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

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Introduction

In its much-awaited ruling in the case of *Coman*,[1] the European Court of Justice (ECJ) held that the term "spouse" for the purpose of the grant of family reunification rights under EU free movement law, includes the *same-sex* spouse of a Union citizen who has exercised EU free movement rights. This means that in such situations, the Union citizen can rely on EU law to require the Member State to which (s)he moves to admit within its territory his/her same-sex spouse and grant him/her a right of residence, irrespective of whether that Member State has opened marriage to same-sex couples within its territory.

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 made it clear that same-sex marriages are equal to opposite-sex marriages for the purposes of EU free movement law.

This report will aim to analyse the case, explaining its overall importance but, also, highlighting the gaps in protection that persist even after the delivery of the Court's judgment.

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Factual and Legal Background

The case involved a married same-sex couple – Mr Relu Adrian Coman (a dual Romanian-US national) and Mr Robert Clabourn Hamilton (a US national) – who wished to settle permanently in Romania together, relying on the family reunification rights that Mr Coman enjoys under EU free movement law.

Mr Coman and Mr Hamilton met in the US in 2002 and lived together in New York from 2005 to 2009, when Mr Coman took up residence in Belgium. The couple married in Brussels in 2010. The issue that led to this case emerged in 2012, when the couple contacted the General Inspectorate for Immigration, Romania, to enquire whether Mr Hamilton – in his capacity as the spouse of Mr Coman – could obtain the right to reside lawfully in Romania for more than three months, on the basis of Directive 2004/38,[2] in case Mr Coman decided to return to Romania. Directive 2004/38 provides that the "family members" of a Union citizen who are not nationals of an EU Member State and who accompany or join the Union citizen in the host Member State, shall have the right of residence there for a period of longer than three months.[3] For the purposes of the Directive, "family member" means, inter alia, "the spouse" of a Union citizen.[4]

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1 Case C-673/16 *Coman, Hamilton and Asociaţia Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* EU:C:2018:385. For an academic analysis of the case by the author of this report see A. Tryfonidou, "The ECJ recognises the right of same-sex spouses to move freely between EU Member States: the *Coman* ruling" (2019) 44 *European Law Review* (forthcoming).

2 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

3 Directive 2004/38 (above n. 2), art. 7(2).

4 Directive 2004/38 (above n. 2), art. 2(2)(a).

The Romanian authorities replied that Mr Hamilton did not have the right to reside lawfully in Romania for more than three months as, under Romanian law, he was not recognised as the spouse of Mr Coman: the Romanian Civil Code defines marriage as a union between a man and a woman,[5] whilst it notes that marriage between persons of the same sex is prohibited;[6] in addition, it provides that marriages between persons of the same sex entered into or contracted abroad shall not be recognised in Romania.[7]

As a result of that, Mr Coman, Mr Hamilton, and the Romanian LGBT organisation Asociaţia Accept, brought an action against the decision of the Inspectorate, seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the EU right of freedom of movement. In their action, they also argued that the parts of the Romanian Civil Code which do not recognise same-sex marriage are unconstitutional, as they infringe the provisions of the Romanian Constitution that protect the right to personal life, family life, and private life, and the provisions relating to the principle of equality. The first instance court hearing the case referred the matter to the Romanian Constitutional Court which, in its turn, decided to stay the proceedings and make a reference for a preliminary ruling to the ECJ asking, essentially, whether a Union citizen who has exercised free movement rights can enjoy, with his same-sex spouse, family reunification rights under EU law.

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Advocate General Opinion

Advocate General Wathelet delivered his Opinion in January 2018.[8] He explained that Directive 2004/38 does not apply in a situation like the one on the facts of the case, where a Union citizen returns *to his Member State of nationality* after having resided in the territory of another Member State; however, it must be applied by analogy in such circumstances, when interpreting Art. 21 TFEU, from which a right of residence can be derived.[9] The Advocate General noted that if the third-country national spouse of a Union citizen is not allowed to join him/her in his/her Member State of nationality, the Union citizen could be discouraged from leaving that Member State in the first place,

> owing to the prospect of not being able to continue, on returning to his Member State of origin, a way of family life which might have come into being in the host Member State.[10]

Following earlier Court pronouncements, the Advocate General explained that it is only if the Union citizen created or strengthened family life during genuine residence in the host Member State, that Art. 21 TFEU requires that the citizen's family life may continue on

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5 Law no. 287/2009 Codul civil al României (Romanian Civil Code) (available at http://www.imliasi.ro/noul-cod-civil.pdf), art. 259(1).

6 *Ibid*, art. 277(1).

7 Romanian Civil Code (above n. 5), art. 277(2).

8 ECLI:EU:C:2018:2.

9 *Coman*, AG Opinion, paras 22-24.

10 *Coman*, AG Opinion, paras 25.

returning to the Member State of which (s)he is a national.[11] It was then noted that Mr Coman and Mr Hamilton did, indeed, "consolidate" a family life while Mr Coman was residing in Belgium: the couple "founded" a family life when they lived together for four years in New York and their relationship was consolidated by their marriage in Brussels.[12] The relationship was not rendered ineffective as a result of the fact that the couple did not live continuously together, as in a,

> globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children's education.[13]

