The ECJ recognises the right of same-sex spouses to move freely between EU Member States: the Coman ruling

Article

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The ECJ recognises the Right of Same-Sex Spouses to move freely between EU Member States: the *Coman* ruling

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SUMMARY (150 words)
In its recent *Coman* ruling, the European Court of Justice held that the term "spouse" includes the same-sex spouse of a Union citizen, for the purpose of the grant of family reunification rights in free movement cases. Hence, a Union citizen can rely on EU law to require the Member State of destination to admit within its territory his/her same-sex spouse, irrespective of whether that Member State has opened marriage to same-sex couples. *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 article 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.

KEYWORDS
Same-sex marriage; legal recognition of same-sex relationships; EU law; EU free movement; fundamental rights; equality and non-discrimination; LGB rights; Romania

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Introduction

In its much-awaited ruling in the case of *Coman*,[1] the European Court of Justice ("ECJ" or "Court of Justice") held that the term "spouse" for the purpose of the grant of family reunification rights, 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 of destination 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 article will 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.

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.

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. In 2012, Mr

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[1] *Coman, Hamilton and Asociatia Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (C-673/16) EU:C:2018:385.

Coman was considering to move back to Romania and the couple contacted the Romanian General Inspectorate for Immigration 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] The latter 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]

The Romanian authorities replied that Mr Hamilton did not have the right to reside in Romania 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]

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 EU free movement rights. 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 a number of provisions of the Romanian Constitution. 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.

Advocate General Opinion

In his Opinion,[8] Advocate General Wathelet noted that if the third-country national spouse of a Union citizen is not allowed to join him in his 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.[9]

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 returning to the Member State of which (s)he is a national.[10] 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.[11]

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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 ibid, art. 7(2).

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

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 Romanian Civil Code, art. 277(1).

7 Romanian Civil Code, art. 277(2).

8 ECLI:EU:C:2018:2.

9 *Coman*, AG Opinion, at [25].

10 *Coman*, AG Opinion, at [26].

11 *Coman*, AG Opinion, at [27].

The Advocate General then pointed out that the term "spouse", for the purposes of EU free movement law, must "be given an autonomous and uniform interpretation"[12] throughout the EU which "must be independent of the sex of the person who is married to a Union citizen".[13] 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.[14] The Advocate General then proceeded to analyse the different terms used in Directive 2004/38 – which applies, by analogy, to Union citizens who return back to their Member State of nationality – 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",[15] 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 a rather sizeable proportion of Member States have opened marriage to same-sex couples,[16] whilst the term "spouse" must be interpreted in a way which complies with the right to family life as *currently* interpreted.[17] 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.[18] 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.[19]

Judgment

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.[20]

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",[21] 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.[22]

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

12 *Coman*, AG Opinion, at [34].

13 *Coman*, AG Opinion, at [32].

14 *Coman*, AG Opinion, at [36-42].

15 *Coman*, AG Opinion, at [44-50].

16 *Coman*, AG Opinion, at [54-58].

17 *Coman*, AG Opinion, at [59-67].

18 *Coman*, AG Opinion, at [68-75].

19 *Coman*, AG Opinion, at [76].

20 *Coman*, Judgment, at [18-27].

21 *Coman*, Judgment, at [33-34].

22 *Coman*, Judgment, at [35].

> 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.[23]

Moreover, although a person's status (including marital status) continues to fall within Member State competence,[24] when exercising that competence, Member States must comply with EU law.[25] 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.[26]

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.[27] It concluded that the refusal of a Member State to recognise a same-sex marriage contracted in another Member State 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.[28]

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,[29] guaranteed by the EU Charter of Fundamental Rights ("EUCFR").[30] 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.[31]

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

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23 *Coman*, Judgment, at [36].

24 *Coman*, Judgment, at [37].

25 *Coman*, Judgment, at [38].

26 *Coman*, Judgment, at [40].

27 *Coman*, Judgment, at [43-44].

28 *Coman*, Judgment, at [45].

