirement for recognition of same-sex marriages and registered partnerships between EU Member States." By drawing on the US experience, it demonstrated how in this particular country "the issue of recognition today depends on conflicts of law and its interface with US constitutional freedoms against discrimination." According to the author, legal recognition in the EU also depends on resolving the tension between private international law and rights as set out in higher norms, in this case, the EU Treaties and the European Convention on Human Rights. The author acknowledges, "family law falls only partly within Union competence, that existing EU Directives have had limited success at achieving full equality and that powers to implement new measures have not been used to their full potential." In the author's interpretation, however, the existing "Treaty provisions outlawing discrimination on the grounds of nationality can be interpreted to require recognition in many cases. Treaty citizenship rights can also be interpreted favourably to mandate recognition, once private international law is itself recognised as an obstacle to free movement." Evolving interpretations of the European Convention on Human Rights can also be understood as supporting cross-border recognition of existing relationships.

31. Van den Brink, Martijn. What's in a Name Case? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU, *German Law Journal*, Vol. 17, No. 3, 2016, 421–449, <https://doi.org/10.1017/S2071832200019829>.

"This Article engages the debate over the free movement of same-sex couples and explores what can, and should, be learned from the case law on the recognition of names. These 'name cases' provide valuable lessons for both the proponents and opponents of same-sex marriage recognition. These cases show, first, that Member States are under the presumption to recognize marriages performed in other Member States. This Article also considers the importance of the national and constitutional identities of the Member States and suggests that there remains a possibility that Member States may justify the non-recognition of a marriage or deprive same-sex couples of some of the rights heterosexual married couples benefit from. The Article explores how the EU is confronted with a federal clash of values and offers some suggestions on how to solve this clash."

32. Safradin, Barbara. The 'legal jungle' of same-sex relationship recognition at the national and European level: a comparative constitutional law review, Conference paper bEUcitizen 2015, 2015, <https://beucitizen.eu/publications/the-legal-jungle-of-same-sex-relationship-recognition-at-the-national-and-european-level-a-comparative-constitutional-law-review/>.

"The definition of 'marriage' varies across the European Union (EU). An increasing number of Member States is willing to or is in the process of including same-sex couples under the notion of 'marriage'. Family law in general and the regulation of marriage in particular is something that has remained in the hands of Member States. Although the Union is not competent to harmonise Member States' family laws, general principles such as supremacy and full effectiveness of EU law require national laws to adhere both to the right to the free movement, as well as fundamental rights such as the non-discrimination principle. Since Member States have retained almost full power in the area of family law, significant differences are noticeable; certain States provide for different legal institutions, such as registered partnership or marriage to same-sex couples. At the other end of the spectrum there are Member States that do not provide for any legal recognition. Hence, same-sex couples often face difficulties since the civil status they acquired in one Member State may not be recognized in other States. Moreover, Directive 2004/38 gives the host State the full discretion to define what constitutes a 'family member' under Article 2. Consequently, same-sex couples wishing to move and reside in another Member State may sometimes be denied the full benefits of EU citizenship. This paper focuses on the 'legal jungle' that same-sex couples face when moving and residing from one Member State to another. A comparative constitutional law review will be conducted at the national and European level in order to analyse which obstacles same-sex couples face when invoking their free movement rights in the EU. At the national level, the level of legal recognition of same-sex relationships in Croatia and Italy is explored. The research hereby aims to examine how these – profoundly Catholic – Member States have dealt with citizenship rights of mobile same-sex couples. This paper argues that the recognition of same-sex relationships depends strongly on the interaction between the judiciary and the legislature."

### 3.3. Property and Succession

33. Ruggeri, Lucia; Kunda, Ivana; Winkler, Sandra (eds.). Family Property and Succession in EU Member States: National Reports on the Collected Data, Rijeka, Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, Faculty of Law, 2019, [https://www.euro-family.eu/news-89-psefs e book with national reports from 28 member states](https://www.euro-family.eu/news-89-psefs-e-book-with-national-reports-from-28-member-states).

The publication presents national reports from all 28 EU Member States produced in the course of EU-funded project Personalized Solution in European Family and Succession Law. The collected national reports provide an updated insight into the Member States' legislation concerning issues related to property relations in family and succession. The reports also include information on same-sex partnerships in this context.

34. Peraro, Cinzia. Citizens' Family Life in EU Regulations, with Particular Respect to Property Regimes, Conference paper bEUcitizen 2015, 2015, <https://beucitizen.eu/publications/citizens-family-life-in-eu-regulations-with-particular-respect-to-property-regimes/>.

"European Union law in relation to family life is increasing and developing while continuing to have regard to Member State legislation, social values and traditions. The European perspective is apparent in two proposals for regulations concerning property regimes, two separate acts aimed at considering new forms of union, such as registered partnerships. The Commission has recognised the difficulties encountered by international couples in terms of the management of patrimonial effects and has pursued the objective of ensuring legal certainty. The present paper aims to offer a general analysis of interpretations of the concept of family in Europe, with particular reference to the Italian and English systems. The opinions by the two governments will be examined

in order to put in evidence the main questions arising: the recognition and the continuity of civil status. Indeed, the concept of registered partnership is still a debated issue in Italian society, where not all forms of union are accepted, differently from the United Kingdom, which allows same-sex marriages and where civil partnerships are recognised. The need for uniformity in this field, in law and practice, is also remarked in the CEFL Principles regarding property relations between spouses, as well as in other, non-binding, instruments. Finally, despite the questions surrounding the concept of family, certain benefits are likely to accrue to European citizens as a result of the proposals in terms of the predictability of the applicable law and the recognition and enforcement of decisions on property regimes.”

### 3.4. Adoption

35. Messina, Roberta; D’Amore, Salvatore. Adoption by Lesbians and Gay Men in Europe: Challenges and Barriers on the Journey to Adoption, *Adoption Quarterly*, Vol. 21, No. 2, 2018, 59–81, <https://doi.org/10.1080/10926755.2018.1427641>.

“No psychological research has been done investigating the experiences of adoption by sexual minorities living in Europe. This qualitative study is the first cross-national research within the European context giving the floor to LG (lesbian and gay) adoptive parents in order to explore the main challenges they encountered in the transition to adoptive parenthood. Sixty-two LG adoptive parents (16 lesbians and 46 gay men) living in Belgium (n = 14), France (n = 26), and Spain (n = 22) participated in this study. Semi-structured interviews were conducted in order to gather information about two key steps in the adoptive path: the decision making and the adoption process itself. Results revealed that while choosing to adopt, LG adoptive parents experienced numerous self-doubts and emotional conflicts driven by introjected heteronormative assumptions about family. During the adoption procedure, they were confronted with a large number of challenges and legal roadblocks connected to their sexual minority status. Exploring the experience of the first generation of LG adoptive parents in Europe provides insight into the great impact that the sociolegal context has on their lives. Findings suggest the necessity of promoting practice geared not only to fight discrimination but also to provide better support to LG people throughout the adoption process.” The study also involved international adoptions, and this part of the research indicated that one of the parents had to be formally left out of the procedures to avoid complications.

36. Castillo Ortiz, Pablo José; Medina, Iván. Paths to the recognition of homo-parental adoptive rights in the EU-27: a QCA analysis, *Contemporary Politics*, Vol. 22, No. 1, 2016, 40–56, <https://doi.org/10.1080/13569775.2015.1112955>.

“Although the recognition of the adoptive rights of LGBT (lesbian, gay, bisexual, and transgender) couples is a socially salient topic, cross-national variation regarding this issue has been largely underexplored in social science research. With the aid of configurational analysis, this article fills this gap and shows the conditions that explain the recognition of the adoptive rights of homosexual couples in the countries of the EU-27. It is argued that two different paths led to this outcome. All countries where adoptive rights were recognized had higher degrees of secularisation and lower levels of social homophobia. In addition, in Northern European countries, the Protestant background and absence of conservative governments for a certain time period seemed to be the determinant. However, for the remaining European countries that recognized these rights, rising levels of gender equality appeared to have a more salient role.”

37. De Graeve, Katrien. Queering the family? A multi-layered analysis of relations of inequality in transnational adoption. *Culture, Health & Sexuality*, Volume 16, Issue 6, 2014. <https://doi.org/10.1080/13691058.2014.901562>.

“This paper explores the tensions between the (equal) parental right claims in adopting countries and the global inequalities in class, race and geographical location that shape

transnational adoption. It uses the story told by a Belgian couple who disguised their lesbian relationship from the authorities involved to explore the narratives of child, family and nation that undergird transnational adoption. The paper discusses the potential and limits of the creation of non-traditional families for producing greater equity and significant reinterpretations of kinship and the family script. Moreover, taking into account different layers of both oppression and privilege, it discusses the ethical implications of the (queer) liberal ideologies of parental rights and Western moral superiority that prevail in transnational adoption. It argues for a shift away from the desire to create non-biological and/or non-heterosexual forms of private nuclear kinship through transnational adoption to a more profound and critical re-thinking of the (transnational) care of children, with space and acceptance for profoundly different constellations of care.”

### 3.5. ART/IVF and Surrogacy

38. L’Ifop pour l’Association des Familles Homoparentales (ADFH), *Les LGBT, la famille et la parentalité : état des lieux et perspectives*, Septembre 2018, <https://www.ifop.com/publication/les-lgbt-la-famille-et-la-parentalite-etat-des-lieux-et-perspectives/>

On the publication of an opinion of the National Consultative Ethics Committee (CCNE), particularly on the extension of the PMA to women couples, Ifop publishes a survey that allows for the first time assessment of LGBT parents’ desire for parenthood and their willingness to use medically assisted procreation techniques to have children. Produced by Ifop for the Association of Homoparental Families (ADFH), the study was conducted with a representative national sample of 994 homosexual, bisexual and transgender persons. It does not encompass cross-border issues but is relevant to understand the motives of LGBTI for accessing ART/IVF.

39. Falletti, Elena. LGBTI discrimination and parent–child relationships: cross-border mobility of rainbow families in the European Union. *Family Court Review*, Vol. 52 No. 1, 2014: 28–45. <https://onlinelibrary.wiley.com/doi/abs/10.1111/fcre.12068>.

“One of the most critical issues in the landscape of the member states of the European Union is the recognition in other countries of the parent–child relationship within ‘rainbow’ families. The parenthood of partners of same-sex couples is acknowledged in Spain, Sweden, Denmark, Belgium, and the Netherlands. In other countries laws offer timid and partial protection against discrimination of the children of same-sex couples. In the majority of countries, however, there is still no legislative provision recognizing and protecting a child’s relationship with one of the partners of a same-sex relationship. This legal fragmentation threatens freedom of movement within the European Union and challenges the principle of discrimination between children only on the basis of the sexual orientation of the partners in the family.”

### 3.6. Transgender and Intersex Persons

40. Garland, Jameson; Slokenberga, Santa. Protecting the Rights of Children with Intersex Conditions from Nonconsensual Gender-Conforming Medical Interventions: The View from Europe, *Medical Law Review*, 13 December 2018, <https://doi.org/10.1093/medlaw/fwy039>.

“Nonconsensual gender-conforming interventions on children with intersex conditions have recently come under sharp criticism from human rights authorities within the United Nations, the Council of Europe, and the European Union, which have identified these interventions as violating children’s rights to bodily integrity, privacy, and protection from violence, torture, and degrading treatment. Responding largely to requests for intervention from nongovernmental organisations, these authorities have called upon nations to reform their legal frameworks, both to prevent these rights violations and to

redress them. To date, however, few nations have endeavoured to prohibit nonconsensual gender-conforming procedures on children with intersex conditions, and none have enacted significant reforms of their frameworks to redress rights violations. This particular 'compliance gap' between human rights recommendations and law reform stems from a failure of national legal orders to formally recognize the scope of rights that are threatened by nonconsensual gender-conforming interventions—rights that are well-established as part of states' positive obligations to prevent physical and psychological harm to children. This article, therefore, analyses the nature of the rights at stake and the importance of reporting human rights violations to generate direct calls for reform wherever violations occur. The article further analyses how developments in Europe may have special significance for legal framework reforms—particularly if they facilitate judicial actions against national authorities through the European Convention of Human Rights, which may serve as a model for litigation elsewhere.”