The Advocate General then pointed out that the term "spouse", for the purposes of the Directive, must "be given an autonomous and uniform interpretation"[14] throughout the EU which "must be independent of the sex of the person who is married to a Union citizen".[15] Providing such an interpretation does not detract from the competence of the Member States to determine whether to provide or not for same-sex marriage in their internal legal order, as it is only concerned with situations where Union citizens and their family members exercise their EU right to free movement.[16] The Advocate General then proceeded to analyse the different terms used in the 2004 Directive to describe family members and concluded that the word "spouse" "relates to marriage, it is gender-neutral and independent of the place where the marriage was contracted",[17] whilst he pointed out that the context in which the Directive is now interpreted and its objective confirm this. In particular, the Advocate General explained that the context in which the Directive is *currently* interpreted is one whereby a rather sizeable proportion of Member States have opened marriage to same-sex couples,[18] whilst the term "spouse" must be interpreted in a way which complies with the right to family life as *currently* interpreted.[19] He also noted that the free movement objective pursued by the 2004 Directive supports an interpretation of the term "spouse" independent of sexual orientation, as this "facilitates the free movement of a greater number of citizens", whilst it is consistent with another objective of the Directive, namely, its implementation without discrimination on grounds such as sexual orientation.[20] The suggested interpretation, the Advocate General added, is also apt to ensure a high level of legal certainty and transparency as married same-sex couples will know that they will be recognised in every Member State to which they move.[21]

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11 *Coman*, AG Opinion, para. 26.

12 *Coman*, AG Opinion, para. 27.

13 *Coman*, AG Opinion, para. 28.

14 *Coman*, AG Opinion, para. 34.

15 *Coman*, AG Opinion, para. 32.

16 *Coman*, AG Opinion, paras 36-42.

17 *Coman*, AG Opinion, paras 44-50.

18 *Coman*, AG Opinion, paras 54-58.

19 *Coman*, AG Opinion, paras 59-67.

20 *Coman*, AG Opinion, paras 68-75.

21 *Coman*, AG Opinion, para. 76.

Judgment

Like the Advocate General, the Court began its analysis by explaining that Directive 2004/38 is not applicable to the facts of the case, since Mr Coman wished to be joined by his same-sex spouse *in his Member State of nationality*; however its provisions should apply be analogy in such circumstances, when Art. 21 TFEU – from which family reunification rights can be derived in such a scenario – is interpreted.[22] The Court then proceeded to note that an EU citizen who has exercised the right to move freely between Member States can rely on the rights pertaining to EU citizenship even against his Member State of nationality.[23] Such rights include the right to lead a normal family life with their family members in the Member State to which they return after exercising free movement rights.[24]

The Court then pointed out that Directive 2004/38 includes the "spouse" as a "family member" which "refers to a person joined to another person by the bonds of marriage",[25] whilst it also noted that "the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned".[26]

The Court explained that since Directive 2004/38 does not make reference to national law in relation to the term "spouse",

> a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.[27]

Moreover, although a person's status (including marital status) continues to fall within Member State competence,[28] when exercising that competence, Member States must comply with EU law.[29] The Court, in particular, explained that,

> the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States.[30]

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22 *Coman*, Judgment, paras 18-27.

23 *Coman*, Judgment, para. 31.

24 *Coman*, Judgment, para. 32.

25 *Coman*, Judgment, paras 33-34.

26 *Coman*, Judgment, para. 35.

27 *Coman*, Judgment, para. 36.

28 *Coman*, Judgment, para. 37.

29 *Coman*, Judgment, para. 38.

30 *Coman*, Judgment, para. 40.

Accordingly, unlike the Advocate General, who argued for the adoption of an autonomous, uniform, EU, interpretation of the term "spouse", the Court chose to apply the home State principle and to require the Member State to which a Union citizen returns, to recognise a marriage *lawfully entered into in the territory of another Member State*.

The Court then examined possible justifications, recognising that Member States might seek to rely on the obligation imposed on the EU by Art. 4(2) TEU to respect the national identity of the Member States or on the ground of public policy.[31] It concluded that the refusal of a Member State to recognise a same-sex marriage contracted in another Member State and the resultant refusal to grant family reunification rights to a Union citizen who has exercised free movement rights, cannot be justified on either of the above grounds:

> the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and … falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.[32]

The Court then stressed that, in any event, the contested refusal would not be capable of being justified as it would be inconsistent with the right to respect for private and family life,[33] guaranteed by the EU Charter of Fundamental Rights (EUCFR).[34] In particular, as the Court has explained, drawing on the case-law of the European Court of Human Rights, "the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation".[35]

The Court, however, did not proceed to analyse this argument in more detail but it simply concluded that the contested refusal was precluded by Art. 21 TFEU. In other words – unlike the Advocate General – the Court preferred to base its reasoning in the case on a free movement argument, with fundamental human rights coming into the equation only at the justification stage, instead of forming the basis of a separate line of argument for finding a breach of EU law.[36]

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31 *Coman*, Judgment, paras 43-44.

32 *Coman*, Judgment, para. 45.

33 *Coman*, Judgment, paras 47-50.

34 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

35 *Coman*, Judgment, para. 50.

36 For an analysis of how fundamental human rights protected under EU law can form a separate, independent, basis for a finding of a breach of EU law in cases where Member States refuse to recognise the legal status attached to same-sex relationships see A. Tryfonidou, "EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition" (2015) 21 *Columbia Journal of European Law* 195.

Analysis

Same-Sex Marriage and the EU

The legal recognition of same-sex relationship has, in the past couple of decades, become one of the most prominent issues discussed in parliaments, in courts, and in the media, around the world, with views on both sides of the debate being overwhelmingly strong. This is a complicated and delicate matter which touches on issues relating to human rights, religion, morality, and tradition, as well as on constitutional principles such as equality, autonomy, and human dignity. Despite the fact that there is evidence that suggests that there are benefits – especially for young LGB persons – to the opening of marriage to same-sex couples,[37] most religions and Churches reject this move and are, even, often vehemently opposed to it, considering homosexuality a "sin", this leading, in turn, to negative societal attitudes towards LGB persons, especially in countries that are deeply religious. What is more, the decision to extend legal recognition to same-sex relationships in countries where this step has been taken, does not signal the end of the debate, but rather begets a number of additional questions: what legal status should be given to same-sex couples? Should they be allowed to adopt children as a couple? Should same-sex couples comprised of two men be allowed to have a child through a surrogacy arrangement? Should same-sex couples comprised of two women be allowed to have a child (as a couple) through medically assisted insemination and, if yes, should the State fund this?

