Iustum Aequum Salutare
XIV. 2018. 2. • 149–171.

# SAME SEX COUPLES' RIGHT TO FREE MOVEMENT IN LIGHT OF MEMBER STATES' NATIONAL IDENTITIES

## *The legal analysis of the Coman case*

Laura Gyeney
associate professor (PPCU)

### 1. Introduction

There are an increasing number of cases brought before the European Court of Justice whose facts are regulated by provisions that *a priori* belong to *the competence of the member states*, including those which govern *the entry and residence rights of third country nationals*, however, they are closely related to the right of EU nationals to free movement and residence. To approach the issue from another aspect, the enforcement of *the supranational rights of the EU citizens* requires, in certain cases, that the EU law be applied in some highly sensitive areas which are traditionally the regulatory competence of the member states. Such issues include, for example, the loss of member state citizenship,[1] immigration policy,[2] or the area of family law, as we will also see in this paper.

The case that is discussed in the paper, i.e. the *Coman*[3] case, also belongs to the above group. It focuses on the very sensitive and complex issue[4] of legal recognition of same sex marriages of EU citizens who exercise their free movement rights.

Although the case is a pending one, it is still worth examining since this is the first time the European Court of Justice has been asked to decide whether 'spouse' under EU free movement law includes a same-sex spouse. The above issue i.e. the recognition of same-sex marriages in a member state that is different from the one

1 Rottman judgment, C-135/08, ECLI:EU:C:2010:104.

2 Zambrano judgment, C-34/19, ECLI:EU:C:2011:124.

3 Coman case, C- 673/16 (case in progress).

4 The recognition of the marriage of same-sex couples in a member state different from the place where the marriage was entered into raises quite a number of further questions, for example, the legal effects of the marriage, the use of names, adoption, as well as participation in a human reproduction procedure.

where the marriage was entered into during exercising the right to free movement has sparked intense debates in the national parliaments of the member states, at the various judicial forums, as well as in the media. In the latter disputes, the views voicing the constitutional principles of equality, the right to self-determination and human dignity on the one hand, and the member state considerations that openly reject same-sex marriages in their fundamental laws, on the other hand, are in conflict with each other. According to the latter views, the recognition of the relationship of same-sex couples as a family would inevitably lead to the reinterpretation and depreciation of the institution of marriage, as well as the radical transformation of the fundamental structure of society. [5]

Unfortunately, the 2004/38/EC Directive on the right of EU citizens and their family members to move and reside freely within the territory of the EU member states[6] (hereinafter referred to as: the Free Movement Directive) does not give any guidance with regard to the above issue. The latter keeps quiet about what it regards as a valid marriage, so basically, it is not specified either whether the rules of the Directive regarding free movement and residence can be applied for same-sex marriages.

However, it seems that in the future, the Union will be less and less in the position to avoid giving an answer to the above-detailed family law issues.[7] Through the liberalization of member state regulations and the relevant Strasbourg jurisprudence, the following question is expected to come up more and more frequently: what will happen if same-sex couples[8], that validly got married in one of the members states would like to move or return to the territory of a member state where same-sex marriages are not recognized, exercising their right to free movement? In this case, can the couple claim EU-level 'family reunification rights'? In other words, the question is whether the third country member of the married couple may obtain the 'family member' status in accordance with the Free Movement Directive and primarily the residence rights arising from this status.[9] The *Coman* case,[10] referred before the European Court of

---

5 Király, M.: *Egység* és *sokféleség. Az Európai Unió jogának hatása a kultúrára.* (Unity and Diversity. The Impact of the Law of the European Union on Culture) Budapest, Új ember Publishers, 2007. 79.

6 Directive 2004/38/EC (April 30, 2004) 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 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 (OJ L 158, 30.4.2004, p. 77; Hungarian special edition, chapter 5, volume 5, p. 46)

7 As the number of marriages involving an international element is growing and in parallel, there are more and more provisions related to family law in the EU-level international private law norms, this issue is increasingly coming into focus. This is also indicated by the setting up of the Commission on European Family Law in 2001, which endeavors to elaborate fundamental principles in the above field as an academic umbrella organization, examining the future role of EU family law harmonization.

8 The question logically arises in the case of those couples one of the members of which is a third country national.

9 Of course, the question may also hold relevance in case that both members of the couple are EU nationals and one of the members does not meet the requirements of lawful residence as defined in the Directive, i.e. he or she is economically inactive and does not have sufficient financial resources, so he or she would impose an unreasonable burden on the member state's social assurance system.

10 See the Coman case (footnote 3).

Justice for preliminary decision-making, is targeted at examining this very issue in which case no decision has yet been adopted by the Court. However, it is still worth examining, in light of the current state of development of EU law, what kind of decision can be expected in the issue in question, with special regard to the great anticipation that surrounds it from the side of politicians,[11] advocacy group members, and last but not least, from academics. This great anticipation is particularly understandable in view of the recent Obergefell v. Hodges decision of the US Supreme Court requiring states to issue marriage licenses to same-sex couples and to recognize same-sex marriages that were legally formed in other states.[12] According to some views[13] Obergefell v. Hodges is the case that put the US ahead of the EU with regards to the issue of the legal recognition of same-sex relationships and now Coman gives the EU the opportunity to catch up with the US. However, we must keep in mind that as things stand now, the EU cannot require Member States to open marriage to same-sex couples. Nonetheless, a number of EU law provisions appear to require Member States to recognise same-sex marriages lawfully entered into in the territory of another Member State. In the following, I shall predict possible decision in light of those provisions.

## 2. The facts of the case and the application for preliminary decision-making

Adrian Coman, Romanian gay rights activist married a US citizen back in 2010. The couple currently lives in the United States. Mr. Coman turned to the Romanian immigration authorities in 2012, in order to find out about the criteria that are required to be fulfilled by his partner for obtaining the right of residence in the territory of the member state. The authorities responded that his application would be refused, with regard to the fact that according to the Romanian Civil Code, a marriage entered into abroad by same-sex couples cannot be recognized. The couple filed a claim, according to which the rejection of the application for residence by the Romanian authorities on the above grounds violates Mr. Coman's right to free movement, and also, it represents an example for discrimination on the basis of sexual orientation, which runs counter

[11] It is enough just to think about that recently, a high number of member state leaders were compelled to take an open stand on the issue of homosexuality. It is perhaps the Italian head of state Matteo Renzi who should be mentioned in this context, who, in response to the Oliari decision of the Strasbourg Court, announced, already before the summer break of the Parliament, that by the end of 2015, they would like to get the act recognizing the common-law relationship of homosexual couples adopted, which did happen by early 2016. The issue is given a special flavor by the fact that today, the governments of Ireland, Serbia and Luxembourg are all headed by homosexual politicians, however the views of these politicians significantly vary on the individual rights of homosexual persons.

[12] Two years ago (on June 26, 2015), a Supreme Court decision was adopted in the Obergefell v. Hodges case in the United States, which in principle 'seems to settle' the issue of the recognition of same-sex relationships. The decision adopted by the Supreme Court, the Fourteenth Amendment to the United States Constitution obliges every state to permit same-sex couples to get married and to recognize a lawfully permitted marriage, which was legally entered into between two persons of the same sex in another state.

