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LAW 2019/03
Department of Law

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EUI Working Paper **LAW** 2019/03

ISSN 1725-6739

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This paper provides a detailed critical analysis of the case of *Coman*, where the Court of Justice clarified that the meaning of the term 'spouse' in Directive 2004/38 was gender-neutral, opening up the door for same-sex marriage recognition for immigration purposes all around the EU, thus destroying the heteronormative misinterpretations of the clear language of the Directive practiced in a handful of Member States. The state of EU law after *Coman* is still far from perfect, however: we underline a line of important questions which remain open and which the Court will need to turn to in the near future to ensure that marriage equality in moves beyond mere proclamations in the whole territory of the Union.

Keywords

Coman, marriage equality, non-discrimination, same-sex marriage, EU law

Authors' contact details:

Dimitry Kochenov

Professor of European Constitutional Law
and Citizenship
University of Groningen
The Netherlands

d.kochenov@rug.nl

Uladzislau Belavusau

Senior Researcher in European Law
T.M.C. Asser Institute
University of Amsterdam

u.belavusau@uva.nl

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Introduction

The case of *Coman*,[1] decided on 5 June 2018, is akin to a lemma proven: totally unsurprising in terms of result, yet an achievement in terms of elegance and depth, leading to the further development of equality and non-discrimination law in Europe. The Grand Chamber clarified that the gender-neutral framing of 'spouse' in Article 2(2)(a) of the Citizenship Directive 2004/38 implies that, yes, indeed, married same-sex couples enjoy free movement rights equally to heterosexual married couples throughout the whole territory of the Union, no matter how each particular Member State frames 'family' in its own legislation. This now includes situations where a gay union remains unrecognized in violation of ECHR law, as Article 8 ECHR contains a positive obligation to this effect,[2] which is of sufficiently general nature,[3] while differences based solely on sexual orientation are outlawed.[4] This was exactly the case in Romania, where a Romanian-American, Mr Coman, wished to move in together with his American husband, Mr Hamilton. Discrimination on this ground is thus not any more inherent in the fabric of the internal market[5] – a development as long awaited,[6] as it is absolutely welcome, finally putting a thick full stop in a long esoteric debate concerning who should be entitled to define 'spouse' and what the term should mean.[7]

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[1] Case C-673/16, *Coman et al. v. Inspectoratul General pentru Imigrări*, ECLI:EU:C:2018:385.

[2] In ECtHR, *Oliari et al.* v. *Italy*, Appl. nos. 18766/11 and 36030/11, judgment of 21 July 2015, the ECtHR found Italy to be in breach of Art. 8 ECHR for the failure to institute 'a specific legal framework providing for the recognition and protection of … same-sex unions' (para. 185). Cf. Ragone and Volpe, "An Emerging Right to a "Gay" Family Life? The Case *Oliari* v. *Italy* in a Comparative Perspective", (2016), 17 GLJ 451. Even more: ECtHR held in *Pajić* v. *Croatia* Appl. No. 68453/13, judgment of 23 February 2016, that a same-sex partnership *implies* a possibility of family reunification (paras. 74-77, 85). In other words, if only Romania was a state compliant with ECHR law – an impossibility, of course – no recourse to EU law would be necessary at all in this case.

[3] There is a debate on the scope of the obligation contained in *Oliari*. In any event, the legal conditions of the Member States of the EU appear to be sufficiently similar to expect Romania to be bound by the obligation directed in *Oliari* to Italy. This is particularly so following *Orlandi and Others* v. *Italy*, Apps. Nos 26432/12. 26742/12, 44057/12 and 60088/12, judgment of 14 Dec. 2017, where the ECtHR required to introduce some form of recognition of same-sex marriages celebrated abroad. But see, Tryfonidou, "The ECJ Recognises the Right of Same-Sex Spouses to Move Freely between EU Member States: The *Coman* Ruling", ELRev. (2019, forthcoming).

[4] *Vallianatos et al.* v. *Greece*, App. nos. 29381/09 and 32684/09, judgment of 7 November 2013, paras 77 and 92.

[5] And thus, a departure from earlier case-law, where the ECJ implied that 'marriage' is a union between a man and a woman: Joined Cases C-122 & 125/99, *P, D. and Sweden* v. *Council* ECLI:EU:C:2001:304, para. 34.

[6] See, among numerous other scholarly analyses arguing to the same effect: Bell and Bačić Selanec, "Who Is a "Spouse" under the Citizens' Rights Directive? The Prospect of Mutual Recognition of Same-Sex Marriages in the EU", 41 ELRev. (2016), 655; Belavusau & Kochenov, "Federalizing Legal Opportunities for LGBT Movements in the Growing EU", in K. Slootmaeckers et al. (Eds.), *The EU Enlargement and Gay Politics* (Palgrave, 2016), 69-96; Tryfonidou, "EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition", 21 CJEL (2015), 195; Rijpma and Koffeman, "Free Movement Rights for Same-Sex Couples under EU Law: What Role to Play for the ECJ?", in Gallo et al. (Eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer Verlag, 2014), 455; Gruth, "When is a Partner not a Partner?: Conceptualizations of "Family" in EU Free Movement Law", 33 *Journal of Social Welfare and Family Law* (2011), 193; Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism", 33 FILJ (2009), 156; G.-R. de Groot, "Private International Law Aspects Relating to Homosexual Couples", 11 *Electronic J. Comparative L.* (2007), 30; Kochenov, "Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities", 13 *Texas Wesleyan L.Rev.* (2007), 459; O'Neill, "Recognition of Same-Sex Marriage in the European Community: the European Court of Justice's Ability to Dictate Social Policy", 37 *Cornell International LJ* (2004), 199; Bell, "We Are Family – Same-Sex Partners and EU Migration Law", 9 MJ (2002), 251–352; Jessurun d'Oliveira, "Lesbians and Gays and the Freedom of Movement of Persons", in Waaldijk and Clapham (Eds.), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993), 294.

[7] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34). See also Titshaw, "Same-Sex Spouses Lost in Translation?

This working paper will first present the facts and the law involved, as well as the turbulent context of a referendum, held in the Romania on 6 and 7 October 2018, to entrench the heteronormativity of the families recognized by law into the national constitution, akin to the ones in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia. We will then set out, very briefly, the key lines of argument in Advocate General Wathelet's Opinion, and summarize the decision of the Court.

Having situated the Grand Chamber's ruling in context, and explained the core achievements of the case, we will move to the analysis of the numerous outstanding problems the case failed to tackle. 5 June 2018 is bound to remain a notable date on the calendar of achieving marriage equality, yet, crucially, our analysis will demonstrate that the EU is just at the beginning of a long road and plentiful crucial issues remained unresolved. The federalization of equality rights in the EU is a vitally important on-going development[8] to which *Coman* has greatly contributed: EU sexual citizenship has just received a pivotal boost.[9]

Factual and legal background in the context of Romanian developments

The EU Citizens' Free Movement Directive 2004/38/EC employs gender-neutral language for family unions and partners.[10] The Directive establishes several regimes for married, registered and unregistered partners. If a same-sex couple is married and the marriage is recognized in their previous Member State of residence, then EU law unquestionably requires the host state to recognize the marriage and makes family unification in the host-state automatic, irrespective of the nationality of the spouse of the EU citizen. The wording of the Directive is crystal-clear.[11] In practice, host states not recognizing same-sex marriages often obstructed the practical enjoyment of the right of a spouse to join their partner,[12] either refusing recognition all together, or treating marriage as a registered partnership, where the rules applicable under the Directive are more restrictive. Two situations are possible in the case of a registered partnership. Should the host Member State treat registered partnerships as equivalent to marriage, an individual then has the right to join his or her partner as if they were spouses.[13] If the host state does not treat registered partnerships as equal to marriage, then the couple falls into the category of unregistered partners in a 'durable relationship'.[14] EU law creates no obligation to recognize registered partnerships as such. Instead, the Directive obliges Member States to 'facilitate entry and residence' to unregistered partners who are in a 'durable relationship'. This blurry rule applies equally to same-sex couples and to

How to Interpret 'Spouse' in the EU Family Migration Directives", 34 *Boston U. Int'l LJ* (2016), 45; Guild, Peers & Tomkin, *The EU Citizenship Directive: A Commentary* (OUP, 2014). See equally the literature listed in note 6, *supra*.