Europe has, until recently, boasted as the most progressive continent regarding the legal recognition of same-sex relationships, with Denmark being the first country in the world to introduce same-sex registered partnerships (in 1989) and the Netherlands being the first country to introduce same-sex marriage (in 2001). In fact, currently all western EU Member States make provision for legal recognition of same-sex relationships, though there remains considerable diversity between the types of legal status being afforded. At the same time, there are still six EU Member States[38] - all situated in eastern Europe – which do not offer *any* legal recognition to same-sex relationships whilst there are seven EU Member States – again, all situated in eastern Europe – that maintain a constitutional ban on same-sex marriage.[39]

Accordingly, even today, there is a legal patchwork regarding the legal recognition of same-sex relationships in the EU. The picture becomes even more fragmented, when we examine which Member States allow same-sex couples to act *jointly* as parents and which avenues to parenting are open to them.[40]

The question, of course, is whether the existence of such a legal patchwork is permissible under EU law. In particular, is it permissible for some EU Member States to completely ban

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37 See, for instance, "Drop in teenage suicide attempts linked to legalisation of same-sex marriage". The Guardian. 20 February 2017 www.theguardian.com/us-news/2017/feb/20/drop-in-teenage-suicide-attempts-linked-to-legalisation-of-same-sex-marriage (last accessed on 9 January 2019)

38 Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia.

39 At the moment of writing, seven EU Member States have a constitutional ban on same-sex marriage: Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia.

40 An excellent summary of the legal framework regarding LGBTI issues in European countries is published annually by ILGA Europe. The most recent edition of the summary is available at http://rainbow-europe.org (last accessed on 9 January 2019).

same-sex marriage and to fail to offer some kind of legal recognition to same-sex relationships, even though some other EU Member States are among the most progressive in the world when it comes to the protection of LGBT rights?

The answer to the above question is that it is fully within the rights of the Member States to decide whether they will offer legal recognition to same-sex relationships within their territory, and if yes, what exact form this will take. This is because family law and, thus, questions, regarding the legal recognition of relationships and the corresponding civil status, fall within the realm of Member State competence.[41]

Yet, as with other areas where the Member States maintain full competence and the EU cannot legislate, it is clear that with regards to family law and, in particular, the legal recognition of same-sex relationships, Member States must comply with EU law when exercising their competence.[42]

The scenario in *Coman* is precisely an example of a situation where the exercise of Member State competence in the family law field could give rise to a breach of EU law. In this case, Romania prohibited same-sex marriage in its territory. This is not problematic from the point of view of EU law, since Member States are free to determine whether they will open marriage to same-sex couples in their territory and this decision does not breach any EU law provisions. However, Romania's decision not only to prohibit same-sex marriage *in its territory*, but, also, to *refuse to recognise same-sex marriages contracted elsewhere*, does amount to a breach of EU law, in situations where an EU citizen *coming from another Member State* seeks to claim family reunification rights in its territory. This is – as explained by the Court – for the simple reason that the failure to recognise that citizen's marriage and the resultant refusal to allow his spouse to live with him in Romania, can clearly impede his right to move there from another Member State: as it has been well-established in the Court's case-law, the inability to be joined or accompanied by close family members is a factor which is highly likely to deter a Union citizen from exercising free movement rights.[43] This reasoning is clearly applicable, also, in the context of married same-sex couples[44]: "the main right of EU citizenship, which is free movement, cannot be made dependent on the sex or, for that matter, the sexual preferences of citizens".[45]

Accordingly, Romania's exercise of its competence in the family law field and, in particular, its choice not to recognise same-sex marriages *contracted in other Member States*, is contrary to EU law as it can impede the exercise of EU free movement rights and, hence, the ECJ rightly

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41 *Coman,* Judgment, para. 37; Case C-443/15 *Parris* EU:C:2016:897, para. 59; Case C-267/06 *Maruko* EU:C:2008:179, para. 59. See H. Toner, *Partnership Rights, Free Movement and EU Law* (Oxford: Hart, 2004) 1; K. Lenaerts, "Federalism and the Rule of Law" (2011) 33 *Fordham International Law Journal* 1388, 1355.

42 *Coman,* Judgment, para. 38; *Parris* (above n. 41) para.58.

43 See, inter alia, Case C-40/11 *Iida v Stadt Ulm* EU:C:2012:691, para. 68; Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645, para. 22; Case C-87/12 *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:291, para. 35.

44 K. Lenaerts (above n. 41) 1359-1360.

45 D. Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33 *Fordham International Law Journal* 156, 184.

found a breach of EU law in the case of *Coman*. It is clear that this rationale pertains to both situations where a Union citizen seeks to be accompanied by his same-sex spouse in his Member State of nationality where he returns after exercising free movement rights (the *Coman* scenario), as well as where a Union citizen seeks to be accompanied by her same-sex spouse in a Member State other than that of her nationality, to which she moves.

Prior to *Coman*, the Court of Justice had only been once confronted with the question of whether same-sex marriage should be recognised as "marriage" for the purposes of EU law, and that was only indirectly, since the facts of the case involved a same-sex registered partnership and not a marriage. This was in the staff case of *D and Sweden v Commission*.[46] In that case, the Council refused to grant a household allowance to the same-sex registered partner of one of its employees, on the ground that the allowance was only available to the spouses of employees. Upholding the right of the Council to do so, the ECJ – hearing the case on appeal from the Court of First Instance – pointed out that,[47] "it is not in question that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex".