41. Holzer, Lena. Non-binary gender registration models in Europe: Report on third gender marker or no gender marker options, ILGA-Europe, 2018, <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/non-binary-gender-registration-models-europe>.

“The aim of this report is to provide an overview of the different legal gender registration models which somehow cause a break in the static registration of gender as binary, and recognize gender identities as considerably more diverse as is understood under the auspices of the two categories, namely women and men. It focuses on the legalistic and bureaucratic aspects of implementing these models in order to provide a clear picture how states can avoid unintended consequences when introducing non-binary gender categories, or, conversely, no longer registering gender for various purposes. The report provides some stance into how non-binary gender registration models affect the human rights, the well-being and social acceptance of non-binary persons. Yet, in order to obtain further conclusive knowledge regarding this topic, more far-reaching qualitative research is necessary. Since this report serves as a background study for the development of its own policy regarding non-binary gender registration models by ILGA-Europe, it concentrates on possible developments in member states of the Council of Europe (CoE). Nonetheless, it also discusses examples from other regions in order to determine possible best practices and lessons-learned for the European framework.”

42. Van den Brink, Marjolein; Dunne, Peter. Trans and intersex equality rights in Europe – a comparative analysis, Luxembourg, Publications Office of the European Union, 2018, <https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb>.

The European Commission requested the European Equality Law Network to carry out an overview of trans- and intersex equality frameworks across the 28 EU Member States and three additional EFTA states (Iceland, Liechtenstein and Norway). The report is the product of that request. Proceeding through nine substantive chapters, the report analyses whether and how trans- and intersex communities enjoy equality guarantees across the EU and EFTA. The report contains information on the reasons for persons to seek treatment abroad and the information on the financial coverage of treatment abroad.

43. Amnesty International, First, do no harm: Ensuring the rights of children with variations of sex characteristics in Denmark and Germany, Amnesty International, 2017, <https://www.amnesty.org/en/documents/eur01/6086/2017/en/>.

In this report, Amnesty International documents specific human rights violations faced by children and adults with variations of sex characteristics. It focuses specifically on the human rights violations, in particular, the violation of their rights to a private life, to the highest attainable standard of health, to bodily integrity, self-determination and recognition before the law – experienced in the course of non-emergency, invasive and irreversible 'normalising' surgeries and other medical practices, and the failure of the state to protect individuals against these violations. The publication does not contain

information on intersex people in cross-border situations, but it is interesting due to intersection of intersex issues with issues related to children.

44. Council of Europe, Commissioner for Human Rights, Human rights and intersex people: Issue paper published by the Council of Europe Commissioner for Human Rights (Reprinted 2<sup>nd</sup> edition), Strasbourg, Council of Europe, 2017, [https://rm.coe.int/ref/CommDH/IssuePaper\(2015\)1](https://rm.coe.int/ref/CommDH/IssuePaper(2015)1)  
[https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish).

"This issue paper traces the steps which have already been taken towards understanding and responding to the situation of intersex people from an ethical and human rights perspective. It urges governments to end medically unnecessary 'normalising' treatment of intersex people when it takes place without their free and fully informed consent. It also suggests ways forward in terms of protection against discrimination, adequate recognition of sex on official documents and access to justice." Among others, the paper looks into areas of legal recognition of sex and gender, non-discrimination and equal treatment, as well as access to justice and accountability.

45. Degner, Anne; Nomanni, Miriam. Psychiatry in legal gender recognition procedures in Europe: A comparative human rights analysis (Working paper Nr. 11), Berlin, Humboldt Law Clinic Grund- und Menschenrechte, 2017, <http://hlcmr.de/wp-content/uploads/2017/01/Psychiatry-in-legal-gender-recognition-procedures-in-Europe.pdf>.

"The paper first investigates the role of psychiatry in legal gender recognition procedures in 49 European states, including the 47 that are member states of the Council of Europe. The involvement of psychiatry can include expert assessments, 'real-life tests' and supervision for at least 18 months. Of the states examined, 8 do not provide any legal gender recognition procedure at all. In most of the other states, the World Health Organisation's International Classification of Diseases (ICD) diagnosis of 'transsexualism', which it considers a mental and behavioural disorder, is mandatory for legal gender recognition." The paper was produced in cooperation between the Humboldt Law Clinic "Grund- und Menschenrechte" and Transgender Europe. It does not cover cross-border situations, but it has a robust comparative value.

46. Dunne, Peter. Transgender Sterilisation Requirements in Europe, *Medical Law Review*, Vol. 25, No. 4, 2017, 554–581, <https://doi.org/10.1093/medlaw/fwx028>.

"The possibility of individuals procreating post-transition has long staked debates on transgender rights. In 1972, Sweden became the first European jurisdiction to formally acknowledge preferred gender. Under the original Swedish law, applicants for gender recognition were explicitly required to prove an incapacity to reproduce—either through natural infertility or through a positive act of sterilisation. Across the Council of Europe, 20 countries continue to enforce a sterilisation requirement. When considering reforms to their current gender recognition rules as recently as 2015, the Polish executive and the Finnish legislature both rejected proposals to remove mandatory infertility provisions. This article critiques the rationales for transgender sterilisation in Europe. It places transgender reproduction, and non-traditional procreation, in the wider context of European equality and family law. Adopting a highly inter-disciplinary framework, the article explores legal, social, medical, and moral arguments in favour of sterilisation, and exposes the weak intellectual and evidential basis for the current national laws. The article ultimately proposes a new departure for Europe's attitude towards transgender parenting, and argues that sterilisation should not be a pre-condition for legal recognition." However, the article does not cover cross-border issues.

47. Henzel, Lina. Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children, October 2016, Transgender Europe, <https://tgeu.org/children/>.

The publication provides an analysis of the rights of trans children under the UN Convention on the Rights of the Child with a focus on legal gender recognition and education. It is a result of the collaboration between the Humboldt Law Clinic "Grund- und Menschenrechte" and Transgender Europe. The publication does not contain information on transgender people in cross-border situations, but it is notable due to intersection of transgender issues with issues related to children.

48. Köhler, Richard et al. Legal Gender Recognition in Europe: toolkit (2<sup>nd</sup> revised edition), Transgender Europe, 2016, [https://tgeu.org/toolkit\\_legal\\_gender\\_recognition\\_in\\_europe/](https://tgeu.org/toolkit_legal_gender_recognition_in_europe/).

The first part of the publication deals with the elementary aspects of gender recognition legislation as reflecting international and European human rights provisions. It further looks at recent developments in legislation and jurisprudence. The publication also includes a wholly reworked and updated section on jurisprudence with the European case law and a selection of national-level case law. In addition to the Argentinian framework, the gender recognition legislation in Malta is considered as an example of good practice and is discussed in detail. The publication also provides for a refined Checklist on Legal Gender Recognition as a hands-on tool that is useful in assessing any legislation or draft legislation with a view to basic human rights obligations. The report contains a case study on a transgender person who did not succeed to obtain transgender recognition in her home state.

49. Szydowski, Maciej. Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people, *International Journal of Transgenderism*, Vol 17, No. 3-4, October 2016, 199–211, <https://doi.org/10.1080/15532739.2016.1217183>.

"Transgender people worldwide are subject to discrimination and violence. They are either being denied legal rights and thus face marginalisation and increased vulnerability or their recognition is subject to cumbersome legal and medical preconditions that often infringe on the rights to self-determination, privacy, family life, and physical integrity. This article will situate legal gender recognition in the human rights domain as key to the enjoyment of the right to self-determination and explore its role in fulfilling the rights to health and health care. Using examples from European Union members' legal frameworks, the author will argue that any mechanism for legal recognition of transgender identities should not draw on a pathological view of gender variance. Instead, lawmakers should acknowledge the existence of gender diversity within societies and respect the right to self-determination of transgender people, as enshrined in the Yogyakarta Principles (2007), by way of allowing them to self-declare their gender identity without the imposition of any discriminatory preconditions. Free of these requirements, gender recognition will not only assert the right to self-determination but also help transgender people achieve that state of physical, mental, and social well-being necessary for their enjoyment of the highest attainable standard of health."

50. European Union Agency for Fundamental Rights, The fundamental rights situation of intersex people (FRA Focus 04/2015), Luxembourg, Publications Office of the European Union, 2015, <https://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people>.

"This paper examines the legal situation of intersex people from a fundamental rights perspective. It draws on evidence from the Agency's updated legal analysis on homophobia, transphobia, and discrimination on grounds of sexual orientation and gender identity, which now includes a section on intersex issues." The study leaves out cross-border issues but indicates that in the many Member States, a legal representative can consent to sex 'normalising' medical interventions independently of the child's ability to decide.

51. Keuzenkamp, Noah. TGEU's Activist's Guide on Trans People's Rights under EU Law: An Overview of Current EU Law Covering Gender Reassignment, Gender Identity and

Gender Expression, Berlin, Transgender Europe, 2015, <https://tgeu.org/tgeu-guides-eu-law/>.

The guide provides an overview and summary of EU law that is relevant for trans people living, working, visiting or claiming asylum in the EU. It covers the areas of discrimination in employment, discrimination in the access to and provision of goods and services, crime victim's rights, and asylum. It is useful for transgender persons who plan to move to another EU Member State to prepare for potential difficulties.

52. Scherpe, Jens M. (ed.). *The Legal Status of Transsexual and Transgender Persons*, Intersentia, Cambridge, Antwerp, Portland, 2015, <https://www.cambridge.org/core/books/legal-status-of-transsexual-and-transgender-persons/5002EE29EDCD4BEE8123FC899C17AA0D>.

This book is the result of a research project conducted under the auspices of the Centre for Medical Ethics and Law (CMEL) of the University of Hong Kong. This volume comprises not only national reports from more than 14 selected jurisdictions from around the globe but also chapters on medical/psychological and Christian views and a comparative analysis that concludes with concrete recommendations regarding the legal status of transsexual and transgender persons. It does not include focused chapters or detailed information on cross-border aspects of transgenderism.

53. Travis, Mitchell. *Accommodating Intersexuality in European Union Anti-Discrimination Law*, *European Law Journal*, Vol. 21, No. 2, March 2015, 180–199, <https://doi.org/10.1111/eulj.12111>.

"This article considers the relationship between EU anti-discrimination law and intersexuality. Recent changes in German legislation that recognise intersexuality have prompted consideration of sex and gender throughout Europe. This article considers some of the disadvantages in the way the German legislation has been adopted and attempts to remedy them through the existent Recast Directive. The article rejects the current binary approach to sex and gender and recommends a broader interpretation that understands sex as a spectrum or continuum. It concludes that anti-discrimination law may be a more suitable realm for questions of intersex to be raised than mandatory state documentation. Anti-discrimination law is preferable, it is submitted, because it offers individuals an opt-in model, which does not require any medical 'proof'. Similarly, anti-discrimination law offers activists a fluid site of resistance that is not based on medicine or the potential fixity of the birth certificate."

54. Van den Brink, Marjolein; Tigchelaar, Jet. *Gender identity and registration of sex by public authorities*, *European equality law review*, No. 2, 2015, 29–40, <https://www.equalitylaw.eu/downloads/2955-european-equality-law-review-2-2015-pdf-1-338-kb>.

The article first examines the legal history of sex registration in the Netherlands and the current Dutch legal framework. The article then looks at the international level to explore whether international agreements and obligations could restrict national possibilities to change sex registration systems. It then proceeds with an analysis of the relevant developments in five countries, and concludes "with an indication of the expected legal and practical consequences of changing gender registration, by widening the options or abolishing it altogether, and with some short-term possibilities to reduce the burden of the binary gender registration system for trans persons."

55. European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data*, Luxembourg, Publications Office of the European Union, 2014, <https://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>.

