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THE CJEU CROSSING THE RUBICON ON THE SAME-SEX MARRIAGES? COMMENTARY ON *COMAN* CASE

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Summary: The article analyses the decision of the EU Court of Justice in *Coman* in which the Court derived residence rights for spouses in the same-sex marriages. The article outlines the basic grounds of the judgement and critically appraises them in the context of EU primary as well as secondary law and especially Directive 2004/38. The article raises concerns about the division of competences between the EU and its Member States, extended interpretation of the term "spouse" in the context of EU law, human rights considerations as well as potential effects of the decision on national family law.

Keywords: same-sex marriages, Coman, Court of Justice of the European Union, human rights, EU Charter of Fundamental Rights, European Convention on Human Rights, Directive 2004/38

1. Introduction

In June 2018 the Court of Justice of the European Union (CJEU) issued a ground-breaking decision in *Coman*[2] in which it derived residence rights for spouses in the same-sex marriages. This EU law obligation must be fulfilled by all Member States including those which do not recognise same-sex marriages as equal to traditional marriages.

The first reactions both appraised[3] the decision as well as found it problematic[4] or disturbing.[5] We assert that the decision deepened uncertainty in relation

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2 C-673/16 *Coman and Others*, ECLI:EU:C:2018:385.

3 See for example TAN, Daron. *Adrian Coman v. Romania: A Small Victory with Wasted Potential*. OxHRH Blog, 19 June 2018, [online]. Available here: http://ohrh.law.ox.ac.uk/adrian-coman-v-romania-a-small-victory-with-wasted-potential, Accessed: 30.10.2018.

4 See for example ADF International, „Problematic judgment in same-sex marriage case undermines national law", available here: https://adfinternational.org/news/coman-ruling-eng.

5 See for example STANCIU, Roxana. *A disturbing decision by the EU's Court of Justice rede-*

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to the impact of EU citizenship rules and provisions of Directive 2004/38. The decision also challenged national constitutional rules and values as it limited recourse to them in relation to the same-sex marriages and confirmed the competence of the CJEU to scrutinise their conformity with the EU law. Consequently, the conclusions in *Coman* will certainly generate a series of discussions either in support or against this decision and, particularly, on the national concepts of marriage.[6]

2. Decision in *Coman* in brief

The decision of the CJEU in *Coman* was delivered in the preliminary ruling procedure that was initiated by the Romanian Constitutional Court. National proceedings were conducted between the Romanian General Inspectorate for Immigration and Ministry of Interios, on one side, and Mr Coman and Mr Hamilton, on the other. Mr Coman – a Romanian and American national – and Mr Hamilton – an American national – lived together for several years in Belgium where they got married according to the Belgium law which permitted the same-sex marriages. Mr Coman worked there and after he quitted the job he received unemployment benefits.

In between the applicants posted a question to Romanian authorities relating to the conditions under which Mr Hamilton as a non-EU national could get the residence right in Romania for more than three months. The key issue was whether Mr Hamilton could be regarded as a family member of Mr Coman. National authorities refused the right of residence since the Romanian civil code does not recognise same-sex marriages. Accordingly, an extension of Mr Hamilton's right of temporary residence in Romania could not be granted on the grounds of family reunion.[7] The subsequent proceedings initiated by the applicants were founded on the asserted discrimination based on sexual orientation. They declared a breach of several provisions of Romanian Constitution such as the right to personal life, family life and private life and the provisions relating to the principle of equality.[8]

The lower instance court referred the case to the Romanian Constitutional Court to decide on the constitutionality of the contested legislation. The Constitutional Court asked the CJEU about the interpretation of the relevant pro-

fines the term 'spouses', [online]. Available here: http://www.europeandignitywatch.org/disturbing-decision-by-the-eu-court-of-justice-redefines-the-term-spouses/, Accessed: 30.10.2018

6 As is currently being discussed for example in the Czech Parliament with two opposite proposals, one suggesting to introduce same-sex marriages as equal to traditional marriages, the other requiring the insertion of clause in the Czech Constitution protecting the traditional concept of marriage, see f.e. https://www.parlamentnilisty.cz/arena/monitor/Vetsina-poslancu-ma-v-otazce-manzelstvi-pro-homosexualy-volne-hlasovani-557492.