29 *Coman*, Judgment, at [47-50].

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

31 *Coman*, Judgment, at [50].

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.[32]

Analysis

Same-Sex Marriage in Europe

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 to such relationships and the types of rights and entitlements that are extended to same-sex couples who formalise their relationship. At the moment of writing, fourteen EU Member States have opened marriage to same-sex couples,[33] whilst eight offer only some form of registered partnership.[34] At the same time, there are still six EU Member States[35] which do not offer *any* legal recognition to same-sex relationships whilst there are seven EU Member States that maintain a constitutional ban on same-sex marriage.[36] The picture becomes even more fragmented, when we examine which Member States allow same-sex couples to act *jointly* – under the law – as parents and which avenues to parenting are open to them, with a little less than half of the EU Member States, currently making no provision for same-sex couples to be recognised legally as co-parents.[37]

Accordingly, even today, there is a legal patchwork regarding the legal recognition of same-sex relationships – and the consequences ensuing from formalising such relationships – in EU Member States.

The question, of course, is whether the existence of such a legal patchwork is permissible under EU law. In particular the question that concerns us here is whether it is permissible for EU Member States to completely ban same-sex marriage in their territory *and* to fail to recognise the legal status attached to same-sex relationships in other Member States. This question will be considered, first, taking into account the obligations imposed by the European Convention on Human Rights (ECHR) on its signatory States (which include *all* EU Member States) and, secondly, by analysing EU law and the obligations imposed by it.

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32 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 CJEL 195; 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.

33 Austria, Belgium, Denmark, France, Finland, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain, Sweden, UK (apart from Northern Ireland).

34 Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Slovenia.

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

36 Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia.

37 Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia. For a rather recent analysis of the laws and trends regarding same-sex parenting in different EU Member States see N. Nikolina, "Evolution of parenting rights in Europe – a comparative case study about questions in section 3 of the LawsAndFamilies Database" in K. Waaldijk, *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*, Working Paper 75 (2017) in the FamiliesandSocieties Working Paper Series, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20-%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3> (last accessed on 27.11.2018)

All EU Member States have signed and ratified the ECHR and, thus, they must ensure that their actions (or omissions) do not violate any of the provisions of this instrument. In addition, the ECHR is applicable to EU Member States more indirectly via the application of EU law: already back in the 1970s, the ECJ had ruled that the ECHR is a source of inspiration for itself when determining which human rights form part of the fundamental rights protected as general principles of EU law[38] (something which was, later, codified in Article 6 TEU); and the EUCFR – which is legally binding since 2009 – provides in its Article 52(3) that when it contains rights which correspond to rights guaranteed under the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the" latter, whilst this "shall not prevent Union law providing more extensive protection".

Accordingly, in this part of the article, the obligations imposed on EU Member States by the ECHR with regards to the legal recognition of same-sex relationships and, in particular, the stance of the European Court of Human Rights (ECtHR) on the matter, will be explored.

The ECtHR has been reluctant to lead on same-sex relationships, preferring to allow Member States to develop national law around this matter first. For this reason, it has repeatedly confirmed in its rulings that the question whether a State will allow same-sex marriage *in its territory* falls to be decided by it. In *Schalk and Kopf v Austria*,[39] the ECtHR was for the first time directly confronted with the question whether signatory States are required by the ECHR to open marriage to same-sex couples. The case was brought by an Austrian, same-sex, couple who wished to get married in Austria which – at the time – did not allow same-sex couples to formalise their relationship, though, by the time the ECtHR heard the case, it had introduced registered partnerships for same-sex couples. Noting that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another",[40] and that "it must not rush to substitute its own judgment in place of that of the national authorities",[41] the Court held that,

> as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.[42]

Accordingly, the case established that Article 12 ECHR (which provides the right to marry and to found a family) cannot be relied on by same-sex couples for the purpose of requiring an EU Member State to allow them to marry in its territory; the Court, also, held that the same is the case for Article 14 ECHR taken in conjunction with Article 8 ECHR, given that the ECHR "is to be read as a whole and its Articles should therefore be construed in harmony with one another".[43]

Nonetheless, the Court in the same case also took the opportunity to hold, for the first time, that a same-sex couple can enjoy, together, family life, within the meaning of Article 8 ECHR[44] – a step that has been symbolically hugely important in that it signified the broadening of the notion of the "family" to encompass non-traditional relationships, whilst it, also, enabled the Court to formally bestow its "approval" on same-sex relationships.