In this way, the ECJ in 2001 *explicitly* noted that a union between two persons of the same sex cannot be a "marriage" *for the purposes of EU law*, sending a message that the EU – at the time – did not recognise same-sex marriages. This was not surprising, given that it was only three years earlier that the same Court had pronounced that,

> in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.[48]

At the same period of time, the EU legislature had adopted a more nuanced approach to the issue. In particular, when the EU institutions were discussing the proposal of what later became Directive 2004/38, the issue of same-sex marriage came up, with different institutions having different views as to whether the term "spouse" should include same-sex spouses.[49] Instead of making it clear that same-sex spouses are or are not included in the term "spouse" for the purposes of the Directive, a compromise position was adopted, using the gender- and sexual orientation-neutral term "spouse" alone, without offering any clarification as to whether it requires that the two spouses are of different sexes.[50] In this way, it was left open to the ECJ, if and when it would feel that the time was ripe, to provide a clarification that the term includes both opposite-sex and same-sex spouses.

As we have seen, it was only about fifteen years later, that the Court was presented with the opportunity to take this step in *Coman*. In deciding to rule that the term "spouse" includes same-sex spouses in this context, the ECJ may have been influenced by the steps taken by the

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46 Joined Cases C-122 & 125/99 P *D and Sweden v Council* EU:C:2001:304.

47 ibid, para. 34.

48 Case C-249/96 *Grant v South-West Trains* EU:C:1998:64, para. 35.

49 For more on this see M. Bell, "Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union" (2004) 5 *European Review of Private Law* 613, 618-622.

50 See the analysis of AG Wathelet in his Opinion in *Coman*, paras 51-52.

US Supreme Court which in two judgments in, respectively, 2013 and 2015, gradually provided full and complete recognition for married same-sex couples, for all legal purposes. In 2013, in the *Windsor* case the Court held that same-sex marriages that have been validly performed and have been approved by the states must be recognised for all *federal* purposes, in this way taking the first step towards marriage equality in the US.[51] The Court, however, took the next step towards full equality for married same-sex couples in the subsequent *Obergefell v Hodges* judgment in 2015.[52] In that case the US Supreme Court held that a) all US States must open marriage to same-sex couples and b) that all US States must recognise same-sex marriages validly performed in other jurisdictions.[53]

With *Coman* the ECJ seems to have only *partly* followed the steps of the US Supreme Court in *Obergefell v Hodges*, in that it made it clear that EU Member States must recognise same-sex marriages contracted in other EU Member States, albeit that in the EU context this is only limited to situations where a Union citizen moves between Member States and, in particular, when (s)he claims family reunification rights under EU law. In addition, the ruling in *Coman* seems to imply that same-sex marriages must now be recognised for all EU law purposes, which brings the EU in line with the US Supreme Court ruling in *Windsor* which established federal recognition of same-sex marriages: if, as the judgment states, albeit quite vaguely,[54] failing to recognise same-sex marriages in the same way as opposite-sex marriages breaches fundamental human rights protected under the EUCFR, it would seem that all EU law provisions should be read in a way which provides for marriage equality and the EU institutions must recognise same-sex marriages as equal to opposite-sex marriages for all purposes.

With the above steps, however, the ECJ has gone as far as it can go, in terms of marriage equality. The Court cannot completely follow the path trodden by the US Supreme Court in *Obergefell v Hodges* since – as explained earlier – the EU does not have the competence to require Member States to open marriage to same-sex couples *in their territory*.[55]

In fact, even the European Court of Human Rights (ECtHR) which, admittedly, has a broader remit in the family law field, has stopped short of requiring the European Convention on Human Rights (ECHR) signatory states to open marriage to same-sex couples in their territory.[56] In *Schalk & Kopf v Austria*, the ECtHR noted that, "as matters stand, the question

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51 *United States v Windsor*, 570 US 744 (2013).

52 *Obergefell v Hodges*, 576 US (2015).

53 For an explanation of these steps see S. Titshaw, "Same-Sex Spouses Lost in Translation? How to Interpret 'Spouse' in the EU Family Migration Directives" (2016) 34 *Boston University International Law Journal* 45, 65-68.

54 *Coman*, Judgment, paras 47-50.

55 For the same view see C. Bell and N. Bačić Selanec, "Who is a 'spouse' under the Citizens' Rights Directive? The prospect of mutual recognition of same-sex marriages in the EU" (2016) 41 *European Law Review* 655.

56 P. Dunne, "Who Is a Parent and Who Is a Child in a Same-Sex Family- Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective" (2017) 30 *Journal of the American Academy of Matrimonial Lawyers* 27, 33-34.

whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State".[57]

In *Oliari*, the same court required Italy to create a legal framework for the recognition of same-sex relationships in its territory.[58] However, the judgment makes it clear that it suffices that there is *some* kind of legal recognition of same-sex relationships. In addition – as submitted by others[59] – the obligation seems to be imposed only on Italy, since the ECtHR in its judgment emphasised that the particular legal and social context in that signatory state seems to require this. Hence, *Oliari* cannot be considered a source of a general obligation imposed on *all* ECHR signatory states to create a legal framework for the recognition of same-sex relationships in their territory.[60] What is more, as regards the cross-border recognition of same-sex relationships, the Strasbourg court is, somewhat, more cautious than its Luxembourg counterpart,[61] in that in *Orlandi*,[62] it has recently ruled that the signatory states are required to recognise same-sex marriages contracted abroad, albeit not, necessarily, as *marriages* – in other words, as long as signatory states do provide some form of recognition to same-sex marriages contracted abroad, this suffices for satisfying the requirements of Art. 8 ECHR. Hence, unlike the *Coman* ruling which requires the host state to recognise a same-sex marriage contracted in another Member State *as a marriage* for the purpose of granting EU family reunification rights, in *Orlandi* the ECtHR established that signatory states are obliged to recognise *in some legal form* marriages contracted in other countries.