[8] Belavusau & Kochenov, "Federalizing Legal Opportunities for LGBT Movements in the Growing EU", *supra* note 6, 69-96 (in particular, on pp. 71-77 and 84-85 arguing for the reasoning adopted by the Court in its 2018 *Coman* decision back in 2016).

[9] Belavusau, "EU Sexual Citizenship: Sex beyond the Internal Market", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2015) 417–442.

[10] In accordance Article 2(2) the Directive 2004/38, "(a) the spouse; (b) 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; (c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

[11] Article 2(2)(a), Article 3(1) and (2)(a) and Article 7(2) of Directive 2004/38/EC (supra note 2).

[12] Examples of non-recognition range from Germany to Eastern European countries. See, for analyses, Bodnar and Śledzińska-Simon, "Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe", in Gallo, Paladini and Pustorino (Eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), 211; Meeusen, "Instrumentalization of Private International Law in the European Union: Towards a European Conflicts Revolution?", 9 EJML (2007), 287 (at 297).

[13] Article 2(2)(b).

[14] Article 3(2)(b).

couples of the opposite sex. Either registered or unregistered partners thus do not enjoy the same right as a spouse to join their partners. The worst cases arise, however, when a Member State does not recognize *any* form of same-sex partnerships, leading to a situation when its territory is *de facto* removed from the geographical scope of application of free movement of persons law of the EU, as far as same-sex (married) partners are concerned. To put it differently: homophobia switches off internal market law in such cases, depriving EU citizens of their free movement rights.

This third, worst, situation for the (married) same-sex partners was exactly the one at issue in *Coman*. Following several years of living together in New York, Mr Relu Adrian Coman, who holds Romanian and US citizenship, and Mr Robert Clabourn Hamilton, an American citizen, got married in Brussels in 2010, where Mr Coman took up residence to work as a parliamentary assistant at the European Parliament. Such a marriage would not be possible in Romania, a country among the last of all the current Member States of the EU to de-criminalize homosexuality and one that does not offer the institutions of either marriage or partnership for same-sex partners. Following several years in a long-distance relationship, Coman and Hamilton decided to settle in Romania, and Mr Coman applied for a residence-permit for his American husband based on the family reunification clause of Directive 2004/38. Expectedly, Romanian authorities refused to abide by the Directive, explaining their decision by non-recognition of "homosexual unions" in Romania. Supported by the reputable LGBT organization Asociaţia ACCEPT, the couple appealed the decision of the Romanian authorities.[15] When their case reached the Constitutional Court of Romania (*Curtea Constituțională*), the court decided to stay the proceedings and submitted a preliminary reference to the Court of Justice to clarify the conditions under which Mr Hamilton may be granted the right to reside in Romania for more than three months.

Although the constitution of Romania, unlike the constitutional texts of Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia, contains a gender-neutral phrasing surrounding 'family', the Romanian Civil Code (*Codul Civil*) not only defines marriage as the union of a man and a woman,[16] but also stipulates – in a rather atypical manner for continental civil codes – that "marriage between persons of the same sex shall be prohibited" and, even more specifically, "marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognized in Romania".[17] Far from being dead-letter, the formulation contained in *Codul Civil* in fact affected the meaning that the Constitutional Court of Romania has given to the gender neutral provision of the constitution. In other words, the case of *Coman* arouse in a very hostile legal context.

Politically, poisonous turmoil of Romanian public life marked by countless scandals, mass protests and corruption,[18] also unquestionably boasts an on-going homophobic line to it. The centre-stage here is occupied by the Romanian 'Campaign for Family' NGO Coalition, which collected 3.000.000 signatures in the span of six months in 2016 in order to hold a national referendum to amend the Constitution of the country. This initiative replaced a gender-neutral definition of marriage with a restrictive one, presenting marriage as a union between a man and a woman. This is an astonishingly large number of signatures for a country of less than 20 million inhabitants; just half a million signatures create a legal obligation to initiate the process. Even more strikingly, the Romanian Constitutional Court did not see any problem with the substance of the proposed amendment, alleging in fact that it was unnecessary given that, although gender-neutral, the relevant provision of the Constitution (Article 48(1)) already

[15] *Coman* is the second case regarding discrimination on sexual orientation from Romania, and the second supported by Asociaţia ACCEPT, following their win in Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, EU:C:2013:275. Cf. Belavusau, "A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on *Asociația ACCEPT*", 21 CJEL (2014), 353.

[16] Art. 259(1) and (2) of the Civil Code of Romania.

[17] Art. 227(1), (2) and (4) of the Civil Code of Romania.

[18] Perju, "The Romanian Double Executive and the 2012 Constitutional Crisis", 13 I-CON (2015), 246.

implied the prohibition of same-sex marriage, as Constantin Cojocariu reported.[19] The referendum, held in October 2018, failed due to low turnout – only 20% of the voters, instead of at least 30% required, showed up to vote. The story of the referendum demonstrates quite clearly that the country essentially has not moved far away from its pre-accession stance, where parliamentarians worried that the membership of the EU could actually undermine the situation of steep discrimination against sexual minorities and when the Romanian Orthodox Church campaigned incessantly against the decriminalization of homosexuality.[20] When explained that EU law honours basic principles of dignity, equality and non-discrimination the members of the Romanian parliament expressed worries and confusion: entering the EU was not supposed to mean 'entering Sodom and Gomorrah'.[21] *Coman*, therefore, will no doubt renew the fears in these circles.

Opinion of the Advocate General

On 11 January 2018, Advocate General Melchior Wathelet delivered his Opinion, which was largely based on exploring two possible paradigms of interpreting the available secondary law of the Union in this case. According to the applicants, the Dutch Government, and the Commission, Article 2(2)(a) of Directive 2004/38 must be given a uniform autonomous interpretation. According to that interpretation, the national of a third country of the same sex as the Union citizen to whom he or she is lawfully married in accordance with the law of a Member state is covered by the term "spouse". In contrast, the Romanian, Latvian, Hungarian and Polish governments contended that the term "spouse" does not fall within the scope of EU law, but must be defined in the light of the law of the host Member State.[22] The AG opted for the first approach, considering that the autonomous interpretation must be applied and that the meaning of the term "spouse" used in Article 2(2)(a) of Directive 2004/38 must be independent of the sex of the person who is married to a Union citizen.[23] The AG further looked into the argument advanced by the Latvian government regarding the justification by "national identity" on behalf of Romania regarding the supposedly sensitive status of marriage. To this the learned AG answered that, if the concept of marriage were to be considered related to national identity in certain Member States, the obligation to respect that 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.[24]

The AG further explored the drafting history of Directive 2004/38 and concluded that the chosen word ("spouse") was deliberately neutral.[25] Although the expression "spouse" had previously been used by the Commission in its initial proposal, the Parliament wished to mention the irrelevance of the sex of the person concerned, by adding the words "irrespective of sex, according to the relevant national legislation". However, the Council expressed its reluctance to opt for a definition of the term "spouse" that would expressly include spouses of the same sex. At the time, only two Member states had adopted legislation authorizing marriage between person of the same sex, and the Court had previously held that the definition of marriage generally accepted by the Member states at the time referred to a union between two persons of opposite sex. Relying on the Council's concerns, the Commission preferred to "restrict [its] proposal to the concept of spouse as meaning in principle spouse of a different sex, *unless*

[19] Cojocariu, "Same-Sex Marriage before the Courts and before the People: The Story of a Tumultuous Year for LGBT Rights in Romania", *Verfassungsblog* (25 January 2017), available at: https://verfassungsblog.de/same-sex-marriage-before-the-courts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania/.

[20] Turcescu and Stan, "Religion, Politics and Sexuality in Romania", 57 *Europe-Asia Studies* (2005), 291.

[21] Ibid., 294.

[22] Para 31 of the AG Opinion.

[23] Para. 32 of the AG Opinion.

[24] Para. 40 of the AG Opinion.