[13] A. Tryfonidou: Same sex marriages: The EU is lagging behind. http://eulawanalysis.blogspot.hu/2015/06/same-sex-marriage-eu-is-lagging-behind.html [Tryfonidou (2015a)]

to the provisions set out in the Charter of Fundamental Rights of the European Union. The Court of Appeal turned to the Romanian Consititutional Court in order to request the constitutionality examination of the relevant article of the Romanian Civil Code. Finally, the Constitutional Court suspended the procedure and referred the following questions to the European Court of Justice for a preliminary ruling.

a) Does the concept of spouse defined in Point (a), Section (2), Article 2 of the Free Movement Directive include the same-sex spouse of an EU national, and if so, can the host member state be required to grant the right of residence on its own territory for more than three months to the same-sex spouse of a migrant EU citizen?
b) If the answer to the first question is negative, can the same-sex spouse of the EU citizen, who is a third country national, qualify as "any other family member" pursuant to Point (a), Section (2) of Article 3, or according to Point (b), Section (2) of Article 3 of the directive, "the partner with whom the Union citizen has a durable relationship, duly attested", and if so, will the host member state be obliged to facilitate for these persons to enter and reside in that country, if the host member state does not recognize same-sex marriages and does not provide for an alternative form of legal recognition, for example, registered partnerships.

Taking the liberalization trend of the past fifteen years into account, as a result of which the number of those member states which provide some kind of legal recognition to same-sex relationships is growing, it seems like the EU cannot avoid a response to the recognition of *some cross-border relationship rights of same-sex couples*, including that of their *'family reunification rights'* in the EU law sense of the word. In this sensitive issue, the Court has not been compelled to take an open stance up till now[14], the Coman case is the first one in which the Court can express its position on the above issue.[15]

The restraint demonstrated in this respect is entirely understandable from the part of the Union, as it is commonly known that the regulation of *family law* is an issue that still belongs *exclusively to the competence of the member state*. Thus, the member states can decide by themselves whether the same-sex couples can enter into a marriage or a registered partnership in their respective territories. Despite all this, the question arises what will happen if an EU national, using their right to free movement, travels to the territory of such a member state, with their same-sex spouse, in which member state the legal system does not recognize this form of a relationship as valid. It is a

[14] In the anti-discrimination jurisprudence of the European Court of Justice, the Court got rather close to this but definitely not in a cross-border context. The situation is that the facts of the respective cases were either centered around the country of origin (Grant, Maruko, Römer, Hay cases), or emerged in relation to the EU's civil servant staff regulations (the cases D. and Sweden v. Council of Europe, W. v. Commission).

[15] Although in the context of the Cocaj case, which also had Hungarian implications, a similar question was also brought to the Court earlier, the referring forum finally withdrew its claim. In this case, the Court was supposed to similarly clarify the concept of a registered partner in the context of free movement. Case No. C- 459/14.

question whether the host member state may refuse to provide residence to a third country citizen in its territory under the legal title of family reunification.

As it is commonly known, the legislator recognized, as early as at the outset of European integration, the importance of ensuring family reunification rights during the member state nationals' exercise of their right to free movement. As we could also see, the right of residence provided by the Free Movement Directive bear special significance for third country nationals, as they can exclusively exercise these rights of theirs derivatively, in their capacity as family members.[16] What is more, EU law now also provides these rights to those EU nationals who use their right to free movement and then return to their State of nationality.[17] Although such cases of return are not regulated by the Free Movement Directive, the family reunification rights ensured in the directive *should still be applied to the returners* too, *through an analogy*, as has been stipulated by the Court in the O&B case.[18] Exactly because of this, the questions submitted for decision-making in the Coman case are targeted at the interpretation of the relevant articles of the Free Movement Directive, thus primarily at examining whether *the concept of spouse* as specified in Point (a), Section (2), Article 2 of the Directive includes the same-sex spouse of an EU national.

## 3. The legal context of preliminary reference

The *spouse* of a migrant citizen has always been considered one of the family members that can rely on EU law in order to require the Member State of destination to accept him or her in its territory. As was already mentioned above, these rights are provided by the Directive to the family members irrespective of their origins, i.e. it is not relevant whether we are talking of an EU or a third country family member in the case in question.

This is absolutely clear as the family reunification rights were and are still merely targeted *facilitating free movement*, so in the first place, they are aimed at avoiding a situation in which the fact that the EU citizens cannot be accompanied or later joined by their family members should exert a *deterrent effect* on the free movement of EU citizens.

In the Coman case, the referring forum is trying to find an answer to the question whether the concept of a spouse as defined in the Directive includes the same-sex spouse of an EU national, who uses the right to free movement. As it was already mentioned above the Directive itself *does not define* the concept of *a spouse*. The relevant provision in question, i.e. Point (a), Section (2) of Article 2 was defined *in an* absolutely *gender-neutral way*, despite the fact that this issue was in fact on the

[16] The scope of those eligible is stipulated by Articles 2 and 3 of the Directive.

[17] Surinder Singh judgment, C- 370/90, ECLI:EU:C:1992:296, Eind judgment, C- 291/05, ECLI:EU:C:2007:771.

[18] O & B judgment, C-456/12, ECLI:EU:C:2014:135.

agenda when the proposed directive was discussed.[19] While the European Parliament meant to make an explicit reference to same-sex couples when defining the concept of marriage, the co-legislator Council refrained from doing so without explicitly excluding the theoretical legal possibility for this.[20] In summary, it can be concluded, that the legislator, exactly because of the divergence of opinion between the member states on this issue, avoided to give an exact definition, thus making this an issue that would have to be resolved by judicial interpretation. The lack of such definition obviously does not cause a problem when the directive is applied to heterosexual couples as such marriages are equally recognized by each member state. However, exactly with regard to the lack of consensus between the member states, as we can see, this may cause a problem with regard to the free movement of same-sex couples.

Among the commentators, there are some who opine, even in lack of the statutory definition of marriage/spouse on the level of EU law that the concept extends to same-sex couples too, so no legal interpretation by the European Court of Justice will become necessary. Costello thinks, by taking the literal interpretation into account, that "a marriage is a marriage", i.e. the effect of the directive extends to the marriages validly entered into in the territory of one of the member states in each and every case.[21] Kochenov represents a similar view, as he opines that if same-sex couples enter into a marriage that is valid in one of the member states, the host member state will be obliged to recognize such marriage in each case, pursuant to EU law. In his opinion, "the wording of the directive is crystal-clear in this respect", so the European Court of Justice does not need to intervene in any way whatsoever with regard to its definition [22]. In this respect, however, we have to agree with Tryfonidou, who does not think that it is so clear in practice[23]. The situation is that by the legislator's having failed to define the concept of marriage as understood in the directive, and thus, to stipulate the mutual obligation of the member states to recognize same-sex marriages, basically, it is the "principle of the host member state that was tacitly accepted"[24]. On the basis of this,

---

19 It is absolutely clear from the draft directive that the Commission considered to limit the concept of a spouse to persons of the opposite sex, avoiding the mere suspicion of its intending to interfere with the area of family law, which is the exclusive competence of the member states. COM (2003) 199, p. 11.

20 M. Bell: Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union. *European Review of Private Law*, Vol. 12., No. 5., 2004. 621.

21 C. Costello: Metock: Free movement and normal family life' in the Union. *CML Rev.,* Vol. 46., 2009. 615–616.

22 D. Kochenov: The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal,* Vol. 19., Iss. 4. (2013) 502.; D. Kochenov – U. Belavuasu: On the 'entry options' for the 'right to love': Federalizing legal opportunities for LGBT movements in the EU. *EUI Working papers,* issue 2016/09. 11.

23 A. Tryfonidou: EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition. *Columbia Journal of European Law,* Vol. 21. (2015) 210. [Tryfonidou (2015b)] What is more, the Court, contrary to its jurisprudence applied in economic issues (see the concept of EU workers) has never endeavored to elaborate genuinely autonomous concepts in the area of family law, including the introduction of uniform Union-level concepts.

24 Tryfonidou (2015b) op. cit. 212. In the case of registered relationships, the legislator wishes to enforce the principle of the host member state expressis verbis, as the registered partner will be entitled to

the host member state may in turn refuse to recognize the same-sex spouse as a spouse as per the directive, along with all of its legal consequences.