Accordingly, it seems that in Europe, full marriage equality is unlikely to be imposed from above but steps to that direction can only be taken once and when each state is ready to proceed with this. And with seven EU Member States currently having a constitutional ban

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57 *Schalk & Kopf v Austria* (App. No. 30141/04) Judgment of 24 June 2010, para. 61.

58 *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11) Judgment of 21 July 2015.

59 P. Dunne (above n. 56) 29-30 and 36-37; S. Ragone and V. Volpe, "An Emerging Right to a 'Gay' Family Life? The Case of *Oliari v. Italy* in a Comparative Perspective" (2016) 17 *German Law Journal* 451, 481; J. Mulder, "Dignity or Discrimination: What paves the road towards equal recognition of same-sex couples in Europe?". University of Bristol Law School Blog. 26 March 2018 <https://legalresearch.blogs.bris.ac.uk/2018/03/dignity-or-discrimination-what-paves-the-road-towards-equal-recognition-of-same-sex-couples-in-europe/> (last accessed on 9 January 2019). In his Concurring Opinion in *Oliari*, in which he was joined by Judges Tsotsoria and Vehabovic, Judge Mahoney noted – referring to the other judges – "Our colleagues are careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States" – Concurring Opinion in *Oliari* by Judge Mahoney joined by Judges Tsotsoria and Vehabovic, para. 10.

60 For a view that the ECHR requires *all* its contracting parties to provide a legal framework for same-sex couples because – following *Schalk & Kopf* – same-sex couples are deemed to have "family life" within the meaning of Art.8 ECHR, see J. M. Scherpe, "The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights" (2013) 10 *The Equal Rights Review* 83.

61 Contrary to established practice, according to which the ECtHR is "braver" than its Luxembourg counterpart – R. Wintemute, "In Extending Human Rights, which European Court is Substantively 'Braver' and Procedurally 'Fitter'? The Example of Sexual Orientation and Gender Identity Discrimination" in S. Morano-Foadi and L. Vickers, *Fundamental Rights in the EU: A Matter for Two Courts* (Oxford: Hart, 2015).

62 *Orlandi and Others v Italy* (App. No. 26432/12, 26742/12, 44057/12 and 60088/12) Judgment of 14 December 2017.

on same-sex marriage, it seems that the EU is, at the moment, quite far from achieving full marriage equality and, thus, with regards to this matter, the EU is lagging behind the US.[63]

The Importance of Coman

The ruling in *Coman* was eagerly awaited and, hence, the wide attention it received in the media[64] and in scholarly blogs and publications[65] following its delivery was not unexpected. The ruling did not disappoint. In fact, with its audacity, the Court has pleasantly surprised LGBT organisations, lawyers and academics interested in LGBT rights, as well as married same-sex couples who had been concerned by the lack of clarity that prevailed prior to this judgment as regards the protection they enjoy under EU law.

The ruling in *Coman* will – as suggested by the Advocate General in the case[66] – ensure a high level of legal certainty and transparency, as married same-sex couples comprised of one EU citizen, will now know that they will be recognised in every Member State to which they move, at least for the purposes of family reunification. This may, in fact, constitute a "push" for same-sex couples to choose to marry instead of entering into a registered partnership (where this is possible), as although same-sex marriages *must* now be recognised for the purposes of family reunification, Directive 2004/38 *explicitly* leaves it to the host Member State to decide if it will recognise the registered partnership of couples coming from other Member States, whether these are opposite-sex or same-sex.[67]

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63 A. Tryfonidou, "Same Sex Marriage: The EU is Lagging Behind". EU Law Analysis Blog. 29 June 2015 <http://eulawanalysis.blogspot.com/2015/06/same-sex-marriage-eu-is-lagging-behind.html> (last accessed on 9 January 2019).

64 See, for instance, "Same-sex spouses have EU residence rights, top court rules". BBC News. 5 June 2018 <www.bbc.com/news/world-europe-44366898> (last accessed on 9 January 2019); "Same-sex marriages are backed in EU immigration ruling". New York Times. 5 June 2018 <www.nytimes.com/2018/06/05/world/europe/romania-ecj-gay-marriage.html> (last accessed on 9 January 2019); "EU's top court backs same-sex marriage". Aljazeera. 6 June 2018 <www.aljazeera.com/news/2018/06/eu-top-courts-sex-marriage-180606173829854.html> (last accessed on 9 January 2019).

65 See, inter alia, A. Tryfonidou, "Free Movement of Same-Sex Spouses within the EU: The ECJ's Coman Judgment". European Law Blog. 19 June 2018 <https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/> (last accessed on 9 January 2019; U. Belavusau, "The Federal Rainbow Dream: On Free Movement of Gay Spouses under EU law". VerfBlog. 5 June 2018 <https://verfassungsblog.de/the-federal-rainbow-dream-on-free-movement-of-gay-spouses-under-eu-law/> (last accessed on 9 January 2019); M. Beury, "The CJEU's Judgment in Coman: a small step for the recognition of same-sex couples underlying European divides over LGBT rights". Strasbourg Observers. 24 July 2018 <https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/#more-4202> (last accessed on 9 January 2019); S. Peers, "Love Wins in the CJEU: Same Sex Marriages and EU free movement law". EU Law Analysis Blog. 5 June 2018 <http://eulawanalysis.blogspot.com/2018/06/love-wins-in-cjeu-same-sex-marriages.html> (last accessed on 9 January 2019); P. Dunne, "Coman: vindicating the residence rights of same-sex 'spouses' in the EU" (2018) EHRLR 383; D. Kochenov and U. Belavusau, 'Same-Sex Spouses: More Free Movement, but What about Marriage? The Romanian State, Sodom and Gomorrah, and the Case of *Coman*' (2019) 56 *Common Market Law Review* (forthcoming); A. Tryfonidou (above n. 1).