7 Comp. *Coman*, paras 9–12.

8 Comp. *Coman*, para 14.

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visions of EU law. In its decision the CJEU confirmed the direct application of provisions on EU citizenship (especially of art. 21 para 1 TFEU). Further, it established that the situation of Mr Coman is out of the scope of Directive 2004/38 which regulates the free movement of EU citizens. However, at the same time the CJEU applied the Directive by analogy and extensively interpreted the term "spouse" so as to include also the same-sex spouses. The CJEU grounded its decision on the protection of family life as it is guaranteed in the EU law as well as in the European Convention on Human Rights. Finally, the CJEU strictly refused any justification of national restrictions based on public order, national identity or constitutional rules.

Thereby the decision raised questions of the division of competences between EU and the Member States, interaction of free movement law and national family law as well as the issue of judicial activism or restraint in boundary and nationally sensitive issues.[9] In the following we will not give a full analysis of the case, but we will try to evaluate most important conclusions and give our commentary on selected issues.

3. Commentary and broader perspective of *Coman*

3.1. Regulation of same-sex marriages: lack of consensus in Member States

First of all, it seems useful to fit the decision in the context of developments in the Member States. The current regulation of the same-sex marriages considerably varies across Europe and the EU is divided approximately in two halves. Part of the Member States (currently 16 states including Austria which should introduce the same-sex marriages in 2019) permit same-sex marriages (such as Belgium, France, Spain or Great Britain). Other Member States (currently 10 states) allow for some form of a civil union or a registered partnership covering (also) the same-sex relations (for example the Czech Republic, Hungary, Italy or Greece). Exceptionally one Member State gives no formal status to the same-sex relations; this is actually the case of Romania. Importantly in a number of Member States a marriage is limited to opposite-sex couples directly in national constitutions. This is true for Croatia, Central and Eastern European countries such as Bulgaria, Poland, Slovak Republic or Hungary as well as two Baltic countries, namely Latvia and Lithuania.[10]

Thus, at present there is not a persuasive majority consensus on the recognition of the same-sex marriages as being equal to opposite-sex marriages. Besides,

9 For a fine survey of perception of these terms see for example BUREŠ, Pavel. *Human Dignity: An Illusory Limit for the Evolutive Interpretation of the ECHR?* Amicus Curiae, Issue 110, summer 2017, p. 20–23.

10 For a survey see https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/marriage-civil-partnerships-and-property-issues_en or in more detail https://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_Europe; Accessed: 30.10.2018.

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it seems that the liberalising as well as conservative tendencies have been developing approximately at the same time. Whereas the first movement is stronger in the western part of the EU, the opposite tendency can be traced with the Member States that acceded to the EU in previous two decades as well as some EU candidates (such as Montenegro) or associated countries (such as Ukraine or Serbia).[11]

In Romanian law the registered partnership is not regulated and there has currently arisen a strong national movement to define a marriage as a bond of a man and woman. The national petition in that regard counted around three million signatures. Hence, the issue is neither settled in Romanian society, nor neutral by a considerable part of Romanian population.

3.2. Questioning EU competence

The essential issue is whether the EU has competence to regulate the situation concerned, namely the application of EU citizenship provisions against own state, and which is then the law applicable in that regard. The crucial provision in relation to the EU citizenship is art. 21 TFEU. According to its first paragraph every EU citizen has the right to move and reside freely within the territory of the Member States. As is well documented, the decision of the CJEU in *Grzelczyk*[12] commenced a period of pro-active application of provisions on EU citizenship. In numerous subsequent cases the CJEU decided that the scope of application of art. 21 para 1 is broader than as it was originally meant and also as it was interpreted by the CJEU in the early years of the EU citizenship.[13] It is well set up that the EU citizenship may cover also relationship between EU citizens and their own state on condition that some (even potential[14]) EU dimension is present. Thus, it is unsurprising that the CJEU did not challenge the EU competence in *Coman*.[15]