[25] Para. 51 of the AG Opinion.

there are subsequent developments".[26] The AG therefore concluded that no argument in favour of one interpretation over the other could be derived from the drafting history of the Directive,[27] and that the wording of the term "spouse" in the Directive was neutral based on the context and the objective of the Directive.[28] The AG further affirmed that EU law must be interpreted "in the light of the present day circumstances",[29] and, based on statistical and comparative analysis from various jurisdictions regarding the scope of fundamental rights,[30] concluded that the broad interpretation of the term 'spouse' provides the optimum respect for family life guaranteed in Article 7 of the EU Charter of Fundamental Rights, while leaving to Member States the freedom to authorize – or not – a marriage between persons of the same sex.[31] Likewise, the AG concluded that the objective pursued by the Directive 2004/38 supports a broad autonomous interpretation of the term 'spouse', independent of sexual orientation[32] The AG has also suggested a plan B to the Court, in case it would not follow his suggested reasoning about the interpretation of 'spouse'. If Mr Coman's husband was not a 'spouse' due to Romanian law, he had to be considered a partner or other family member under Article 3 of the Directive. The Opinion argued that due to the marital bond recognized by another Member State, there would be no discretion to refuse admission in this case.[33]

Judgment of the Court of Justice

In its preliminary observations, the Court presented its major finding; that if during the genuine residence of a Union citizen in a Member State other than that of which (s)he is a national, family life is created or strengthened, TFEU requires that the citizen's family life may continue when (s)he returns to the Member State of origin.[34] Although the Directive, which aims to regulate the rights of EU citizens *outside* of their Member State of nationality, would not apply to such cases directly, Article 21(2) TFEU is unquestionably applicable by analogy.[35] If no such derived right of residence were granted, the Union citizen would be discouraged from exercising rights under EU law. The Court, therefore, logically based the questions referred by the national court on the premise that, during the period of his genuine residence in Belgium, Mr Coman created or strengthened a family life with Mr Hamilton.[36] The Court then continued with an unequivocal interpretation that the term 'spouse' within the meaning of Directive 2004/38 was gender-neutral. It could therefore cover the same-sex spouse of the Union citizens concerned.[37] It followed that a Member State cannot rely on its national law as justification for refusing to recognize in its territory 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, for the sole purpose of granting a derived right of residence to a third-country national.[38] Admittedly, a person's status, which is relevant to the rules on marriage, remains a matter that falls within the competence of the Member States, and

[26] Para. 51 of the AG Opinion.

[27] Para. 52 of the AG Opinion.

[28] Para. 53 of the AG Opinion.

[29] Para. 56 of the AG Opinion.

[30] Paras 57–67 of the AG Opinion.

[31] Para. 67 of the AG Opinion.

[32] Paras 68–76 of the AG Opinion.

[33] On this point, see Peers, "Love Wins in the ECJ: Same Sex Marriages and EU Free Movement Law", *EU Law Analysis Blog* (5 June 2018), available at: http://eulawanalysis.blogspot.com/2018/06/love-wins-in-ECJ-same-sex-marriages.html

[34] Para. 24.

[35] Para. 23. Compare: Judgment of 14 November 2017, *Lounes*, Case C-165/16, EU:C:2017:862, para. 46.

[36] Para. 26.

[37] Para. 35.

[38] Para. 35.

EU law does not detract from that competence. The Member States are thus free to decide whether or not to allow marriage for persons for the same sex.[39] Nevertheless, the Court stressed that it was well-established case-law that, in exercising the competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States.[40]

Subsequently, the Court built on the observation of the Advocate General,[41] finding that to allow Member States the freedom to refuse residence in their territory to a third-country national whose marriage to a Union citizen was concluded in another Member State in accordance with the law of that state, based on whether national law allows marriage to persons of the same sex, would cause free movement of Union citizens to vary amongst Member States. Such a situation would be at odds with the Court's case-law, to the effect that, in light of its context and objectives, the provisions of Directive 2004/38 may not be interpreted restrictively and might be deprived of their effectiveness.[42] From this finding, the Court proceeded to assess possible legal justifications for such a restrictive measure at place in Romania. In order to be justifiable, this measure must be based on objective public interest considerations and be proportionate to a legitimate objective pursued by national law.[43] Latvia and Poland, in their submissions to the Court, referred to public policy and national identity considerations as legitimate public-interest reasons relevant for a number of Member States at stake.[44] To this observation, the Court commented, however, that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society,[45] which is not on the surface appliable in the present case. Recognizing a same-sex marriage registered in another Member state for the sole purpose of granting a derived right of residence does not undermine the institution of marriage in Romania.[46] Further on, the Court strengthened its view by referring to provisions of the EU Charter of Fundamental Rights and the European Convention of Human Rights on family rights and privacy.[47] It therefore concluded that TFEU must be interpreted as precluding Romanian authorities from refusing to grant a third-country national spouse a right of residence in Romania on the ground that the Romanian law does not recognize marriage between persons of the same sex.[48] Likewise, the Court has concluded that this right for third country nationals like Mr Hamilton, who are married in another Member State recognizing same-sex marriage, goes together with the right to reside in the territory of Romania for more than three months.[49]

An unquestionable achievement of the Court of Justice

The Court's decision in *Coman* is unequivocal. When a Union citizen has made use of the freedom of movement by taking up genuine residence in a Member State other than that of which he is a national, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant their third-country national spouse a right of residence in the territory of that Member State on the ground that the law of that Member State does

[39] Para. 37. Compare: Judgment of 24 November 2016, *Parris*, Case C-443/15, EU:C:2016:897, para. 59.

[40] Para. 38.

[41] Para. 73 of the AG Opinion.

[42] Para. 39 of the Judgment.

[43] Para. 41.

[44] Para. 43.

[45] Para. 44.

[46] Para. 45.

[47] Paras 49 and 50.

[48] Para. 51.

[49] Para. 56.

not recognize marriage between persons of the same sex for the purposes of residence in that Member State. More importantly, the Court refused to extend public policy derogations available in EU primary law to moralistic concerns of the Member States. The Court did not impose on all the Member States an obligation to introduce an institution of same-sex marriage or partnership; doing this would be both questionable in terms of EU competence limitations, as family matters lie within the realm of the national law of the Member States, and redundant in the light of the European Court of Human Rights (ECtHR) case-law, which has already established such an obligation. It did, however, demand single-purpose recognition of the status attached to same-sex marriage where this institution exists in the Member States in Member States where it is legally unknown, in order to ensure that free movement can be enjoyed without discrimination on the basis of sexual orientation all across the territory of the Union. Particularly important in this regard is the outright dismissal of the esoteric defense of moral choices to discriminate without any critical scrutiny, clothed by the terminology of "constitutional identity",[50] which has played its ambiguous role in the line of case law regarding the right to a name.[51] It is thus a most welcome and atypical development, given prior case law, that the ECJ does not use identity excuses in order to humiliate minorities when sexual minorities are involved.[52] The absurdity of the 'protection of the traditional family' argument, which lies at the core of 'identity' considerations, was outlined by AG Wathelet, as well as previously by AG Jääskinen in his Opinion in *Römer*,[53] and, given its obvious clarity, diverging from it would be difficult for the Court.

Hence, indeed, there are no surprises. The outcome and reasoning of *Coman* has been awaited in the literature for years, and has been discussed at countless conferences, including the meetings uniting renowned authorities in the field of EU law, such as London-Leiden seminars.[54] All types of interpretations of the Directive in question; its drafting history;[55] as well as parallels with other fields where mutual recognition is similarly required in the context of the lack of EU's legislative competence, in particular the recognition of names;[56] with all the rich case-law at hand, all warrant a conclusion that *Coman* is among the best-founded decisions of the Court in its history from the viewpoints of legal certainty and the articulation of the letter and the spirit of the law.

The outcome was mandated by the language of the relevant legal provisions since their inception, and could thus only seem problematic in the context of EU law, where the key principle, to agree with Somek, is the lack of clarity.[57] Even a purposefully gender-neutral 'spouse' in the Directive 2004/38[58] was regarded as 'unclear' and 'in need of clarification'. It is now clear: gender neutral, clarified the

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[50] Article 4(2) TEU. See Cloots, *National Identity in EU Law* (OUP, 2015).

[51] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien,* ECLI:EU:C:2010:806; Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2011:291. For a detailed analysis of this stream of cases, critiquing the Court for playing the tune of nationalism, see Kochenov, "When Equality Directives are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU", in Belavusau and Henrard (Eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2018).

[52] On this point, see Farraguna, "L'amore vince (e l'identità nazionale perde?): il caso *Coman* alla Corte di giustizia", 3 *Quaderni costituzionali* (2018), 711-714.