Thus, first of all, we should examine *the relevant member state regulation* concerning same-sex marriages, furthermore, how *the EU legislation and the Luxembourg case law* relate to same-sex relationships, i.e. whether these take the changes in member state regulation into consideration.

## 4. Assessment of same-sex marriages in the member states, with special regard to Romania

In Europe, the only legal way to make a relationship official was the institute of marriage for long centuries, which possibility was exclusively open to heterosexual couples. As a result of the liberalization trends of the past two decades, however, more and more member states ensure the recognition of same-sex marriages. Holland was the first country to ensure a legal framework for same-sex marriages in 2001. Holland was followed by Belgium, where homosexual couples have been allowed to get married since June 2003. In Spain, the marriage of same-sex couples was legalized in July 2005, while in Sweden the official marriage of same-sex couples in the framework of a civil or church ceremony has been permitted since May 2009. In Portugal, a law became effective on June 1, 2010, which deleted the reference to "opposite sex" spouses from the definition of marriage. In Denmark, same-sex couples have been permitted to hold church weddings since 2012. In England and Wales, the Parliament agreed to legalize same-sex marriages in 2013. In the summer of 2013, France also made this possible, 14th among the countries of the world. In Finland and Luxemburg, the Parliament made such a decision in 2014, while Ireland was the first in the world to vote for the legalization of gay marriage in the form of a referendum in 2015. A Slovenian law allowing same-sex marriage took effect in February 2017.[25] In July 2017, Malta also adopted the law that permits the marriage of homosexual couples. Same-sex marriage became legal in Germany on 1 October 2017.[26]

However, quite a high number of member state constitutions prohibit the marriage of same-sex couples, which means that Croatia, Bulgaria, Latvia, Lithuania, Slovakia and Poland have a constitutional ban on gay marriages. The Fundamental Law of Hungary[27]

---

automatically enter and reside in the host country if "the laws of the host member state regard the registered partnership as one that is equal to marriage". Article 2(2)(b) of the Free movement directive.

25 The Slovenian Act Concerning Partnership affords same-sex couples the right to marry, extending the same rights and duties of opposite-sex married couples to same-sex married couples, with the exception of adoption and assisted reproduction.

26 However, in a high number of further member states, it is possible for same-sex couples to make their relationship official without getting married. This becomes possible through *the registration of a partnership,* for example in Austria, the Czech Republic, Hungary, Estonia, Greece, Croatia, Italy and Cyprus.

27 The new Fundamental Law of Hungary strives, both on the level of solemn declarations and on that of more specific regulations, to provide a stronger protection to the institution of the family than before. The article on the protection of the institutions of marriage and family contains a unique extra element as compared to the earlier text: "(1) Hungary shall protect the institution of marriage as the union of a

also protects the institution of marriage as a union of a man and a woman, based on a voluntary decision.[28]

As regards the member state affected by the case, i.e. Romania, the country's Chamber of Deputies also voted for a proposal amending the constitution in May 2017, in which a family is defined as "the marriage of a man and a woman established by a voluntary decision", thus preventing that a law on same-sex marriages be adopted in Romania.[29] The amendment of the fundamental law (which currently mentions "spouses" in the definition of the family) was proposed by a civil society organization called "Coalition for Family", affiliated with the Orthodox Church, which has since then collected as many as over three million supporting signatures for their civil initiative. By the way, Romania does not ensure any possibilities for the official recognition of same-sex relationships in any form whatsoever. The *Coman* case is the second major Romanian case that has been brought before the European Court of Justice, and in the focus of which are the rights of homosexuals.[30]

In summary, we can conclude that the European legislation is rather diverse with regard to the legal recognition of same-sex marriages.

## 5. Assessement of the relationship rights of same-sex couples in EU law, issues of competence

It cannot be stressed enough that the *Coman* case is exclusively targeted at the issue of the cross-border recognition of same-sex marriages. The situation is that, differently from the Supreme Court of the USA, the European Court of Justice still has no competence to require the legalization of same-sex marriages by the member states.[31]

---

man and a woman established by voluntary decision, and the family as the basis of the survival of the nation." Article (L), Section (1)). Schanda, B.: A jog lehetőségei a család védelmére. (The Possibilities of Law to Protect the Family.) *Iustum, Aequum, Salutare*, Vol. VIII., 2012/2. 77

[28] As you can see, the level of acceptance of same-sex relationships is the highest in Northern and Western Europe, while the Central-Eastern European countries tend to oppose them. Balázs Schanda and Katinka Bojnár do not think that this is surprising, since the countries with similar historical backgrounds react to each other's decisions, they exert an effect on each other. Schanda, B. – Bojnár, K.: Házassági jogrendszerek versenye, vagy párkapcsolati szupermarket? (Competition of Legal Systems of Marriage, or the Relationship Supermarket?) *Iustum, Aequum, Salutare*, Vol. XII., 2016/2. 178.; J. Scherpe: The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights. *The Equal Rights Review*, 2013/10. 84.

[29] In Romania, the draft amendment of the constitution has to be accepted by both chambers of the Parliament with a two-third majority in order to be able to amend the fundamental law, and within thirty days from such acceptance, a referendum should be called. This referendum is expected to be held in the autumn of 2017.

[30] The first case was the one called Asociaţia ACCEPT, which surfaced in the context of the prohibition of discrimination on grounds of sexual orientation, which is also stipulated by directive 2000/78/EC on equal treatment. In this, the Court essentially declared that due to the homophobic statements made by the "head" of the football club, it may be up to the club to prove that they do not apply a discriminatory admission policy. Asociaţia ACCEPT judgment, C-81/12, ECLI:EU:C:2013:275.

[31] The Obergefell v. Hodges decision does not only render it obligatory to recognize marriages entered into between two persons of the same sex but it essentially legalizes the marriages entered into by same-

According to the current status of the EU law, family law issues are to be deemed as ones that traditionally belong to the competence of the member states. Thus, in the case of *purely internal situations*, the member states make their own decisions on any issues concerning family law. This is fully understandable, as this is a very sensitive area that reflects the social and cultural values of a state, where the member states wish to maintain their regulatory competences. The sensitive nature of the issue is indicated by the fact that not even the Lisbon Treaty has brought about any major changes in the EU-level harmonization of family law.[32] In light of the above, it is not at all surprising that the *Treaty* approved in the last century and the related *secondary law* rest on the basis of a conservative family model, in the center of which you can find the institution of heterosexual marriage.[33] In this respect, the draft proposal consolidating the system of free movement[34] and the Free Movement Directive approved on this basis and serving as the subject for preliminary decision-making have not brought about any major changes either.[35] Same-sex couples, despite the above-described proposal of the EP[36], have remained invisible, maintaining by this the uncertainties of the earlier system, including the freedom of the member states to make decisions on the interpretation of

sex couples. It should be noted here that it was right after this decision adopted in the States that the European Court of Human Rights adopted a decision of a similar subject in the Oliari and others v. Italy case, to be discussed later (appl. no. 18766/11, 36030/11, July 21, 2015), in which the European Court of Human Rights only renders the minimum level of protection in the state recognition of relationships. Renáta Uitz thinks that the European Court of Human Rights obviously does not even wish to revisit the issue of gay marriages under Article 12 of the Convention, as in this part, it did not deem the motion acceptable. Uitz, R.: Egy lépéssel lejjebb, egy lépéssel feljebb. (One Step Lower, One Step Higher.) *Fundamentum,* 2015/4. 85.; furthermore, Balázs Schanda and Katinka Bojnár emphasize that the parties argued in vain that an increasing number of states opens the possibility for same-sex couples to get married, and although the Court quotes the position taken by the US Supreme Court, it did not think that this was an example to follow, confirming by this its earlier jurisprudence. Schanda–Bojnár op. cit. 180.