The direct application as well as the broad reading of art. 21 para 1 TFEU may be well justified in cases eliminating the discrimination caused by the residence of an EU citizen in another Member State. This "classic" interpretation was given in cases concerning various social and economic benefits when a stay in another Member State (e.g. for work, business, etc.) would cause the loss of them in the home Member State.[16] In these cases the CJEU principally requires national

11 Comp. ibid.

12 C184/99 *Grzelczyk*, EU:C:2001:458.

13 See for example CRAIG, Paul, de BÚRCA, Gráinne. *EU law text, cases and materials*. Oxford: Oxford University Press, 6th ed., 2015, p. 860 and following. See also a summary of the developments in the last decade at: TRYFONIDU, Alina. *The Impact of Union Citizenship on the EU's Market Freedoms*. Hart Publishing, Oxford 2016, p. 48 and following.

14 In that regard see especially decision of the CJEU in *C-34/09 Ruiz Zambrano*, EU:C:2011:124.

15 Comp. *Coman,* para 23.

16 For a survey see for example STEHLÍK, Václav, HAMUĽÁK, Ondrej. *Legal Issues of EU Internal market: understanding four freedoms*, Palacký University Olomouc, 2013, 2013, p. 91.

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courts to set aside all national discriminatory rules as they clearly breach the basic principles underlying the EU integration.

However, in *Coman* there was actually no such discrimination as the Romanian law did not permit same-sex marriages and, consequently, did not attribute any rights to own nationals. We suppose that non-existence of same-sex marriages makes a difference in relation to other "internal-like" situations concerning rights to bring to the home Member State spouses who were third country nationals.[17] In principle in those cases marriages with third country nationals would be considered as equal to national marriages in the home Member State and these cases concerned dominantly clashes between EU law and national administrative rules and possible circumvention of national immigration rules via EU law.

Admittedly, the EU law goes further and may catch also non-discriminatory rules which are equally applicable for all own nationals irrespective of whether they have exercised their right to free movement. The EU law tends to prohibit any barriers which make it more difficult to utilise the freedom even though no discrimination is present. The classic argument of EU law says that such a rule would be prohibited if it had the potential to discourage the EU citizen to leave his/her home state and stay abroad.[18] Actually this argument is not much convincing in the situation of Mr Coman. There is no direct evidence that he would be deterred to leave Romania to work in another Member State due to the fact that Romania would not recognise his same-sex marriage which he might potentially conclude abroad with a third country national. This argument of the CJEU both in *Coman*[19], as well as in other previous cases,[20] seems rather artificial and construed so as the EU competence and applicability of EU law could be asserted.

Actually, *Coman* was decided without the use of the classic discrimination/non-discrimination language. It is a direct application of *Grzelczyk* line of case-law where the CJEU proclaimed that the EU citizenship is a fundamental status of nationals of the Member States.[21] The problem with this case-law is that it does not set clear boundaries of the scope of EU law. In practice the provisions on EU citizenship may have effect even in situations with only very limited or just potential cross-border element. We will not outline a fully-fledged evaluation thereof; we just would like to raise our concern that this increases uncertainty, potentially generates new disputes and blurs the division of competences between EU and national law, including national constitutional rules.

17 See for example CJEU judgement in C-456/12 *O and B*, ECLI:EU:C:2014:135.

18 See *Coman*, para 24.

19 See ibid, para 24.

20 See or example case C-291/05 *Eind*, ECLI:EU:C:2007:771, para 34–37. The possible deterrent effect was refused for example by the Dutch and Danish governments in this case, see para 33 of *Eind*. See also C-456/12 *O and B*, para 46.