[53] Opinion of AG Jääskinen in Case C-147/08 *Römer* v. *Freie und Hansestadt Hamburg,* ECLI:EU:C:2010:425, para. 175.

[54] See the literature in note 6 above.

[55] See Titshaw, *supra* note 7, at 92–106; C. Bell and Bačić Selanec, *supra* note 6, at 657; M. Bell, "Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union", 12 *European Review of Private Law* (2004), 613.

[56] See, for the most rigorous treatment, Van den Brink, "What's in a Name? Some Lessons for the Debate over the Free Movement of Same-Sex Couples within the EU", 17 GLJ (2016), 421; C. Bell and Bačić Selanec, *supra* note 6, at 662–666.

[57] Somek, "Is Legality a Principle of EU Law?", in Vogenauer and Weatherill (Eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017).

[58] Art. 2(2)(a) Directive 2004/38. Cf. Titshaw, *supra* note 7, at 92–106; C. Bell and Bačić Selanec, *supra* note 6, at 657; M. Bell, *supra* note 55.

Court, indeed means gender neutral. We read in para. 34 that "the term 'spouse' […] refers to a person joined to another person by the bonds of marriage".[59] Again, this is the least surprising and among the most-awaited findings of the Court of Justice in the history of EU law. While the opinions regarding the impact of Regulation 1612/68 on the free movement of same-sex couples were divided,[60] Directive 2004/38 is much clearer. According to Recital 31 of Directive 2004/38, "Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [*inter alia*] sexual orientation".

Most surprisingly, however, until *Coman*, the ECJ has not had a chance to demand either absolute mutual recognition of same-sex couples moving between Member States, nor to clarify the meaning of a term 'spouse' under Directive 2004/38/EC – the two options that have been evidently open for changing the current practice of national-level non-compliance in a number of Member States. The EU free movement of persons regime has thus tolerated discrimination on the basis of sex and sexual orientation as its starting point, a regrettable situation long described in the literature in detail.[61] The early case of *P. v. S* (1996),[62] where the ECJ used a gender equality clause to protect the rights of transsexuals, was already a huge achievement for LGBT rights, considering that back in the 1950s, when the European Economic Community was established, judges all over Europe (including the Council of Europe's European Commission for Human Rights) employed the language of crime, pathology and deviation when describing any alternative sexuality or gender identity.[63] Indeed, the WHO removed homosexuality from its list of diseases only in 1992.[64] *P.* v. *S.* was of little help to lesbian and gay couples, however, as the ECJ refused to apply its sexual discrimination approach to such relationships.[65] This produced a truly shaky, if not outright shameful, jurisprudence that has now been laid to rest,[66] though not explicitly overruled (the question 'why not' remains). In the EU of *Grant* v. *SWT*, gay couples remained entirely unprotected, the calls to the contrary from the European Parliament notwithstanding.[67] The introduction of sexual orientation as a ground of discrimination via Article 19 TFEU, and subsequent harmonization of this equality field "beyond gender" by 2000 Equality Directives, has

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[59] An explicit statement of the gender-neutral essence of the term is unequivocally stated in para. 35.

[60] Cf. Clapham and Weiler, "Lesbians and Gay Men in the European Community Legal Order", in Waaldijk and Clapham (Eds.), *Homosexuality: A European Community Issue: Essays on Lesbian and Gay Rights in European Law and Policy* (Leiden: Martinus Nijhoff, 1993), 7.

[61] See, especially, Waaldijk and Clapham (Eds.), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993). See, especially, Jessurun d'Oliveira's contribution to this volume, *supra* note 6; Wintermute & Andenæs (Eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001).

[62] C-13/94 *P. v. S and Cornwall County Council* (1996), ECLI:EU:C:1996:170.

[63] Criminalization of homosexuality was not seen as contrary to Art. 8 ECHR. E.g.: ECtHR, *W.B.* v. *Germany*, Appl. No. 104/55, judgment of December 17, 1955; ECtHR, *X.* v. *Germany*, Appl. No. 5935/72, judgment of September 30, 1975; ECtHR, *Dudgeon* v. *UK*, App. No. 7525/76, judgment of 22 October 1981. Even more, the European Commission for Human Rights has explicitly excluded same-sex relationships from the scope of Article 8 ECHR as inferior to 'family': *X & Y*, Appl. No. 9369/83. Such reading of Art. 8 ECHR persisted well into the first decade of this century: ECtHR, *Karner* v. *Austria*, Appl. No. 40016/98, judgment of 24 July 2003; ECtHR, *Kozak* v. *Poland*, Appl. No. 13102/02, judgment of 2 March 2010. Cf. Fichera, "Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape", 17 GLJ (2016), 384, 389–297.

[64] About medicalization of the homosexual subject in EU and comparative law, see Belavusau, "Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship", 7 *European Journal of Risk Regulation* (2016) 801-809.

[65] Kochenov, "On Options of Citizens and Moral Choices of States", *supra* note 6.

[66] Case C-249/96 *Grant v South-West Trains Ltd*, EU:C:1998:63. See Koppelman, "The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolph Hitler", in Wintermute & Andenæs (Eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001).

[67] European Parliament, Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 1994 OJ C 61; European Parliament, Resolution of Equal Rights for Gays and Lesbians in the European Community, 1998 OJ C 313.

changed the situation slightly, but has not solved the core outstanding problems.[68] The Court's post-2000 jurisprudence has largely failed to make any real break-throughs regarding recognition of the equal status for same-sex unions, some achievements notwithstanding:[69] free movement of persons in the territory of the Member States remained, for gay people, but a promise, a myth. The case of *Coman* transcends this narrow paradigm of discrimination within employment schemes and extends it to the federal horizons, clearly mimicking the earlier jurisprudence of the US Supreme Court and establishing for gay couples what heterosexuals could enjoy all-along: basic protections of free movement of persons in the internal market.

Notwithstanding its significance, *Coman*, where the Court found that same-sex spouses should enjoy free movement rights in the EU (including the crucial right to return home in *Singh* situations)[70] *en par* with heterosexual spouses, is not a revolution. In essence, it has established the importance of absolute mutual recognition of each other's meanings of 'spouse' between the Member States for the purposes of EU free movement of citizens law.[71] Most fundamentally, however elementary and much expected, the case of *Coman* has a huge impact on the lives of plenty of same-sex spouses around the EU whose legally-celebrated marriages have not been recognized as a result of the failure of a large number of Member States to implement Directive 2004/38 correctly.

Problems and open questions

It would be unwise to present *Coman* in a solely celebratory light. The case poses a number of important questions, which will only be answered in case law and practice in the years to come. Let us have a look at the most important features of the case likely to have lasting significance through either remaining problematic, or by providing further food for thought for lawyers and policy-makers.

Questions about the Commission's effectiveness and the failure of conditionality

The case of *Coman* allows one to ask where the Commission, the 'guardian of the Treaties', was in a situation where, for more than ten years,[72] several Member States *obviously* implemented and applied Directive 2004/38 wrongly toward gay spouses, undermining the letter and the spirit of the law and derailing the lives of countless EU citizens.[73] It is quite surprising that no commentator, to our knowledge, actually expected Article 258 TFEU – with all its drawbacks, still a usable instrument[74] – rather than Article 267 TFEU, to end the obvious injustice and mistreatment of families when the gender-neutral text of the Directive was *abundantly clear*. After all, equality and non-discrimination are also among the values on which the Union is built upon, as per the Treaty text, most notably Article 2

[68] Belavusau & Henrard (Eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2018).

[69] For a superb, theoretically able overview, see Fichera, *supra* note 63. See also Rijpma and Koffeman, "Free Movement Rights for Same-Sex Couples under EU Law: What Role to Play for the ECJ?", in Gallo et al. (Eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer Verlag, 2014).

[70] Case C-218/14 *Singh and Others v Minister for Justice and Equality* (2015), ECLI:EU:C:2015:476.

[71] See also Rijpma and Koffeman, *supra* note 69; Jessurun d'Oliveira, "Freedom of Movement of Spouses and Registered Partners in the European Union", in *Private Law in the International Arena:* Liber Amicorum *Kurt Siehr* (2000), 527.

[72] The implementation deadline of Directive 2004/38 has expired long ago.

