

Obstacles to the Free Movement of Rainbow Families in the EU

KEY RESULTS OF THE [NEW STUDY](#) BY PROF. ALINA TRYFONIDOU AND
PROF. ROBERT WINTEMUTE, REQUESTED BY THE EP'S PETI COMMITTEE



Why this study?

Rainbow families within the EU still face many problems when they attempt to exercise their free movement rights. Same-sex couples cease to exist when crossing a border, children lose their legal ties to (at least one of) their parents. More and more cases show the urgent need to change the situation. Luckily, the EU Commission wants to elaborate a legislative proposal. This study gives some more evidence of the existing obstacles and offers a range of recommendations to the EU institutions and Member States why and how they could push for a better recognition of rainbow families.





“

When rainbow families move between EU Member States in exercise of free movement rights, EU law requires the EU institutions and the Member States to respect the fundamental (human) rights of the members of these families which are laid down in the Charter or which constitute part of the general principles of EU law.”

”

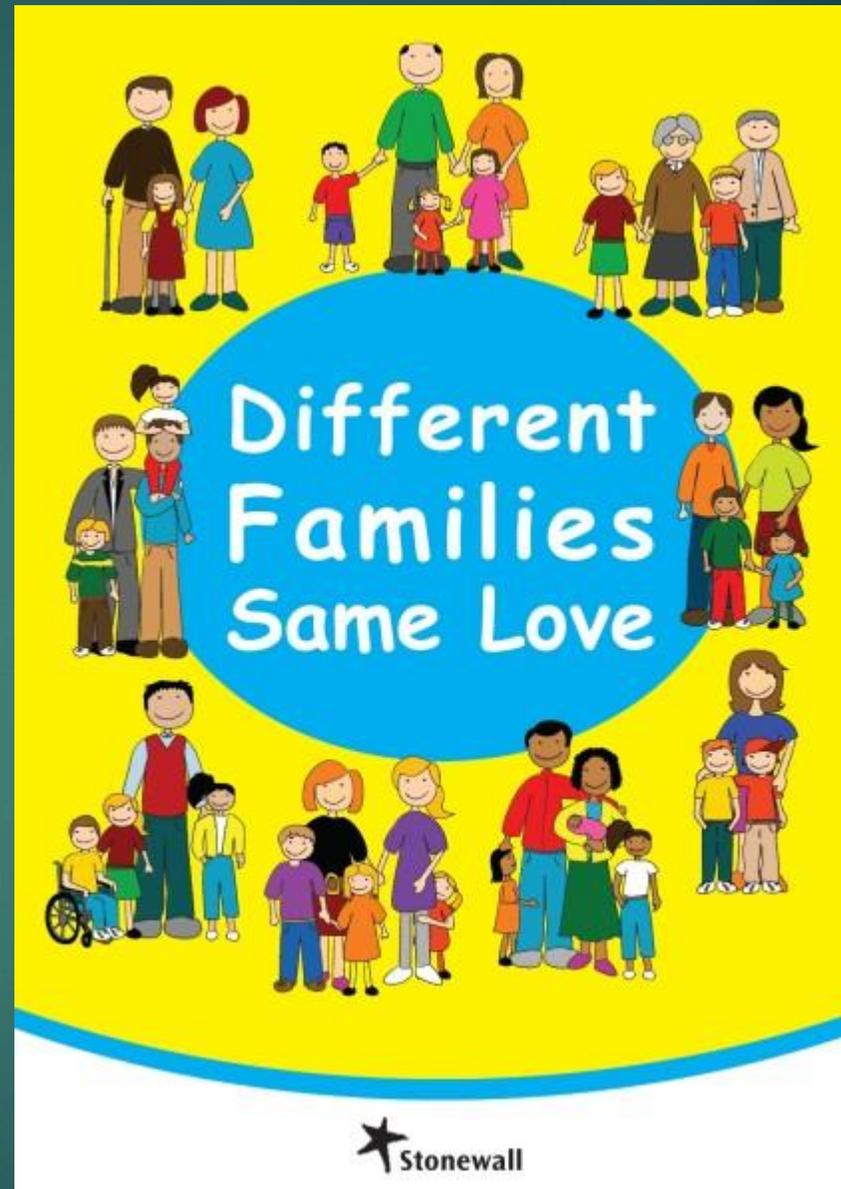
OBSTACLES TO THE FREE MOVEMENT OF RAINBOW FAMILIES, PAGE 33

DIRECTIVE 2004/38/EC states that EU citizens and their family members („spouses“, „registered partners“, „direct descendants“) have the right to move freely within the European Union. But it is still unclear, if this includes rainbow families. In 2018, the EU Court of Justice ruled in the „Coman case“, that same-sex marriages should be recognised in every Member State...

KEY FINDINGS...

A questionnaire was sent to the Member States in June 2020 to clarify if or how they recognise and treat same-sex couples and rainbow families whose legal ties were already established in another Member State [means: who got married or entered a civil union abroad and/or who got registered as legal parents to their child(ren)].

Some of the results were really surprising (in a negative and positive sense). In general, they reveal the lack of clear (EU) provisions...