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38 *Nold* (Case 4/73) ECLI:EU:C:1974:51.

39 *Schalk & Kopf v Austria* (App. No. 30141/04) Judgment of 24 June 2010.

40 *Schalk & Kopf v Austria*, at [62].

41 *Schalk & Kopf v Austria*, at [62].

42 *Schalk & Kopf v Austria*, at [61].

43 *Schalk & Kopf v Austria*, at [101]. The Court confirmed these conclusions in *Chapin & Charpentier v France* (App. No. 40183/07) Judgment of 9 June 2016. For a strong critique of the Court's approach see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012) Ch. 6.

44 *Schalk & Kopf v Austria*, at [94].

In the subsequent case of *Vallianatos v Greece*,[45] the Court held that when a signatory State introduces a new family status (on the facts, registered partnership), it must not exclude same-sex couples from it, if this would be the only way for them to formalise their relationship in its territory, as this would amount to unjustified discrimination on the ground of sexual orientation as regards the enjoyment of the right to private and family life.

The *Oliari* case which was decided subsequently originated in two applications against Italy, brought by a number of Italian nationals who complained that the Italian legislation did not allow them to get married or enter into any other type of civil union with their same-sex partner. The ECtHR held that Article 8 ECHR required Italy to create a legal framework for the recognition of same-sex relationships in its territory.[46] However, the judgment makes it clear that it suffices that there is *some* kind of legal recognition of same-sex relationships, meaning that Article 8 ECHR does not require the signatory states to open *marriage* to same-sex couples, in line with the judgment in *Schalk and Kopf*. In addition – as submitted by others[47] – the ruling seems to have imposed this obligation only on Italy, since the ECtHR in its judgment emphasised that the particular legal and social context in that signatory state seemed 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. [48]

It was only in *Orlandi*,[49] nonetheless, that the ECtHR was confronted with the question of the *cross-border* legal recognition of same-sex marriages. The case originated in four applications against Italy, brought by eleven Italian nationals and one Canadian national, complaining that the Italian authorities' refusal to register their marriages contracted abroad breached the ECHR. The ECtHR 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 family reunification rights in free movement cases, in *Orlandi* the ECtHR established that signatory states are obliged to recognise *in some legal form* marriages contracted in other countries.

Same-Sex Marriage: The Position of the ECJ

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45 *Vallianatos v Greece* (App. Nos 29381/09 and 32684/09) Judgment of 7 November 2013.

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

47 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 J. Am. Acad. Matrimonial Law 27, 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 GLJ 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 14 August 2018). 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, at [10].

48 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.

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

It is well-established that family law and, thus, questions, regarding the legal recognition of relationships and the corresponding civil status attached to them, fall within the realm of Member State competence and, thus, cannot be regulated by the EU.[50] In the words of the ECJ

> A person's status, which is relevant to the rules on marriage, is a matter than falls within the competence of the Member States and EU law does not detract from that competence …. The Member States are thus free to decide whether or not to allow marriage for persons of the same sex.[51]

Accordingly, EU law cannot require Member States to open marriage to same-sex couples and 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. 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.[52]

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. This case involved the Romanian prohibition on same-sex marriage within Romania. This prohibition is not problematic from the perspective of EU free movement 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, did amount to a breach of EU law, in situations where an EU citizen *coming from another Member State* sought to claim family reunification rights in its territory. This was – 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, would 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.[53] This reasoning is clearly applicable, also, in the context of married same-sex couples[54]:

> 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.[55]

