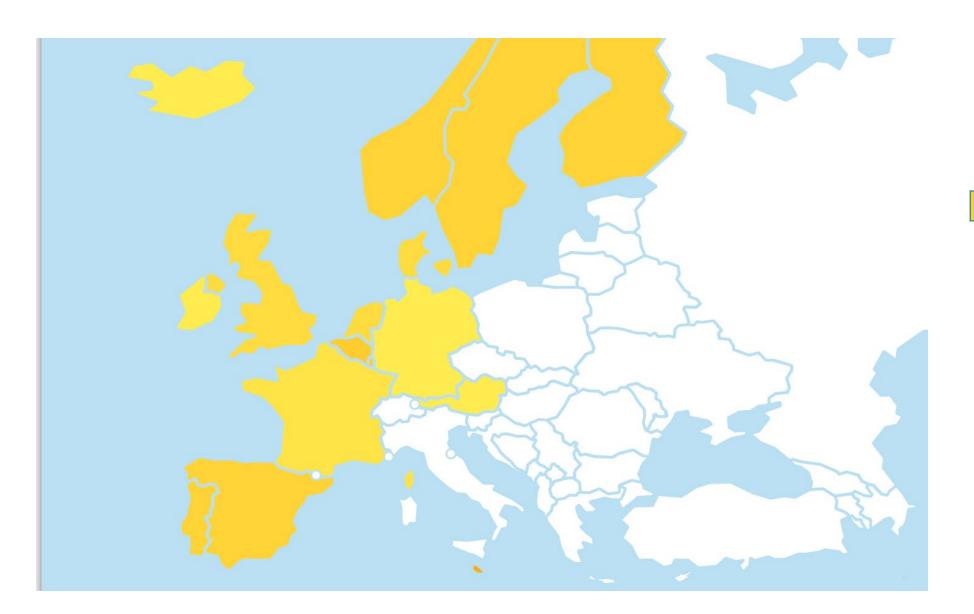# After *Coman*: Same-Sex Couples in Private International Law within the EU

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Focus of Paper

- Focus on …
- fragmentation in how adult relationships are formalised within EU
- impact of national PIL rules on cross-border recognition of same-sex marriage and same-sex registered partnership within the EU
- implications of *Coman* for national PIL rules
- implications of *Coman* for EU PIL, specifically Regulation 2019/1111 (Brussels II*ter*)
- implications of ECtHR judgment in *Orlandi v Italy* (2017) for national/EU PIL

ILGA Map: Same-Sex Marriage

Has same-sex marriage
13 EU Member States

Of the remaining 14 MS,
some offer RP,
some do not.

Impact of National PIL rules

- This fragmentation makes cross-border portability of status all the more fraught!
- Broad tendency to apply *lex loci registrationis* to determine essential and formal validity of foreign registered partnership
- Broad tendency to apply traditional choice-of-law rules for marriage in determining validity of foreign same-sex marriage
  - So *lex loci celebrationis* to determine formal validity and law of nationality (or domicile) to determine essential validity (latter can have significant invalidating effect)
- Also public policy plays a major role – both *in favour of* recognition where one party lacks capacity due to same-sex restriction under personal law (eg in Ireland) or *against* recognition even where both parties had capacity under personal law (eg in Poland)
- Also characterisation challenges loom large: eg foreign same-sex marriage recognised as civil union in Italy; foreign registered partnership recognised either as marriage, or not at all, in Ireland
- A lot of fuzziness/uncertainty/inconsistency/complexity in recognition of foreign same-sex marriage and registered partnerships
- A lot of non-recognition (much more than would traditionally have been the case for different-sex spouses)

Implications of *Coman* for National PIL Rules

- *Coman* was mainly concerned with the interpretation of Directive 2004/38/EC as applied by analogy (next presentation)
- BUT there were some indications in the judgment that it went further and imported a 'negative integration' doctrine into cross-border marriage recognition – ie allowed for disapplication of national PIL rules which inhibit cross-border recognition – ie imported a more *general* obligation of status recognition
- This implication arose from the references to *Garcia Avello* and *Grunkin* in paras 37-38 and language which suggested that the division of competence in this domain (marriage) was the same as in the domain of surname recognition

Implications of *Coman* for National PIL Rules

- In *Garcia Avello* and *Grunkin* choice of law rules, which resulted in the non-recognition of a surname as established in another MS, had to be disapplied to facilitate recognition

- ECJ emphasised domestic autonomy in laying down local name laws but EU competence in striking down PIL rules which inhibit cross-border recognition creating 'serious inconvenience' in the exercise of free movement

- Muir Watt (2008) Tulane L Rev referred to *Garcia Avello* as establishing a 'methodological revolution' in the European conflict of laws, entailing a 'unilateral recognition of foreign situations or relationships without reference to the forum's choice-of-law principles'

- In paras 37-38 *Coman* ECJ refers to *Garcia Avello* and *Grunkin* in outlining the division of competence between MSs and EU in regulating marriage – and echoes the language used in *Garcia Avello* in laying down the division of competence described above.