"The EU LGBT survey collected information from LGBT persons living in the EU. A total of 93,079 persons who identified themselves as lesbian, gay, bisexual and transgender

participated in this survey. Among these, 6,771 self-identified as transgender. After data cleaning the responses of 6,579 survey respondents were used in the analysis for this report. The main results report includes the total group of 6,771 trans respondents and compares them to the other groups of respondents – lesbian women, gay men, bisexual women and bisexual men. Trans persons' responses, with very few exceptions, indicate the highest levels of discrimination, harassment and violence of all LGBT respondents. This report analyses the trans respondents in more detail, to uncover differences within this very diverse group of respondents."

### 3.7. Asylum

56. ACCEM, La situación de las personas solicitantes de protección internacional y refugiadas LGTBI, 2018, <https://www.accem.es/archivos/libro/files/downloads/Estudio-LGTBi.pdf>.

Historically, studies focusing on sexuality have not enjoyed much attention in the field of social sciences. At the end of the 20<sup>th</sup> century, they began to gain academic relevance due to the impulse exerted by feminist thought and lesbian-gay and queer studies. This study acts as a theoretical background to decipher the existing complications on asylum requests for reasons of sexual orientation and gender identity, understanding that the displacement experienced by LGTBI persons is not only geographical, but it is also cultural. Exploring the context surrounding asylum seekers implies understanding that each cultural context defines normativities and social models around sexuality and corporeity.

57. Ferri; Federico. Assessing Credibility of Asylum Seekers' Statements on Sexual Orientation: Lights and Shadows of the F Judgment, *European Papers*, Vol. 3, No. 2, 2018 (European Forum, Insight of 17 July 2018), 875–884, <http://www.europeanpapers.eu/en/europeanforum/assessing-credibility-of-asylum-seekers-statements-on-sexual-orientation>.

"This case concerns a very sensitive topic, as it relates to the admissibility of an expert's report and projective personality tests to assess the existence of a specific ground upon which international protection can be asked, namely sexual orientation. The Court lays down important criteria in a constant attempt to ensure the respect of the applicant's fundamental rights. The F judgement is likely to give an impetus to a new legal approach on the matter, even if some points of the Court's legal reasoning are not fully convincing."

58. Ammaturo, Francesca Romana. *European Sexual Citizenship Human Rights, Bodies and Identities*, Palgrave Macmillan, 2017.

"This book is an innovative and critical contribution to the study of the human rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people in the context of Europe. Combining legal and Foucauldian approaches, it investigates the ways in which current discourses about LGBTIQ rights in Europe are tightly bound to contemporary debates about national and trans-national citizenship. The author defines and analyses the concept of 'multisexual citizenship' to illustrate new, flexible forms of sexual and gendered citizenship that could radically transform practices of citizenship and the current human rights framework in Europe. She does this by combining critical deconstructions of the case law of the European Court of Human Rights with ethnographic observations and sociological analysis."

59. European Union Agency for Fundamental Rights, Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers, Luxembourg, Publications Office of the European Union, 2017, <https://fra.europa.eu/en/publication/2017/march-monthly-migration-focus-lgbti>.

The report covers: statistics and numbers; assessment of LGBTI asylum claims (collecting evidence regarding claims based on sexual orientation or gender identity,

assessing claims based on sexual orientation or gender identity, guidance and training and interpreters) and reception conditions (measures to ensure safe accommodation, training of reception staff, LGBTI asylum seekers and the hate crime risk, transgender-related healthcare). The report focuses on selected Member States.

60. Gomez, Erin. The Post-ABC Situation of LGB Refugees in Europe, *Emory International Law Review*, Vol. 30, No. 3, 2016, 475–500, <http://law.emory.edu/eilr/content/volume-30/issue-3/comments/post-abc-lgb-refugees-europe.html>.

“This comment discusses the current European legal framework for determining whether sexual minority asylum seekers are credible when they allege their sexual identities. This Comment pays special attention to the European Court of Justice’s most recent ruling on the topic, *A, B and C v. Staatssecretaris van Veiligheid en Justitie (ABC)*, and critiques the Court’s holdings. This Comment then highlights what the author believes to be the three major problems facing sexual minority credibility determinations in Europe: (1) the use of sexually explicit questioning and invasive procedures to determine asylum applicants’ sexualities; (2) the focus on asylum applicants’ homosexual self-identification as opposed to their noncompliance with heterosexual norms; and (3) reliance on stereotypes to determine asylum applicants’ sexualities. This Comment critically considers the English Barrister S. Chelvan’s DSSH Method as a solution to these three problems. This Comment concludes by suggesting a limited version of the DSSH Method, allowing adjudicators a wide range of discretion, a complete end to the use of stereotypes in these determinations, and cultural competency training for adjudicators to aid in LGB asylum determinations.”

61. Spijkerboer, Thomas; Jansen, Sabine. Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU, Vrije Universiteit Amsterdam, September 2011, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2097783](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097783).

The report notes some positive steps undertaken by the EU and its Member States concerning LGBTI persons in the context of international protection (e.g. recognising sexual orientation as a persecution ground in Article 10 of the Qualification Directive, or explicitly adding gender identity as a persecution ground in their national legislation (Portugal, Spain) or policy documents (Austria, the UK). It, however, indicates notable differences among the Member States when processing LGBTI asylum applications, a highly problematic issue as the EU strives for a Common European Asylum System. The study further highlights the fact that European practice lags behind the standards prescribed in international and European human rights and refugee law. According to the study, “European practice clearly shows that national authorities in many instances rely on stereotypes when examining LGBTI asylum applications.” “On a regular basis, LGBTI asylum seekers are returned to their country of origin because they purportedly can prevent persecution by concealing their identity,” the study also alleges. As regards trans individuals, they are not granted asylum although serious violations of their rights occur in many parts of the world.

### 3.8. Theoretical Perspectives on Policy Changes Concerning LGBTI

62. Howard, Erica. EU anti-discrimination law: Has the CJEU stopped moving forward?, *International Journal of Discrimination and the Law*, Vol. 18, No. 2-3, 2018, 60–81, <https://doi.org/10.1177/1358229118788454>.

“This article analyses the protection which two European Union (EU) Directives, adopted in 2000, provide against discrimination on the grounds of racial and ethnic origin, religion or belief, disability, age and sexual orientation. This protection is not the same for all these grounds, and this has led to what is often referred to in the literature as a hierarchy of discrimination grounds. The article examines these differences in protection against discrimination and the reasons for them and includes an analysis of the influence of the case law of the Court of Justice of the European Union (CJEU) on the development of this area of law. The argument in this article is that the CJEU has generally given a

purposive and expansive interpretation to the provisions and has expanded the protection against discrimination in many cases, but three recent cases seem to form an exception to this. Possible reasons for this recent reticence are given.”

63. Mulder, Jule. Dignity or discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?, *Journal of Social Welfare and Family Law*, Vol. 40, No. 1, 2018, 129–144, <https://doi.org/10.1080/09649069.2017.1414430>.

“The article analyses possibilities for the Court of Justice of the EU to go beyond its current narrow approach towards same-sex couples’ rights within the EU non-discrimination law framework, considering a comparative treatment of dignity-based arguments. It critically reviews the CJEU’s current approach exclusively focusing on direct discrimination and the comparator paradigm. By doing so, the Court has tolerated a situation of de facto discrimination and limited advancement of same-sex rights. The question is then whether the situation could be overcome if the CJEU would follow other courts and develop reasoning based on dignity to underpin the EU non-discrimination analysis with substantive meaning. The article rejects this proposition. Dignity is not suitable because it is both too wide and too narrow to ensure certainty and substantive protection within EU non-discrimination law. While the concept of dignity protects a minimum standard and can provide a floor of rights, non-discrimination law fosters equality by imposing procedural standards and challenging measures that affect groups differently. The concepts should thus not be conflated. Instead, a consistent application of the concepts of direct and indirect discrimination seems more promising.”

64. Schönplugg, Karin et al. If Queers were Counted: An Inquiry into European Socioeconomic Data on LGB(TI)Qs, *Feminist Economics*, Vol. 24, No. 4, 2018, 1–30, <https://doi.org/10.1080/13545701.2018.1508877>.

“This article is engaged with the public availability, provision, and quality of large-scale data on the socioeconomic standing of lesbian, gay, bisexual, transgender, intersex, and queer persons (LGB[TI]Qs) in Europe. While large-scale data on LGB(TI)Qs are a potentially powerful foundation for public discourse and policymaking, their use and sufficiency are highly contested among researchers, activists, and statistical bodies. Analyzing data provided by official national and European statistics institutes, this article describes the inclusion of sexual orientation in the data-generation and reporting processes in thirty European countries and discusses how legal and social acknowledgment make LGB(TI)Qs in/visible in socioeconomic statistics. The article therefore examines if and how LGB(TI)Qs are being ‘counted’ and, importantly, what it means ‘if queers are counted’.”

65. Siegel, Scott; Wang, Yiqian Alice. Broken rainbows: the partisan politics of marriage equality in Europe, *European Politics and Society*, Vol. 19, No. 4, 2018, <https://doi.org/10.1080/23745118.2018.1429195>.

The authors note that “a growing number of European governments have legalized same-sex civil unions (SSU) and same-sex marriage (SSM) in the past two decades, others have moved in the opposite direction by stalling partnership legislation or adopting constitutional amendments defining marriage as a heterosexual institution.” According to them, a limited number of studies exists that have examined the effects of party politics on partnership laws, and such studies stress the positive influence of left-wing parties. By revisiting the issue, the authors suggest that rather than on governments’ traditional left-wing/right-wing positioning, legalisation of such partnerships depends on their preferences for ‘traditional’ versus ‘self-expression’ values. They employ event history analysis to reveal, “that governments favouring postmaterialist, self-expression values are more likely to legalize SSU/SSM, irrespective of where they are situated on the conventional left/right spectrum”. Apart from this, their findings indicate the importance of political ideology for the advancement of LGBT rights in Europe, and not just social movements or public opinion.

66. Bell, Mark. Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI People, 2017, Luxembourg: Publications Office of the European Union, [https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=45790](https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45790).

This report focuses, among other things, on the existing legal framework for collecting data on LGBTI persons in the EU Member States, maps existing sources of data, and looks at methods of current data collecting and challenges in collecting LGBTI-related data. The report was completed within an EU-funded project (<https://www.humanconsultancy.com/projects/equality-data-collection-in-the-eu>). The main findings of the report are, among others, that there are needs to enhance the use of existing data, ensure comparability of various sources, conduct more surveys that will be equality and non-discrimination specific, support stakeholders to collect equality data and enhance the acceptance of data collection for equality and non-discrimination purposes by explaining that the collection of sensitive data is protected. The report, a part of a comparative review of equality data collection practices across the 28 EU Member States, is based on the input by national experts who completed a questionnaire concerning national data collection practices, including a section on LGBTI-related data.

67. Hildebrandt, Achim et al. Sooner or later: the influence of public opinion and religiosity on the enactment of laws recognizing same-sex unions, *Journal of European Public Policy*, Vol. 24, No. 8, 2017, 1191–1210, <https://doi.org/10.1080/13501763.2016.1228693>.

“Starting in the 1990s, almost all Western democracies recognized same-sex partnerships within just over two decades. This study examines which factors accelerated or decelerated these legal changes. It focuses on the effects of several facets of culture: attitudes towards homosexuality in general; attitudes towards gays and lesbians as people; and religiosity. An event history analysis of 19 Western countries shows that the less tolerant people are of gays and lesbians and the greater a country’s percentage of regular attendees of religious services, the longer the time until a same-sex union law is introduced. The results provide new insights into policy effects of culture and point out the importance of distinguishing between the various elements of public opinion.”

68. Kuhar, Roman; Paternotte, David (eds.). *Anti-Gender Campaigns in Europe: Mobilizing against Equality*, London, New York, Rowman & Littlefield International, 2017.