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50 J. Borg-Barthet, "The Principled Imperative to Recognise Same-Sex Unions in the EU" (2012) 8 Priv. Int. L. 359; H. Toner, *Partnership Rights, Free Movement and EU Law* (Oxford: Hart, 2004) 1; K. Lenaerts, "Federalism and the Rule of Law" (2011) 33 Fordham Int'l LJ 1388, 1355; C. Bell and N. B. Selanec, "Who is a 'spouse' under the Citizens' Rights Directive? The prospect of mutual recognition of same-sex marriages in the EU" (2016) 41 E.L. Rev. 655. This is, also, reflected in the EUCFR, which provides in Article 9 that "The right to marry and the right to found a family shall be guaranteed *in accordance with the national laws governing the exercise of these rights*" (emphasis added). The Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, provide that Article 9 "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".

51 *Coman*, Judgment, at [37]. See, also, *Parris* (C-443/15) EU:C:2016:897, at [59] and *Maruko* (C-267/06) EU:C:2008:179, at [59].

52 *Coman*, Judgment, at [38]; *Parris*, at [58].

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

54 K. Lenaerts (above fn. 50) 1359-1360.

55 D. Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33 Fordham Int'l LJ 156, 184.

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*, was contrary to EU law as it could impede the exercise of EU free movement rights and, hence, the ECJ rightly found a breach of EU law in *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*.[56] 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,[57]

> 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. 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.[58]

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.[59] 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.[60] In this way, it was left open to the ECJ, if and when it would be offered the opportunity via a reference for a preliminary ruling, 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 given this opportunity in *Coman* and chose to clarify the meaning of this term by noting that it does include same-sex spouses.

Accordingly, it seems that in EU Member States, full marriage equality is unlikely to be imposed from above but steps to that direction can only be taken once and when each Member State is ready to proceed with this. Both EU law and the ECHR allow EU Member States to open marriage to same-sex couples when they choose to do so, though – in States where the particular socio-legal context calls for this – the ECHR requires that a legal framework for the recognition of same-sex relationships is introduced. As regards the cross-border legal recognition of same-sex marriages, the ECtHR has made it clear that same-sex marriages contracted in *any* other country, must be granted some form of legal recognition

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56 *D and Sweden v Council* (C-122/99 P and C-125/99 P) EU:C:2001:304.

57 *D and Sweden v Council*, at [34].

58 *Grant v South-West Trains* (C-249/96) EU:C:1998:64, at [35].

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

60 *Coman*, AG Opinion, at [51-52].

(albeit not necessarily as marriages), whereas the ECJ has gone further by requiring same-sex marriages to be recognised as marriages, but in the more limited context of situations where there is movement between EU Member States and *only* for the purpose of the grant of family reunification rights deriving from EU law.

The Importance of Coman

The ruling in *Coman* was eagerly awaited and, hence, the wide attention it received in the media[61] and in scholarly blogs[62] 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, following the delivery of this ruling, will now be certain that they are entitled to family reunification rights as "spouses" under EU free movement law.

Legal Certainty

The ruling in *Coman* will – as suggested by the Advocate General in the case[63] – 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

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61 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 14 August 2018); "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 14 August 2018); "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 14 August 2018).

62 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 14 August 2018); 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 14 August 2018); 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 14 August 2018); 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 14 August 2018).

63 *Coman*, AG Opinion, at [76].

instead of entering into a registered partnership (where this is possible[64]),[65] 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.[66]

Reconciling the Principle of Supremacy of EU Law with Constitutional Tolerance

At the same time, it is likely that the ruling will lead to some backlash, as, in addition to fuelling homophobic statements and remarks,[67] it may also lead Member States that want to avoid its effects to introduce – as was recently considered in Romania[68] – 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,[69] 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. It is, of course, true that the EU has embraced the

64 It should be noted that at the moment, as seen earlier, only fourteen EU Member States offer the choice of marriage to same-sex couples.

