Groundbreaking decision or a tiny tremor? The Court of Justice decision in *Coman*

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In the Netherlands, the discussion surrounding the opening of civil marriage rights for same-sex couples is not even a memory for the majority of students who started university in September this year. Civil marriage was opened to same-sex couples in Netherlands on 1 April 2001. More than 17 years later the Court of Justice of the European Union[1] has had the opportunity to render judgment for the first time on the definition of the term 'spouse' within the meaning of directive 2004/38/EC.[2] This Free Movement Directive deals with the rights of citizens of the EU and their family members to move and reside freely within the territory of the Member States. Nevertheless, the judgment itself could be highly influential within the international family law arena.

Mr Coman (a dual Romanian and American citizen) married Mr Hamilton (an American citizen) in Brussels, Belgium. Two years after getting married, the couple contacted the Romanian authorities requesting information as to the procedure and applicable conditions for Mr Hamilton (a non-EU citizen) to be able to reside for more than three months in Romania. The Romanian authorities responded by stating that Mr Hamilton was only entitled to a three-month period of residence, as their marriage was not able to be recognised in Romania, and therefore Mr Hamilton could not be regarded as Mr Coman's spouse in accordance with Directive 2004/38/EC.

The couple petitioned the Romanian courts and argued that the decision of the Romanian authorities was discriminatory on the basis of sexual orientation in relation to their exercise of the right to free movement within the European Union. Ultimately the case proceeded to the Romanian Constitutional Court, where the court referred a number of questions to the Court of Justice of the European Union. The following question is of particular interest to those involved in the field of private international family law,

> 'Does the term "spouse" in Article 2(2)(a) of Directive 2004/38/EC, read in light of the Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?'

The Court of Justice determined that a Union citizen who has exercised his or her right to free movement by moving to and acquiring a genuine residence in accordance with Article 7 of the Directive, should be entitled to utilise his or her marriage rights acquired in the new Member

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1 CJEU 5 June 2018, C-673/16, ECLI:EU:C:2018:385, *NIPR* 2018, 229 (*Coman*).

2 *OJ* 2004, L 158/77.

State in accordance with Article 21(1) Treaty on the Functioning of the European Union. The fact that Mr Coman had legally concluded a civil marriage in Belgium meant that Mr Coman was, therefore, also entitled to utilise these marriage rights within the framework of the Free Movement Directive. Yet the question arises whether the decision of the Court of Justice requires all Member States to now recognise civil marriages between same-sex couples concluded in other Member States? Although at first glance it might appear that the decision of the Court seems groundbreaking as it would appear to put an end to the approach taken by the Court in *D and Sweden* v. *Council*,[3] nevertheless, my answer to this question is 'no'.

The reason for the rather disappointing answer is intertwined with the method applied by the Court of Justice in reaching its decision. The question is basically summed up as follows: Did the Court determine that the same-sex marriage concluded in Belgium had to be *recognised* by the Romanian authorities thus leading to rights being acquired within the context of the Free Movement Directive, or did the Court determine that the term 'spouse' within the context of the Free Movement Directive had to be *interpreted autonomously* to include reference to a same-sex married couple? Obviously, the answer to this question immediately provides an indication as to my rather somber view of the impact of the Coman decision for the recognition of same-sex marriages within the European Union.

Despite the fact that the Court refers to the 'recognition of the marriage' (e.g. in § 36 and 40), it is evident in my opinion that the Court is actually applying the same method employed by the Attorney General, namely the autonomous interpretation method (which can also be seen in § 34 and 35 of the Court's judgment). This difference in method has important consequences as illustrated in the dichotomy mentioned above. The recognition method would ensure that the Belgian marriage would need to be recognised in Romania, and thus could have far reaching implications beyond the sphere of immigration. However, I believe that the Court was doing no more and no less than providing an autonomous interpretation of the term 'spouse' for the purposes of the Free Movement Directive.

Despite the fact that there is obvious reason to praise the Court of Justice for taking such an extensive and liberal approach to the interpretation of the term 'spouse', it does also provide Member States with the opportunity to continue to deny same-sex couples married in one Member State full recognition of their marriage in another Member State. Recognition in the field of the Free Movement Directive cannot and should not be seen as a general blanket need for recognition. It has after all been a longstanding private international law principle in the field of maintenance rights, for example, that recognition of a maintenance decision from a foreign jurisdiction does not necessarily entail recognition of the family bond which created the maintenance right in the first place. Therefore, the implications of the judgment should, in my opinion, be placed in context.

Furthermore, the Court also reiterates that the Court of Justice does not have the competence to require Member States to open civil marriage to same-sex couples (although in light of the *Oliari* v. *Italy* decision of the European Court of Human Rights,[4] European countries are increasingly obliged to provide same-sex couples with some form of legal recognition of their relationship). However, the Court also held that the term 'public policy' should be interpreted strictly and that it cannot be determined by each of the Member States unilaterally. The rec-

3 CJEU 31 May 2001, C-122/99 and C-125/99, ECLI:EU:C:2001:304 (*D and Sweden* v. *Council*).

4 ECtHR 21 July 2015, Appl. Nr. 18766/11 and 36030/11 (*Oliari* v. *Italy)*.

ognition of a marriage between couples of same-sex does not affect a Member State's national identity nor does it form a threat to the public order of the Member State in question. Therefore, the Court also held that a measure which restricts the free movement of persons can only be justified if it is in conformity with the fundamental principles laid down in the Charter, in particular the rights of private life and family life laid down in Article 7.

Without wishing to shed even more dismal light on the decision, there are perhaps two other indications that point to a need for caution. Firstly, the Court in its decision explicitly refers to marriages concluded in a Member State. Would therefore the same rule also apply if Mr Coman and Mr Hamilton had concluded their marriage in Norway or South Africa? Secondly, the Court also restricts its interpretation to when a union citizen has exercised his or her free movement rights and acquired a *genuine* residence (which is interpreted as meaning more than three months). This therefore, prohibits those couples that live in Member States that do not currently allow for same-sex marriage (namely Estonia, Latvia, Lithuania, Poland, Slovakia, Romania and Bulgaria, as well as Croatia, Cyprus, Czech Republic, Greece, Hungary, Italy and Slovenia [but this last group of countries do provide for some form of registered or civil partnership]) from utilising this judgment. If these limitations are to applied cumulatively then this would mean that the marriage in question would need to be concluded in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden or the United Kingdom by a party that has a genuine right to residence in that Member State. The ultimate effect of the *Coman* decision would be to allow for the non-citizen spouse to exercise their rights under the Free Movement Directive.

All in all, the *Coman* decision should be regarded as an important step towards a more inclusive, liberal interpretation of the marital terminology used throughout EU legislation. Perhaps this is the start of the slow progress towards full marriage recognition within the EU? Perhaps a small step for mankind, and a-rather-mediocre leap for the European Union?