21 See C184/99 *Grzelczyk*, EU:C:2001:458, para 31, referred to in *Coman*, para 30.

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Actually an important competence issue which attracted more attention in the context of *Coman* concerned limits for the family law harmonisation. This is very restricted at the EU level and conditioned by a unanimous decision of all Member States. It has been asserted that the case such as *Coman* would interfere into this domain reserve of Member States.[22] Although the CJEU formally refused any such interference in *Coman*,[23] we think that it is not fully free of these effects. We will shortly explain our position further in text.[24]

3.3. Interpretation of the term "spouse"

After the CJEU established the EU competence, the key issue was whether the Directive 2004/38 would be applicable to the case. It has been earlier decided that the Directive applies only to situations when an EU citizen intends to enter and reside in a Member State other than his/her own.[25] In *Coman* this interpretation was reconfirmed[26] with the result that provisions of the Directive were not directly applicable to the current situation. As a consequence, the broad reading of art. 21 TFEU creates a regulatory lacuna including the lack of subsequent secondary legislation. In *Coman* this gap was fulfilled by the CJEU through an analogous application of the Directive.[27]

The analogous application of Directive raised the issue how to interpret the term "spouse", namely whether it might include partners in the same-sex marriages or not.[28] In that regard the CJEU made a comparison of art. 2(2)(a) which classifies the "spouse" as a family member unconditionally whereas art. 2(2)(b) classifies the "registered partner" as a family member only on condition that the home Member State treats registered partnerships as equivalent to marriage. The result of the CJEU considerations was that the term "spouse", contrary to the term "registered partner", is unconditional, gender-neutral and covers also spouses of the same sex.[29]

22 See for example Intervention (written observations) concerning the Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării, C-673/16 Coman and others, by ADF International, [online]. Available at: https://adfinternational.org/ Accessed: 30.10.2018; esp. para 9.

23 See *Coman*, para 37.

24 See especially subchapter 4.

25 See in that regard especially case C-434/09 *Mc Carthy*, ECLI:EU:C:2011:277

26 Comp. *Coman*, para 20 and recent case-law quoted therein.

27 See *Coman*, para 25.

28 The up-to-date interpretation in the context of EU Staff rules was expressed by the CJEU in Joined Cases C-122/99 *P* and C-125/99 P *D and Sweden v Council*, EU:C:2001:304, para 34 where the CJEU stated that „*according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex.*"

29 *Coman*, para 35.

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Although the argument based on unconditionally of the term "spouse" *vis-à-vis* conditionality of the registered partnership may have its formal logic, it does not seem to be properly justified. Such an interpretation of these articles seems rather formalistic and not fully respecting the purpose of the provision and its internal structure. It may well be argued that the interpretation of the "spouse" in the context of Directive 2004/38 *vis-à-vis* the term "registered partner" should be just opposite.[30]

The rationale behind the conditioned acceptance of registered partners as family members in the host Member State was the respect for countries which do not intend to formalise same-sex relationships or do not equalise them with the traditional marriage.[31] Such a recognition of registered partnership was inserted in the Directive at the time when the institute of registered partnership started to be introduced in various Member States. It was perceived mostly as an alternative to the same-sex marriage. The basic reason was that most Member States did not intend to "weaken" the institute of traditional opposite-sex marriage. If this is accepted, then by a simple argument *a minori ad maius* the interpretation of the CJEU of the term "spouse" must be rejected. In other words, if the Member States, based on the perceptions of values and family law concepts in their legal orders, did not allow registered partners to be regarded as family members, the more it must be true in relation to the same-sex marriages. The Member States simply wanted to keep the competence in this matter.

This interpretation of the EU legislation can be supported by several other arguments. First of all, it is useful to take into consideration the *travaux preparatoire* of Directive 2004/38. According to the relevant EU documents created in the process of adoption of the Directive the original proposal of the Commission did not intend to cover same-sex marriages. Such a proposal was formulated by the European Parliament in amendment 14 concerning art. 2 para 2, point (a) suggesting that family members with the right of residence would cover the spouse, irrespective of sex, according to the relevant national legislation. The European Parliament justified it by the necessity to "*reflect and respect the diversity of family relationships that exist in today's society*".[32]

30 The alternatives for interpretation for the treatment of same-sex marriages were interestingly presented by Koen Lenaerts before *Coman* case, see f.e LENAERTS, Koen. The Court of Justice and the Comparative Law Method. Eli Annual Conference ELI, Ferrara, 9 September 2016, [online]. Available here: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf, p. 5 and following, Accessed: 30.10.2018

31 Comp. also Intervention (written observations) concerning the Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării, C-673/16 Coman and others, by ADF International, [online]. Available at: https://adfinternational.org/ Accessed: 30.10.2018; esp. para 45.