“After decades of steady progress in terms of gender and sexual rights, several parts of Europe are facing new waves of resistance to a so-called ‘gender ideology’ or ‘gender theory’. Opposition to progressive gender equality is manifested in challenges to marriage equality, abortion, reproductive technologies, gender mainstreaming, sex education, sexual liberalism, transgender rights, anti-discrimination policies and even to the notion of gender itself. This book examines how an academic concept of gender, when translated by religious organisations such as the Roman Catholic Church, can become a mobilizing tool for, and the target of, social movements. How can we explain religious discourses about sex difference turning into massive street demonstrations? How do forms of organisation and protest travel across borders? Who are the actors behind these movements? This collection is a transnational and comparative attempt to better understand anti-gender mobilisations in Europe. It focuses on national manifestations in eleven European countries, including Russia, from massive street protests to forms of resistance such as email bombarding and street vigils. It examines the intersection of religious politics with rising populism and nationalistic anxieties in contemporary Europe.”

69. Ayoub, Phillip M. *When States Come Out: Europe’s Sexual Minorities and the Politics of Visibility*, Cambridge, Cambridge University Press, 2016.

“In the last two decades, the LGBT movement has gained momentum that is arguably unprecedented in speed and suddenness when compared to other human rights movements. This book investigates the recent history of this transnational movement in

Europe, focusing on the diffusion of the norms it champions and the overarching question of why, despite similar international pressures, the trajectories of socio-legal recognition for LGBT minorities are so different across states. The book makes the case that a politics of visibility has engendered the interactions between movements and states that empower marginalized people, mobilizing actors to demand change, influencing the spread of new legal standards, and weaving new ideas into the fabrics of societies. It documents how this process of 'coming out' empowers marginalized social groups by moving them to the centre of political debate and public recognition and making it possible for them to obtain rights to which they have due claim."

70. Fichera, Massimo. Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape, *German Law Journal*, Vol. 17, No. 3, 2016, 383–420, <https://doi.org/10.1017/S2071832200019817>.

"This article has a twofold aim. First, it focuses on a particular case study, which has attracted the interest of several scholars from an interdisciplinary perspective: the legalisation of same-sex marriage. The Article aims to show how changes in one specific socio-cultural landscape may spill into other contexts as a result of a ripple effect. The idea is to demonstrate how the emergence of a social fact—the increasing demands made by homosexual couples for their union to be recognized in one way or another—may make the process of institutionalisation natural. A legal system may sometimes be bound to recognize social facts, and transnational law may enhance this phenomenon. The second aim of the Article is to claim is that, when analysing change, legal deterministic theories should be dismissed, as they are based upon easy assumptions that do not correspond to empirical observations. Instead, as shown by constructivist approaches, the combined effect of structure and agency in some specific circumstances contributes to social and legal change. However, constructivists perhaps underestimate the relevance of unpredictable events and the (positive or negative) influence that transnational frameworks may have in forming discourses of power. In particular, the EU and the ECtHR systems may facilitate the diffusion of ideas and norms deriving directly from the liberal paradigm that inspire them. However, the liberal paradigm is contradictory, as it does not necessarily provide an incentive for change."

71. Hildebrandt, Achim. Who's in favour? Same-sex union laws in parliament, *The Journal of Legislative Studies*, Vol. 22, No. 3, 2016, 404–423, <https://doi.org/10.1080/13572334.2016.1202649>.

"The article analyses which parties support registered partnership and same-sex marriage bills in parliament in Western Europe. Existing comparative research indicates that left parties back same-sex union laws. This article shows that support is not limited to the left camp. Liberal and even Christian democratic parties have expressed above-average support as well, albeit with certain exceptions. The chief opponents of same-sex union laws are Protestant parties and the parties of the far right; in terms of numbers, however, both are largely insignificant. Far more relevant for these laws' chances of success are the positions of the large parties at the centre and at the right of the political spectrum. The analysis reveals considerable inter-country differences in these parties' attitudes, which can be explained to a large extent with the two-worlds-of-morality-politics distinction introduced by Engeli, Green-Pedersen and Larsen: countries in which centre and right parties continue to oppose same-sex union laws are part of the religious world, with the exception of France. The results for France indicate a need for further research."

72. Ragone, Sabrina; Volpe, Valentina. An Emerging Right to a "Gay" Family Life? The Case *Oliari v. Italy* in a Comparative Perspective, *German Law Journal*, Vol. 17, No. 3, 2016, 451–485, <https://doi.org/10.1017/S2071832200019830>.

"This Article analyses, through the lens of comparative law, the *Oliari and others v. Italy* judgment, which was issued by the European Court of Human Rights (ECtHR) in July 2015. The *Oliari* case is important for being the first judgment in which the ECtHR

established the granting of legal 'recognition and protection' to same-sex couples as a positive obligation for the Member States of the Council of Europe on the basis of Article 8 of the European Convention on Human Rights. In order to understand the role of judicial bodies in the progressive protection of homosexual rights, this Article combines an analysis of European case law with the national perspective. As it concerns the supranational facet, the authors illustrate *Oliari's* reasoning and situate the case in the jurisprudence of the ECtHR. Elements of both continuity and innovation emerge from the analysis, as well as a relevant dimension of judicial dialogue supporting the incremental recognition of gay rights in Europe. As it concerns the national facet, this specific case was initially dealt with at the domestic level and was the object of judgment 138/2010 by the Italian Constitutional Court. The judgment is critically put into perspective through the examination of the jurisprudence of other European Constitutional Courts (France, Portugal and Spain) that were called on to decide similar cases in the same period. Therefore, the Article offers a comparative analysis of the *Oliari* judgment clarifying its relevance and speculating on the potential value of this case for the future recognition of the right to a 'gay' family life in Europe."

73. Ayoub, Phillip M. Contested norms in new-adopter states: International determinants of LGBT rights legislation, *European Journal of International Relations*, Vol. 21, No. 2, June 2015, <https://journals.sagepub.com/doi/full/10.1177/1354066114543335>.

"This article is concerned with the question of why lesbian, gay, bisexual, and trans (LGBT) rights legislation is introduced at higher levels in some cases and less so in others. To address this puzzle, the article analyses changes in LGBT rights legislation across European Union (EU) member states between 1970 and 2009. It focuses on the diffusion of five different categories of such legislation (anti-discrimination, criminal law, partnership, parenting rights, and equal sexual offenses provisions) to new EU member states in Central and Eastern Europe, compared with diffusion patterns in older EU member states." According to the author, "new-adopter states are more dependent on international resources for making new issues visible and are more inclined to see policy adoption as a means to gain external legitimacy and improve reputation. The analysis reveals that the transnational embeddedness of a state's LGBT advocacy organisations is a powerful statistical explanation for successful policy diffusion to new EU member states, alongside international channels that lead to LGBT visibility among society and state authorities. In addition to lending cross-national, empirical reinforcement to some of the theoretical expectations regarding the international sources of diffusion, the results suggest variability in the determinants of LGBT policy adoption between the 15 old and 12 new EU states. Domestic factors, particularly economic modernisation, are more relevant for policy adoption in the older member states, whereas the newer member states display greater dependence on transnational actors and are more influenced by international channels."

74. European Union Agency for Fundamental Rights, *EU LGBT survey: European Union lesbian, gay, bisexual and transgender survey: Main results*, Luxembourg, Publications Office of the European Union, 2014, <https://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main>.

"The survey results provide valuable evidence of how LGBT persons in the EU and the then accessing country, Croatia, experience bias-motivated discrimination, violence and harassment in different areas of life, including employment, education, healthcare, housing and other services. The findings show that many hide their identity or avoid locations because of fear. Others experience discrimination and even violence for being LGBT. Most, however, do not report such incidents to the police or any other relevant authority. By analysing the survey results, this report will assist the EU institutions and Member States in identifying the fundamental rights challenges facing LGBT people living in the EU and Croatia. It can thereby support the development of effective and targeted European and national legal and policy responses to address the needs of LGBT persons and ensure the protection of their fundamental rights."

#### 4. ANALYSIS: OVERVIEW OF STUDIES' FINDINGS

The studies listed in the previous section were published by specialised scholars and academics from various scientific fields, as well as by international organisations that regularly produce reports and updates relevant for this project. These organisations are:

- European Commission against Racism and Intolerance at the Council of Europe – ECRI (<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/country-monitoring>). In their fifth and sixth monitoring cycles, ECRI strengthened monitoring on LGBTI issues;
- European network of legal experts in gender equality and non-discrimination (<https://www.equalitylaw.eu>);
- European Union Agency for Fundamental Rights (FRA) (<https://fra.europa.eu/en/theme/lgbti>);
- ILGA Europe (<https://www.ilga-europe.org/>);
- NELFA – Network of European LGBTIQ\* Families Associations (<http://nelfa.org>);
- OII Europe – Organisation Intersex International Europe (<https://oiieurope.org>);
- Transgender Europe (<https://tgeu.org>).

The main findings of the studies identified are as follows. On the national level, the information on most of the listed issues related to this LGBTI mapping study are available, namely access to same-sex marriage or partnership, property and succession rights, access to ART/IVF, surrogacy and adoption, immigration and asylum, access to intersex status or gender reassignment and legal gender recognition procedures. Interactive maps, charts and country reports are regularly updated with comparative information on the national legislation and practice concerning the access of LGBTI persons to rights for all EU Member States. There are several reports on how the right to non-discrimination based on sexual orientation is ensured throughout the EU.<sup>2</sup> For most of the listed issues, it is possible to determine the current state of affairs and the challenges in the individual EU Member States.

This mapping report, however, does not focus on the domestic aspect of LGBTI equality, and their availability on the national level, and does not cover the situation of LGBTI persons who are EU nationals but do not exercise their free movement rights. Instead, it focuses on the access to rights by LGBTI persons who are in cross-border situations. It explores what happens when LGBTI persons start exercising their free movement rights enshrined in the EU legislation, when they transit borders, move abroad and, based on that, invoke their rights.

Since the regulation of most of the fields covered by this study (e.g. marriage or partnership registration, adoption, IVF/ART, surrogacy, gender reassignment and legal gender recognition, treatment of intersex persons, etc.) are not within the competence of the EU, studies show that the situations, regulations and options available to the LGBTI persons differ significantly from one EU Member State to another. Consequently, studies find that, when individuals enter into a same-sex marriage or conclude a registered partnership in their home state and then move to another Member State (i.e. host state) where the legal situation is different, difficulties arise. Similarly, people whose home states do not provide for same-sex marriage or registered partnership and therefore travel to jurisdictions where these options are available and make use of them, may find that, upon returning to their home state, their civil status might not be recognised. Further, studies warn that people may adopt children or become legal parents through surrogacy in another EU Member State, and then present their administrative or court decisions and birth certificates to the authorities of their home states, not knowing whether they would be recognised or not. Also, LGBTI persons might move abroad and

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<sup>2</sup> E.g. Marco Cellini, *The Right to Non-Discrimination on the Ground of Sexual Orientation: An Analysis of the EU Law and the Jurisprudence of European Court of Justice*, Rome, Consiglio Nazionale delle Ricerche – Istituto di Ricerche sulla Popolazione e le Politiche Sociali, IRPPS Working papers n. 81/2015.

benefit from either gender reassignment procedure, from legal gender recognition or from being recognised in a non-binary gender category, not knowing whether this new gender-related status will be recognised as such upon their return.

A question remains whether non-recognition of various legal statuses of LGBTI persons breaches EU law. This question has been addressed by researchers only to a limited extent about certain statuses, such as family filiations,<sup>3</sup> while there are no final answers yet with regard to other issues, particularly those in the realm of parentage, intersex and gender reassignment or legal gender recognition related statuses.

Some fields covered by this study, however, do fall within the competence of EU law. These are, for instance, the right of EU nationals to have their family members recognised as such for the purposes of issuing residence cards, and the right of third-country nationals to seek international protection in the EU. In these fields, as research shows, it is not the legal regulation that causes uncertainty, but different implementations of EU law in practice.