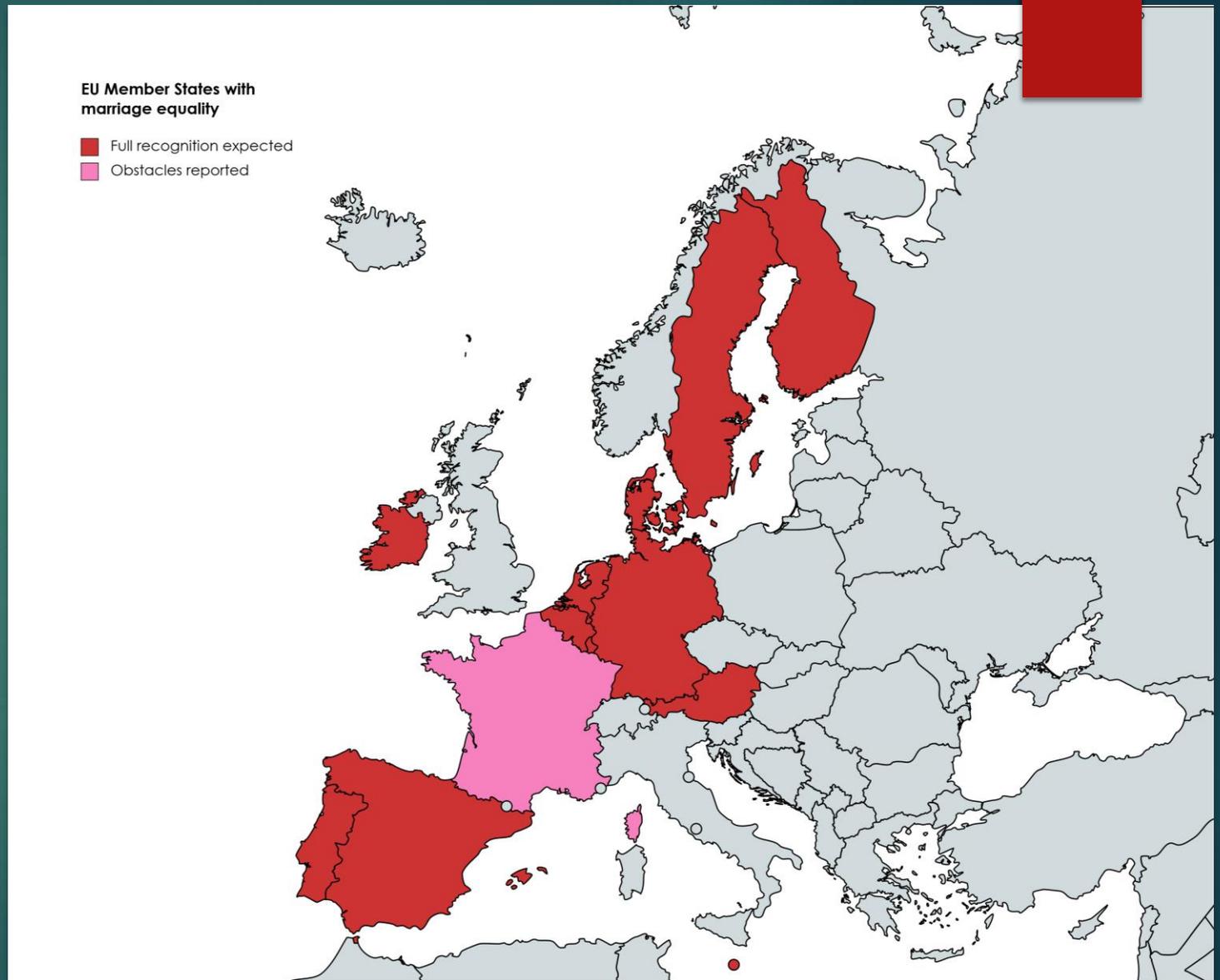


Same-sex marriages

The study assumes that Member States with marriage equality will recognise same-sex spouses who have established their marriage in another EU country.

Belgium, Malta, Luxembourg and Denmark didn't reply to the questionnaire – but they all have already marriage equality.

Not examined in the study: France is an exception. NELFA knows cases of married couples (from UK and Finland) who weren't directly recognised (because of a lack of wedding ceremony duties...). Germany didn't recognise marriages contracted abroad before 2017/18 (Petition 0402/2020).

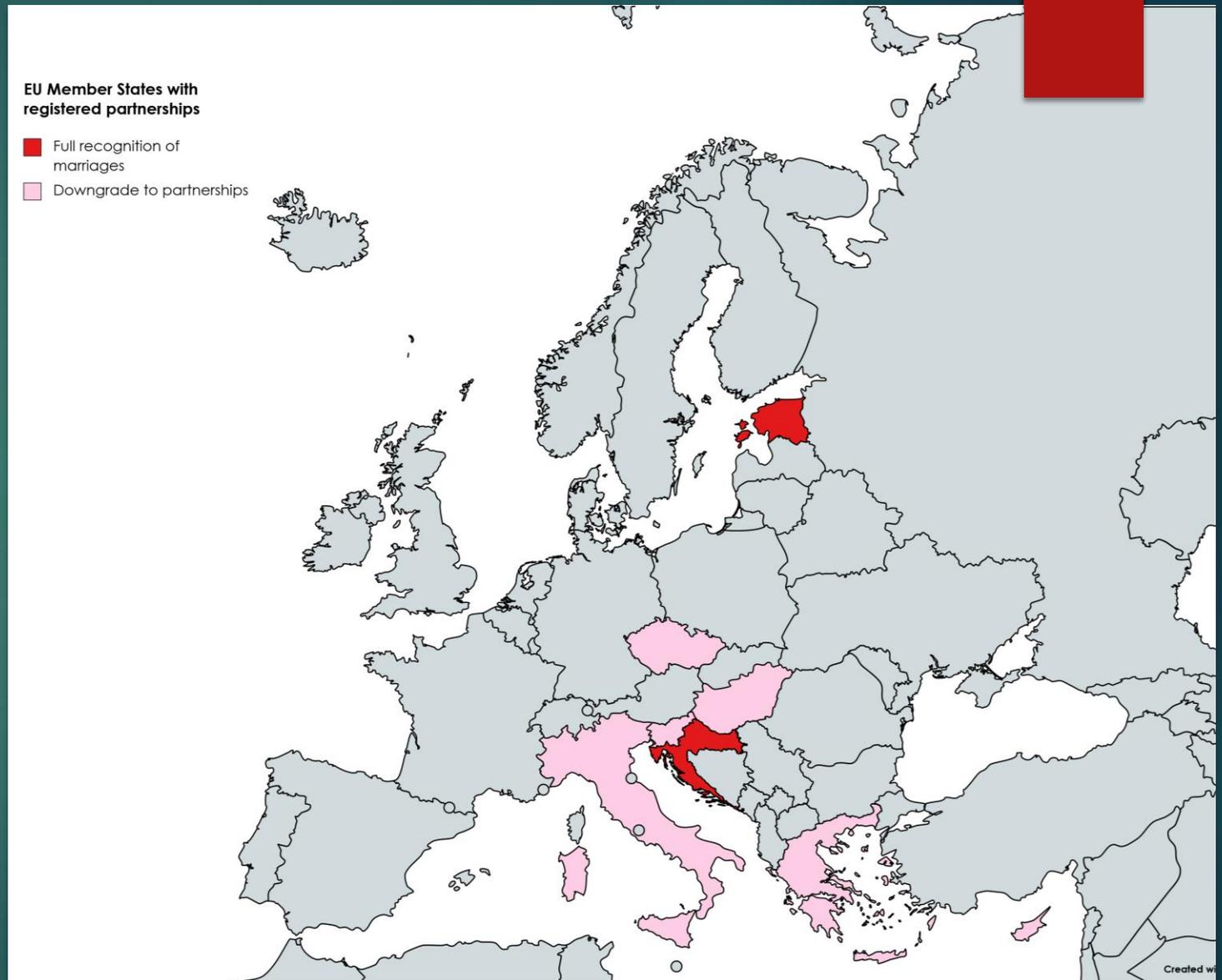


Same-sex marriages

Interestingly, **Estonia and Croatia would recognise same-sex marriages contracted abroad** even they don't provide this option for their own citizens.