66 *Coman*, AG Opinion, para. 76.

67 Article 2(2)(b) of Directive 2004/38 provides that "'family member' means the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State,

At the same time, it is likely that the ruling will lead to some backlash, as, in addition to fuelling homophobic statements and remarks,[68] it may also lead Member States that want to avoid its effects to introduce – as was recently considered in Romania[69] - a constitutional ban on same-sex marriage. However, Member States should bear in mind that such a move would not shield them from the effects of the ruling: the EU principle of supremacy provides that EU law prevails even over constitutional provisions of a Member State,[70] in case there is a conflict between the two, and thus *Coman* requires even Member States that have a constitutional ban on same-sex marriage to recognise such a marriage in situations that fall within the scope of EU law.

As noted in the Introduction, the judgment has a huge symbolic importance. As the Advocate General noted in his Opinion, the opportunity given to the Court in this case to rule on the concept of "spouse" in the context of a same-sex marriage,

> is a delicate matter for, although it relates to marriage as a *legal* institution, in the specific limited context of freedom of movement of citizens of the European Union, the definition of the concept of "spouse" to be given will necessarily affect not only the very identity of the men and women concerned, and therefore their dignity, but also the personal and social concept that citizens of the Union have of marriage, which may vary from one person to another and from one Member State to another.[71]

The ruling in *Coman* is, thus, hugely important in that it has made it clear that for the purposes of EU law, married same-sex couples are in the same position as married opposite-sex couples. Unlike in previous "delicate" cases,[72] where the ECJ refrained from conducting the balancing exercise at the justification stage itself and tossed this "hot potato" to the referring court instead, in this ruling, it did proceed to explain that obstacles to free movement which emerge from a refusal to grant family reunification rights to an LGB Union citizen married to a person of the same sex, can under no circumstances be justified. This is hugely important, both practically and symbolically, in that the Court has demonstrated that it has no tolerance for Member States' attempts to discriminate against LGB persons and their relationships, in

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if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State".

68 Following the delivery of the judgment, a number of Polish MPs made comments criticising the judgment – see, for instance, "ECJ 'gay marriage' ruling sparks opposition in Poland". Poland in English. 6 June 2018 <http://polandinenglish.info/37528158/ecj-samesex-marriage-ruling-sparks-opposition-in-poland> (last accessed on 9 January 2019).

69 On 6-7 October 2018, a referendum took place in Romania asking whether the Romanian Constitution should be amended to comprehensively ban same-sex marriage by changing the definition of "family" from one referring to "a union between spouses" to one making explicit reference to "a union between a man and a woman". The referendum failed to reach the required 30% turnout threshold and, thus, its result was not valid.

70 Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

71 *Coman*, AG Opinion, para. 2.

72 See, for instance, Case C-528/13 *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* EU:C:2015:288 and the comments in A. Tryfonidou, "The *Léger* ruling as another example of the ECJ's disappointingly reticent approach to the protection of the rights of LGB persons under EU law" (2016) 41 *European Law Review* 91, 101-104.

situations which fall within the scope of EU law. The Court in *Coman* made it clear that EU law requires that the exercise of the primary and fundamental right to move and reside freely in another Member State can under no circumstances lead to the loss by a Union citizen of the marital status (s)he has acquired in the Member State from which (s)he moves, *at least* when it comes to the receipt of EU family reunification rights.

I say "at least" in order to highlight the fact that although the case raised the rather narrow question of whether same-sex marriages must be recognised by the Member State of destination only a) when there is an exercise of free movement rights by an EU citizen and b) for the purpose of the grant of family reunification rights, it clearly has the potential to create the need for such marriages to be recognised in a broader range of circumstances.

If we consider the *Coman* case itself, the ruling simply requires Romania to recognise Mr Hamilton as the spouse of Mr Coman and, as such, to allow him to reside in its territory for a period of longer than three months. However, from the moment that Romania recognises Mr Hamilton as the spouse of Mr Coman for one purpose (i.e. his admission and residence in its territory), wouldn't it appear anomalous to refuse to treat the couple as married for other legal purposes? We can clearly imagine a scenario whereby Mr Hamilton is asked by a government department the basis of his residence in Romania – to which he will reply that this is his marriage to Mr Coman, *as recognised by Romania* – only to be subsequently told that he is not entitled to receive a tax advantage or an employment-related benefit available only to married couples, on the basis that under Romanian law, the couple is not recognised as "married".

As argued elsewhere,[73] EU anti-discrimination law and, in particular, Directive 2000/78,[74] can be relied on by same-sex couples once they have been admitted to the territory of another Member State, if they are discriminated against on the ground of their sexual orientation as regards the receipt of employment-related benefits. The main difficulty that Mr Coman and Mr Hamilton would face if they made a claim on this basis, nonetheless, would be that in Romania, there is no legal status for same-sex couples on which to base a comparison with opposite-sex married couples (as was the case, for instance, in previous cases such as *Maruko*[75] and *Hay*[76]), and that Directive 2000/78 explicitly provides in its Recital 22 that it "is without prejudice to national laws on marital status and the benefits dependent thereon". Accordingly, a national court – or the ECJ, if the matter reached it – might be unwilling to read Directive 2000/78 as requiring Member States to recognise *all* married couples coming from another Member State (whether opposite-sex or same-sex) as married for the purpose of the grant of employment-related benefits, as it would be wary of being accused of introducing same-sex marriage in Romania through the backdoor. The same concern might prevent a successful claim under Art. 21 EUCFR which prohibits discrimination on the ground of sexual orientation in situations which fall within the scope of EU law, even though since married

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73 A. Tryfonidou (above n. 36), 216-221 and 232-234.