32 Although Section (3), Article 81 of the Treaty on the Functioning of the European Union creates a legal basis for the acceptance of measures aimed at family law issues with cross border implications, in the framework of the judicial cooperation in civil matters, the resistance of the member states in this respect is well reflected by the fact that the requirements of unanimity and the consultation procedure for decision-making have remained unchanged in family law issues. This basically gives a veto right to the member states against those EU proposals affecting family law which the member states deem incompatible with the values of the member state in question.

33 The family as a social unit is organized on a patriarchal basis, where the man is the breadwinner, the woman manages the household, and their relationship is based on a heterosexual marriage. E. C. di Torella – A. Masselot: Under construction: EU family law. *European Law Review,* Vol. 29., 2004/1. 39.

34 COM (2001) 257.

35 This is understandable, with regard to the fact that the institution was accepted as late as in 2001 even in Holland, which was the first EU member state to accept gay marriage.

36 From the part of the European Parliament, those endeavors which aim to shift EU law from this traditional status continue to be present. This is reflected by the recently accepted report of Lunacek as well, which, although has no legally binding force, requests the Commission to make proposals for the mutual recognition of the effects of all civil status documents across the EU, including registered partnerships, marriages and legal gender recognition, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement.

the concept of a spouse[37]. Exactly because of the above, in the case of the new Brussels II Regulation on matrimonial matters and the matters of parental responsibility[38], legal literature was uniform for a long time in that it is only the form of monogamous co-habitation of opposite-sex couples that should be understood by the concept of marriage within the scope of the regulation, while the marriage of same-sex couples is not within the scope of the regulation. However, this interpretation is by far not so unambiguous today[39]. The effect of the Rome III Regulation related to divorce cases[40] clearly extends to same-sex marriages as well.

As regards the *Court*, we can also state that its case law preceding the turn of the millennium was for a long time based on the approach of traditional, heterosexual marriage, which, as a general rule, excluded the relationships operating in another form from the protection provided by the EU law. A good example for this is the statement made by the Court regarding the case *D. and Sweden v. the Council of Europe*, according to which the most generally accepted definition in the law of the member states is that "the term marriage means a union between two persons of the opposite sex" [41]. In the specific case, the Court found that those who live in a marriage and those who are registered partners are not comparable, this is why in their case, we can't talk of discrimination either.

After the millennium, however, the Court' case law that directly examined the relationship rights of same-sex couples and the issues of discrimination based on sexual orientation brought a kind of turn, for example the decisions adopted by the

---

37 It is here that we should make mention of the guidance on the better transposition of the Free Movement Directive, which already suggests that in the application of the directive, in principle, all marriages that have been validly entered into anywhere in the world should be recognized for the purpose of the application of the Directive. In the case of forced marriages and polygamous marriages, however, it emphasizes that the member states are not obliged to recognize these marriages if this goes against their own systems of law, COM (2009) 313.

38 Council Regulation 2201/2003/EC (November 27, 2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1

39 Wopera, Zs.: Az európai uniós családjog érvényesülésének kritikus pontjai. (The Critical Points of the Enforcement of EU Family Law.) *Családi Jog*, Vol. 11., No. (3), 2013. 42.; Molnár, S.: Az uniós jog és jövője a házasság és más típusú együttélések témájában. (EU Law and its Future with regard to Marriage and Other Types of Cohabitation.) *Iustum, Aequum, Salutare*, Vol. X., 2014/4. 143.

40 Council Regulation 1259/2010/EU (December 20, 2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, 29. 12. 2010, p. 10.)

41 D. and Sweden v. Council of Europe judgment, C-122/99 and C-125/99, ECLI:EU:C:2001:304. p. 34. In the case in question, a Swedish official working for the European Union and living in a registered partnership recognized by Swedish law applied for a family allowance, a so-called household allowance, similarly to married couples. However, his application was refused, with regard to the fact that he did not live in a marriage but in a registered partnership with a same-sex person. According to the decision adopted by the Court, the grounds for providing these allowances is a relationship that takes the form of a marriage, so the decision does not violate the provisions set out in Article 141 of the Treaty, which is on the equal pay for men and women (currently Article 157 of the Treaty on the Functioning of the European Union), as it is not the gender of the applicant but only the nature of their relationship that has governing effect. However, in the case in question, the nature of such tie was logically determined by the sexual orientation of the applicant.

European Court of Justice in the *Maruko*[42] and *Römer*[43] cases. In the cases in question, the Court interpreted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[44], which, contrary to the earlier laws, expressly *mentions the prohibition of discrimination on the grounds of sexual orientation*.

Thus, according to the above decisions of the Court, the *concept of direct discrimination on the grounds of sexual orientation* could be applied. In this, it meant significant support that the Court, different from the earlier cases, did *not* require *general assessment of comparability* any more but merely that the two institutions, i.e. marriage and registered partnership should be comparable with regard to the application for *specific allowances*[45]. However, it should be stressed that in the reasoning of its judgment, the Court specifically declared that the legislation on the family status and the allowances based on the latter *belong to the competence of the member states on the basis of the current status of the EU law*, and the EU law does not violate this competence of the member states. [46]

The twist in the jurisprudence of the European Court of Justice based on sexual orientation was further strengthened by the entry into force of the Lisbon Treaty. On the one hand, it incorporated a new article (Article 10) in the Treaty on the Functioning of the European Union, pursuant to which "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." [47] On the other hand, it gave binding effect to the Charter of Fundamental Rights of the European Union, according to Section (1), Article 21 of which all kinds of discrimination based on sexual orientation are prohibited. The changed direction is well indicated by the Court's highly practical and dynamic judgment in the *W. v European Commission* case[48] aimed at the interpretation of the EU Staff Regulation, from which it becomes

---

42 Maruko judgment, C-267/06, ECLI:EU:C:2008:179.

43 Römer judgment, C-147/08, ECLI:EU:C:2011:286.

44 Council Directive 2000/78/EC of 27 November, 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2. 12. 2000, pp. 16–22. In the focus of the cases in question, there were such allowances provided in the scope of occupation under the effect of the Equal Treatment Directive which were refused to be provided to the homosexual persons living in a registered partnership of this case, as opposed to the heterosexual couples living in marriages.

45 The above decision of the Court, however, was strongly criticized, first of all because the Court left it to the member state court to define whether a spouse and a registered partner are in a comparable position with regard to the above-mentioned benefits. Toggenburg thinks that the judgment is only revolutionary at first sight, exactly because of this. G. Tobbenburg: GBT go to Luxembourg: Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice. *European Law Reporter,* Vol. 5., 2008. 174.

46 Maruko judgment, Points 58-60, Römer judgment, Point 38, Hay judgment, Point 26. However, in Point 59 of the Maruko judgment, the Court also points it out that in exercising this competence, the member states are obliged to respect Community law, among others, the provisions on the principle of non-discrimination.