In the other six countries with registered partnerships, married same-sex couples would be treated as partners – means: a downgrade. Czechia and Hungary state that the legal provisions would be “almost identical” (however, no parental rights are included... in Czechia, activists name 105 different provisions [property rights etc.]

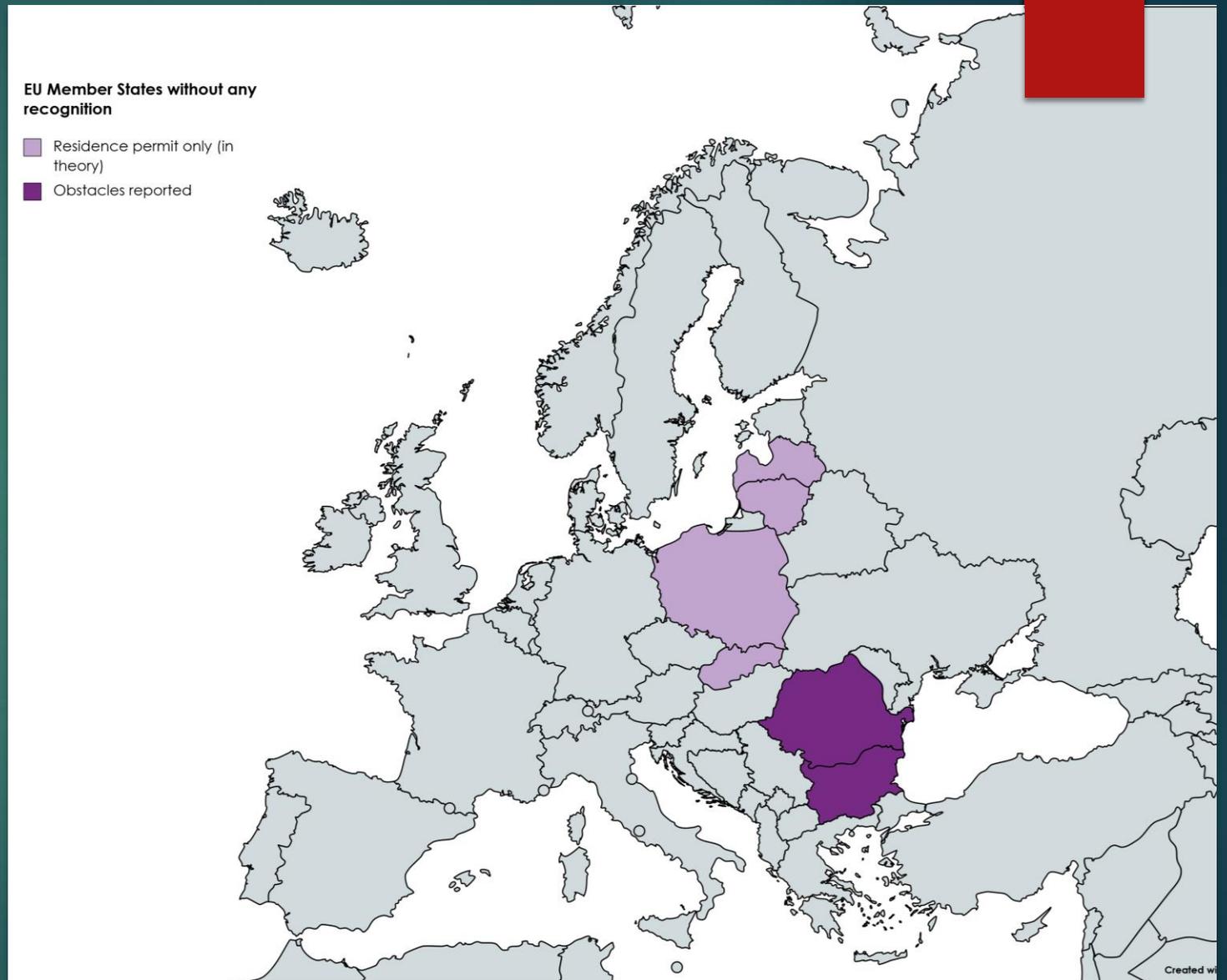
Not examined in the study: Civil servants in **Hungary** impede in reported cases the conversion of foreign same-sex marriages into civil partnerships because the applicants couldn't prove that they are “singles”. (The study reports on a case where Poland didn't deliver a legal status proof for a same-sex marriage in Spain. NELFA knows a similar case in Portugal.)



Same-sex marriages

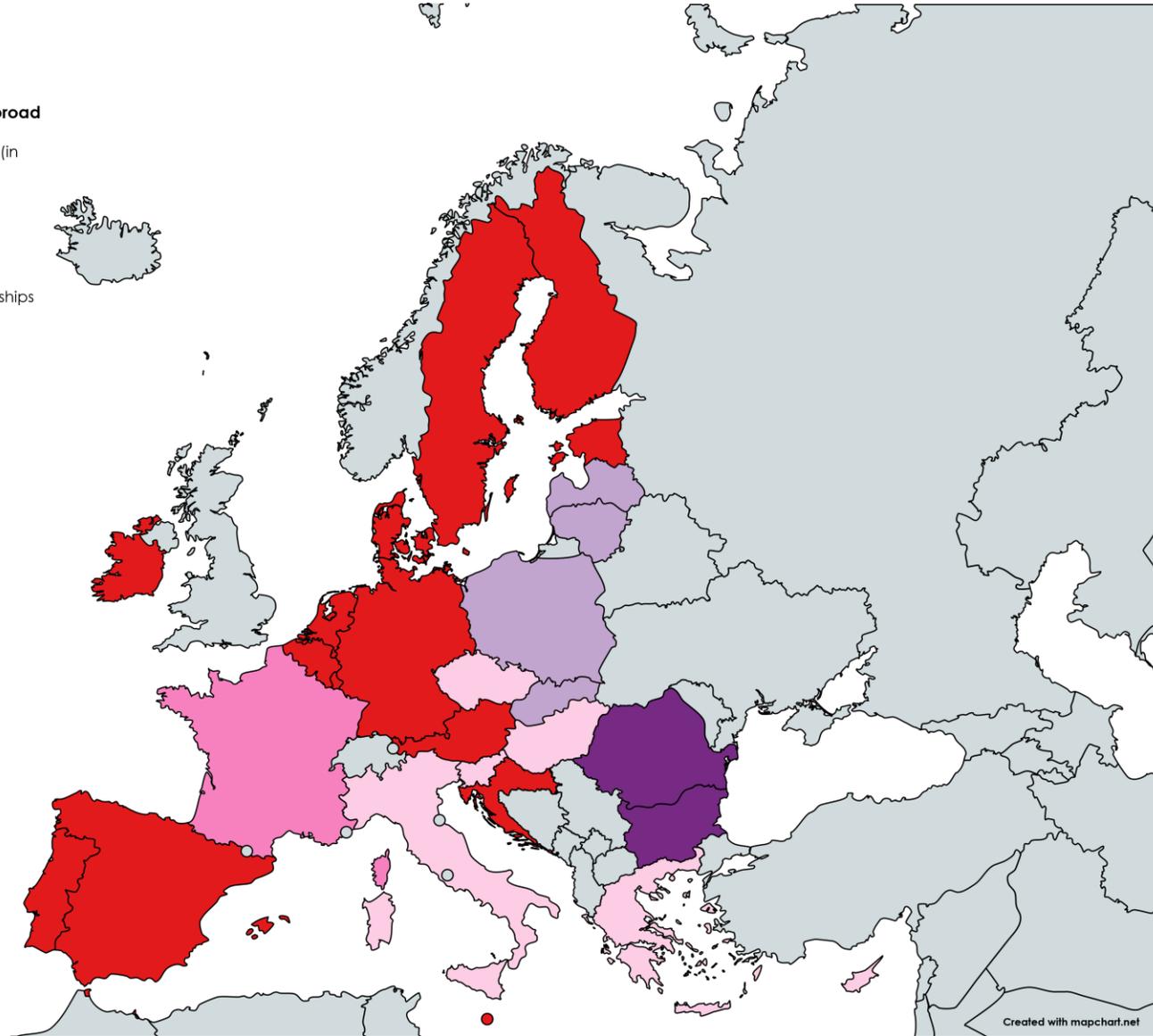
Six countries who neither recognise same-sex marriages nor civil unions would – at least theoretically – recognise same-sex spouses for the purpose of residence permit. Latvia's answer remains unclear. And: **Same-sex spouses are not recognised for any other purposes of national law (tax benefits...)**

