

# EUROPEAN COURT OF JUSTICE SAYS “I DO” TO EXPANDING THE ACQUIS COMMUNAUTAIRE ON FREE MOVEMENT RIGHTS TO INCLUDE SAME-SEX MARRIAGE

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## I. INTRODUCTION

On June 5, 2018, the Court of Justice of the European Union [hereinafter "CJEU"]<sup>1</sup> confronted a question which often arises under European Union law: What happens when European Union (EU)<sup>2</sup> law intersects with potentially conflicting Member State law? If an ambiguous key term in an EU harmonization directive is interpreted differently under the domestic law of various Member States, how shall the term be defined under EU law? These are essentially the questions the CJEU endeavored to answer in the case *Coman v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*.<sup>3</sup> In this case, the court was essentially tasked with resolving the definition of "spouse" for the purposes of determining whether or not same-sex couples are covered under the Citizens' Rights Directive, a key provision of EU law, in the face of widely divergent Member State law on the matter. But because the facts of the case went beyond the Citizens' Rights Directive, the piece of EU legislation in which "spouse" was determined to be gender-neutral, the case involved a rather complicated interrelationship between the Citizens' Rights Directive and Article 21 of the Treaty of the Functioning of the European Union. In establishing this relationship, the Court drew upon its

1. *The Court of Justice of the European Union*, EUROPA EU, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited Mar. 4, 2020) [hereinafter CJEU] (noting CJEU is the supreme judicial organ and court of last instance concerning matters falling under the ambit of EU law for EU Member States).

2. The European Union is a supranational institution with full legal personality under international law, comprised of twenty-seven European countries [hereinafter "Member States"]. It is the product of the evolution and development of nearly seven decades of ever increasing interstate cooperation and integration among European states following the Second World War (European Coal and Steel Community, European Atomic Energy Community (Euratom), and the European Community (EC)). Its mandate is to facilitate solidarity, cooperation on economic, social, cultural, foreign policy and security policy matters predicated on the premise that all its Member States hold in common "European" values of individual liberty and human rights, democracy, the rule of law, economic liberalism and the free market, consumer and environmental protection, and European cultural diversity. Its mandate covers the four Fundamental Freedoms of the European Union: Freedom of Movement of labor (people), goods, capital and services without impediment, the result of which achieves a Customs Union and European Single Market. Its premiere institutions consist of the Council of Europe (the Heads of State of each Member State), European Parliament (legislative body elected representatives elected in proportion to each Member State's population) the European Commission (tasked with drafting EU legislation and other legal documents in the form of Regulations, Directives, and Opinions), and the Court of Justice of the European Union (CJEU), tasked with interpreting EU law and resolving disputes arising thereunder. EU TREATIES, [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en) (last visited Mar. 4, 2020).

3. Case C-673-16, *Coman & Others v. Romania*, 2018 CURIA 385 (not yet published in an official European journal), [hereinafter "*Coman*"] (The Romanian government represented its immigration ministry before the CJEU; hence the case is more widely known as *Coman v. Romania*).

own body of case law, as well as regional human rights law, that of the European Court of Human Rights interpreting the European Convention on Human Rights.

The case from which the ruling is derived involves two men, Adrian Coman, a Romanian and EU citizen,<sup>4</sup> and Claibourn Robert Hamilton, a U.S. citizen, who married each other in Belgium, an EU Member State which recognizes same-sex marriage. The two sought to have their marriage recognized in Romania, also an EU Member State, in order to secure a derived right of residence so that Hamilton could reside with Coman in Romania. The CJEU held that all EU Member States must recognize marriages between an EU citizen and Third Country citizen, irrespective of the sex of the spouses, insofar as is necessary to provide a derived right of residence of Third Country national in an EU Member State, if such marriages are lawfully performed in accordance with the law of another EU Member State in the course of “genuine residence”<sup>5</sup> therein. The *Coman* decision significantly expanded the immigration rights of EU citizens and their Third Country<sup>6</sup> spouses in all the countries which are EU Member States and represented a significant development for the expansion of familial rights in the European Union, the immigration law of EU Member States, and the development of harmonization of policy between Member States, and moreover, the *acquis communautaire* on Free Movement of People in the European Union in EU jurisprudence generally.

Prior to the expansion of the rights of sexual minorities in EU Member States, Member State law with respect to marriage had been relatively uniform, recognizing marriage as a legal union between one man and one woman. However, with the expansion of such rights over recent decades, domestic law among the Member States began to diverge, creating inevitable

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4. All citizens of one of the constituent twenty-seven Member States are automatically citizens of the European Union (colloquially “European citizens”), endowed with the full body of protections and political rights granted to them under EU law, for example, the general right to travel in, reside, work, study and conduct business in any and all Member States, the right to settle family members, and the right to work for any of the plethora of EU institutions, run for European Parliament, and vote for representatives to the European Parliament. *EU Treaties*, EUROPA EU, [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en) (last visited Mar. 4, 2020).

5. *Coman*, *supra* note 3, ¶ 58(1).