47 Article 10 of the Treaty on the Functioning of the European Union.

48 Thus, in the focus of the W. v. European Commission case, there was a Belgian-Moroccan double citizen living in a registered relationship, who complained of the decision in which the Commission refused to

clear that the Court does not only rely on the word for word interpretation of the Regulation any more but it also pays due attention to the underlying considerations. [49] The *Hay* case[50] also deserves mention, the subject of which is the same as those of the *Maruko and Römer* cases but in which the Court already *conducted* the comparative analysis required for registered partnerships and marriages *by itself*[51], differently from the previous cases. This determined stance from the part of the Court definitely does signify something, according to Bell and Selanec[52]. Tryfonidou is of a similar opinion, as the Court's latest decisions, which already focus on individual rights, including the above-quoted ACCEPT and *X, Y and Z v Minister voor Immigratie en Asiel* ("*XYZ*") cases[53], also point towards the Court's changed policy. [54]

## 6. The future interpretation of the concept of spouse by the Court

Based on the above, we can see that the Court is not in an easy situation in answering the question whether the concept of spouse as defined in the Free Movement Directive

provide the household benefits to him. The Commission argued that according to the Staff Regulations, those officials will be entitled to receive support who live in a marriage, as long as this is allowed by the member state in question. The situation is that the Commission thought that their relationship was not in line with the criterion set out in the Staff Regulations, as in Belgium, they have the possibility to enter into a lawful marriage. In its decision, the Court found that this rights proves to be theoretical and illusory if the concept of "the possibility of entering into a lawful marriage in one of the member states" is interpreted exclusively by formal criteria, so when it is examined, it cannot be treated separately from the statutory regulations of the other member state to which the situation in question is closely related due to the citizenship of the persons concerned and which declare the actions between homosexual persons punishable. W. v. European Commission judgment, F-86/09, ECLI:EU:F:2010:125

49 S. O'Leary: Applying principles of EU social and employment law and EU staff cases. *European Law Review,* vol. 36., issue 6. 2011. 777.

50 F. Hay, who was living in a registered relationship with his same-sex partner, was denied some benefits that were provided to employees on the basis of a collective agreement, with the justification that these benefits are only due if a marriage is entered into. In this decision, the Court, basically overriding the D. and Sweden v. the Council of Europe case, declared that "The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.", Hay judgment, Point 44.

51 The situation was that in its request, the French court that referred the case clearly pointed it out that those couples who live in a registered partnership with their same-sex partners are not comparable to married couples. As a response to this, the Court made it clear that those same-sex couples who live in registered partnerships are in fact in a similar position to those couples who enter into a marriage, with regard to the provision of the benefits in question, considering that at the time of the main proceeding, entering into a marriage was only allowed by the French regulations to opposite-sex couples, so they were not allowed to get married.

52 In their view, when the enforcement of the principle of equal treatment is jeopardized with regard to an EU act, the Court will not delay to defend them, not even in an area that traditionally belongs to the competence of the member states. C. Bell – N.B. Selanec: Who is a "Spouse" under the Citizens' Rights Directive? The Prospect of Mutual Recognition of Same-Sex Marriages in the EU. *European Law Review*, Vol. 5., 2016. 661–662.

53 X, Y, Z joined cases, C199/12–C201/12**,** ECLI:EU:C:2013:720.

54 Tryfonidou (2015b) op. cit. 221.

should be interpreted as one that also extends to the marriage of same-sex couples, basically requiring the member states to ensure the settlement of such couples for family reunification purposes, including those states which otherwise do not allow homosexual couples to get married. This is understandable because the issue of same-sex marriages raises serious moral, legal and social philosophical questions[55], which strongly divide public opinion and also, the member states themselves. The argument most frequently voiced by those who oppose the recognition of same-sex marriages is that recognizing these marriages in this way would gravely damage European social norms (*race to the bottom*)[56]. Those who promote the issue of same-sex marriages, on the other hand, refer to some mutually agreed and stipulated human rights and those 'beyond' them[57], which have been confirmed by the above mentioned decision on the *Obergefell v. Hodges* case adopted by the Supreme Court of the USA.

Thus, as regards answering the question, there is *quite a number of legitimate interests in conflict with each other*, which have so far made both those applying the laws and the legislators cautious. This is best demonstrated by the fact that the Court, in its jurisprudence related to same-sex relationships, has always paid attention to the legislation of the EU and the level of legal development achieved there[58], as a kind of response to those *concerns about democratic deficit* according to which a determined stance taken by the Court on the above issue would essentially take away the right of the member state to decide in this important area. All this also holds true for the draft EU laws, in which regard the more conservative decisions of the Court are eagerly referred.[59]

In the following chapters, I am trying to explain those considerations which will presumably influence the Court in its decision-making on the basis of three topics, i.e. the fundamental right to free movement, the legal principle of equal treatment, as well as the enforcement of the EU requirement concerning the respect for family life as stipulated in Article 7 of the European Charter of Fundamental Rights.

---

55 Király op. cit. 79.

56 On the extent to which reforms that are implemented in one member state increase the willingness to pass similar legislation in the other state, see in more detail Schanda–Bojnár op. cit.

57 So Kochenov quotes the Right to Love in his article [Kochenov (2013) op. cit].

58 Thus, in the Court's judgment on the D. and Sweden v. the Council of Europe, on the issue of treating a relationship as equivalent to a marriage, the decision was basically assigned to the legislator when it said that "Only the legislature can, where appropriate, adopt measures to alter that situation", point 38 of the judgment.

59 As a kind of vicious circle, the Commission proposed to the Council and the Parliament during the definition of the concept of "spouse" in the Free Movement Directive that they should restrict this concept exclusively to opposite-sex couples, by taking the Court's judgment on the D v. Council of Europe case into account. In some views, the reference to the above decision of the Court may act as a kind of justification for the legislator's conservativism, which may, however, lead to even more cautious judicial decisions in the future. H. Toner: *Partnership Rights, Free Movement, and EU Law.* Hart Publishing, 2004. 264.

6.1. The exercise of the right to free movement

There is basically agreement among the representatives of legal literature in that in lack of the recognition of a marriage entered into in one of the member states by the other member states, it is essentially the principle of the host member state that will prevail. The situation is that the refusal by the host member state to recognize a marriage that was validly entered into may also breach the right to free movement guaranteed by the provisions set out in Article 21 of the TFEU[60]. If one starts out from purely practical considerations, it is really hard to think that an EU citizen who entered into a lawful marriage in one of the member states would be ready to move to another member state to which he cannot be accompanied or later joined by his or her partner. Essentially, the situation is the same when the spouse may obtain a legitimate right to reside in the territory of the member state on his or her own right, however, the marriage itself and the legal consequences thereof are not recognized by the member state in question. The problem is that this may result in serious legal disadvantages in many areas, including taxation, social benefits, property law, as well as inheritance law[61]. However, we must keep in mind that one of the key considerations underlying the residence rights provided to third country nationals is *to faciliate the exercise of free movement rights conferred on EU citizens*. Thus, the very fact that an EU citizen may not be certain of whether their spouse will be allowed to follow them to the country of destination, and if they are, whether they will in fact be regarded as a married couple, may in itself have a deterrent effect on exercising the right to free movement. With a view to supporting the above ideas, some commentators[62] draw parallels between the group of case related to family status studied in this paper and some of the Court's case law *regarding the use of surnames* (*Garcia Avello, Grunkin Paul* decisions) [63].

The situation is that in these decisions, it was established by the European Court of Justice that the refusal by the host member state to register surnames according to the practice applied by the country of origin qualifies as a kind of measure aimed at preventing free movement, with regard to the fact that the discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels[64]. These representatives of legal literature think that the rejection of family status may cause even more significant inconveniences, which in this way

---

60 Tryfonidou (2015b) op. cit. 222–229.;, K. Lenaerts: Federalism and the Rule of Law: Perspectives from the European Court of Justice. *Fordham International Law Journal,* Vol. 33., Issue 5., 2011. 1355–1360.; Bell–Selanec op. cit. 679.

61 Tryfonidou (2015b) op. cit. 225.

62 G. Biagioni: On Recognition of Foreign Same-Sex Marriages and Partnerships. In: D. Gallo – L. Paladini –P. Pustorino (eds.): *Same-Sex Couples before National, Supranational and International Jurisdictions*. Springer, 2014. 376.; Bell–Selanec op. cit. 674.