[73] For those still not convinced that this indeed has been the case even in the light of all the arguments presented above, the Commission's own implementation guidelines for better transposition of Directive 2004/38 could provide an additional illustration of why Romania failed to implement the Directive correctly and that the ECJ's decision in *Coman* cannot be regarded as in any way surprising by the Commission in the light of its own documents.

[74] Gormley, "Infringement Proceedings", in Jakab & Kochenov (Eds), *The Enforcement of EU Law and Values* (OUP, 2017).

TEU.[75] Although the general ability of the EU institutions to enforce these values has been far from obvious to commentators as of late,[76] the Commission could in fact do much more than bringing Article 258 TFEU cases against the Romanias of our Union. Unlike in cases of rule of law or democracy backsliding – such as Hungary and Poland[77] – the values at play in the context of same-sex families are not at the fringes of the *acquis*, but in the text of the Directive itself, which instantly removes plenty of problems faced by the institution in other value-spheres.[78] While nothing has been done – and in this we emphasize the shame of the Commission for not acting – the embarrassment was particularly reinforced by the silence from the Commission on this issue in its regular reports on EU citizenship. Article 258 TFEU is clearly open to the Commission now that *Coman* has restated the obvious. Given that Romania is not the only state acting in this homophobic fashion, and the fact that 'spouse' in the Directive is gender-neutral, it is up to the Commission to ensure that Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia, whatever their constitutions are said to mandate, all honour same-sex marriages for the purposes of free movement. Even more: all the Member States not providing for same-sex marriage, such as Italy or Slovenia, will have to ensure, in practice and on paper, that the unconditional nature of the admission of same-sex spouses in the situations falling within the scope of application of Directive 2004/38 and of *Coman*'s *Singh*-inspired scope, can fully benefit from the automatic nature of spousal admission in Article 2(2)(a) of the Directive, without any illegal attempts to treat spouses as 'registered partners'. It is now clear that any attempt to do that would be a wrongful implementation of the Directive 2004/38.

An even more acute question arises, however, out of the Commission's inaction. The Member States recently admitted to the Union and known to be problematic in the context of gender equality face overwhelming scrutiny from the Commission under the Council's mandate to implement the conditionality principle.[79] Sneaking the twin equality directives of 2000 through the legislative process allowed the Union to move on from the humiliation of *Grant*. Even so, the Commission admitted states expected to oppose same-sex marriage and the improvement of the rights situation of the LGBT community in the context of a broader 'Failure of Conditionality' exercise,[80] where anti-gay legislation and practice has not in fact deterred their membership,[81] including in particular the case of Romania.[82] They have also been free to continue that which had to be solved before they became Member States post-accession.

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[75] Klamert and Kochenov, "Article 2 TEU", in Kellerbauer, Klamert & Tomkin (Eds), *Commentary of the EU Treaties and the Charter of Fundamental Rights* (OUP, 2019).

[76] Kochenov, Magen & Pech (Eds.), "The Great Rule of Law Debate in the EU", JCMS symposium (2016). The Commission and the Court are learning very fast, however: compare Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:687 with C-619/18 *Commission v. Poland*, ECLI:EU:C:2018:910 and *C-64/16, Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117. Cf. Belavusau, "On Age Discrimination and Beating Dead Dogs: Commission v. Hungary", 50 CMLRev (2013) 1145-1160; Pech and Platon, "Court of Justice Judicial Independence under Threat", 55 CMLRev (2018) 1827-1854.

[77] Pech and Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", 19 CYELS (2017), 3.

[78] Kochenov, "The *Acquis* and Its Principles: The Enforcement of the 'Law' vs. the Enforcement of 'Values' in the European Union", in Jakab & Kochenov (Eds), *The Enforcement of EU Law and Values* (OUP, 2017).

[79] Maresceau, "Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE", in *Le droit de l'Union européenne en principes:* Liber amicorum *en l'honneur de Jean Raux* (LGDJ 2006); Hillion, "The Copenhagen Criteria and Their Progeny", in Hillion (Ed.), *EU Enlargement: A Legal Approach* (Hart, 2004).

[80] Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008).

[81] Langenkamp, "Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law", 4 *San Diego International LJ* (2003), 437; Kochenov, "Democracy and Human Rights – Not for Gay People", *supra* note 6.

[82] Turcescu & Stan, *supra* note 20.

Questions about the sustainability of a single-purpose recognition

There is no secret that *Coman* is, in essence, about immigration rights. When same-sex spouses move to a Member State which, in breach of the ECHR law[83] and the Charter of Fundamental Rights of the EU,[84] refuses to provide any legal form of recognition for same sex-relationships, it unequivocally obliges the Member State to recognize the marriage as such. The consequences of such 'single purpose' recognition, to borrow from David de Groot,[85] is that all the other rights enjoyed by family members around the EU might still regrettably lie outside the reach of the same-sex spouses who successfully invoked EU law to move to a homophobic Member State. Lacking these rights, which could include inheritance, taking up the lease, survivor pension, hospital visits, or raising children together,[86] could still pose huge problems in such Member States, and will require further litigation.

David de Groot is thus justified in doubting whether the case of *Coman* will have any immediate implications at all for the actual recognition of the marriage in question by the Romanian authorities.[87] The meaning acquired by Article 8 ECHR in *Oliari et al.*, however, is a powerful helping hand in the context of the unconditional mutual recognition argument, which the ECJ made in *Coman*. Acting otherwise could, essentially, amount to allowing for the limitations of the free movement rights of some families based on a national rule, which is in breach of Article 8 ECHR. This would deviate entirely from the logic of the Union as a constitutional system respecting human rights and violate the Charter of Fundamental Rights, with its gender-neutral framing of the right in Article 9. Incidentally, Article 9 itself inspired a change of heart by the ECtHR, showcasing a spectacular example of cross-pollination between the two supranational legal systems in Europe.[88] The Charter, once it entered into force, was taken to signify a new consensus among the European states on the important issue of same-sex relationships, thus mandating the evolution of Strasbourg case law.[89]

Important in this respect is the fact that ECHR and Charter rights, as deployed, would squarely fit within the free-movement internal market paradigm of EU integration. Such rights could thus unquestionably expect protection even where the approach to rights as such in EU law is chiefly instrumental, as the Court has explained in Opinion 2/13.[90] Whether the Court is to be blamed for not doing more in *Coman* to avoid the hint of 'single purpose' is an open question.[91] Family, after all, is famously outside the scope of EU law as it were – Poland even appended a declaration to this effect to the Treaties. When treading

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[83] ECtHR, *Oliari et al.* v. *Italy*, *supra* at 2.

[84] See the Preamble and Arts 52(3) and 53 CFR.

[85] D.A.J.G. de Groot, *Civil Status Recognition in the European Union* (Ph.D. Thesis, Bern, 2019). See also Farraguna, *supra* note 52.

[86] Tryfonidou, "EU Free Movement Law and Children of Rainbow Families: Children of a Lesser God?" (2019, unpublished, on file with the authors).

[87] D.A.J.G. de Groot, *supra* note 85.

[88] Cf. Wintermute, "In Extending Human Rights, Which European Court is Substantively 'Braver' and Procedurally 'Fitter'?", in Morano-Foadi and Vickers (Eds.), *Fundamental Rights in the EU – A Matter for Two Courts* (Hart, 2015), 179. In this particular case, the cross-pollination is somewhat tongue-in-cheek, as the "Explanations Relating to the Charter of Fundamental Rights" ([2007] OJ C 303/17) are quite unequivocal on the fact that Art. 9 CFR contains no obligation to introduce same-sex marriage.

[89] ECtHR, *Goodwin* v. *UK*, Appl. No. 28957/95, judgment of 11 July 2002, para. 100.

[90] Opinion 2/13 (*ECHR Accession II*) (2014) ECLI:EU:C:2014:2454, para. 170. Kochenov, "EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?", 34 YEL (2015), 94; Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?", 38 FILJ (2015), 955.