74 Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 180/22.

75 *Maruko* (above n. 41).

76 Case C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* EU:C:2013:823.

opposite-sex couples are recognised as married for all legal purposes when they move between Member States, the same should be the case for married same-sex couples.[77]

In any event, even if the EU itself would be reluctant to take the additional step of requiring Member States to recognise same-sex marriages contracted in other Member States for purposes other than family reunification, the Member States themselves might feel the need to proceed with such a step, in situations where LGB Union citizens who are married to a person of the same-sex move to their territory, simply because it would be impracticable not to do so. What is more, if Member States do take this step, this will have a domino effect in that it will make no sense to treat their own nationals who have not exercised free movement rights and who have nonetheless lawfully concluded a same-sex marriage abroad, worse than nationals of other Member States who move to their territory as well as their own nationals who are in a *Coman*-like scenario.

Limitations of the Judgment

Whilst the judgment in *Coman* should be applauded for its breadth and boldness, there are, admittedly, some limitations to it.

The first is that although the Advocate General emphasised in his Opinion that the term "spouse" is "independent of the place where the marriage was contracted",[78] the Court has made repeated references in its judgment to marriages that were "concluded in a Member State in accordance with the law of that state" or made similar statements to that effect.[79] Does this mean that same-sex marriages concluded lawfully in, say, the US or Canada, cannot benefit from the *Coman* ruling? In other words, if Mr Hamilton and Mr Coman happened to marry in New York instead of Brussels, would the ECJ rule that Romania was not obliged to recognise them as spouses? This is a question left unanswered by the judgment and, thus, we can only hope that the Court will be given the chance to clarify this in a subsequent case. In the previous case of *Metock*,[80] the ECJ had noted that,

> neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised.

Accordingly, in order to avoid providing an interpretation of the Directive which is discriminatory on the grounds of sexual orientation, contrary to its Recital 31 and Art. 21 EUCFR, the Court will either have to impose the requirement that the marriage must have been concluded in a Member State in respect of all marriages (if this is what it intended to do in *Coman*) or will have to clarify that the term "spouse" for the purposes of the Directive, does not depend – when it comes to same-sex marriages – on whether the marriage was concluded in an EU Member State.

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77 J. Mulder, "Dignity or discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?" (2018) 40 *Journal of Social Welfare and Family Law* 129, 137.

78 *Coman*, AG Opinion, para. 49.

79 *Coman,* Judgment, paras 33, 35, 36, 39, 40, 42, 45, 51, 52, 56.

80 Case C-127/09 *Metock* EU:C:2008:449, para. 98.

The second limitation is *not* one that has been specifically created for cases involving same-sex couples, given that it is a principle that was established in previous case-law and which the Court has repeated in this case. This is the principle that it is only when a Union citizen has taken-up *genuine* residence in the territory of another Member State *and* during that period of *genuine* residence has established and strengthened family life, that (s)he can claim family reunification rights on his/her return to his/her Member State of nationality.[81] In previous case-law, the Court clarified that such genuine residence can only exist when the Union citizen has settled in another Member State *for over three months*.[82] At first glance, this limitation is liable to affect opposite-sex and same-sex married couples equally, since – as is obvious from ECJ case-law – both will need to prove such genuine residence in order to be able to claim family reunification rights on their return to their Member State of origin. However, in practical terms, the limitation will have a particularly restrictive effect on same-sex couples, given that the "free movement route" is the only way for such couples to formalise their relationship, in cases where they reside in Member States which do not allow same-sex couples to marry or enter into a registered partnership: without this limitation, the ruling in *Coman* would enable same-sex couples who reside (*and wish to continue residing*) in Member States that have not opened marriage to same-sex couples, to visit another Member State which permits same-sex marriages, get married in its territory, and upon their return to their Member State of residence require the latter to recognise their marriage.[83] The application of the "genuine residence" limitation in this particular context, however, seems to serve, exactly, as a mechanism for preventing marriage tourism and for appeasing the Member States that have not opened marriage to same-sex couples, in that it ensures that Union citizens who reside in such a Member State cannot side-step its laws. Accordingly – as emphasised by the Court in its judgment – *Coman* merely enables same-sex spouses who are legally recognised as such in a Member State that has opened marriage to same-sex couples and where they have established and strengthened family life *during a period of "genuine residence" there*, to move together (by virtue of the fact that they are spouses) to all Member States, irrespective of the recipient State's stance on same-sex marriage: the judgment can under no circumstances be used to require Member States to introduce same-sex marriage in their territory or to recognise same-sex marriages contracted elsewhere in situations which do not involve a real connection with EU free movement law.

Another, related, limitation is that the case makes provision, merely, for married same-sex couples who move between Member States for the purpose of becoming settled in the Member State of destination. However, what happens to married same-sex couples who visit another Member State only for a few days and while there they need to be recognised as spouses? For instance, if a married same-sex couple from France visits Romania for a few days and one of the spouses is hit by a car whilst there, will the other spouse be recognised as such

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81 Case C-456/12 *O and B v Minister voor Immigratie, Integratie en Asiel* EU:C:2014 :135, para. 51.