32 See Amendment 14 of the Report from 23 January 2003, on the proposal for a European

This initiative was rejected by the Commission which reflected the opinion expressed by Member States in the Council.[33] This refusal was grounded on the fact that the harmonisation by the Directive should not result into amendments of family law legislation in certain Member States, as this is an area which does not fall in the EU competence. The Commission also found it sufficient that the Member States would be bound by the obligation of non-discrimination and must treat couples from other Member States in the same way as their nationals. Interestingly the Commission also saw a prospect of change of interpretation based on the future developments in the legislation of Member States.[34]

In any case, the broad interpretation of the term "spouse" was refused in the EU legislative process.[35] Certainly one may cast doubt on the significance of the historic interpretation as the interpretation of EU law should be dynamic/evolutive. This is similar to the interpretation of human rights guaranteed by the European Convention as the evolutive interpretation keeps the meaning of rights *contemporary* and *effective*.[36] Actually this approach was also expressed in the Opinion of Advocate General according to which the EU law should reflect current developments of EU law and EU integration.[37] In this context we find it significant that the Directive was agreed only a decade and half ago with two years implementation period. Thus, it may be taken as quite a current expression of the will of Member States, including those countries that acceded in 2004. As we outlined previously, this conclusion is also strongly supported by the lack of clear consensus which is still apparent with the Member States. The freedom of

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Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257-C5-0336/2001–2001/0111(COD).

See in that regard art. 81, para 3 TFEU.

33 See Common Position (EC) No 6/2004, adopted by the Council on 5 December 2003 with a view to adopting Directive 2004/. . ./EC of the European Parliament and of the Council of… on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004/C 54 E/02), Section B, European Parliament Amendments which have been rejected by the Council.

34 See, Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), COM/2003/0199 final – COD 2001/0111, point 3.

35 A different interpretation can be found in the Opinion of Advocate General in *Coman* who evaluated the developments in the legislative process as deliberately neutral as far as the definition of the term spouse is concerned, see para 51–53 of the Opinion.

36 Comp. f.e. DZEHTSIAROU, Kanstantsin. *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*. German Law Journal 12, 2011, p 1730; see also BUREŠ, Pavel. *Human Dignity: An Illusory Limit for the Evolutive Interpretation of the ECHR?* Amicus Curiae, Issue 110, summer 2017, p. 23 et following.

37 Comp. also Opinion of Advocate General in *Coman*, para 56.

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Member States to decide on the same-sex marriages is confirmed also in other provisions of the Directive and other EU legislation.[38]

Besides, the Directive in its preamble explains that persons who do not fall in the definition of family members do not enjoy an automatic right of entry and residence and will be treated on the basis of national legislation. National legislation then should take into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence on the EU citizen.[39] Consequently, such a partner could be categorised as a person with whom the EU national has a duly attested durable relationship with the obligation of Member States to facilitate his/her entry and residence. Member States would be obliged to undertake an extensive examination of the personal circumstances and justify any denial of entry or residence.[40]

It may be summarised that even though the Directive 2004/38 is not directly applicable to the situation it clearly sets up principles which Member States agreed upon when regulating the intra-EU migration. The Directive also formulated a compromise in a very sensitive area of family law and regulation of same-sex marriages. Thus, the recourse to the broad interpretation of the term "spouse" does not seem to be properly reasoned by the CJEU.

3.4. Human rights implications

The *Coman* case has also an important human rights dimension. This was shortly covered also by the CJEU which referred to provisions of the EU Charter of Human Rights as well as the European Convention on Human Rights and, consequently, the case-law of the ECtHR.[41]

In relation to the EU Charter we could point out especially to art. 9 which guarantees the right to marry and the right to found a family. However, this right is conditional and it must be exercised in accordance with the national laws governing the exercise of these rights. The official explanations to the Charter make it clear that this article does not impose the obligation to grant the status of marriage to unions between people of the same sex. This right is, thus, similar to that accorded by the ECHR, but its scope may be wider when national legislation so provides.[42]

38 For a further analysis see, Intervention (written observations) concerning the Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării, C-673/16 Coman and others, by ADF International, [online]. Available at: https://adfinternational.org/ Accessed: 30.10.2018; esp. para 43–48.