6. *See infra* note 202 (noting that Third Country citizens are non-citizens of any of the twenty-seven EU Member States and therefore do not hold EU citizenship. Therefore, they require a legal basis to legally reside in the European Union unless they are citizens or legal permanent residents of EEA/EFTA states, which are Norway, Iceland, Liechtenstein and Switzerland pursuant to the EU-EEA Agreement and the EU-Swiss Agreement. In the context of the European Union, a derived right of residence for the Third Country spouses to reside in the EU through marriage is enumerated in Article 2 of the Citizens’ Rights Directive, (discussed further, *infra*.) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC 2004 O.J. (L 158/77), arts. 1, 2, 7(2), at 87–88, 94–95. [hereinafter “Citizens’ Rights Directive”]. Accordingly, marriage provides a “derived right of residence” to a Third Country national whereby the “right of residence” of the foreign national to reside in the EU is “derived” through the Third Country citizen’s marriage to an EU citizen.

conflict within the EU with respect to the implementation of the right of Free Movement under EU law, one of the four fundamental freedoms under EU law. This question of interpretation involved an ancient tension in EU jurisprudence: subsidiary and proportionality on the one hand—holding in utmost regard, the sovereignty and will of the individual Member States—and on the other hand, the need and mandate for harmonization to achieve an integrated and functioning EU system. The case also implicated the “margin of appreciation,” the latitude or discretion with which the individual Contracting States in a multilateral system may implement binding mandates and policy.

The *Coman* case is recognized as a groundbreaking “landmark” ruling in the history of European Union jurisprudence. While the decision will not result in dramatic socioeconomic transformations, as did, for example, the accession of Central European Member States to the European Union, this decision expands the legal rights of the nationals of Member States which recognize neither same-sex marriage nor any other legal relationship sufficient to establish a derived right of residence for a Third Country partner. Accordingly, it is a deeply salient legal development for same-sex couples planning to reside in Central or Eastern European Member States. This decision is also significant in the context of the legal development of EU jurisprudence because it altered the *acquis communautaire*<sup>7</sup> on one of the four fundamental freedoms which comprise the European Single Market and European Union, thereby materially expanding the *corpus juris* of one of the four cornerstones of the European Union.

This Note undertakes to familiarize the reader with the basic legal framework of the European Union and the relevant aspects of Primary and Secondary Law as they relate to the *Coman* decision. The article will transition to a brief procedural history of the case and an exposition of the legal effect of the ruling within the Member States in the context of their legal environments prior to *Coman*. The Note will also examine the interrelationship between EU jurisprudence handed down from the Court of Justice of the European Union and that of the European Court of Human Rights, especially within the context of the principle of the margin of appreciation. The Note will analyze and critique the decision from a legal and political context as well as the legal positions advanced by various Member States. It will discuss theoretical implications on EEA/EFTA states in the context of their legal relationship to the EU and some of the many possible permutations of legal uncertainty imposed by Brexit on the *Coman* decision.

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7. This is essentially analogous to the *corpus juris* on any issue or question concerning EU law.

## II. LEGAL FOUNDATIONS FOR THE *COMAN* RULING

### A. *Relevant Provisions of EU Primary and Secondary Law*

#### 1. *Primary Law*

EU Primary Law consists of the three core treaties which form the legal foundation of the European Union<sup>8</sup> and broadly define the mandate of the European Union, as well as the rights of EU citizens and obligations and duties of the Member States. These three fundamental pillars of EU law are (1) the Treaty on the European Union (TEU), (2) the Treaty on the Functioning of the European Union (TFEU), and to a lesser practical extent, (3) the Charter of Fundamental Rights of the European Union.<sup>9</sup> The TEU generally sets forth the structure and mandate of the EU institutions and the legal procedures therein, and the Charter of Fundamental Rights provides the values, aspirations, and collective understanding of rights by which the other treaty documents and Secondary Law are to be interpreted.

However, it is the TFEU which is most substantively relevant, detailing the specific competences (essentially subject matter jurisdiction) of the EU, and setting forth how the EU Member States are to implement the four Fundamental Freedoms in achieving a European Single Market, whereby, with few specific exceptions, there is to be no discrimination against legal and natural persons from other Member States by any Member State and no substantial impediments to commerce within the EU with respect to persons, goods, capital, and services.

With respect to the Free Movement of Persons, Article 21 TFEU is the most relevant provision of the Treaty provisions. It obliges Member States to recognize that “[e]very citizen of the [European] Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”<sup>10</sup>

#### 2. *Secondary Law*

EU Primary Law broadly sets forth the EU’s core mandate and structure, and Secondary Law rests upon the foundation of Primary Law. Comprised of *Regulations*, *Directives* and *Decisions*,<sup>11</sup> Secondary Law elucidates the rights of EU citizens and the obligations of Member States and EU institutions, as well as jurisdictional areas of competence, in further detail. Regulations and

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8. See *EU Law*, EUROPA.EU, [https://europa.eu/european-union/law\\_en](https://europa.eu/european-union/law_en) (last visited Jan. 4, 2020).