To learn to what extent these questions have already been addressed by researchers, this mapping of studies has been undertaken. In total, 74 relevant studies have been identified concerning all the fields covered by this study. The topic most analysed is the recognition of same-sex marriage or partnership entered into in another EU Member State. A general observation is that studies and findings are scattered, incomplete with regard to either topic or geography, and unsystematic. Consequently, there are a number of research gaps that have the potential for further studies that could provide knowledge based on which new measures could be designed to address discrimination faced by LGBTI persons in various areas throughout the EU.<sup>4</sup>

This essay summarises the main findings extracted from the listed studies. It also identifies the needs and potential topics for further research, data collection and analysis.

A finding common to all topics targeted by this study relates to the recognition of documents. Recognition of documents concerns marital or partnership status, recognition of birth certificates, recognition of change of the legal gender, and documents recognising parental rights to LGBTI couples obtained either by law (*ex lege*), an administrative decision or a court (judicial) decision. What is generally missing in the existing sources is comprehensive and comparable information from all EU Member States on administrative and judicial practice in the field of recognition of any kind of foreign judicial or administrative decisions or documents attesting a person's legal status and relationship with others. In this context, the research points out that the Regulation (EU) 2016/1191 on simplifying the circulation of public documents in the European Union and amending Regulation (EU) No 1024/2012<sup>5</sup> solely relates to the authenticity of the documents and not to their legal recognition.<sup>6</sup>

Private international law (PIL) norms are often applied in decision-making processes concerning the rights and legal interests of LGBTI persons in cross-border situations. Whilst the EU PIL rules are gender-neutral, at the national level, some PIL statutes explicitly mention how LGBTI persons or same-sex couples should be treated pursuant to

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<sup>3</sup> Alina Tryfonidou, *EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?*, *Yearbook of European Law*, 2019, 1–47.

<sup>4</sup> Achim Hildebrandt et al., *Sooner or later: the influence of public opinion and religiosity on the enactment of laws recognizing same-sex unions*, *Journal of European Public Policy*, Vol. 24, No. 8, 2017, 1191–1210; Nigel Sherriff, Laetitia Zeeman et al. *Co-producing knowledge of lesbian, gay, bisexual, trans and intersex (LGBTI) health-care inequalities via rapid reviews of grey literature in 27 EU Member States*, *Health Expectations: An International Journal of Public Participation in Health Care & Health Policy*, 22 Jun 2019 (Special issue paper).

<sup>5</sup> Full name: Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

<sup>6</sup> Isabelle Rein-Lescastereyres: *Recent Case Law on Cross-Border Surrogacy*. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 140.

PIL rules,<sup>7</sup> while in other countries general PIL rules apply. To map the methodologies that PIL statutes take, an EU-wide comprehensive and comparative study would be needed. Such study would also contribute toward understanding the current situation in various jurisdictions and the manners in which the courts and the administrative bodies apply PIL in cases concerning LGBTI and same-sex couples. Such analysis would be useful also from the perspective of identifying the role which PIL rules could play, in particular in relation to novel issues that did not exist when PIL rules were created – issues such as the ART/IVF, cross-border adoption and cross-border surrogacy – and whether in that context amendments to those rules could be necessary.

In the remainder of this section, specific findings for each of the fields covered by this report are presented.

#### 4.1. Marriage/Partnership Recognition

In the EU, family law belongs to the national competence including the conditions for marriage/partnership. However, as studies point out, EU law has already had an impact on strengthening the protection of LGBTI couples in cross-border situations. Namely, both the Free Movement Directive 2004/38/EC and Family Reunification Directive 2003/86/EC recognise same-sex spouses, registered partners and cohabiting partners as family members, provided they meet the required conditions that are unrelated to sexual orientation or gender identity. Research shows that the option of being recognised as a family member necessarily brings spillover effects from countries with a higher level of protection of LGBTI persons to countries with a lower level of protection.

To set the ground for further analysis in this field first, gathering of data is required on how many same-sex couples exist in the EU, what kind of relationship statuses they have, and which relationship recognition options they would prefer. Since several countries do not provide for the option of partnership recognition, a study is needed on how the (lack of) availability of legal recognition influences their life choices, including on moving abroad.

On the EU law level, several studies have been identified that examine the developments in the field of status recognition. Substantial research and analysis exist in the field of recognition of marital and partnership status obtained in one EU Member State after moving to another EU Member State.<sup>8</sup> This is also a consequence of the delivery of the first judgment of the European Court of Human Rights (ECtHR) on this topic, in the case *Orlandi and Others v. Italy*.<sup>9</sup> The case concerned a complaint by six same-sex couples that had been unable to have their marriages, which they had contracted abroad, formally recognised in Italy. They claimed, among other things, discrimination on the

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<sup>7</sup> For Czech Republic see Suzana Kraljić, Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation? In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 71.

<sup>8</sup> See, for example, Manuela Naldini, Joëlle Long, Geographies of Families in The European Union: A Legal and Social Policy Analysis, *International Journal of Law, Policy and the Family*, Vol. 31, No. 1, April 2017, 94–113, p. 103; Scott Titshaw, Same-Sex Spouses Lost in Translation? How to Interpret ‘Spouse’ in the E.U. Family Migration Directives, *Boston University International Law Journal*, Vol. 34, 1 January 2016, 45–112; Neža Kogovšek Šalamon, Prihodnost temeljnih pravic v Evropski uniji: Primer svobode gibanja mavričnih družin [The Future of Fundamental Rights in Europe: The Case of Freedom of Movement in the European Union], *Delavci in delodajalci*, Vol. 15, No. 1, 2015, 7–32; Barbara Safradin, The ‘legal jungle’ of same-sex relationship recognition at the national and European level: a comparative constitutional law review, Conference paper bEUcitizen 2015; Nelleke Renate Koffeman, Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships, Intersentia, Cambridge, November 2015 (dissertation); Neža Kogovšek Šalamon: LGBT People as Refugees and Immigration Rights. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 220 and onwards.

<sup>9</sup> ECtHR, Application nos. 18766/11 and 36030/11, Judgment of 14 December 2017. See also Claire Poppelwell-Scevak: Oliari, Orlandi and Homophobic Dissenting Opinions: The Strasbourg Approach to the recognition of same-sex marriages, 2 August 2018; Angela Maria Romito, The Rights of same sex couples under European and Italian Law (I), *Bulletin of the Transilvania University of Braşov*, Vol. 11 (60), Special Issue No. 2, 2018, 161–166, p. 164.

grounds of their sexual orientation. The ECtHR noted that while states had a broad discretion on whether to allow or register same-sex marriages or not, it found there had been a violation of the spouses' rights.

Even more importantly for the EU, the Court of Justice of the European Union (CJEU) adjudicated in *Coman and Others v. Romania*<sup>10</sup> that the term "spouse" within the meaning of the Free Movement Directive is gender-neutral and may, therefore, cover same-sex spouses of EU citizens for the purpose of granting a right of residence. The case has been widely commented upon by authors exploring its implications and significance for the advancement of LGBT equality.<sup>11</sup>

As Tryfonidou interprets the judgment, the principal implication of the case is the ruling's message that EU Member States must recognise same-sex marriages contracted in the other EU Member States, even though this is only limited to cross-border situations, i.e. where a Union citizen moves between the Member States and claims family reunification rights under EU law.<sup>12</sup> Further, the *Coman* judgment seems to imply that "same-sex marriages [performed abroad] must now be recognised for all EU law purposes".<sup>13</sup> The Court did not completely follow the example of the US Supreme Court in *Obergefell v. Hodges*<sup>14</sup> because the EU does not have the competence to require the EU Member States to open up marriage for same-sex couples in their respective territories. Studies illustrate that the CJEU does not push for the Member States to introduce any form of legal recognition of same-sex relationships. The reason for this, as studies stress, can be found in Recital 22 of the Preamble in Directive 2000/78/EC, which explicitly excludes EU competence on national laws on marital status and the benefits dependent on them. Howard notes that the Commission's proposal extending the protection against discrimination provided beyond employment (COM (2008) 426) follows the same logic.<sup>15</sup> Researchers have yet to address an issue of reversed discrimination caused by the fact that those who concluded marriage abroad are in a better position than those who remained in their home country where same-sex marriage is not allowed. Spalding also indicates that, as a consequence of *Coman*, EU migration laws will need to be adapted to better suit a wider range of relationships than marriage.<sup>16</sup>

Following the judgment in the *Coman* case, it is now clear that the term "spouse" in the Free Movement Directive should cover same-sex spouses as well. However, this does not mean that this is also the case in practice – it remains to be explored by researchers how individual Member States are recognizing marriages or partnerships concluded abroad, which approaches they take, which dilemmas they face and what the issues are that the partners going through these processes encounter.

A need exists for a comprehensive and comparable EU-wide study on law and practice on which marital/partnership statuses are recognised where,<sup>17</sup> and on possible differences

<sup>10</sup> CJEU, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, judgment of 5 June 2018.

<sup>11</sup> E.g. Alina Tryfonidou, *An analysis of the ECJ ruling in Case C-673/16 Coman – The right of same-sex spouses under EU law to move freely between EU Member States*, NELFA, 2019; Jorrit J. Rijpma, *You Gotta Let Love Move*, ECJ 5 June 2018, Case C-673/16, *Coman*, Hamilton, *Accept v Inspectoratul General pentru Imigrări*, *European Constitutional Law Review*, 2019, 1–16; Laura Gyeney, *Same sex couples' right to free movement in light of Member States' national identities: The legal analysis of the Coman case*, *Iustum Aequum Salutare*, Vol. 14, No. 2, 2018, 149–171; Colten W. Hall, *Sound the Shofar in Luxembourg: Cross-Border Recognition of Same-Sex Spouses in the European Union and Israel's Ben Ari v. Director of Population Administration*, *Indiana International & Comparative Law Review*, Vol. 28, No. 2, 2018; Alina Tryfonidou, *The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses"*: Case C-673/16, *Relu Adrian Coman*, Robert Clabourn Hamilton, *Asociația Accept v Inspectoratul General pentru Imigrări*, *Ministerul Afacerilor Interne*, *Feminist Legal Studies*, 2019.

<sup>12</sup> Alina Tryfonidou, *An analysis of the ECJ ruling in Case C-673/16 Coman – The right of same-sex spouses under EU law to move freely between EU Member States*, NELFA, 2019, p. 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), at 23 (U.S. June 26, 2015).

<sup>15</sup> Erica Howard, *EU anti-discrimination law: Has the CJEU stopped moving forward?*, *International Journal of Discrimination and the Law*, Vol. 18, No. 2-3, 2018, 60–81.

<sup>16</sup> Amanda Spalding, *Where Next After Coman?*, *European Journal of Migration & Law*, Vol. 21, No. 1, 2019, 117–139.

<sup>17</sup> Now this specific information can only be found for individual countries. For Croatia see, for example, Suzana Kraljić, *Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation?*. In: Katharina Boele-Woelki and

between recognition of spouses, registered partners or cohabiting (life) partners. A study is also needed on which set of rights derives from the recognised marital/partnership status – the one enjoyed in the country of marriage or the one provided for in the country of status recognition. Specifically, there is a lack of information on practices in receiving states in the field of recognising cohabiting same-sex partners as beneficiaries of the Free Movement Directive and whether these practices differ from practices related to the recognition of cohabiting opposite-sex partners as family members.

Also, there is a need for analysis on how many Member States follow the *Coman* decision and how many of them now have a reverse discrimination regime after *Coman*, i.e. a regime in which they in fact (in their case law) or in law (by amending their statutes) recognise the legal status of same-sex spouses who entered marriage abroad, but they themselves do not provide for same-sex marriage.