39 See par. 6 of the recital of the Directive.

40 See art. 3, para 2 of Directive 2004/38.

41 See *Coman*, paras 47–51.

42 See Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35

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However, the CJEU did not reflect art. 9, but referred to art. 7 of the EU Charter which formulates the right for private and family life. This right is guaranteed to everyone and, as a consequence, is not conditioned by national regulations. Still, this article does not give to the EU any right to formulate a definition of marriage and enforce the right to family life disrespecting the concept of marriage in individual Member States. In relation to art. 7 of the Charter the CJEU referred to the interpretation of private and family life in art. 8 of the European Convention. The European Convention is relevant as according to art. 52 (3) of the Charter the rights in the Charter have the same meaning and the same scope as those guaranteed in the European Convention. The CJEU concludes that both the right to private as well as family life of homosexual couples is protected by the ECtHR.[43] In that regard it may be noted that even though the ECtHR accepted the right to family life of same-sex couples, it did not formulate any right to a regular marriage for same-sex partners.[44]

Moreover, the case-law referred to by the CJEU concerned registered partnership[45] or the ECtHR explicitly confirmed the choice of national legislator not to allow same-sex marriage; this being in line with the Convention.[46] We think that this reserved approach of the ECtHR reflects the lack of European consensus. We would expect a similar approach of the CJEU in this regard.

3.5. Possible "side-effects" of the judgment

First of all, the decision in *Coman* may foster the "marriage tourism", namely that nationals of those Member States that do not allow for the same-sex marriages would get married in another Member State. After their return they could use the EU law to have "recognised" their marriage in their home Member State.[47] It is true that the CJEU conditions the rights of same-sex spouses by the requirement that in the host Member State they created and strengthened a family life.[48] However, this condition is rather vague and probably in practice it can be fulfilled without much difficulty. Similarly, it might be expected that in case of doubts national courts would decide in favour of the rights of the couple. Moreover, couples could adjust the length of their stay in another Member State with regard to the judicial practice in their home country.

43 *Coman*, para 49.

44 See *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12., esp. para 143.

45 See ECtHR, *Vallianatos and others v. Greece*, nos. 29381/09 and 32684/09, judgment of 7 November 2013.

46 See ECtHR, *Orlandi and others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, judgment of 14 December 2017, para 207.

47 For an example of this practice in Italy see VRIES DE, Sybe, WAELE DE, Henri, GRANGER, Marie-Pierre (eds.). *Civil Rights and EU Citizenship: challenges at the crossroads of the European, National and Private Spheres.* Edward Elgar Publishing, Cheltenham, 2018, p. 131–132.

48 See *Coman*, esp. para 24.

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Second, the *Coman* case concerned the same-sex marriage with a third country national. However, any limitation of *Coman* to marriages with third country nationals would not make much sense and we expect that the judgment would be read so as to accord the same treatment also to same-sex marriages of two EU citizens, irrespective of their nationality (including one being Romanian). These spouses should be considered as family members including rights of residence in any Member State. Even though the EU citizens could have the right of residence on their own, if they satisfy conditions of Directive 2004/38, newly they would automatically be regarded as family members.

Similarly, the *Coman* conclusions would not concern only marriages concluded in the EU but also marriages concluded outside the EU.[49] We suppose that if the traditional marriage concluded in the third country would be recognised in the Member State, there is no reason why based on *Coman* principles the corresponding same-sex marriage should be refused. The CJEU decision is based on the asserted protection of family life in the same-sex marriage which develops irrespective of the jurisdiction where the marriage was concluded.[50] The condition which still should be fulfilled is that the family life of the couple would be reinforced during the stay in the host Member State.