Romania even didn't implement the Coman judgment yet (two years after the decision in Luxembourg). In Bulgaria, another case of obstacles is reported (via the Youth organisation Deystvie in Sofia).



Recognition of same-sex marriages contracted abroad

- Residence permit only (in theory)
- Obstacles reported
- Full recognition of marriages
- Obstacles reported
- Downgrade to partnerships



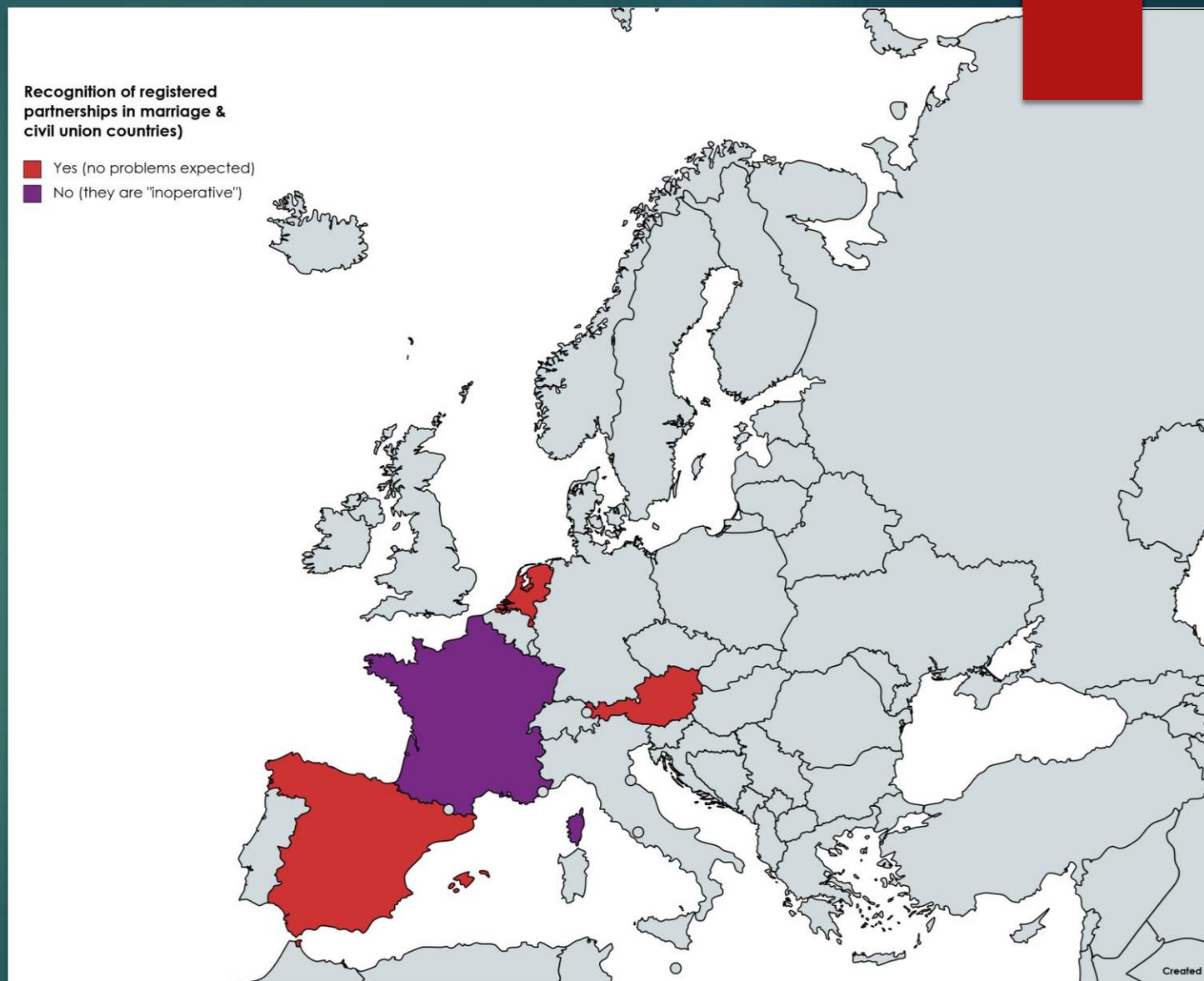
Registered partnerships

The study divides the EU Member States in several groups. The first one is about countries that have both instruments – **marriage and civil partnerships for their citizens: Austria, The Netherlands, France and Spain.** (No answers came from Denmark [probably recognition], Belgium [problems reported], Malta [probably recognition] and Luxembourg [probably recognition]).

No problems are to be expected for registered partners from abroad?

Surprisingly, **France would not issue residence permits** for them!!