63 Garcia Avello judgment, C-148/02, ECLI:EU:C:2003:539; Grunkin Paul judgment, C-353/06, CLI:EU:C:2008:559.

64 What is more, they could not even be justified with regard to the immutability of surnames as one of the principles that establish social order and with reference to making public administration simpler (Garcia Avello judgment, Point 36 and 42, as well as Grunkin Paul judgment, Point 36).

undoubtedly has a deterrent effect on free movement, and it breaches the law exactly because of this. [65]

However, as it is commonly known, the measures restricting free movement do not always conflict with EU law, on condition that the member state in question can provide a legitimate reason by which these restrictions may be justified. In the scope of refusing to recognize marriages, the following *qualify as such legitimate goals: the protection of public morality*[66], *the family, or traditional marriages* in the territory of the member state in question. If some of the commentators used the above parallelism, the Sayn-Wittgenstein and Vardyn decisions[67], which are related to the use of names, are definitely to be mentioned at this point. In the former case, the Court accepted the reference of the member state to public policy and the principle of equality before the law as *a justification*, what is more, it stipulated that "Those specific circumstances which may justify *recourse to the concept of public policy,* may *vary from one country to another and from one period to another.* This is why "the competent national authorities must be allowed a margin of discretion within the limits imposed by the Treaty" [68]. The same holds true for the Vardyn case, where the member state restriction was accepted with reference to the protection of the national language, with special regard to Section (2), Article 4 of the Treaty on European Union, which says that "the Union shall respect the national identities of member states, inclusive of the protection of the official national language of the states." [69]

Similarly to the protection of the national language, Section (2), Article 4 of the Treaty on European Union has special significance for the member state protection of the institution of marriage as well, as it declares that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional. […]"[70] The situation is that the definition of the concept of marriage by the member state is undoubtedly the expression of the *national identity.* Some member states, as mentioned above, ensure *the institutional protection of traditional marriages* in their national fundamental laws, for this very reason, stipulating it on the highest constitutional level that a marriage means a tie between a man and a woman in each and every case.[71] What is more, a high number of member states accepted the above constitutional amendments following the call of a national referendum, ensuring by this full legitimacy to adapting the constitutional legal system to the national religious and cultural identity. [72]

---

65 Biagoni op. cit. 376–377.

66 However, some authors point it out that public morality as grounds for exemption is not listed in the legal documents on the free movement of persons, unlike in the documents on the free movement of goods. See Kochenov (2015a) op. cit. 15.

67 Malgožata Runevič-Vardyn judgment, C-391/09, ECLI:EU:C:2011:291, Sayn-Wittgenstein judgment, C-208/09 ECLI:EU:C:2010:806.

68 Sayn-Wittgenstein judgment, Points 87–88.

69 Vardyn judgment, Points 85-86

70 Section (2), Article 4 of the Treaty on European Union.

71 Similarly to Hungary, Bulgaria and Poland are also in the ranks of such countries.

72 So, for example, Slovakia called a referendum in protection of the family.

The above is confirmed by Article 10 of the Charter too, pursuant to which EU citizens are entitled to express their religious views in a collective form, furthermore, by Article 3 of the Treaty on European Union and Article 167 of the Treaty on the Functioning of the European Union, which stipulate that the Union shall respect cultural diversity[73]. The protection of the concept of c*ultural diversity* is also present in the jurisprudence of the European Court of Human Rights. In the justification of the *Vallianatos* case of the Strasbourg forum, the Court specifically acknowledged that "the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment "[74], while in the above-mentioned *Oliari* case, it said that "the national authorities, who are best placed to assess and respond to the needs of society ", so they have *wide discretionary powers* to enforce the interests of their communities.[75]

This means that pursuant to the EU law, the member states should be provided *a margin of discretion* when they wish to restrict the enforcement of one of the fundamental freedom, in this case, that of the right to free movement, with reference to *their national traditions*. For this, it is not even necessary for a restrictive measure issued by the authorities of one of the member states to correspond to a conception shared by all Member States with regard to the protection of the interest in question, including the moral, religious or cultural considerations shared by all the member states.[76] However, it should be noted that pursuant to Article 27 of the above-discussed

---

[73] Article 3, Treaty on European Union: "The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.", Article 167 of the Treaty on the Functioning of the European Union: "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."

[74] Vallianatos and others v Greece, Appl. no. 29381/09, 32684/09, Judgment of 7 November, 2013, Point 83. In the Vallianatos case, the European Court of Human Rights examined the compatibility of the Greek regulation that excludes same-sex couples from registered partnerships with the Convention. In relation to this, the Court established that with regard to the claim for the legal recognition and protection of their relationship, the applicant same-sex couple is in a comparable situation with the opposite-sex couples and that the law constitute unequal treatment on grounds of sexual orientation**.** The Court found that the protection of families in the traditional sense of the word, as well as of children born out of wedlock can be a strong and legitimate reason to apply a different treatment, however, in this specific case, it decided that Greece had not supported the exclusion of same-sex couples from the effect of the regulation with a duly convincing, objective and reasonable justification.

[75] Oliari and others v Italy, Appl. no. 18766/ 11 and 36030/11, Judgment of 21 July, 2015, Point 191. In the Oliari case, three homosexual couples who have been living in a partnership for several years turned to the European Court of Human Rights, since no recognition whatsoever was given to their relationship by Italian law. The Italian state referred to the discretion that the member states are given, underlining that it is the member states that are in the best position for assessing the sentiments of their communities. This was not disputed by the European Court of Human Rights but it still judged, in the case in question, that the Italian state was not able to show off any such community interest which may compete with the momentous interests of those who filed the motions. Thus, it declared that the lack of a formal state recognition, including the uncertain legal situation of homosexual couples in Italy violates the provisions set out in the Convention, more precisely, Article 8, which ensures respect for private and family life.

[76] Omega Spielhallen judgment, C-36/02, ECLI:EU:C:2004:614, Point 37. According to the Court's jurisprudence, however, the concept of "public policy" should always be understood strictly in the EU

directive 2004/38/EC, *any measures taken on grounds of public policy* shall be based exclusively on the *personal conduct* of the individual concerned. What is more, during the consideration of competing interests, the test of *proportionality* shall always be taken into account. So in this specific case, what is to be reckoned with is that the member state measure restricting free movement should on the one hand be suitable for achieving the aim of public interest, i.e. in this case for protecting the traditional institution of marriage, and on the other hand, it should prove to be the least restrictive means to achieve this goal.

Finally, the question arises whether the possible mutual recognition of marriages in the scope of free movement carries the risk of *'marriage tourism'*, similarly to the threat of social tourism. The situation is that it may easily happen that an EU national, leaving his or her home country, settles down in another member state, with a view to invoke the free movement rights when he or she returns to his or her country of origin. In this respect, it should be pointed out that in its recent case law the Court has been trying to keep these endeavors at bay.[77] In its above-cited *O and B* decision[78], the Court emphasized that it is exclusively *genuine residence* in the host member state that may generate EU rights for the family members. The Court also quantified this when it said that only a period of residence that exceeds three months may create such right of residence on return. What is more, even after residence that exceeds a period of three months, there will only be a presumption on the intention to settle in the host member state, which should be examined by the national court on an individual basis in each case.[79]

Consequently, with reference to the above practice followed by the Court, the risk of marriage tourism can be reduced if not fully eliminated, since those whose residence is not genuine in the territory of the state in question may not benefit from fee movement law.