Thus, even though the CJEU explicitly leaves the decision on the notion of marriage to each Member State, *Coman* will create a pressure on national legislators to change their family laws. This is despite the fact that, according to the EU primary law, measures concerning family law with cross-border implications can be adopted by the EU only via the special legislative procedure with the requirement of unanimity in the Council and with the red-card right of national parliaments.[51] This gives the evidence of high sensitivity of family law issues and the highest possible threshold for any harmonisation at the EU law level. Actually national competence was confirmed by the CJEU in *Coman*,[52] but the CJEU tried to make difference between harmonisation of national family law *vis-à-vis* residence rights and cross-border family issues in *Coman* like situations. In that regard, as was indicated above, the CJEU does not seem to fully respect the spirit of the EU primary law which requires measures concerning family law with cross-border implications to be adopted with unanimity at the EU level.

Third, the CJEU restricts the effects of *Coman* only to the derived right of residence with the same-sex partner in the home Member State.[53] It would mean

49 Comp. in that regard e.g. TRYFONIDOU, Alina. *Free movement of same-sex spouses within the EU: the ECJ's Coman judgment*, [online]. Available here: https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment, Accessed: 30.10.2018.

50 Comp. in this regard C-127/08 *Metock and Others,* EU:C:2008:449, para 99; see also opinion of Advocate General *Coman*, paras 48–49.

51 See in that regard art. 81, para 3 TFEU.

52 *Coman*, para 37.

53 See *Coman*, para 40,

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that it intended to attribute rather a limited right to the spouses in the same-sex marriages. We doubt that this conclusion on the narrow interpretation of the *Coman*-like rights will be preserved in the future. From the legal point of view it is very unconvincing that the CJEU would require the home Member State to give right to residence to the same-sex spouses and at the same time it would allow a discrimination in relation to "non-residential" issues.[54] Any other discrimination of foreign same-sex marriages compared to traditional marriages in that Member State would also impede the right to family life. This could concern social benefits, tax law, inheritance law, etc.

Therefore, we suppose that in the upcoming cases there will be a strong pressure to equalise most rights of spouses in *Coman*-like situations to those in traditional national marriages. If this happens, then the same-sex marriages concluded in another Member States might be fully equalised to domestic marriages and would become attractive also for spouses who are both of the nationality of the home Member State and, therefore, having the residence rights in their home state, but facing limitations in other issues. This would mean a full circumvention of national family law just by fulfilling the condition that the spouses should strengthen their family life by stay in another Member State.

Last but not least, as the law stands now, *Coman* principles are applicable only to marriages concluded outside the home Member State. Thereby the CJEU set up a reverse discrimination since Romanian same-sex couples would not be allowed to enter into marriages in Romania whereas such marriages of foreigners would be legally approved. The approach to reverse discrimination in the free movement law varies; according to some authors such *discrimination appears to be an anomaly in an organisation which aspires to create a meaningful notion of citizenship.*[55] However, any deeper interference into national law would call in sensitive issues of jurisdiction and role of national courts and *leads to uncertainty with regard to the limits of the relevance of questions to and the jurisdiction of the Court of Justice*.[56] Whatever perspective we adhere to, the reverse discrimination in the EU internal market law can lead to lowering national standards, which predictably may happen also in the area of EU migration law.[57] The decision in

54 Comp. e.g. Alina TRYFONIDOU: Free movement of same-sex spouses within the EU: the ECJ's Coman judgment, available here: https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment.

55 See TRYFONIDOU, Alina. *Purely Internal Situations and Reverse Discrimination in a Citizens' Europe: Time to "Reverse" Reverse Discrimination?* in: XUEREB, Peter (ed.) *Issues in Social Policy: A New Agenda*. Jean Monnet Seminar Series. Progress Press, Valletta, 2009, p. 29.

56 See SÁNCHEZ Sara Iglesias. *Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?* EuConst 14, 2018, p. 28

57 See a discussion on the concept of internal situations for example in KRUMA, Kristine. *Family Reunification: A toll to shape the concept of EU citizenship*, in: Maribel Gonzales PASCUAL, Aida Torres PÉREZ. *The Right to Family Life in the European Union*. Routledge, 2017 p. 144 et following.

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Coman will increase pressure on Member States to equalise same-sex marriages to traditional marriages and introduce them in full in their legislation. Hence, the final "side" effect of *Coman* may be a progressive harmonisation of national family law in this regard. Consequently, the CJEU's affirmation that it preserves the national competence in the sphere of family law is not much convincing.