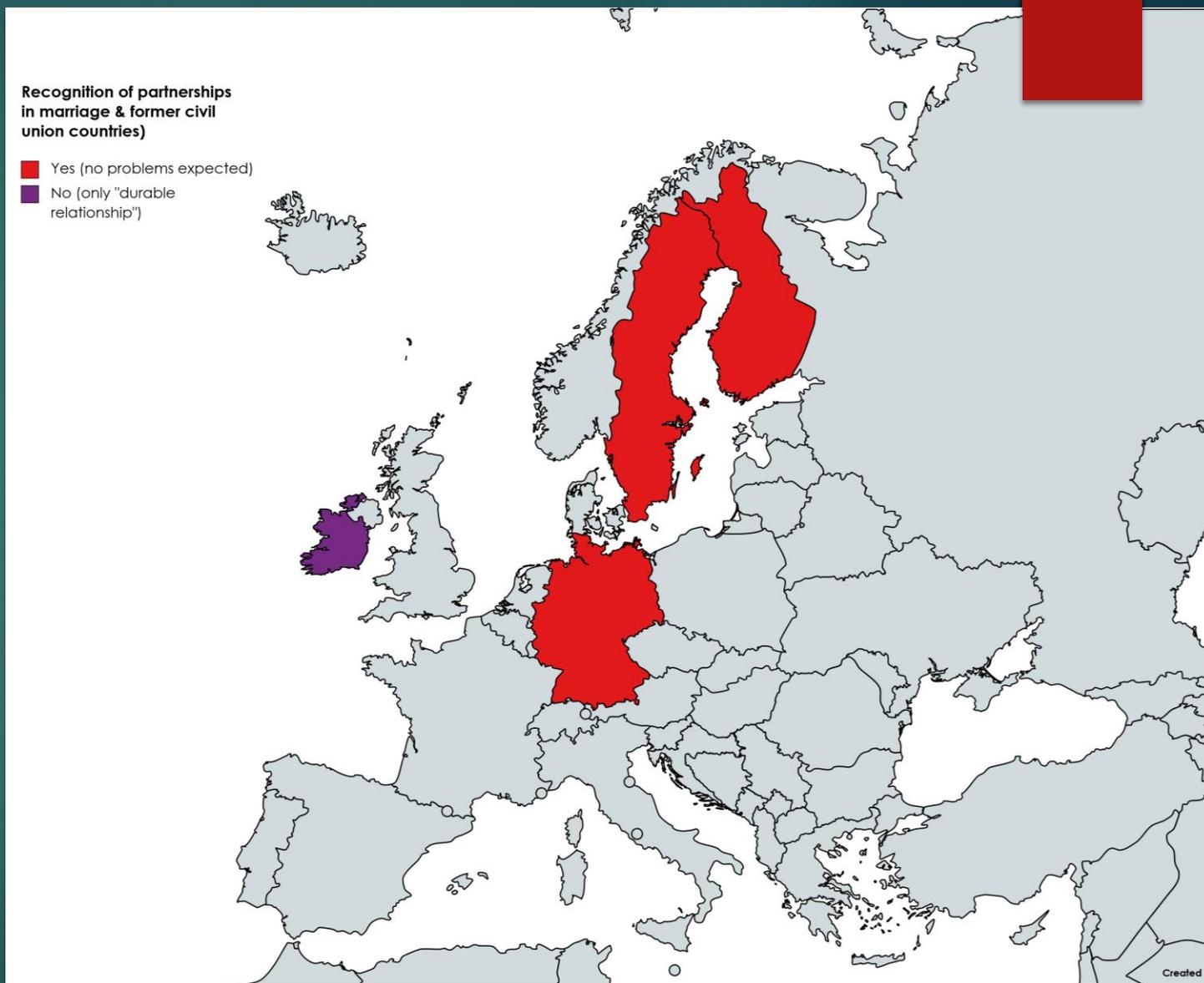
Questionnaire quote: "**In the case of the various forms of foreign civil pacts, similar to France's civil solidarity pact, they are inoperative for foreign partners settling in France.**"



Registered partnerships

The second group is composed of countries where existing **civil union laws were repealed, and marriage equality was introduced**. Means: Registered partnerships may remain, but for new couples, only marriage is available: This is the case in **Germany, Finland, Ireland and Sweden**. In general, no problems would be expected for the recognition of registered partners from abroad. However, ...

Ireland doesn't recognise foreign civil partnerships on or from 16 May 2016 (marriage equality referendum) – downgrade to "durable relationships"!



Registered partnerships

The third “group” is **Portugal**, where civil unions didn’t exist. In 2016, the country directly implemented a marriage equality law. This means, for civil partnerships, no public registration is required or possible.

Unlucky summary of the given facts:
Even Portugal has marriage equality, same-sex partners from abroad seem to be treated as partners in a “durable relationship”.



Registered partnerships

The fourth group is about countries which provide for any kind of registered partnerships for same-sex couples: **Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy and Slovenia**. The study does not expect problems for registered partners from abroad. At least, no answer raises any suspicion.