65 This "push" towards choosing marriage in order to secure family reunification rights under EU law, would not be welcome by those opposing the extension of marriage to same-sex couples, in view of the fact that marriage is considered as an institution which is deeply rooted to patriarchy and gender inequality and it is viewed as an assimilationist threat to gay and lesbian lifestyles. For an analysis of the arguments against opening marriage to same-sex couples see, inter alia, N. Polikoff, "We will get what we ask for: Why legalizing gay and lesbian marriage will not dismantle the legal structure of gender in every marriage" (1993) 79 *Virginia Law Review* 1535; K. Norrie, "Marriage is for Heterosexuals: May the Rest of Us Be Saved from It" (2000) 12 CFLQ 363). For an analysis of these arguments see J. Borg-Barthet (above fn. 50) 383-384.

66 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, *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*". Emphasis added.

67 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 16 August 2018).

68 On 6-7 October 2018 (and less than a month since it was announced), 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. The referendum and the concerns voiced by numerous human rights groups that the proposed constitutional amendment might lead to a breach of international human rights standards and increase homophobic discrimination in Romania, were one of the points noted by the European Parliament in its resolution on 13 November 2018 on the rule of law in Romania (2018/2844 (RSP)), para. L. In the same document, the Parliament also noted that Romania ranks 25th out of 28 EU Member States in the ILGA-Europe "Annual Review of the Human Rights Situation of LGBTI People in Europe 2018" (para. M). In addition, less than a week before the referendum took place, 48 MEPs wrote a letter to the Romanian Prime Minister to register their opposition to the referendum (the full text of the letter is available here <http://www.lgbt-ep.eu/press-releases/meps-write-to-romanian-pm-protect-all-families/> (last accessed on 23 November 2018)). In addition, Frans Timmermans – First Commission Vice-President and Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights – also expressed concerns about the rule of law in Romania in view, inter alia, of the referendum at a hearing in the European Parliament Human Rights and Civil Liberties Committee, which took place a few days before the referendum.

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

notion (coined by Weiler)[70] of "constitutional tolerance", by seeking to build "an ever closer union among the peoples of Europe"[71] whilst maintaining distinct peoples and respecting their distinct identities and values; something which is reflected in the EU's motto "United in Diversity", adopted in 2000. This is more clearly encapsulated in Article 4(2) TEU – introduced in 2009 – which provides, inter alia, that the EU shall respect the national identities of the Member States.[72] In fact, in *Coman* itself, the Latvian Government in its intervention, stated that even if the contested refusal of family reunification rights amounted to a restriction of Article 21 TFEU, it was nonetheless justified on grounds of public policy *and national identity*. To this, the Court replied that the obligation to recognise same-sex marriages *for the sole purpose of granting a derived right of residence* in situations involving free movement between Member States "does not undermine the national identity or pose a threat to the public policy of the Member State concerned", as it does not oblige Member States to provide in their national law for same-sex marriages.[73] This demonstrates that constitutional tolerance has its limits, which are reached when national values clash with fundamental values of the Union or breach fundamental rights – such as the right to free movement or fundamental human rights – that are derived from EU law. As noted by Advocate General Wathelet in his Opinion in *Coman*, "the obligation to respect [national] identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU. In accordance with that obligation, the Member States are required to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".[74]

The Judgment's (Symbolic and Practical) Importance

The ruling in *Coman* is hugely important 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. Unlike in previous "delicate" cases,[75] 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 does not tolerate Member States' attempts to discriminate against LGB persons and their relationships, in 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.

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70 J. H. H. Weiler, "On the Power of the Word: Europe's Constitutional Iconography" (2005) 3 I.CON 173, 184-190.

71 Article 1 TEU and Preamble of TEU.

72 For a thorough analysis of this provision see G. van der Schyff, "The Constitutional Relationship between the European Union and its Member States: the Role of National Identity in Article 4(2) TEU" (2012) 37 E. L. Rev. 563.

73 *Coman*, Judgment, at [45-46].

74 *Coman*, AG Opinion, at [40].