### 6.2. Non-discrimination on the grounds of sexual orientation

In interpreting the provision of the Free Movement Directive regarding marriage, the Court shall not disregard the general principles of EU law, including the requirement of *equal treatment*, which is also mentioned in Article 21 of the Charter[80] This is all the more important because the prohibition of discrimination on the grounds of sexual orientation is also included in the Free Movement Directive as a guideline in the

context, when an exception on a fundamental freedom has to be proven, in such a way that the content of this concept could not be one-sidedly defined by the member states, without control by the institutions of the Community.

77 This is clearly proven by the recently adopted decisions in the Dano and Alimanovic cases, with regard to the issue of social tourism. Dano judgment, C-333/13, ECLI:EU:C:2014:2358; Alimanovic judgment, C-67/14, ECLI:EU:C:2015:597.

78 O & B judgment, C-456/12, ECLI:EU:C:2014:135.

79 Ibid., Points 32–57.

80 Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

application of the Directive. Preamble 31 of the Directive stipulates that "In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sexual orientation." In light of the above, it seems like the directive itself requires that its own provisions, including the definition of the concept of spouse, be interpreted without sexual discrimination. This is confirmed by the Luxembourg Court's above-cited case law of non-discrimination on the grounds of sexual orientation (Maruko, Römer and Hay cases), in which it was clearly declared that the advantages offered by Directive 2000/78/EC shall not be denied from homosexual couples purely based on sexual orientation. It is a question whether the above conclusions can be applied for the Free Movement Directive through an analogy. The question becomes whether a member state constitutes prohibited discrimination if it does not ensure the advantages arising from the EU law to homosexual married couples arriving from other member states, in this case, the right to family reunification, which it otherwise ensures to heterosexual married couples. Although in some views, including the opinion of Mark Bell, no doubts whatsoever may emerge in this respect[81], some others like Chloé Bell and Nica Bacic Selanec ask for caution, with regard to the different nature of the non-discrimination investigation in relation to the two directives[82]. While the comparison remained within the boundaries of national legislation in the *Maruko, Römer and Hay* cases, the examination of cross-border family reunification extends to the regulation of several member states rather than one. This means that it extends, on the one hand, to the regulation of the member state where the legally binding marriage was entered into, and on the other hand, to that of the host member state, where the homosexual couples wish to exercise their rights stemming from the EU law. In this context, Mark Bell opines that as the recognition of a marriage entered into by homosexual couples in another member state exerts no effect whatsoever on the member state competences regarding the authorization of the marriages of same-sex couples, homosexual and heterosexual marriages are definitely comparable with regard to the merely EU law objectives. The only factor that makes them different is their sexual orientation. Different treatment on these grounds, however, is prohibited under the EU law, as is also stipulated by Article 21 of the Charter. What is more, after the Hay case, these comparability tests can now also be conducted by the Luxembourg Court. Of course, the justification opportunity also comes up here but the jurisprudence followed by the European Court of Human Rights will have governing effect in this case as well, according to which a different treatment on the grounds of sexual orientation can only be justified by especially grave reasons.[83]

---

[81] Mark Bell puts it very bluntly, i.e. that the interpretation of the concept of marriage in the directive by any institution, even the Court, which excludes same-sex spouses, qualifies as direct discrimination on grounds of sexual orientation, which violates the contents of Article 21 of the European Charter of Fundamental Rights. M. Bell: EU directive on free movement and same sex families: guidelines on the implementation process. *ILGA Europe,* October 2005. 5.

[82] Bell–Selanec op. cit. 680.

[83] Dudgeon v United Kingdom, Appl. No. 7525/76, 22 October, 1981, Point 52; Smith and Grady v United Kingdom, appl. No. 33985/96 and 33986/96, Point 81.

6.3. The right to respect for private and family life

Finally, during the preliminary decision-making procedure, the Court will presumably discuss the question whether the limitation of the concept of marriage to heterosexual couples in the directive is in compliance with the provision of Article 7 of the European Charter of Fundamental Rights regarding *the respect for private and family life*. The situation is that it can easily happen that the refusal to grant family reunification rights as described above would not only violate Article 21 of the Charter but also, its Article 7, which declares the right to the respect for private and family life. With regard to the fact that the European Court of Justice does not yet have an established case law for the interpretation of the relationship rights of same-sex couples in light of Article 7 of the Charter, it is the jurisprudence of the Strasbourg Court aimed at respecting private and family life, in line with the provisions set out in Section (3), Article 52 of the Charter[84], that can serve as a starting point for the investigation. As regards the relevant case law followed by the European Court of Human Rights on this subject, first of all it is the *Schalk & Kopf* judgment adopted in 2010 that should be mentioned, which somewhat seems to shift from the earlier conservative approach. In this case, the Court already recognized homosexual couples as a family and it declared that "it would be artificial to uphold the position that, as opposed to heterosexual couples, the concept of 'family life' as defined in Article 8 of the Convention does not include same-sex relationships"[85]. This was followed by the above-quoted judgments of the European Court of Human Rights on the *Vallianatos and Oliari* cases and finally, its latest *Pajic v Croatia* decision[86]which also has migration-related implications. In this

[84] As long as the Charter contains rights which are in line with the ones ensured by the European Convention for the Protection of Human Rights and Fundamental Freedoms, then the content and extent of these rights should be deemed equivalent to those which are set out in this convention. This regulation does not prevent the EU law from providing more expanded protection. Section (3), Article 52 of the Charter.

[85] See Schalk and Kopf judgment, appl. no. 30141/04, 24 June, 2010, Point 94.

[86] Pajic v. Croatia judgment, appl. no. 68453/13, 23 February, 2016. In 2011, Pajic, a Bosnian-Herzegovinan national applied to the Croatian authorities for residence, in order to be able to settle down in the town of Sisak with his Croatian partner. This application was refused by the Croatian authorities with the justification that at the time of the occurrence of the case, the Croatian Aliens Act contained no provisions whatsover on the entry of same-sex couples to the country for family reunification purposes. After two years of litigation, he finally turned to the Strasbourg court, saying that the stable partnership in which he lives qualifies as a protected family under Article 8 of the European Convention of Human Rights and as such, the exclusion of his same-sex relationship from the right to settle with the purpose of family reunification, which opposite-sex couples are entitled to, is a case of direct discrimination pursuant to Article l4 of the European Convention of Human Rights. The assertion of the Croatian government, according to which the participating states have a wide margin of appreciation concerning the concepts of family and private life and immigration policy was rejected by the Court. In its decision, the Court referred to its established case law, according to which, pursuant to Article 8 of the European Convention of Human Rights, the concept of family life does not only extend to married couples but also, to same-sex couples in a stable partnership. Ultimately, it was concluded by the Strasbourg forum that same-sex and opposite-sex couples are comparable, so the Croatian regulation that excludes the former group of citizens from family reunification in the territory of Croatia, realizes an act of discrimination with regard to the right to respect for private and family life ensured by the Convention.

case, the Strasbourg forum decided that same-sex and opposite-sex couples are in a comparable situation, so the Croatian regulation that excludes the former group from family reunification in the territory of Croatia commits an act of discrimination with regard to the right to the respect of private and family life ensured by the Convention. Thus, the above-mentioned judgment may serve as a guide to Luxembourg court in cases on similar subjects. Although Article 7 EUCFR cannot, if interpreted in the same manner as Article 8 ECHR, be relied on to require a Member State to admit within its territory the (opposite-sex or same-sex) spouse of a Union citizen, when that provision is read together with Article 20 EUCFR (Everyone is equal before the law), it requires same-sex spouses to be admitted to the territory of the host State under the same conditions that are imposed on opposite-sex spouses.[87]