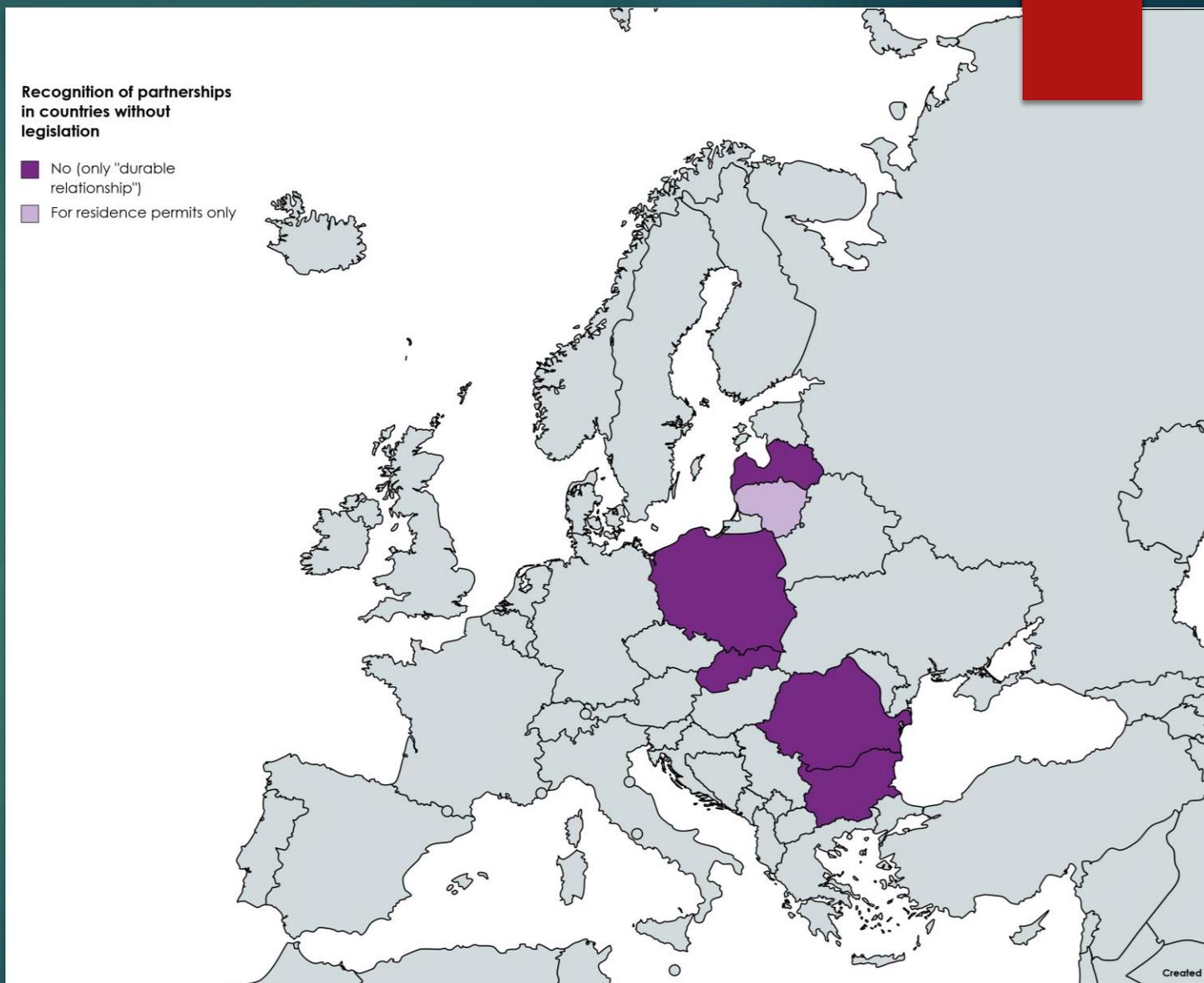


Registered partnerships

The last group covers countries without **any recognition of same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Slovakia and Romania**. The majority of the countries do not recognise registered partners from abroad for the purpose of a residence permit.

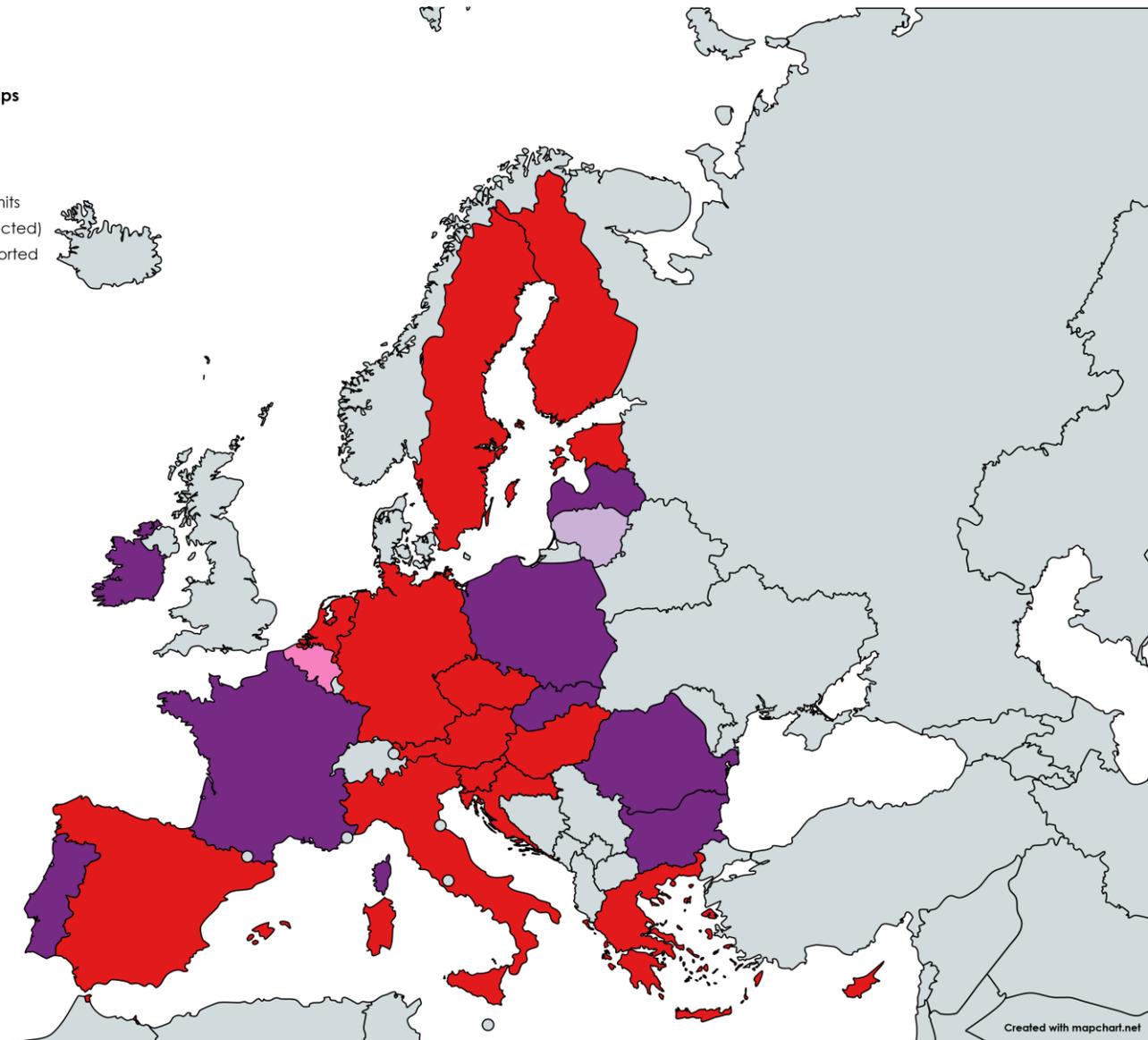
Slovakia appears to treat civil unions as durable relationships.

Positive exception: Lithuania offers temporary residence permits!