[91] Scholars have argued that requiring the legalization of a same sex-marriage in a *Coman* situation could amount to an *ultra vires* act: Bell & Bačić Selanec, *supra* note 6, at 656.

in such contentious fields, particular caution is required.[92] It is thus possible to agree with Alina Tryfonidou, that "in EU Member States, full marriage equality is unlikely to be imposed from above".[93]

Questions about the acceptability of the free movement paradigm for non-discrimination

Single-purpose recognition is not the whole story. The case of *Coman* reinforces a very particular view of EU law. The free-movement paradigm has little to offer to those who would expect their dignity and family life protected without pleasing the 'apolitical' rationale of the internal market:[94] those who stay at home,[95] those who would be 'illegal' in a host Member State – for example, Miss Dano, in love with another Roma lady[96] – and many others. The *Coman* victory is thus *cum grano salis*: it is too self-consciously aware of its federal limitations in terms of competence.[97] The Court was too afraid to tread on the long Polish tradition of discriminatory family ideals and Latvia's arguments of 'constitutional identity', implying that 'identity' consists in ensuring that, in a Union where sex and sexual-orientation discrimination are illegal,[98] and tolerance is one of the values of Article 2 TEU, these goals are never reached, and gay families remain persecuted. This is, to agree with Massimo Fichera, one of the core problems with free movement law as such. "It seems to be built on what is considered 'normal,' so that deviations from normalcy are not contemplated".[99] At the same time, the justification behind the choice of the key paradigm of 'normal' to be protected are blurry and not always clear, to say the least. This has the effect of punishing those persons and relationships that do not fall within the proclaimed 'good citizenship' ideal,[100] be it a same-sex family, a person with a disability,[101] or a woman absent from work during pregnancy.[102] *Coman* represents enormous progress compared with *Grant* v. *SWT* just twenty years ago, warranting one of the authors of this note to correct his earlier statement calling the *Grant*

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[92] Van Elsuwege and Kochenov, "On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights", 13(4) EJMI (2011), 443–466.

[93] Tryfonidou, *supra* note 3.

[94] O'Brien, "*Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights", 53 CMLRev. (2016), 937; Wilkinson, "Politicising Europe's Justice Deficit: Some Preliminaries", in Kochenov et al. (Eds.), Europe's Justice Deficit? (Hart, 2015); Caro de Sousa, "Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?", 20 ELJ (2014), 499.

[95] Cf. Iglesias Sánchez, "A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017).

[96] C-333/13 *Elisabeta Dano and Florin Dano*, ECLI:EU:C:2014:2358; Schiek, "Perspectives on Social Citizenship in the EU – from Status *Positivus* to Status *Socialis Activus* via Two Forms of Transnational Solidarity", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017); but see Carter and Jesse, "The '*Dano* Evolution': Assessing Legal Integration and Access to Social Benefits for EU Citizens", 3 *European Papers* (2018).

[97] And thus, probably, in line with other latest EU citizenship case-law of the Court: Nic Shuibhne, "Recasting EU Citizenship as Federal Citizenship: What are the Implications for the Citizen When the Polity Bargain is Privileged?" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2015). But see Spaventa, "Earned Citizenship – Understanding Union Citizenship through its Scope", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2015).

[98] Belavusau, "EU Sexual Citizenship" *supra* note 9; Koppelman, *supra* note 66.

[99] Fichera, *supra* note 63, at 388.

[100] Caro de Sousa, *supra* note 94; Kochenov, "On Tiles and Pillars" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2018), 3.

[101] O'Brien, "Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017); Tryfonidou, "The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights for the Union Citizen" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017).

[102] Case C-507/12 *Saint Prix* v. *Secretary of State for Work and Pensions*, ECLI:EU:C:2014:2007; See Belavusau, "From Lëtzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy, 2 ELR (2010), 45-49. Busby, "Crumbs of Comfort: Pregnancy and the Status of Worker under EU Law's Free Movement Provisions", 44 *Industrial L.J.* (2015) 134.

Court a "homophobic bench".[103] It is still far-removed from the basic Karstean dignity-oriented approach[104] demonstrated by other jurisdictions around the world. It is thus not marriage equality, it is the boosting of the internal market ideology, rightly described by Weiler as standing 'naked, without a mantle of ideals',[105] that the case of *Coman* has advanced.

Consequently, the gay community faces a situation where, though the dignity of fundamental human bonds is unquestionably recognized, loving each other is only possible in the Union today if one avails themselves of at least some protections of the law, particularly when the context is 'cross-border' and market friendly. 'Bad citizens' of the EU, unlike the 'good citizens', fail to understand and live by the ideal of the internal market and cross-border movement, and as such *do not enjoy* the most basic dignity under EU law. Family life for gay EU citizens is still light years away from being fully recognized and solidified as a true enforceable right at the level of EU law. It is not mentioned in Part II TFEU and thus, apparently, is not part of 'other rights in the Treaties', which Article 20 TFEU refers to, *pace* Article 9 CFR, [106]

Questions about coherence across different instruments of secondary law

Coman has implications for the understanding of the meaning of 'spouse' in the context of other secondary EU law, especially the Family Reunification Directive.[107] Although today's practice in some Member States, as Titshaw reports,[108] treats same-sex couples under different directives differently, such practice unquestionably falls short of the idea of uniform application of EU law. This implies that the semantic unity of the key notions it operates with, as well the compliance with ECHR law, as non-discrimination, family, and private life in the ECHR, are not citizenship-specific and bind the states-parties equally in their regulation of the family life of own and EU citizens, as well as foreigners.

The question of 'genuine residence'

That 'genuine residence' is required is of course a problem, since the direct consequence of someone's residence being deemed 'genuine' is the ability to go on effectively enjoying family life and dignity. In the context where the meaning of 'residence' in the law does not overlap neatly with physical presence, a 'genuine residence' under the law of several Member States is nothing else but the possession of a legally-acquired residence title. It seems to be highly problematic to demand more, especially where someone's family life is dependent on this. To put it differently, this allows for 'abuse of law'.[109] The Commission, as we have discussed above, does not do enough to promote gay rights and non-discrimination against same-sex families. At the same time, for some couples, establishing residence elsewhere is the only way to gain dignity and basic legal recognition for one's same-sex family under

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[103] Kochenov, 'On Options of Citizens and Moral Choices of States', *supra* note 6, at 157. On the generally poor track-record of the ECJ in dealing with discrimination on the basis of sexual orientation in the Union see, e.g., Mulder, "Some More Equal Than Others? Matrimonial Benefits and the ECJ's Case-Law on Discrimination on the Grounds of Sexual Orientation", 19 MJ (2012), 505; Pech, "Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*" 49 CMLRev. (2012), 1841; Kochenov, 'Democracy and Human Rights – Not for Gay People?', *supra* note 6.

[104] Karst, "The Freedom of Intimate Association", 89 *Yale L.J.* (1980), 624.

[105] Weiler, "Bread and Circus: The State of the European Union", 4 CJEL (1998), 223, at 231.

[106] Compare with Kochenov, "Gay Rights in the EU: A Long Way Forward for the Union of 27", 3 *Croatian Yearbook of European Law and Policy* (2007), 469; Cf. Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 1 *Genius* (2014), 42.

[107] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Titshaw, *supra* note 7, at 45.

[108] Titshaw, *supra* note 7, at 58.

[109] See, for a superbly detailed treatment, Kroeze, "Distinguishing between Use and Abuse of EU Free Movement Law", 4 *European Papers* (2018).

the law of a Member State. For *Coman* to include a criterion judging how 'genuine' someone's residence is amounts to one thing: supplying homophobic states with an additional argument to avoid complying with the law, so that they may continue discriminating against sexual minorities. Such an approach invites a whole range of problematic questions and seems to be anything but sustainable.