4. Final considerations and conclusions

Although this paper could not analyse in detail all issues related to *Coman*, it tried to cover the core issues thereof and some concerns linked to the decision. Much will depend also on further developments of the CJEU case-law. Our conclusions may be summarised in the following points.

First of all, we are not convinced that the extensive interpretation of EU competence and impact of EU citizenship rules is fully legitimate. It might be understandable in some situations, especially those concerning various economic rights in the home Member State of the EU citizen. However, where the national migration rules are concerned, the decisions should be very well balanced so as not to cast doubt on national (constitutional) rules as well as public order and public security issues.[58] This is even more pressing in relation to national regulations of family law and societal values formulated therein. It is not fully legitimate to try to enforce EU perspective through the back door. The *Coman* case seems to have potentially such an effect. This conclusion is reinforced even more by the EU law itself as it requires that any harmonising rules in the area of family law must be adopted only with consent of all Member States.

Second, the law made by courts leads to fragmentary regulation of the area concerned and can cause lacunas which have to be fulfilled mostly through judicial activity. This could be seen in the necessity to apply the Directive 2004/38 by analogy. This deepens legal uncertainty and decreases predictability of law. We think that the CJEU should evade these consequences as much as possible.

Third, we found the interpretation of the term "spouse" in Directive 2004/38 unconvincing and against the rationale of the provision, the circumstances of its adoption as well as the will of the Member States. It must be recalled that the Member States are the masters of the founding treaties and they (co-)decide not only about the EU primary law, but also about its implementation in the form of secondary law. It should be properly respected that they did not intend to legalise or harmonise the same-sex marriages and give automatically (residence) rights to the same-sex spouses in all Member States. In that regard the potential effects of *Coman* were overlooked by the CJEU. *Coman* will increase a pressure

58 See *Coman*, para 46, where the CJEU strongly refused the possibility of Member States to have recourse to national constitutions or public order rules. See also VRIES DE, Sybe, WAELE DE, Henri, GRANGER, Marie-Pierre (eds.). *Civil Rights and EU Citizenship: challenges at the crossroads of the European, National and Private Spheres.* Edward Elgar Publishing, Cheltenham, 2018, p. 223.

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on Member States to legalise same-sex marriages. In this context it should be recalled that the status of the same-sex partners is regulated by other provisions of the Directive 2004/38 even without including them in the group of family members; consequently, it should not be an insurmountable obstacle for them to get the residence rights.[59]

Fourth, we expect that *Coman* will be followed by decisions which will concern other rights attributed to spouses in national legal orders. This is despite the fact that the CJEU seemed to limit conclusions only to the right of residence.

Finally, this case-law has a potential to foster also negative perception of EU integration in some Member States. We assert that in these socially sensitive issues the CJEU should refrain from an extensive interpretation of the EU competence which is not explicitly regulated in secondary law. It could refer to the lack of consensus on this human rights issue (similarly as the ECtHR did), as well as wait for a decision of Member States and EU institutions in the legislative process.[60] Until then – also with respect to the principle of subsidiarity – it could leave the solution to national legal systems and respect their legislative choices. National law and its procedures should be well suited to cope with the issue, as can be seen also in the subsequent developments in Romania case.[61]

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59 See art. 3 para 2 of Directive 2004/38.

60 Actually, an example of such a change of legislation was done e.g. in the recent EU Staff Regulations which reflected evolution of legal and social context in the EU and granted to officials in a non-marital relationship the same benefits as to married couples; see LENAERTS, Koen. The Court of Justice and the Comparative Law Method. Eli Annual Conference ELI, Ferrara, 9 September 2016, [online]. Available here: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf, p. 4 and following, Accessed: 30.10.2018.

61 Later on in 2018 the Romanian Constitutional Court decided on the same rights for same-sex couples to private and family life as heterosexual couples and the necessity for them to enjoy legal and juridical recognition of their rights and obligations; in that regard see more at: https://www.apnews.com/ccdc4e3352b14e04b75d1bbb10b5e8e3. Similarly, the subsequent referendum on constitutional changes in Romania had a low turn-out; see more information here: https://www.bbc.com/news/world-europe-45779107.

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