**Recognition of partnerships
contracted abroad**

- No (only "durable relationship")
- Yes, for residence permits
- Yes (no problems expected)
- Yes - but problems reported



Non-registered partnerships

Same-sex couples seem to be treated equally to different-sex couples (for family reunification purposes). However, the legal position is less clear, term “partner” is even not defined in Directive 2004/38/EC

There is a lack of clarity as to the exact requirements that EU law imposes on Member States

Positive here: **Finland treats “durable relationships” as equivalent to marriage for the purpose of granting family reunification rights under EU law.**



Rainbow families

The position of members of a rainbow family under EU free movement law is not clear. **The main question is if rainbow families – already established in another EU Member State - are recognised as a family “for all legal purposes”.**

The study assumes that legal ties between biological parents and children (mostly) continue to exist [except from some surrogacy cases]. Obstacles are to be expected for non-biological parents. Unfortunately, the study does not reveal the systematic problems in detail. The answers seem to be too weak for comprehensive conclusions.



Rainbow families

The study gives the following insights into the answers of Member States

POLAND does not recognise a same-sex couple as the joint parents of a child (refusal to register foreign birth certificates. Court decision in December 2019: Children of Polish citizen should get a PESEL number)

GREECE and SLOVAKIA will only recognise one of the same-sex parents legally

In **ITALY**, even step-child adoption is not expressly authorised by legislation

LITHUANIA: unclear if rainbow families grant other rights than residence permits

ROMANIA/CROATIA: joint parenting by same-sex couples is not allowed (however: parental responsibility possible in Croatia)

HUNGARY: most regulations do recognise the registered/cohabitating partners as step-parent

BULGARIA: links between same-sex parents and children are taken into account for family reunification under EU law (but it is unclear for other legal purposes)

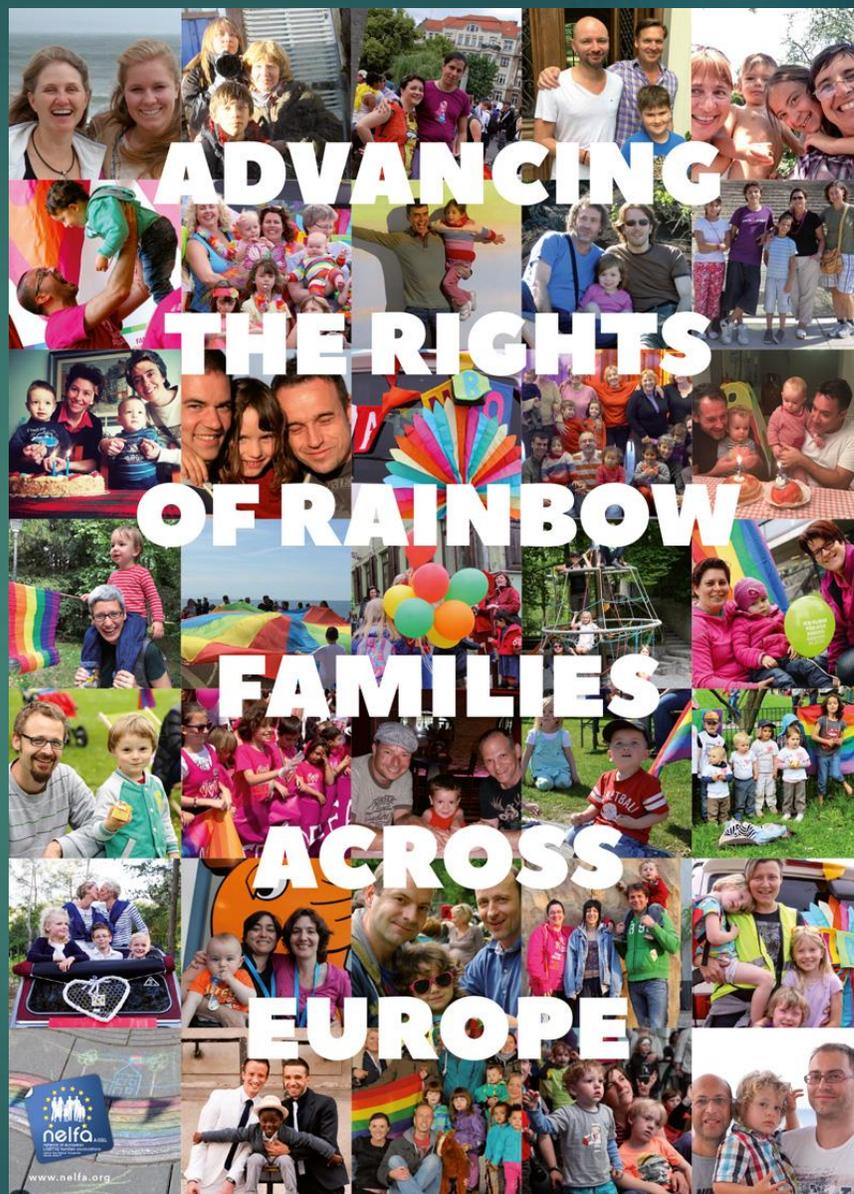
CZECHIA: position is unclear (legal recognition of rainbow families through surrogacy? 2017?)

Questionnaire: **EQUAL TREATMENT for children of same-sex couples in POLAND, AUSTRIA, CYPRUS, ESTONIA, FINLAND, IRELAND, SLOVENIA and SPAIN**

SWEDEN: *“In most cases, yes [...]. There may, however, be differences as an effect of the possibilities to recognise foreign parental confirmations.”*