## 7. Qualifying a same-sex spouse as "another family member" or "a partner"

The second part of the question on preliminary decision-making submitted in relation to the *Coman* case is essentially aimed at finding out whether, in case the Court gives a negative answer to the first question, the same-sex spouse of the migrant EU national may be qualified as "another family member" as per the definition provided in Point (a), Section (2), Article 3 of the directive, or pursuant to Point (b), Section (2) of Article 3 of the directive, as "a partner of the EU national with whom the former maintains a durable, duly attested relationship". In principle, the reference to Section (2), Article 3 of the directive is a valid solution for same-sex couples, as it says that "the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons". However, this would involve the 'downgrading' of marriages entered into in the state of origin and at the same time, disregarding the norms of the country of origin, which is strongly criticized by some commentators[88]. In addition to these, it should be pointed out that pursuant to the above-mentioned article, facilitating entry by the member state *is not an automatic right*, as opposed to the rights provided to married couples based on the provisions set out in Section (2), Article 2 of the directive. This is supported by the Court's judgment on the *Rahman* case, which topic was not brought up in the context of registered partnerships but in that of blood relatives however it was also targeted at the interpretation of the provision under review, i.e. that of Article 3(2) ensuring the entry and residence rights of members of the more extended family. Here, the referring forum basically expected an answer to the question what the *facilitation obligation* for the group of beneficiaries of other family members specified in Section (2), Article 3 of directive 2004/38 means with regard to entry and residence. In its judgment, the Court repeatedly stipulated that "the member states are not obliged to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen" [..], however, they should provide certain advantages to the persons who depend on the EU national

[87] Alina Tryfonidou: http://eulawanalysis.blogspot.hu/2017/03/awaiting-ecj-judgment-in-coman-towards.html

[88] Ibid. 201,; K. Waaldijk: Free Movement of Same-Sex Partners. *MJ*, Vol. 3., 1996. 271., 280.

in some way, over the other nationals of third countries.[89] In order to be able to meet this obligation, the member states should ensure that the decision on the application should be based on an extensive examination of the personal circumstances of such persons, and it should contain a justification in the case of rejection.[90] However, the Court emphasized all through that the turn of phrase "in accordance with its national legislation" mentioned in Section (2), Article 3 ensures *wide discretionary powers* for the member states regarding the facilitation of entry. The only constraint in this respect is that this provision may not be deprived *of its effectiveness*. This means that the Court's *potential future expanded interpretation* of the family reunification rights of other family members and registered partners is not at all reflected in this decision.[91] In this case, the only safeguard can again be provided by the application of *the principle of proportionality*. Furthermore, the fact that the couple in question has already entered into a binding marriage in another member state may serve as a kind of protection, i.e. based on "their personal circumstances", it can be justifiably assumed that they live in a stable relationship.

What is more, the scope of the rights provided on the basis of Point (b), Section (2), Article 3 may also be problematic. With regard to the fact that the Court has not yet adopted a relevant judgment on this subject, it is a question whether the member state should only be obliged to facilitate the entry and residence of same-sex spouses in the member state in question, or whether on this basis, the latter would become entitled to receive all the advantages provided by the directive, including the permanent residence status and the rights attached to this status. However, it may easily happen that the scope of these rights will also be the subject of *member state discretion*, which will give them a wide space of maneuver.

## 8. The prospective judgment and its significance

Although some issues related to the recognition of same-sex relationships had already been put on the agenda of the Court not long after the turn of the millennium, they have so far remained strictly within the competence of the member states. The *Coman* case is the first one to focus on *the family reunification right* of an EU national, thus reaching beyond the borders of the member states. However, the *cross-border* nature of the case may curb the decision-making authority of the member states, which otherwise have exclusive competence on family law issues, considering that the member states shall also *comply with EU law* even if they act in their own competence.

It is exactly because of the above that it is possible that in the *Coman* case, the Court will decide that the member states, including those which do not allow same-sex marriages in their territories, will be obliged to recognize the marriages lawfully

89 C-83/11 Rahman and others judgment, ECLI:EU:C:2012:519, Point 21.

90 See ibid., Point 22. In its judgment, the Court mentions a few circumstances such as the extent of financial or physical dependence, or the level of kinship.

91 Some authors think that this would be a kind of forced solution, through which same-sex couples would subject themselves to the discretion of the member states. See Bell–Selanec op. cit. 684.

entered into in the territory of another member state, with a view to the enforcement of the provisions set out in the Free Movement Directive, irrespective of whether the couples are heterosexual or homosexual.[92]

Even if this happens so, the Court will presumably highlight in its decision that *the principle of mutual recognition is not an absolute rule*, exactly with regard to the *sensitive nature* of the issue and the member states that oppose same-sex marriages *with a view to protecting traditional European values.* As we know, Article 21 of the TFEU, which provides for the right to free movement, as well as Section (2), Article 27 of the directive in question specifically allow this derogation from the fundamental freedom, as long as this restriction *is legitimately justified with reference to public interests*, including, as the case may be, *the protection of family and marriage,* and it passes the test of *proportionality.* Ultimately, it is the test of proportionality that may answer, in specific cases, whether the rejection of same-sex marriages under the concept of marriage used in the directive for the above reason may prove to be a suitable and not over-restrictive means to achieve the goals of public interest set by the member state in question.

As we have seen, the Court has been highly cautious on the issue of same-sex marriages to date, which has only been replaced by a more dynamic approach just recently (*W. v the European Commission, Hay* cases). The Coman case now allows the Court to take a further step on the above-mentioned path through its decision in which it extends the concept of a spouse specified in the directive to same-sex couples, by this eliminating the legal uncertainty that has existed in this area and avoiding the duplication of family statuses.[93]

## 9. Conclusion

The current legal framework, i.e. the wording of the Free Movement directive does not make it clear whether the term 'spouse' in this context also includes the same-sex spouse of the Union citizen who has exercised free movement rights, thus offering the member states an opportunity to exclude third country partners from the rights ensured by the directive, with reference *to their competences in immigration policy* and *family law.*

However, the placement of the goal of the directive, i.e. the effective exercising of the right to free movement into the focus of the Coman case, may however serve as a clear guidance for the interpretation of the provisions in question by the Court. Thus, in the course of decision-making, the Luxembourg forum will definitely take it into account that the restriction of the concept of a spouse exclusively to heterosexual married couples may exert a deterrent effect on the same-sex couples' exercise of the rights to free movement. The EU requirement of the mutual recognition of same-sex marriages

[92] It cannot be stressed often enough that the recognition of marriages cannot oblige the member states in any way whatsoever to redefine the concept of marriage on the national level.

[93] I.e. that there are marriages recognized only on the national level, or ones recognized on both the national and the European levels.

is also supported by both the prohibition of discrimination on the grounds of sexual orientation specified in Article 21 of the Charter, and the provision regarding respect for private and family life set out in Article 7 of the same, also with regard to the latest decision adopted by the Strasbourg Court on the Pajic v. Croatia case. At the same time, during the examination of the above issue, the Court will have to take into account, all through, that the restrictive act by the member states *with reference to public interests*, thus primarily *to the protection of family and traditional concept of marriage*, may *be legitimately justified*, as long as this is in line with the requirement of *proportionality.*

The Court, thus faces a difficult decision. However strong the arguments voiced by the European Union for the mutual recognition of homosexual marriages may be, the legitimate considerations declared by the member states have at least the same weight, with special regard to the requirement stipulated by Section 4 (2) of the Treaty on European Union, pursuant to which "the Union shall respect the national identities of its Member States". The situation is that defining the concept of marriage by the member state is without any doubt the expression of *national identity.*

It is concerning that whatever decision is adopted in the Coman case, the judgment to be passed by the Court will come to the cross-fire of major criticism. Perhaps exactly because of this, it would be desirable that in such a sensitive issue, the final word should be uttered by the EU legislature rather than the Court.