Further research would be required on whether a difference exists between law and practice concerning the recognition of same-sex marriage or partnership and whether the states' authorities are hindering couples from accessing same-sex marriage abroad by refusing to provide the necessary documents. Some research reports indicate that in some EU Member States such practices occur.<sup>18</sup>

Currently, only a limited amount of information exists in the field. As one ongoing study's preliminary findings have demonstrated, there is generally a significant diversity in status recognition methodologies among the Member States. In some Member States, the stated ECJ/ECtHR decisions hardly had any influence, even in areas of law directly affected (e.g. in France regarding EU law, Hungary in general). In others, this case law triggered changes in legislation (e.g. in Germany, Belgium) or influenced the adoption of new acts in the field of private international law (e.g. in Croatia). The reactions of national courts to the case law have been different according to this study: some abide by their national rule of law principles (in France); some use the EU or ECtHR case law as a legal basis for recognition of foreign status while the national law does not provide for such option (e.g. in Austria, Italy). While in some Member States a valid status registration abroad suffices to achieve the acceptance of such status, others rely on the law that would have been applicable from their perspective to establish the status (in Spain, France). The third group of countries re-examines the law applicable from the perspective of the foreign registry (Germany).<sup>19</sup>

Some of the studies that address legal recognition of same-sex marriages stress that some countries (e.g. some Nordic states) which provide for gender-neutral marriage do not allow two foreigners to marry if same-sex marriage is not possible in their home state.<sup>20</sup> This rule aims to avoid "limping marriages", as Anderson explains.<sup>21</sup> Researchers are yet to explore whether and to what extent this changed with the effects of the *Coman* case.

Anderson also points out that in some countries with large minority populations and the option of same-sex marriage, same-sex couples of ethnic minority status face specific

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Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 66.

<sup>18</sup> Karsay, Dodo, *Protecting LGBTIQI rights in Europe: Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5)*, 2018, ILGA-Europe, Transgender Europe, OII Europe; Hristo Hristev, Denitsa Lyubenova, Liliya Dragoeva, *Free movement of European Union citizens – rights and challenges to same-sex families in the republic of Bulgaria*, Center for the study of democracy, Youth LGBT Organisation Deystvie, 2019, p. 65.

<sup>19</sup> These are preliminary findings of an on-going project titled »Recognition of Status in the EU: A Comparative Study on the Cross-border Recognition of Legal Situations Following the ECJ /ECtHR Case Law«, coordinated by Dr. Susanne Lilian Gössl, LL.M. (Tulane) and Dr. Martina Melcher, M.Jur. (Oxon).

<sup>20</sup> Ingrid Lund-Anderson: *Northern Europe: Same-Sex Relationships and Family Law*, In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 10.

<sup>21</sup> *Ibid.*

challenges.<sup>22</sup> However, no studies have been identified which would examine any specificities that might be experienced by same-sex couples of ethnic or religious minority origin who are in a cross-border situation.

Very few comprehensive sources exist on the issues of taxation, inheritance, employment benefits and pension deriving from a recognised marriage or partnership concluded abroad. One of the possible reasons is that the treatment of LGBTI persons in these fields very much depends on whether or not their marital or partnership status is recognised. Once it is recognised, legally the persons concerned should not encounter problems depending on their legal status, at least in principle if not in practice. Hence, the implementation issues would be worthwhile exploring in the future.

Also, some other issues relevant for cross-border movement of LGBTI persons and their family members were not as thoroughly addressed by researchers as the recognition of marriage or partnership. These issues are property and succession, parental rights obtained following IVF/ART, adoption, surrogacy, asylum, transgender and intersex. In these fields, only a few individual legal and sociological<sup>23</sup> studies can be identified with a limited geographical or topical scope. In the following sections, the main findings of these studies are discussed.

#### **4.2. Property and Succession**

At the end of marriage or partnership, be it a result of death of one of the partners or divorce/separation, the questions related to joint property arise. On the EU level, the issues related to property regimes are regulated by Regulations 2016/1103 (on matrimonial property regimes) and 2016/1104 (on property regimes of registered partnerships) for international couples. The latter were adopted in enhanced cooperation because of the questions concerning same-sex partnerships and currently apply in 18 Member States. Few studies specifically address the problem of same-sex couples in cross-border situations managing their property regimes.<sup>24</sup> Only a single comprehensive publication was identified covering all 28 EU Member States on legislation concerning issues related to property relations in family and succession. The publication also includes information on same-sex partnerships in this context.<sup>25</sup> Due to a limited number of sources found, further research is needed to focus specifically on identifying potential problems concerning same-sex couples in these fields.

#### **4.3. Adoption**

Adoption is a way of forming a family, securing parental rights and formalizing child-parent relationships. Individual adoption is relevant for single LGBTI persons or for persons who are seeking to adopt in third countries that do not assign children to same-sex couples. Second-parent (stepchild) adoption is relevant for either lesbian mothers who are partners of women who gave birth to a child but cannot be automatically recognised as parents by law; in addition, stepchild adoption is relevant for partners of biological parents of the child or for partners of adoptive parents who underwent individual adoption. In the context of the LGBTI community, joint adoptions are relevant particularly, but not exclusively, for gay couples.

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<sup>22</sup> Lund-Anderson, Ingrid: Northern Europe: Same-Sex Relationships and Family Law, In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 16.

<sup>23</sup> Digoix, Marie, Franchi, Marina, Pichardo Galán, José Ignacio, Selmi, Giulia, de Stefano Barbero, Matias, Thibeaud, Matthias and Vela, Jose A. M. (2018), *European rainbow families in the making: practices, norms and the law?*, Paris, Ined: Documents de travail n°242.

<sup>24</sup> Cinzia Peraro, *Citizens' Family Life in EU Regulations, with Particular Respect to Property Regimes*, Conference paper d 2015, 2015.

<sup>25</sup> Lucia Ruggeri, Ivana Kunda and Sandra Winkler (eds.) *Family Property and Succession in EU Member States: National Reports on the Collected Data*, Rijeka, Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, Faculty of Law, 2019.

Relatively few thorough studies exist on recognition of adoption decisions issued by another EU Member State following intercountry adoptions. One possible reason for this is that it is usually not another EU Member State, but a third country, where individuals go for adoption. Hence, classic cross-border situations within the EU are rare.

Studies indicate that during the adoption procedure, gay and lesbian parents are confronted with a large number of challenges and legal obstacles connected to their sexual orientation. The studies' findings point at the necessity to fight discrimination in adoption procedures but also to provide better support to people throughout the adoption process.<sup>26</sup> Besides, studies also demonstrate that many third countries where children are available for adoption refuse to assign children to same-sex couples. Namely, they point out that when intercountry adoption is not possible for the couple, couples often resort to individual adoption,<sup>27</sup> return home, register the child into the birth registry so that the child obtains the citizenship of the adoptive parent, and then regularise their situation by second-parent adoption, to establish parental ties with both parents.<sup>28</sup>

Currently, in terms of research, mostly studies on how individual states deal with cross-border adoptions exist,<sup>29</sup> mainly focusing on legal regulation of adoption and the experience of adoptive parents. There is a lack of comparative information on case law and practice in this field. Hence, there is a need for an EU-wide comprehensive and comparable study on the law and case law concerning the recognition of adoption decisions as well as on the issues, problems and difficulties encountered by children, parents and authorities and possible ways to circumvent these problems.

#### **4.4. ART/IVF and Surrogacy**

Free movement enables single women and/or lesbian couples to access cross-border ART/IVF medical procedures in the EU Member States where they are not residents. In this context, persons find themselves in cross-border situations, which bring certain consequences and potential complications concerning the recognition of their parental rights. If persons who underwent an IVF/ART treatment in another state but gives birth in their home state, are no longer in a cross-border situation as they receive a birth certificate from their home state that does not need to be administratively recognised.

However, if they give birth in another EU Member State, e.g. in a state where they accessed ART/IVF, they will either receive a foreign or an international birth certificate, which they will have to use to claim registration of the child in the registry of births in their home state. This is not important only for the recognition of parentage, but also for granting citizenship to the child after the child's parents. In these cases, these parents will once again find themselves in a cross-border situation.

The practices that the states take in these cases depend on the approach assumed in individual cases. The following example is an indication of this dilemma: A cohabiting female partners, nationals of a state A, access ART services in a state B. A child is born in the state B. The state B grants a right to both female partners to be recognised as parents. Consequently, the names of them both are entered in the birth certificate of the child. If upon the return of the family to state A, where cohabiting female partner of the biological mother cannot be recognised as a parent, the national authorities use private

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<sup>26</sup> Roberta Messina and Salvatore D'Amore, *Adoption by Lesbians and Gay Men in Europe: Challenges and Barriers on the Journey to Adoption*, *Adoption Quarterly*, Vol. 21, No. 2, 2018, 59–81.

<sup>27</sup> *Ibid.*

<sup>28</sup> Cristina González Beilfuss: *Southern Jurisdictions: Consolidation in the West, Progress in the East*. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 47.

<sup>29</sup> E.g. for the Czech Republic see Suzana Kraljić, *Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation?* In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 71.

international law provisions to once again decide on parental rights, even though the state B has already taken a decision on recognizing these rights, the child will end up stateless and the parentage of the second mother will not be recognised. However, if the authorities conduct a more straightforward procedure on recognition of a birth certificate as it is and enter both parents' names into the birth register, the child will obtain a nationality of state A and will have two legal parents.

The review of studies shows that there is a lack of information on which method is used in which Member State and how prevalent they are, as only a few case studies exist.<sup>30</sup> A qualitative social sciences research, combined with quantitative data, would be beneficial to establish the scope of these phenomena and ascertain the reasons, trajectories and experiences of these persons. Also, a study on the potential of strengthening the access of the EU citizens to cross-border reproductive services would be useful.

A research shows, situations that are even more complex arise in the context of children born through surrogacy. Since commercial surrogacy is generally not available within the EU and only a few states provide for it on non-commercial terms,<sup>31</sup> studies indicate that individuals and couples are resorting to other jurisdictions where this is allowed (e.g. India, Ukraine and the United States).<sup>32</sup> When this happens, such cases are no longer related solely to free movement within the EU. In the context of the LGBTI community, surrogacy might be an attractive option for forming a family, particularly for single men or male couples.

When a parent (or parents) return to their home state with their newborn child, they have to undergo a procedure of recognition of a foreign judicial or administrative decision or a birth certificate.<sup>33</sup> This procedure may have uncertain results: they may either be recognised as parents in their home state but if their home state refuses to recognise the decision, the judgment or the birth certificate, their child might be left not only parentless but also stateless, as Lescastereyres emphasises.<sup>34</sup> Individual cases of this kind have already been identified by researchers. One such case is the *Paradiso Campanelli v. Italy*<sup>35</sup> where the child was taken away from the intended parents, considered abandoned by the state and then given up to someone else for adoption.

Studies indicate that in some states this situation may be overcome if, e.g. a man as the intended parent, or one of the male partners who are intended parents, is also the biological father of the child. This gives way to establishing paternity for this individual by claiming filiation, as Beilfuss finds,<sup>36</sup> while the other partner will have the recourse to step-child or second-parent adoption<sup>37</sup> to establish parental rights (if such option exists in their home state), as pointed out by Amos.

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<sup>30</sup> Tim Amos QC, Joe Riner: Parenthood for Same-Sex Couples in the European Union: Key Challenges. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 90.

<sup>31</sup> Robert Wintemute: Homophobia and United Kingdom Law: Only a Few Gaps Left to Close? In: Luca Trappolin, Alessandro Gasparini, Robert Wintemute (eds.): *Confronting Homophobia in Europe. Social and Legal Perspectives*, Hart Publishing, 2011, p. 262.

<sup>32</sup> Tim Amos QC, Joe Riner: Parenthood for Same-Sex Couples in the European Union: Key Challenges. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 92.

<sup>33</sup> Isabelle Rein-Lescastereyres: Recent Case Law on Cross-Border Surrogacy. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 124.

<sup>34</sup> Ibid.

<sup>35</sup> ECtHR, *Paradiso Campanelli v. Italy*, Application no. 25358/12, Judgment of 24 January 2017.

<sup>36</sup> Cristina González Beilfuss: Southern Jurisdictions: Consolidation in the West, Progress in the East. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 48.

<sup>37</sup> Tim Amos QC, Joe Riner: Parenthood for Same-Sex Couples in the European Union: Key Challenges. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 93.