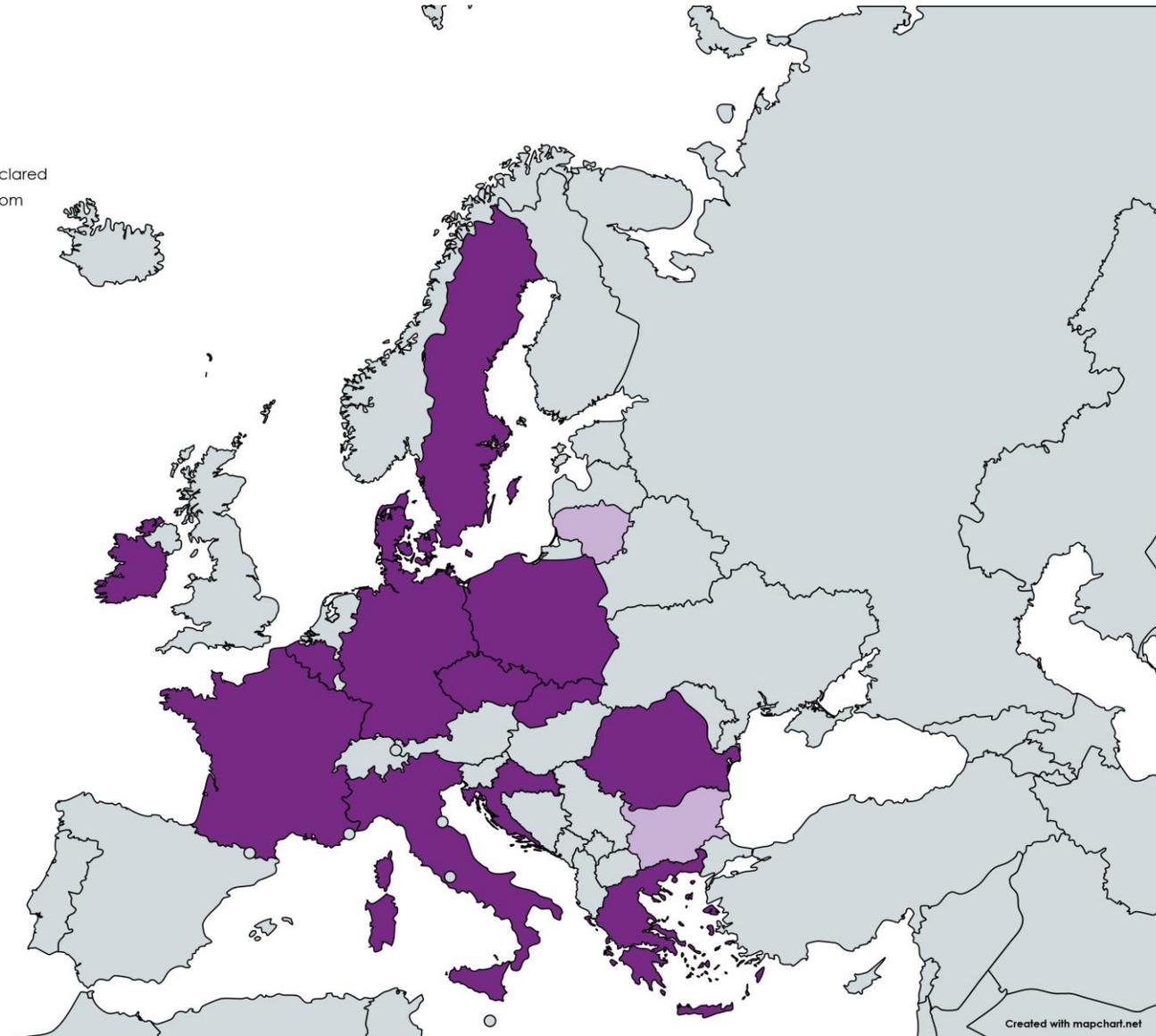
Rainbow families

Since 2018, NELFA is collecting cases of LGBTIQ* parents who face difficulties in cross-border situations. Some of them are mentioned in the study. In 2020, a range of families have sent petitions to the European Parliament. The obstacles come from a non-recognition of birth certificates stating two parents of the same sex. In some cases, the non-recognition of the civil status causes problems for the continuity of familial ties. Other struggles come from specific regulations on assisted reproductive techniques or non-existing rules (i.e. on surrogacy).



Recognition of rainbow families in cross-border situations

- Problems reported/declared
- Problems expected (from answers)





“

Apart from the emotional significance of the continued recognition of a child as legally the child of both of his/her parents, it is important from a practical and legal perspective as well, since it is only in this way that parents can have legal obligations towards their child and that the child can claim rights against them as descendant [...]. Hence, the failure to legally recognise the legal parent-child relationship creates uncertainty, and, with it, insecurity both for the parents and the child, as it, in effect, denies their relationship. It can, also, cause bureaucratic complications and unnecessary delays.

”

OBSTACLES TO THE FREE MOVEMENT OF RAINBOW FAMILIES, PAGE 80

The study states that, currently, EU law comes empty-handed for rainbow families who exercise their free movement rights and, once within the host Member State, wish to be treated like every other family. Unluckily, no explicit or implicit provision or reference is made to rainbow families in any EU law provision or instrument. The authors recommend the EU institutions make it clear that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families at least in all the circumstances that this is required under the EConHR!



“

When the legal links between a child and one or both (same-sex) parents dissolve in the host EU Member State, this amounts to a breach of the right to respect for family life of the child and the parents, and of the right to respect for private life of the child, contrary to Article 7 of the Charter, and the right to respect for private and family life which is protected as a general principle of EU law. [AND: ...] this amounts to a breach of the right of the child (by association) and the parents not to be discriminated against on the grounds of sexual orientation, contrary to Article 21 of the Charter.

”

OBSTACLES TO THE FREE MOVEMENT OF RAINBOW FAMILIES, PAGE 91

The study gives some specific recommendations to the EU Commission how to advance the rights of same-sex couples and rainbow families with children...

SUMMARY of possible actions...

1. Infringement procedure against Romania (non-recognition of the Coman judgment) – 258 TFEU – and enforcement action against all Member States that do not comply.
2. Annulment of the phrase “if the legislation of the host Member State treats registered partnerships as equivalent to marriage” (Directive 2004/38/EC) – 263 TFEU
3. Support of strategic litigation to cover more rights/benefits than a residence permit
4. Insistence on the adoption of the Non-Discrimination Directive (proposal 2008)
5. Legislation should be proposed using the free movement of persons legal bases (which require use of the ordinary legislative procedure) requiring all Member States to recognise, for the purposes of national law, a marriage or registered partnership formed in another Member State, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the ECtHR
6. Legislation should be proposed using the free movement of persons legal bases (which require use of the ordinary legislative procedure) requiring all Member States to recognise for all purposes of national law the adults mentioned in a birth certificate issued in another Member State as the legal parents of the child mentioned in that birth certificate, regardless of the sexes or the marital status of the adults

Thank you for your attention!

NELFA

... IS THE EUROPEAN PLATFORM OF LGBTIQ* FAMILIES ASSOCIATIONS, BRINGING TOGETHER LGBTIQ* PARENTS AND PARENTS-TO-BE FROM ALL OVER EUROPE. NELFA CURRENTLY REPRESENTS 41 ORGANISATIONS IN 33 EUROPEAN COUNTRIES WITH MORE THAN 20,000 MEMBERS. NELFA IS A MEMBER OF ILGA-EUROPE, TRANSGENDER EUROPE AND COFACE FAMILIES EUROPE. WEBSITE: [HTTP://WWW.NELFA.ORG](http://www.nelfa.org). LEAFLET: [HTTPS://BIT.LY/2PST8KP](https://bit.ly/2PST8KP). NEWSLETTER: [HTTP://BIT.LY/2FCN5C5](http://bit.ly/2FCN5C5).

MAKE A DONATION

SUPPORT NELFA AND LGBTIQ* FAMILIES IN EUROPE BY MAKING A DONATION.
BANK: CRELAN, BELGIUM **IBAN:** BE18 8601 1595 2465 **BIC:** NICABEBB