82 Ibid, paras 52-54.

83 A case involving such a scenario is currently pending before the Lithuanian Constitutional Court, from which a reference was made by the Supreme Administrative Court of Lithuania which was hearing the case - The Supreme Administrative Court of Lithuania, Case No. eA-4175-624/2016, 5 December 2016, http://www.lrkt.lt/~prasymai/22_2016.htm. For an explanation of the case see N. Bitiukova, "Gay Couple case Gives Lithuania's Highest Court a Chance to Strengthen Rights Protections". Liberties. 26 January 2017 <https://www.liberties.eu/en/news/lithuania-same-sex-couples-marriage-family-reunion/11236> (last accessed on 9 January 2019).

and, thus, be allowed to give consent for medical treatment on her spouse's behalf? This is a question which remains unclear and it can only be hoped that the ECJ will soon be given an opportunity to rule on this matter.

A fourth limitation is that the case is concerned only with *Union citizens* and their free movement rights and, thus, it does not provide an answer to the question of whether the term "spouse" includes a same-sex spouse when used in the context of the Family Reunification Rights Directive,[84] which determines the conditions under which *third-country nationals* lawfully residing in the territory of the member States can exercise the right to family reunification. Given that third-country nationals do not enjoy free movement rights under the free movement provisions of the Treaty, the free movement rationale on which the Court based its argument in *Coman* will not be able to be transposed into this context, though human rights arguments will clearly be able to be used to interpret the Directive as including same-sex spouses.[85]

Finally, it should be highlighted that the judgment only applies in cross-border situations and, thus, in line with the well-established purely internal rule, it cannot help married same-sex couples who are in a purely internal situation i.e. a situation which has no connection with EU law.[86] Although this, clearly, does make sense legally and, in fact, ensures that the scope of application of EU law is not extended in an unwarranted manner, one cannot help but notice that it highlights the plight of same-sex couples who have chosen not to – or are unable to – exercise their EU free movement rights.[87] For instance, if a Union citizen happens to be a national of, and reside in, a Member State which does not legally recognise same-sex relationships, (s)he will not be able to be joined there by his/her same-sex third-country national spouse, unless, of course, the latter has the right to enter that Member State on a basis other than the EU family reunification rights enjoyed by the Union citizen. Moreover, if a Union citizen has left his/her Member State of nationality but his/her movement has been confined between that Member State and a third-country, then on his/her return to his/her Member State of nationality, the *Coman* ruling will not be able to assist him/her by requiring that Member State to admit within its territory his/her same-sex spouse; this will, also, be the case for Union citizens who move between different parts of one and the same Member State.[88] Of course, in such a case the ECHR would – still – be applicable, and the Union citizen and his/her spouse would be able to rely on *Orlandi*, in order to require the said Member State to legally recognise their relationship (albeit not, necessarily, as a marriage) and to grant them the rights and entitlements attached to that legal status.

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84 Directive 2003/86 on the right to family reunification [2003] OJ L 251/12, Art. 4.

85 J. Rijpma and N. Koffeman, "Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?" in D. Gallo, L. Paladini and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014) 484-487.

86 For an explanation of the purely internal rule see A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009) Ch. 1.

87 For a similar argument see D. Kochenov (above n. 45) 196-197.

88 See S. Peers (above n. 65).

Conclusion

With its recent judgment in *Coman* the Court of Justice pronounced that LGB Union citizens who move between Member States can require the Member State to which they move (whether this is their Member State of nationality or another Member State) to recognise their same-sex spouse as a "spouse" for the purpose of the grant of family reunification rights under EU law.

This report had as its aim to analyse the case and highlight its importance. It was noted that the ruling ensures a high level of legal certainty and transparency, as married same-sex couples comprised of (at least) one EU citizen, will now know that they will be recognised in every Member State to which they move when claiming family reunification rights under EU law. In addition, it was stressed that the ruling is hugely significant from a symbolic point of view, in that it has made it clear that for the purposes of EU free movement law, married same-sex couples are in the same position as married opposite-sex couples. Moreover, the report explained why although the case raised the rather narrow question of whether same-sex marriages must be recognised for the purpose of the grant of family reunification rights in cross-border situations, it clearly has the potential to create the need for such marriages to be recognised in a broader range of circumstances.

Yet, the ruling does not "conclude" the matter of same-sex marriage from the point of view of EU law, but, rather, creates a number of new questions and highlights a number of gaps in the protection of same-sex couples, which persist even following the delivery of this ruling. The ruling speaks only of same-sex couples who have concluded their marriage in an EU Member State – does this mean that same-sex couples who happened to have their marriage concluded outside the EU cannot benefit from the principle established in the case? Moreover, the ruling seems to apply only to same-sex couples who move to another Member State to settle there for more than three months and, thus, it leaves unprotected married same-sex couples who visit another Member State for only a few days e.g. as tourists, on a business trip, or to receive healthcare services. In addition, the case is concerned only with *Union citizens* and their free movement rights and, thus, it does not provide an answer to the question of whether the term "spouse" includes a same-sex spouse for the purpose of the grant of family reunification rights to LGB third-country nationals who are lawfully resident in the EU. Finally, the principle established by the case only applies in cross-border situations and, thus, cannot help married same-sex couples who are in a purely internal situation. Although this, clearly, does make sense legally in that it respects the limits to the EU's competence, it highlights the plight of same-sex couples who have chosen not to – or are unable to – exercise EU free movement rights. Accordingly, and given that the delicate nature of the issue of the legal recognition of same-sex unions means that it is unlikely that political action will be taken to fill-in the above persisting gaps and clarify the issues that remain unresolved, it can only be hoped that the ECJ will be given the opportunity to do so in the near future.

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