The mapping demonstrated some studies contain information on the law and practice in such cases, but only for certain countries (e.g. France,<sup>38</sup> Germany,<sup>39</sup> Italy,<sup>40</sup> Ireland,<sup>41</sup> Spain,<sup>42</sup> Slovenia,<sup>43</sup> The Netherlands<sup>44</sup> etc.). However, there is a lack of a comprehensive and comparative EU-wide law and practice overview that would present the current situation as well as significant developments and trends in this field. There is also a lack of studies examining whether the ECtHR cases *Mennesson v. France*<sup>45</sup> and *Labassee v. France*<sup>46</sup> had any impact on the national regulation, case law and practice across the EU. The two cases concerned the refusal of French authorities to grant legal recognition to parental rights established in the United States based on surrogacy. The ECtHR held that there had been a violation of the European Convention on Human Rights, in particular, the children's right to respect the private life.<sup>47</sup> Studies stress that the countries where surrogacy is prohibited at times resort to refusal of the recognition the parentage to find a way to punish the intended parents for their deed which is considered a crime within their jurisdiction, since they cannot punish them within the criminal justice system because surrogacy is legally allowed in the country where it has been undertaken. Plumy defines this phenomenon as the "extra-territorial effects of the national prohibition of surrogacy".<sup>48</sup> The ECHR Advisory Opinion on surrogacy provides guidance in such cases, invoking the child's right to the protection of private and family life.<sup>49</sup>

In this field, studies analysing case law decided on the European level exist.<sup>50</sup> However, research is missing on national court cases that do not reach the European courts or other international fora. Such research could also address the question of whether state practices differ depending on (one of) the intended parents being biological parent of the child or not and depending on whether the case requires recognition of judicial decision or "merely" a birth certificate, and if yes, what grounds are given for this by the

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<sup>38</sup> Isabelle Rein-Lescastereyres: Recent Case Law on Cross-Border Surrogacy. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 130–131.

<sup>39</sup> Tim Amos QC, Joe Riner: Parenthood for Same-Sex Couples in the European Union: Key Challenges. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 94. Nelleke Renate Koffeman, *Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships*, Intersentia, Cambridge, November 2015 (dissertation), p. 189.

<sup>40</sup> Alessandro Gasparini, Cathy La Torre, Silvia Gorini and Monica Russo: Homophobia in the Italian Legal System: File not Found In: Luca Trappolin, Alessandro Gasparini, Robert Wintemute (eds.): *Confronting Homophobia in Europe. Social and Legal Perspectives*, Hart Publishing, 2011, p. 162. Manuela Naldini, Joëlle Long, *Geographies of Families in The European Union: A Legal and Social Policy Analysis*, *International Journal of Law, Policy and the Family*, Vol. 31, No. 1, April 2017, 94–113, <https://doi.org/10.1093/lawfam/ebw017>, p. 105.

<sup>41</sup> Nelleke Renate Koffeman, *Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships*, Intersentia, Cambridge, November 2015 (dissertation), p. 250.

<sup>42</sup> Cristina González Beilfuss: *Southern Jurisdictions: Consolidation in the West, Progress in the East*. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 48; Manuela Naldini, Joëlle Long, *Geographies of Families in The European Union: A Legal and Social Policy Analysis*, *International Journal of Law, Policy and the Family*, Vol. 31, No. 1, April 2017, 94–113, <https://doi.org/10.1093/lawfam/ebw017>, p. 106.

<sup>43</sup> Neža Kogovšek Šalamon: *Traits of Homophobia in Slovenian Law: From Ignorance towards Recognition?* In: Luca Trappolin, Alessandro Gasparini, Robert Wintemute (eds.): *Confronting Homophobia in Europe. Social and Legal Perspectives*, Hart Publishing, 2011, p. 201.

<sup>44</sup> Manuela Naldini, Joëlle Long, *Geographies of Families in The European Union: A Legal and Social Policy Analysis*, *International Journal of Law, Policy and the Family*, Vol. 31, No. 1, April 2017, 94–113, <https://doi.org/10.1093/lawfam/ebw017>, p. 105. Nelleke Renate Koffeman, *Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships*, Intersentia, Cambridge, November 2015 (dissertation).

<sup>45</sup> ECHR, *Mennesson v. France*, Application no. 65192/11, Judgment of 26 June 2014.

<sup>46</sup> ECHR, *Labassee v. France*, Application no. 65941/11, Judgment of 26 June 2014.

<sup>47</sup> Liesbet Plumy: *Mennesson v. France and Labassee v. France: Surrogate motherhood across borders*, 1 July, 2014.

<sup>48</sup> *Ibid.*

<sup>49</sup> ECHR, *Advisory Opinion of ECHR concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother provides guidance in such cases, invoking the child's right to the protection of private and family life*, Requested by the French Court of Cassation, Request no. P16-2018-001, of 10 April 2019.

<sup>50</sup> Isabelle Rein-Lescastereyres: Recent Case Law on Cross-Border Surrogacy. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 126.

competent bodies or courts. Further research could also examine sociologically the consequences in cases when recognition of birth certificates and parental rights were denied. It could cover the topics on possible problems that are encountered for these children in accessing citizenship, passports, entry permits to travel home with their intended parents. Also, the reasons for the states having such an approach to children born through surrogacy could be examined and pathways towards different solutions could be explored.

An interesting issue may arise in cases when a state B does not legally recognise the child-parent relationship established in a state A either following surrogacy or adoption but the family manages to prove that this interferes with their family life that they *de facto* already enjoyed before moving from state A to state B. The question is whether there are national cases where the court still refused to recognise such parental ties (e.g. due to the lack of explicit legal basis, prohibition of surrogacy and a decision that such recognition would breach public policy), but would at the same time establish that the family enjoyed family life in line with Article 8 of ECHR and recognise certain elements of parental rights. The fact that such strange hybrid situations are theoretically possible is evident from Spanish case law (otherwise related to purely domestic situations).<sup>51</sup> It would be useful to see whether there are other jurisdictions where such case law upholding “social parentage” exists.

Studies indicate that couples are resorting to cross-border surrogacy or IVF-assisted surrogacy due to the lack of possibilities for securing joint parenting rights within the legal framework they live in. On this note, scholars have observed that the advancement of parenting rights for gay and lesbian persons of the ECtHR seems to have reached a plateau in recent years. Bracken notes that while the ECtHR has been effective in ending discrimination against single gay and lesbian parents, it has been somewhat reluctant to find that discrimination against same-sex couples seeking access to joint parenting rights is contrary to the ECHR. Scholars’ suggestions are that joint parenting opportunities will finally have to be made available in law to overcome this problem<sup>52</sup> without relying on courts to do that. The question for further research is if and how the cross-border cases on recognizing parental rights could facilitate this process.

#### 4.5. Transgender and Intersex Persons

Dunne stresses that in some EU Member States transgender persons who undergo legal gender recognition procedures are subjected to invasive requirements (such as forced sterilisation, mandatory surgery or mandatory divorce).<sup>53</sup> Studies show that transgender persons experience one of the highest levels of discrimination, harassment and violence among the minority groups.<sup>54</sup>

Generally, there are many studies and much data available on access to gender reassignment or legal gender recognition procedures in individual states and the attitudes of various cultures to transgender persons.<sup>55</sup> However, very few studies address

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<sup>51</sup> Cristina González Beilfuss: Southern Jurisdictions: Consolidation in the West, Progress in the East. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 49.

<sup>52</sup> Lydia Bracken, *Strasbourg’s Response to Gay and Lesbian Parenting: Progress, then Plateau?*, *International Journal of Children’s Rights*, Vol. 24, No. 2, 2016, 358–377.

<sup>53</sup> Peter Dunne, *Transgender Sterilisation Requirements in Europe*, *Medical Law Review*, Vol. 25, No. 4, 2017, 554–581.

<sup>54</sup> European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data*, Luxembourg, Publications Office of the European Union, 2014.

<sup>55</sup> E.g. Jens M. Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons*, Intersentia, Cambridge, Antwerp, Portland, 2015. Generally also see Maciej Szydłowski, *Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people*, *International Journal of Transgenderism*, Vol 17, No. 3-4, October 2016, 199–211. For Malta as one of the most progressive countries in this field see Tim Amos QC, Joe Riner: *Parenthood for Same-Sex Couples in the European Union: Key Challenges*. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 82.

the problems transgender people might experience after obtaining legal gender recognition and/or undergoing gender reassignment in one Member State and when they then travel or move to another Member State.<sup>56</sup> Little is also known about what factors encourage transgender person to access gender reassignment and legal gender recognition procedures in other EU Member States.

Similarly as transgender persons, intersex persons are recognised as being among the most vulnerable within the LGBTI community. As Garland and Slokenberga find, few states have managed to explicitly prohibit non-consensual gender-conforming procedures on children with intersex conditions, and none have enacted significant reforms of their regulatory frameworks to redress rights violations.<sup>57</sup> Despite the low prevalence of these conditions and the fact that they do not cause disability or illness, Travis points out that "intersex children are routinely subjected to surgical intervention to ensure that their bodies conform to a binary understanding of sex."<sup>58</sup>

Compared to transgender persons, the situation of intersex persons is more under-researched since not even the potential existence of discriminatory practices on the national level is appropriately identified, let alone the experience when persons are exercising free movement rights. This opens up the potential for extensive future research approaches in this field.

The potential for future research is further enhanced by the fact that some EU Member States already provide for non-binary, third gender, or neutral gender options in public documents (these are Portugal, Germany, Austria and Malta). The sources that support these novel ideas reject the current binary approach to sex and gender that is prevalent in most countries and recommend a broader interpretation that understands sex as a spectrum or continuum.<sup>59</sup>

Travis concludes that anti-discrimination law may be a more suitable realm for questions of intersex to be raised than mandatory state documentation of one's gender, because it offers individuals an opt-in model, which does not require any medical evidence for protection. He suggests that in such cases struggle against intersex discrimination could be possible under the rules prohibiting discrimination on the grounds of sex.<sup>60</sup> Namely, the 'grounds of sex' should be understood as a much more expansive approach than being based on the categories of male and female.<sup>61</sup> Further comparative research could show whether this framework has already been used on the national level anywhere in Europe and what could be the obstacles preventing such approach.

#### 4.6. Asylum

Asylum/international protection is one of the few topical fields covered by this study that firmly fall within the competence of EU law. Extensive legal regulation that forms the Common European Asylum System define asylum as one of the fields where the legislation of the EU Member States is highly harmonised. Hence, when it comes to LGBTI persons seeking asylum in the EU, it is not so much the differences in the regulations, but in practices, that these asylum seekers depend on. Several studies exist on the topic of LGBTI persons seeking international protection from persecution and the legal, social

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<sup>56</sup> Richard Köhler et al., *Legal Gender Recognition in Europe: toolkit* (2<sup>nd</sup> revised edition), Transgender Europe, 2016.

<sup>57</sup> Jameson Garland and Santa Slokenberga, *Protecting the Rights of Children with Intersex Conditions from Nonconsensual Gender-Conforming Medical Interventions: The View from Europe*, *Medical Law Review*, 13 December 2018.

<sup>58</sup> Mitchell Travis, *Accommodating Intersexuality in European Union Anti-Discrimination Law*, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 182.

<sup>59</sup> Van den Brink, Marjolein; Tigchelaar, Jet. *Gender identity and registration of sex by public authorities*, *European equality law review*, No. 2, 2015, 29–40.

<sup>60</sup> Mitchell Travis, *Accommodating Intersexuality in European Union Anti-Discrimination Law*, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 181.