Questions about the utility of private international law approaches

Speaking of a 'marriage lawfully concluded in the host Member State', *Coman* does not answer crucial questions about the very *possibility* of the celebration of a same-sex marriage in contemporary EU law. The ECJ has now officially endorsed setting aside private law rules in *Coman* situations,[110] but they could offer an impenetrable obstacle to the establishment of a marriage in law. This is another issue in line to be tackled in order to make *Coman* fully effective. This is due to the fact that *precisely* because of discrimination in the law of the Member State of nationality, making same-sex marriages impossible, the celebration of such a marriage in a different Member State could also be hindered, as Ulli Jessurun d'Oliveira has wonderfully explained.[111] For example, in cases where a same-sex marriage is being celebrated, Belgian law allows departure from the requirement of compliance with the national law of the state of nationality of the partners prohibiting same-sex marriage, if the law of the state of nationality or habitual residence of one of the partners allows for same-sex marriage.[112] Not all the Member States apply such a *favor matrimonii* rule, however, which makes it in practice impossible to celebrate a same-sex marriage between the partners coming from homophobic Member States. This effetively downgrades the level of recognition of same-sex *unions* in such cases to same-sex *partnerships*. The requirement of a marriage 'lawfully concluded in the host Member State', could thus be a very difficult one and, considering states not applying *favor matrimonii* laws, potentially undermines the whole point of the Directive. This extends discrimination, via the medium of private law, from the homophobic Member States to the rest of the EU, thus promoting the violations of ECHR law through very unusual means. *In casu*, Romanian law was of no relevance, since the law of the State of New York was applicable, but in any other factual situation (e.g. an applicant marrying in a different Member State or one coming from the states hostile to same-sex marriage), concluding a marriage would be much more difficult. It is clear, in this context – again agreeing with Jessurun d'Oliveira and with AG Wathelet[113] – that although *Coman* revolved around a marriage celebrated in the host Member State, this should not *per se* be a requirement for benefiting from free movement of persons law in the EU. Any state, including third counties, could definitely produce the same legal effects, once the marriage is recognized in the EU. Here, again, the language adopted by the Court is dangerously narrow and could lead to misinterpretation, while marrying in the State of New York should have been sufficient, under previous case-law,[114] to claim a derivative free movement right for Mr Hamilton, a US citizen, to enter and reside in Romania with his spouse.

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[110] Cf. Biagioni, "On Recognition of Foreign Same-Sex Marriages and Partnerships", in Gallo, Paladini and Pustorino (Eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), 360–361; Wautelet, "Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe: Divided We Stand?", in Boele-Woelki and Fuchs (Eds.), *Legal Recognition of Same-Sex Relationships in Europe* (Antwerp: Intersentia, 2012), 165; Kochenov, "On Options of Citizens and Moral Choices of States", *supra* note 6.

[111] Jessurun d'Oliveira, 'Het Europese Hof omarmt eindelijk het huwelijk van mensen met hetzelfde geslacht' NJb 2018/1426. See also Bell and Bačić Selanec, *supra* note 6, at 671.

[112] Art. 46(2) Belgisch Wetboek van Internationaal Privatrecht (2004).

[113] Para. 50 of his Opinion in *Coman*.

[114] E.g. Case C-127/09 *Metock* EU:C:2008:449, para. 98. See also, Tryfonidou, *supra* note 3.

Questions about the dangers of 'strengthening family life' formulae

There is a real problem with the 'created or strengthened' family life language the Court employs.[115] Families go through phases. In *Shortbus*, the main character is a married woman who discovers she craves a bisexual threesome relationship, and whose first orgasm coincides with the great blackout of New York City. One does not need to see this movie to realize that family life can linger on the backburner, freeze, or, sometimes, be reborn again. A cold family on the ruins of a love that died is still a family, however, as much as an open relationship involving more than two. Likewise, a long-distance union of hearts, where partners never see each other but could nevertheless be dearly present in each other's lives, are families all the same. 'Strengthening' language opens a Pandora's box of a potentially disastrous ECJ intervention into what should be the partners' realm only. Free movement should apply to families getting ready to divorce, to those who hate each other, and to those families in which one of the partners is preparing to die. What is going on between the partners is not and cannot possibly be the ECJ's business. Moreover, this has been the classic approach in the case law all along, recalling the facts of *Singh*, in which a UK/third-national couple moved back to the UK to divorce and was exempted from immigration controls via the application of EU law. Considering the astonishing variety of human bonds and interactions falling under the umbrella term of 'family', the last thing we want is the Court unable to utter the word 'sex' to tell us what 'strengthening' is.[116] Consider how the Court has reduced human agency in other fields, such as 'integration' into the society of the host state,[117] 'work',[118] or 'sufficient resources',[119] bringing disaster to a great number of families and giving EU free-movement law an awkward illiberal turn. This hits both workers and other citizens hard,[120] and makes the Court a true 'actor of injustice'[121] in the eyes of some. The sacrifices made in achieving levels of protection for the ordinary men and women all around the EU teach a simple lesson. Whatever the reasons for the Court to take steps back – and either they fail to convince the addressees, thereby ensuring that the sacrifices of rights made are probably not entirely in vain[122] – it is better for the Court to stay out of our lives and our of our beds. *Coman* regrettably fails this 'no harm done' test by venturing into the 'strengthening' enigmas not mandated by either secondary or primary law.

Questions about non-binary unions and the future of public policy in this field

This brings us, lastly, to a most fundamental question concerning other types of marriage. What about *ménages à trois*? Member States have made their policy choices – all of them favour one particular type of a *binary* unions: polygamy is outlawed and second and further spouses are expressly not covered by the Family Reunification Directive.[123] Observing the networks of wives, friendships and love-triangles on the ground around the EU the question arises how far this kind of favouring of particular

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[115] *Coman*, para. 24.

[116] Belavusau, "Sex in the Union: EU Law, Taxation and the Adult Industry", 4 ELR (2010), 144–150.

[117] Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid.*, ECLI:EU:C:2012:300. See Belavusau & Kochenov, "Kirchberg Dispensing the Punishment: Inflicting 'Civil Death' on Prisoners", 40 ELRev. (2016) 557-577; O'Brien, "Real Links, Abstract Rights and False Alarms", 33 ELRev. (2008), 643.

[118] O'Brien, ibid.

[119] Schiek, "Perspectives on Social Citizenship in the EU – from Status *Positivus* to Status *Socialis Activus* via Two Forms of Transnational Solidarity", in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017).

[120] O'Brien, *Unity in Adversity* (Hart, 2016). But see, Tryfonidou, "In Search of an Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?", 46 CMLRev. (2009), 1591.

[121] De Búrca, "Conclusion", in Kochenov et al. (Eds.), *Europe's Justice Deficit?* (Hart, 2015).

[122] O'Brien, "The ECJ Sacrifices EU Citizenship in Vain: *Commission* v. *United Kingdom*", 54 CMLRev. (2017), 209.

[123] Art. 4(4) Family Reunification Directive.

configurations of relationships actually corresponds to reality and can be justified?[124] This is not an empty question. Once recognizing the 'dignity' of a same-sex marriage is a frontier passed, what arguments, if any, could there be in stock to fight against a three-partner marriage (whatever the sexes of the lovers)? Public policy, of course, will not do the trick. Indeed, it is quite unclear, who, besides state-sponsored hypocrisy, is harmed by moving beyond heteronormative binary relationships. Instead, we confine other types of relationships to the fringes of society; secret, unrecognized, frowned upon, for no clear reason. It is thus impossible to agree with positions in scholarly literature, stating that, to quote Bell and Bačić Selanec, "on a human rights level, a fundamental distinction must be drawn between same-sex marriage and polygamous marriage",[125] citing legal instruments and case-law in support of this statement, which used to bash same-sex partners still ten years ago. Such statements are entirely empty and counterproductive, if no arguments are given in their support besides 'while loving your same-sex partner – something that was untenable and immoral before – is ok, don't you dare loving two people!' What we are witnessing is the culture of justification in action:[126] the beating heart of modern constitutionalism. Once good arguments are not available to defend the limiting involvement of the authority, the rule should go. It is thus very difficult to disagree with Nora Markard's excellent analysis: "in the cases of both polygamy and incest, as with same-sex marriage, moral disapproval – the 'yuck factor' – has to yield in the face of autonomy and privacy; only rational reasons can sustain a prohibition of marriage".[127] The EU has played a crucial role in the process of bringing down absurd rules continent-wide. This process, should one believe Gareth Davies, often amounted to the humiliation of states by confronting them with the utterly, inexplicably stupid choices they make.[128] *Coman* is a great example of that. Yet, the pressure will obviously be mounting to explain to a married woman why she cannot also marry her long-term female lover. The absurdity of pretending that long-standing multi-partner relationships are not a day-to-day practice is self-evident, yet, the law is frequently not on the social reality side. Precisely as the Romanian Civil Code, which will not be applied in *Coman*.