- BUT elsewhere in judgment - four times (!) - ECJ says it is compelling recognition 'for the sole purpose of granting a derived right of residence' – so no wider obligation of recognition???

- ECJ speaking out of both sides of its mouth? Laying foundation for future cases?

Implications of *Coman* for National PIL Rules

- If *Garcia Avello* has been extended into the domain of marriage recognition, questions arise as to whether
  - the recognition obligation is linked to Directive 2004/38 (so only after genuine residence in another MS/subject to restrictions on RP recognition etc)
  - the recognition obligation applies only to marriages celebrated in a MS or to marriages celebrated in third countries (see Case C-490/20 *VMA/Pancharevo* [67] suggesting the latter)
  - the recognition obligation is tolerant of recharacterization?

Parallel Developments at the ECtHR

- *Orlandi v Italy* (App No 26431/12 and others) 14 December 2017
- Held Italian law violated Art 8 ECHR (right to respect for family/private life) in circumstances where same-sex couples who had married abroad could not marry/register their partnership in Italy and could not secure any recognition for their foreign status
- Unclear as to whether focus on absence of domestic opportunity for formalisation of relationship or whether ECtHR is creating a direct obligation of cross-border continuity of formalised status (building on *Wagner v Luxembourg* etc – to reflect 'social reality', avoid 'legal vacuum' [209])
- Clear however that recognition of foreign same-sex marriage as civil union/RP is compatible with Art 8 ECHR [194]-[195] – so recharacterization not a violation of ECHR

Coman and Brussels IIter Regulation (B2T)

- *Coman* suggests that where gender-neutral term 'spouse' appears in EU legislation it should encompass same-sex spouses.
- Also in *Coman* obligation to recognise same-sex marriages "for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law" [45]
  - Suggests same-sex spouses are covered by B2T which confers rights of divorce jurisdiction and divorce-recognition on 'spouses'
- EU Commission in its LGBTIQ Equality Strategy COM (2020) 698 final, p. 17 appeared to assume B2T applies to same-sex spouses:
  - "EU legislation on family law applies in cross-border cases or in case with cross border implications and it covers LGBTIQ people. This includes rules to facilitate Member States' recognition of each other's judgments on divorce."
- But other contrary indications
  - principle of continuity from Brussels II Convention 1998 (Rec 90 B2T)
  - autonomy in defining subject-matter jurisdiction
    - B2T does not compel the grant of any form of matrimonial decree

Future developments?

- EU Commission in its LGBTIQ Equality Strategy COM (2020) 698 final, p. 17 promised it would
  - "explore possible measures to support the mutual recognition of same-gender spouses and registered partners' legal status in cross border situations."
- EU Parliament, "Obstacles to the Free Movement of Rainbow Families in the EU" (March 2021) recommended that
  - "[t]he Commission should support civil-society strategic litigation to extend the scope of the *Coman & Hamilton* jurisprudence from covering only a residence permit to other rights or benefits".
- Numerous complaints to ECtHR arguing that non-recognition of foreign same-sex marriage violated A 8/12/14+8: *Handzlik-Rosuł v Poland* App No 45301/19 (communicated 20 June 2020); *Formela v Poland* App No 58828/12 (communicated 20 June 2020); *Coman v Romania* App No 2663/21 (communicated 9 February 2021); *AB and KV v Romania* App No 17816/21(communicated 19 October 2021)
- Fresh complaint to ECtHR complaining that non-availability of marriage/registered partnership in Poland violates A 8 ECHR *Przybyszewska v Poland* App No 11454/17 (communicated 20 June 2020)

Paper based on book chapter and 2 journal articles

- M Ní Shúilleabháin, 'Cross-Border (Non-) Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law' in J Scherpe and E Bargelli (eds), *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change* (Intersentia, 2021)

- M Ní Shúilleabháin, 'Same-Sex Marriage and the Conflict of Laws: the Unresolved Cross-Border Dimension' (2019) 135 Law Quarterly Review 374

- M Ní Shúilleabháin, 'Private International Law Implications of "Equal Civil Partnerships"' (2019) 68 International and Comparative Law Quarterly 161