<sup>61</sup> *Ibid.*, p. 191.

and policy issues arising from these cases. The issues have been adequately analysed for certain countries.<sup>62</sup> However, further research would be beneficial covering all EU Member States. The first issue that the researchers have identified as problematic in this field is a “discretion requirement”, meaning that asylum seekers are denied their asylum claim with reasoning that upon their return to the country of origin they would be safe if they lived a discrete life. As studies emphasise, the CJEU has already declared that discretion requirement is incompatible with the fact that some human characteristics are unrenouncable and, therefore, should not be imposed.<sup>63</sup>

Another issue that was already identified by researchers as worrying is that some EU Member States are refusing asylum applications by persons coming from states where homosexuality is criminalised and punishable by either death sentence or life imprisonment.<sup>64</sup> Spijkerboer and Jansen note that asylum authorities also often expect LGBTI asylum seekers to seek protection from the authorities of their country of origin, even if the latter is reportedly homophobic and even if homosexuality is criminalised.<sup>65</sup> They find that asylum seekers are also expected to seek protection in other areas of their countries of origin, even if there is no evidence that such protection would be effective or even in criminalizing states. Another element identified by researchers about how LGBTI asylum claims are handled is the credibility assessment. This is part of the refugee status determination procedure in which the asylum seeker’s claims are evaluated in the sense of whether they are probable, believable and supported by evidence. In this context, as studies find, asylum seekers are often expected to prove their sexual orientation and gender identity, which is a moment where various sorts of stereotypes and highly dubious evidentiary methodologies come into play.<sup>66</sup> As scholars stress, the CJEU has already declared that such evidence has little value while at the same time, it infringes upon people’s human rights.<sup>67</sup>

Based on the findings that already exist, it would be useful to continue the research first by expanding the number of countries covered by the study, and second by updating the research results for the countries where such research has already been completed. Further, it would be advantageous to collect information on the effects of two essential CJEU cases on national laws and practices.

#### 4.7. Other Findings

A protruding issue that several authors and researchers have noted concerning LGBTI persons in cross-border situations is the so-called “East-West divide”. While the countries of Western EU Member States have reached high standards in protecting LGBTI persons’ rights as well as removing inequalities between same-sex and opposite-sex couples, many countries in the East have not taken many of these steps yet. Consequently, the researchers suggest that an increasing number of LGBTI persons are resorting to the options available within the legal systems in the West to pursue life trajectories that they are not allowed to access in their home states (e.g. marriage, stepchild or second-parent adoption, ART and IVF, recognition of parental rights *ex lege* etc.).

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<sup>62</sup> Erin Gomez, The Post-ABC Situation of LGB Refugees in Europe, *Emory International Law Review*, Vol. 30, No. 3, 2016, 475–500; Neža Kogovšek Šalamon: LGBT People as Refugees and Immigration Rights. In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition); Federico Ferri, Assessing Credibility of Asylum Seekers’ Statements on Sexual Orientation: Lights and Shadows of the F Judgment, *European Papers*, Vol. 3, No. 2, 2018 (European Forum, Insight of 17 July 2018), 875–884.

<sup>63</sup> CJEU judgment in C-199/12, C 200/12 and C 201/12, *X, Y and Z* of 7 November 2013.

<sup>64</sup> E.g. Spijkerboer, Thomas; Jansen, Sabine. *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU*, Vrije Universiteit Amsterdam, September 2011.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> CJEU – Judgment in Joined Cases C- 148/13 to C- 150/13 A, B and C v *Staatssecretaris van Veiligheid en Justitie* of 21 December 2014.

Hence, in parallel to this divide, studies also show how the instruments of private international law and administrative recognition of legal statuses are blurring the boundaries between the East and the West. At the same time, it is also evident from the research findings that the use of private international law, which has been traditionally aimed at resolving private law relations between the parties, is now being used for the purposes of public policy, in particular where the legislatures have been reluctant to regulate on these issues. Further research would be needed to confirm this hypothesis and explore its further implications.

Finally, very few countries collect comprehensive equality data segregated by sexual orientation, gender identity, gender expression or sex characteristics, which makes it difficult to understand what the needs of these groups are and what is the scale of these needs. Few studies exist where quantitative data has actually been used to analyse the situation of LGBTI community in a specific sector.<sup>68</sup> One study, in particular, identified the need to enhance the data collection and support the stakeholders who are willing to collect data to do so.<sup>69</sup> Further analysis is required on methodologies for such data collection, which at the same time protect the community from abuse of personal data and their use for purposes other than enhancing equality. Some studies indicate that certain countries collect data on marriages concluded abroad.<sup>70</sup> It would be useful to explore how many EU Member States collect these data and what is the data used for and whether it is exposed to abuse.

## 5. RECOMMENDATIONS FOR FURTHER RESEARCH

Based on the research gaps identified in previous sections of this mapping exercise, the following research topics could be included in future studies:

### Recognition of marital/partnership status:

- *Data collection on the number of same-sex couples, on what kind of relationship status they have, which relationship recognition options they would prefer to have at their disposal and whether the (lack of) availability of legal recognition influences their life choices, including a choice of moving abroad.*
- *A comprehensive and comparative EU-wide study on law and practice regarding the availability of and accessibility to various, if any, recognised marital/partnership statuses in individual Member States<sup>71</sup> and which set of rights, entitlements and benefits in the fields of taxation, inheritance, employment, healthcare, pension and other fields derives from the recognised marital/partnership status – the one enjoyed in the country of marriage or the one provided for in the country of status recognition.*
- *Analysis on how many Member States implemented the CJEU Coman decision and how many of them now have a reverse discrimination regime after Coman, i.e. a regime in which they in fact (in their case law) or in law (by amending their respective legislation) recognise the legal status of same-sex spouses who*

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<sup>68</sup> Karin Schönplflug et al., *If Queers were Counted: An Inquiry into European Socioeconomic Data on LGB(TI)QS*, *Feminist Economics*, Vol. 24, No. 4, 2018, 1–30, 10.1080/13545701.2018.1508877.

<sup>69</sup> Mark Bell, *Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI People*, 2017, Luxembourg: Publications Office of the European Union.

<sup>70</sup> Karsay, Dodo, *Protecting LGBTIQI rights in Europe: Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5)*, 2018, ILGA-Europe, Transgender Europe, OII Europe.

<sup>71</sup> Now this specific information can only be found for individual countries. For Croatia see, for example, Suzana Kraljić, *Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation?* In: Katharina Boele-Woelki and Angelika Fuchs (eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU*, Cambridge, Intersentia, 2017 (3<sup>rd</sup> edition), p. 66.

*entered marriage abroad, but they themselves do not provide for same-sex marriage.*

- *A study on whether the CJEU Coman case affected the respective legislation in the Member States that do not or did not allow two foreigners – unlike their own citizens – to enter into a same-sex marriage, in a way that following Coman they now do allow access of two foreigners to same-sex marriage.*
- *A research project on whether a divergence between law and practice exists concerning the recognition of same-sex marriage or partnership (i.e. an option legally exists but is inaccessible) and whether the State authorities are impeding couples from accessing same-sex marriage abroad by refusing to provide the necessary documents required for that.*
- *A study on practice and case law in receiving states in the field of recognizing cohabiting same-sex partners as beneficiaries of the Free Movement Directive and whether these practices differ from practices related to the recognition of cohabiting opposite-sex partners as family members.*
- *A study on specificities that might be experienced by same-sex couples of ethnic or religious minority origin who are in a cross-border situation.*

### **Property and Succession**

- *Due to a limited number of sources identified, further research would be needed to identify potential problems concerning same-sex couples in the fields of management of their property and access to succession in cross-border situations.*

### **ART/IVF**

- *A qualitative social science research, combined with quantitative data, identifying the number of persons accessing cross-border ART/IVF procedures and data gathering about their reasons, trajectories and experiences.*
- *A study on the potential of strengthening the access of EU citizens to cross-border reproductive services.*

### **Adoption**

- *An EU-wide comprehensive and comparative study on the law and case law concerning the recognition of adoption decisions, the issues, problems and difficulties encountered and possible ways to circumvent these problems.*

### **Surrogacy**

- *A comprehensive and comparative EU-wide law and practice overview of the state of affairs in the field of cross-border surrogacy within the EU, including data gathering on significant developments and trends on LGBTI persons resorting to cross-border surrogacy, and their experiences with the recognition of child-parent legal ties in the individual Member States.*
- *A study on whether and how the European Court of Human Rights (ECtHR) cases *Mennesson v. France*<sup>72</sup> and *Labassee v. France*<sup>73</sup> impacted the respective national case law across the EU, specifically whether they limited the extraterritorial effects of the national prohibition of surrogacy.*
- *Research on national court cases that do not reach the European courts or other international fora in the field of recognition of child-parent legal ties in cases of children born through surrogacy. Such research could address the question of whether state practices differ depending on (one of) the intended parents being biological parent of the child and depending on whether the case requires recognition of judicial decision or "merely" a birth certificate. If such recognition is*

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<sup>72</sup> ECtHR, *Mennesson v. France*, Application no. 65192/11, Judgment of 26 June 2014.

<sup>73</sup> ECtHR, *Labassee v. France*, Application no. 65941/11, Judgment of 26 June 2014.

*required, the research should also find the grounds given for such requirement by the competent bodies or courts.*

- *Sociological research on the consequences of refusal of recognition of birth certificates and parental rights for children born through surrogacy (cf. Paradiso Campanelli v. Italy case).*
- *A study on possible problems encountered regarding children born with surrogacy whose birth certificates were not recognised, in accessing citizenship, passports, and entry permits to travel home with their intended parents.*
- *A study on potential national cases where the court refused to recognise parental ties (e.g. due to the lack of express legal basis, prohibition of surrogacy and a decision that such recognition would breach public policy), but at the same time established that the family enjoyed family life pursuant to Article 8 of ECHR and recognised certain elements of parental rights.*

### **Transgender Persons**

- *A legal and sociological study on transgender people in cross-border situations focusing on how the legal gender reassignment and legal gender recognition performed abroad has been formally and factually received by the authorities in individual home EU Member States of transgender persons.*

### **Intersex Persons**

- *An EU-wide comprehensive and comparable study on the legal and social situation of intersex persons, including a focus on potential discriminatory practices on the national level.*
- *Comparative research could indicate whether the rules prohibiting gender discrimination has already been used on the national level anywhere in Europe and what could be the obstacles preventing this.*

### **Asylum**

- *A comprehensive and comparative EU-wide study on recent developments on practice concerning LGBTI persons seeking international protection in the EU.*
- *A study on the effects of CJEU cases A.B.C.<sup>74</sup> and X.Y.Z.<sup>75</sup> on national practices across the EU.*

### **Recognition of Decisions**

- *A comprehensive and comparable EU-wide research on case law, i.e. administrative and judicial practice, in the field of recognition of any kind of foreign judicial or administrative decisions. The research could cover recognition of marital or partnership status, recognition of birth certificates, and documents recognizing parental rights to LGBTI couples obtained by either law (ex lege), an administrative decision or a court (judicial) decision.*

### **Private International Law**

- *An EU-wide comprehensive and comparative study identifying how courts and administrative bodies are applying public international law in cases concerning LGBTI and same-sex couples. Such analysis would be necessary from the perspective of identifying the role which private international law has, in particular in relation to novel issues that did not exist when private international law rules were created, such as the ART/IVF, cross-border adoption and cross-border surrogacy, and whether in that context amendments to those rules would be necessary.*

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<sup>74</sup> CJEU Judgment in Joined Cases C- 148/13 to C- 150/13 A, B and C v *Staatssecretaris van Veiligheid en Justitie* of 21 December 2014.

<sup>75</sup> CJEU Judgment in C-199/12, C 200/12 and C 201/12, X, Y and Z of 7 November 2013.

### **Difference between the Member States**

- *A study on whether and how the instruments of private international law and administrative recognition of legal statuses are blurring the boundaries between various Member States, some achieving higher standards of protection of LGBTI persons and some generally reaching lower standards of protection.*

### **Equality Data Collection**

- *A study on methodologies that allow equality data collection concerning LGBTI persons while at the same time protect the community from abuse of personal data and their use for purposes other than enhancing equality.*
- *A study on how many EU Member States collect such data, what the data is used for and whether it is used in compliance with privacy and data collecting regulations.*

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