There is a curious fact one has to raise in the context of polygamy. The EU is a jurisdiction where registered partnerships and marriages *de jure* tend to be worlds apart, and where some marriages are not universally recognized as marriages. Consequentially, following the outcome of *Coman*, EU law obviously makes polygamy legally possible throughout the Member States. Having married Thijs in Brussels, Leszek can return to native Poland, where this marriage will not be recognized and thus form no legal impediment for him to marry Volha in Natolin. As underlined by David de Groot, this is a most ironic outcome of trying to uphold *one* crucial rule about marriage throughout the EU: total intolerance of polygamy.[129] Be it as it may, this is a great development, as long as Leszek is happy (just as is Thijs and as is Volha, should they be informed about it).

Federal rainbow dream: comparative outlook

AG Wathelet mentions a broad comparative paradigm for *Coman*, specifying that jurisdictions as diverse as Canada, New Zealand, South Africa, Argentina, USA and Taiwan have all opened the gate

[124] The concept of alternative forms of intimacy (especially among gays and lesbians) which is often missing in the heteronormative vision of equality was advanced, in particular, by Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992).

[125] Bell & Bačić Selanec, *supra* note 6, at 678.

[126] Cohen-Eliya & Porat, *Proportionality and Constitutional Culture* (CUP, 2013). See also the review of this book regarding its central idea about the culture of justification in 51 *Common Market Law Review* (2014), 1305 –1307.

[127] Markard, "Dropping the Other Shoe: *Obergefell* and the Inevitability of the Constitutional Right to Equal Marriage", 17 GLJ (2016), 509, at 540.

[128] Davies, "Humiliation of the State as a Constitutional Tactic", in Amtenbrink & van den Bergh (Eds), *The Constitutional Integrity of the European Union* (The Hague: TMC Asser Press, 2010).

[129] D.A.J.G. de Groot, *supra* note 95.

for same-sex marriages.[130] In the EU itself, apart from thirteen Member States which have legalized homosexual marriage, nine other Member States have a registered partnership open to couples of the same sex (Slovenia, Czechia, Hungary, Austria, Croatia, Estonia, Cyprus, Greece and Italy). Emerging global consensus on the issue is absolutely clear.[131] Hence, the days when constitutional lawyers would say that only a small number of EU countries recognizes same-sex unions are entirely passé. This is even more the case given that not offering a registered partnership (at least) in the national law is now a violation of the ECHR.[132] There is a clear consensus that cannot be overlooked by the Court of Justice regarding a nascent recognition of same-sex unions in the absolute majority of EU Member States these days. Yet American jurisprudence and the liberalization from the European Court of Human Rights remain undoubtedly the major inspirations for advancing the federal track on litigating same-sex marriages in *Coman* via EU law.

A somewhat schizophrenic judgement of the US Supreme Court came in the case of *Masterpiece Cake Shop*, which preceded the judgement in *Coman* just by one day. The case regarded the religious sensibilities of a Colorado baker, who refused to deliver a cake for a gay wedding. Another judgment of the US Supreme court, *Obergefell* v. *Hodges* (2015).[133] stands as a crucial example of a federal opportunity for gays and lesbians — a legal track that has been explored by lawyers with regard to *Coman*. Although *Obergefell* was widely streamlined in the media as *the* judgement about same-sex marriages, *de jure* the decision is more about recognition of rights derived from marriage than status, which ironically made the recognition of status all over the American states only a question of time. The case was launched after a same-sex couple, James Obergefell and John Arthur, married in Maryland. Their state of residence – Ohio – did not recognize their marriage license, and they went to court. John Arthur was terminally ill and suffering from amyotrophic lateral sclerosis. For this reason, they wanted the other partner, James Obergefell, to be identified as his surviving spouse on his death certificate, based on their marriage in Maryland. Through this paradigm of rights based on free movement between the states, the Supreme Court established that a there is a fundamental right to marry guaranteed to same-sex couples by the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the United States constitution.

The European Court of Human Rights quickly followed with the *Oliari & Others v. Italy* (2015) judgement,[134] where the Court suddenly established that Italy should offer some form of registered partnership or marriage to gay couples. How far-reaching the distinction between the two can be is limited by ECHR law and expressly includes family reunification, following *Pajić*. It is remarkable that in *Oliari*, the ECtHR refers to comparative jurisprudence, giving the example of the decision in the US Supreme court that preceded Strasbourg by just a couple of weeks.[135] This Strasbourg judgement also captures the growing consensus in the Member States of the Council of Europe, noting that 11 countries of the Council of Europe recognized same-sex marriages, while 18 offered recognition of various forms of same-sex partnerships at the moment of the decision.[136] Of course in *Coman*, the ECJ rounded this important circle of federal thinking, adding to a tacit-recognition track for same sex marriages visible in the jurisprudence of the US Supreme Court and the European Court of Human Rights. *Coman* allows asking uncomfortable questions about the state of the rule of law in Romania and the ability of that country to offer effective protection of rights to its citizens, thus fully benefiting from the membership of the Council of Europe and the European Union.

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[130] Opinion of Advocate General Wathelet, ECLI:EU:C:2018:2, at footnote 41.

[131] Ragone and Volpe, *supra* note 2, at 465 et seq. for an in-depth look at the recent constitutional developments on this issue, in particular, in France, Portugal, and Spain.

[132] *Oliari et al.* v. *Italy*, *supra* at 2.

[133] *Obergefell v. Hodges* (2015). Cf. Markard, *supra* note 127.

[134] *Oliari & Others v. Italy*, *supra* at 2.

[135] ibid., para. 56

[136] ibid., para. 54

Once again, following *Oliari* and *Pajić*, it was beyond any doubt that Romania was in breach of ECHR law, since it did not create a status as demanded by *Oliari* and did not offer a family-reunification track, as demanded by *Pajić*. Worse still, considering the interaction between the EU Charter of Fundamental Rights and ECHR, no doubt could possibly arise that the Directive 2004/ 38 had not been correctly implemented in Romania. It is well known what had to be done in such cases; in a vertical situation, the national Court sets aside the provisions of the Civil Code. However, this was been done, showcasing, yet again, the disastrous level of the rule of law in the country and asking bigger questions. If the situation is so bad in this particular field, where unequivocal ECtHR case law and EU law are being ignored – and considering the ECtHR's systemic enforcement issue[137] – what is going on in other fields? *Coman* stands as a reminder that the level of development of the basic legal capacities in the Member States differ drastically from one state to another.

To conclude: sexual market citizenship in the making?

Although the judgment is very narrowly construed, gradual acceptance of same-sex marriage in the most heteronormative countries, for whatever reason, is bound to be one-way street. The examples of developments in plenty of jurisdictions worldwide clearly show this. Increasing practical recognition of foreign same-sex marriages, for whatever purpose, demonstrates the flimsy hypocrisy underlying the lack of acceptance in other spheres. This is bound to bring about, gradually, changes of radical scale.[138] In other words, to agree with Massmo Fichera, "a legal system may sometimes be bound to recognize social facts, and transnational law may enhance this phenomenon".[139]

EU citizenship is not only a unique space to 'overcome' nationality, often imagined in terms of the dominant ethnicity of Member States. "EU sexual citizenship"[140] equally offers an activist arena for challenging sexual identities and inequalities embedded in those national citizenships, trans-nationalizing discourse on rights and gay emancipation – especially in Central and Eastern Europe – as a matter of EU law. *European*, in this context, becomes a language of rights and entitlements, which can be turned, *inter alia*, against their own states of nationality, albeit approached through a free-movement / internal market lens. Besides the dull and morally-questionable mantras of 'market citizenship',[141] now turning into 'market sexual citizenship', EU federalization fosters the social imagination of EU citizens and social movements who, in turn, rely on EU equality standards as a strategy for humiliating member states. *European* becomes the language of rights and entitlements. EU sexual citizenship turns into a realm to discipline embarrassment in the Union. Dictating gender roles, sexual choices and lifestyles is not yet fully precluded. Yet, thanks to the EU, it is finally a cause for shame, and yields less cash.

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[137] Lambert Abdelgawad, "The Enforcement of ECtHR Judgments", in Jakab & Kochenov (Eds.), The Enforcement of EU Law and Values (OUP, 2017).

[138] Kochenov, "On Options of Citizens and Moral Choices of States", *supra* note 6.

[139] Fichera, *supra* note 63.

[140] Belavusau, "EU Sexual Citizenship", *supra* note 9.

[141] Cf. Nic Shuibhne, "Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 CMLRev. (2015), 889–937; O'Brien, *Unity in Adversity* (Hart, 2017).