75 See, for instance, *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* (C-528/13), 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 E.L.Rev. 91, 101-104.

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,[76] EU anti-discrimination law and, in particular, Directive 2000/78,[77] 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 in previous cases such as *Maruko*[78] and *Hay*[79]), 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 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 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.[80]

In any event, even if the EU 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 could 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 and their own nationals who are in a *Coman*-like scenario. In other words, by extending – voluntarily – the recognition of same-sex marriages contracted abroad even in situations where this is not required by EU law, Member States would, also, feel the pressure to do so in situations which are outside the scope of EU law and would, in fact, *have* to do so if their legal system prohibits reverse discrimination. This would, in effect, mean that same-sex marriages (contracted abroad) would be recognised in their territory for all purposes. But this would, in turn, question the rationality of maintaining a ban on access to same-sex marriage in their territory.

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76 A. Tryfonidou (above fn. 32) 216-221 and 232-234.

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

78 *Maruko* (above fn. 51).

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

80 J. Mulder, "Dignity or discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?" (2018) 40 JSWFL 129, 137.

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",[81] 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.[82] 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?

In the previous case of *Metock*,[83] 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 to 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* as regards same-sex marriages) 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.

A possible reason behind the Court's repeated references in *Coman* to marriages that were "concluded in a Member State", may have been its decision in its judgment to adopt the home State principle for determining the meaning of the term "spouse" for the purposes of Directive 2004/38. In other words, instead of adopting an autonomous *EU* interpretation of the term, the Court preferred to make it clear that Member States are merely required to recognise same-sex marriages which are already recognised as such in another Member State. This is, in fact, one of the points in which the Court's ruling differs from the Advocate General's Opinion, since the latter argued for the adoption of an autonomous, uniform, EU, interpretation of the term, given that "[a]ccording to the Court's settled case-law, it is required by both the uniform application of EU law and the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union".[84] The reason behind the Court's decision to adopt a narrower approach than that of the Advocate General is, possibly, its desire to defer to the Member States the choice as to whether the term "spouse" should include a same-sex spouse, in this way avoiding to take a clear stance on the matter. Conversely, the Advocate General's suggested approach would constitute a clear statement that the EU requires the term "spouse" – at least in this context – to be interpreted as including same-sex spouses, irrespective of whether *any* Member State recognises same-sex marriages and irrespective of whether a same-sex marriage is recognised as such in the home Member State of the couple. The Court may have felt that the time is not yet ripe for adopting such a top-down approach on a sensitive matter like this. After all, as noted by another commentator in this *Review*, some ECJ rulings "reflect a jurisprudential reticence to interpret autonomously concepts of [EU] law which lie in the sphere of family law",[85] and *Coman* appears to be an example of such a ruling.

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81 *Coman*, AG Opinion, at [49].

82 *Coman*, Judgment, at [33, 35, 36, 39, 40, 42, 45, 51, 52, 56].

83 *Metock* (C-127/09) EU:C:2008:449, at [98].

84 *Coman*, AG Opinion, at [34].

85 C. Denys, "Homosexuality: A Non-Issue in Communitiy Law?" (1999) 24 E.L.Rev. 419, 420.

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.[86] 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*.[87] 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.[88] 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 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-

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86 *O and B v Minister voor Immigratie, Integratie en Asiel* (Case C-456/12), EU:C:2014 :135, at [51].

87 Ibid, at [52-54]. For a different approach which considers the length of residence of an EU citizen in another Member State as merely *a* criterion (rather than *the sole* criterion) that must be taken into account in determining whether a situation falls within the scope of EU law see *O and B*, AG Opinion, at [110-111]

88 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 14 August 2018).

sex spouse when used in the context of the Family Reunification Rights Directive,[89] 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.[90]

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.[91] 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.[92] 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.[93] 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.

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 article 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 article 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.

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

90 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.

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

92 For a similar argument see D. Kochenov (above fn. 55) 196-197.

93 See S. Peers (above n. 62).

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 three months or more 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 their 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.