9. The Charter of Fundamental Rights guides the interpretation of other provisions of EU law, but unlike the TEU and TFEU, does not confer any rights *per ipsum*. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: 2010 O.J. (C83) 389, art. 52(2) at 21 [hereinafter Charter of Fundamental Rights].

10. TFEU, CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, art. 80 at 78, [2012] O.J. C. 326/47, art. 21(1) at 57 [hereinafter “TFEU”].

11. See *supra* note 8.

Directives are provisions of EU legislation originating from the European Council and Commission, and ratified through adoption by the European Parliament, and Decisions are the final interpretation of contentions cases concerning EU law from the EU's judicial organ, the Court of Justice of the European Union.<sup>12</sup> Together, the Primary Law trifecta of Treaties (TEU, TFEU, Charter of Fundamental Rights of the European Union) and the Secondary Law Regulations, Directives, and CJEU decisions interpreting them, create the *acquis communautaire* on any legal issue over which the EU exercises jurisdiction.<sup>13</sup>

In 2004, the Citizens' Rights Directive, the most important piece of Secondary Law legislation concerning Free Movement of Persons, entered into force. The Directive significantly clarified and elaborated upon the broadly defined scope of Free Movement Rights of EU citizens under the TFEU (in the present case, under Article 21 TFEU), enumerating the rights of EU citizens and attendant obligations of Member States concerning those rights. Pursuant to the Citizens' Rights Directive, Member States are required to, *inter alia*, allow all EU citizens to reside in their countries,<sup>14</sup> and also provide a derived right of residence to the "spouse"<sup>15</sup> of an EU citizen (or a "registered partner" of an EU citizen "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").<sup>16</sup> In addition to the Citizens' Rights Directive, a series of European Community (EC) (and then after 1993, the European Union) cases further defined the scope of residence rights under EU law, particularly those pertaining to the derived right of residence of the Third Country relatives of EU citizens,<sup>17</sup> some of which are central to the *Coman* court's analysis discussed *infra*.

## B. *Standing of the Litigants*

The legal basis on which petitioner Coman initiated his claim against Romania is the doctrine of *direct vertical effect*, which allows EU citizens to invoke EU law against a Member State. Whereas *Costa v. Enel* established

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12. The CJEU interprets both the Primary Law treaties and the Secondary Law EU Regulations and Directives, (and also its own previous case law) thereby expanding Secondary Law in interpreting previously Secondary Law. Although this concept does not yet exist in the lexicon of EU law, given the specificity of the application of facts to Primary Law and Secondary Law CJEU rulings, it may make sense to view CJEU rulings as a new layer of specificity in the *Acquis Communautaire -Tertiary Law* -a new layer of law which rests upon both Primary Law and also Secondary Law.

13. Issues of sole EU competence are ones which the Member States have agreed, through their accession to the relevant EU treaties, are governed exclusively by the EU institutions, similar to that of enumerated federal powers under the U.S. Constitution.

14. See generally Citizens' Rights Directive, *supra* note 6.

15. Citizens' Rights Directive, *supra* note 6, art 2(a) at 88, art. 7 at 93–95.

16. *Id.*

17. See e.g., Tendai Mukau, *Chapter 12: Re-Dividing Europe: Key Topics in the Legal and Economic Consequences of Brexit on The Low-Wage Economy of the European Single Market*, in *GETTING TO BREXIT*, (Hillman & Horlick eds. 2018) at 160–162.

the supremacy of the law of the European Community (now EU) law,<sup>18</sup> the seminal case, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, established the principle of *direct effect*, whereby EU law “produces direct effects and creates individual rights which Member States must protect.”<sup>19</sup> The court in *Van Gend en Loos* ruled that provisions of EU law are self-executing and therefore immediately applicable to Member States; Member States need not enact any domestic implementing legislation in order for EU law to apply within the Member State.<sup>20</sup> Furthermore, *Van Duyn v. Home Office* extended this principle in establishing *vertical* direct effect, whereby individual European Community Citizens (now EU citizens) can invoke their EU rights “vertically” against their Member State.<sup>21</sup> In *Coman*, litigants vertically invoked EU law against the EU Member State of Romania, requesting that the CJEU review Romania’s domestic law and non-recognition of their marriage for compatibility with EU law.

### C. *Facts and Procedural History of the Case*

In this case, Adrian Coman, who is a citizen of both Romania (an EU Member State), and the United States of America, took up residence in Belgium (also an EU Member State) to work for the European Parliament.<sup>22</sup> While domiciled in Belgium, where same-sex marriage has been legal since 2009, Coman married his partner, Robert Hamilton, who held U.S. citizenship and possessed no EU citizenship.<sup>23</sup> Thereafter, the couple contacted the Inspectoratul General Pentru Imigrări and Ministerul Afacerilor Interne, Romania’s immigration inspectorate, to inquire into Hamilton’s derived right of residence in Romania through his legal relationship to Coman, which was established on the basis of marriage under the domestic law of Belgium.<sup>24</sup> Because Romania does not legally recognize marriages between persons of the same sex, Hamilton could only legally remain in Romania for a period of three months<sup>25</sup> absent other independent legal grounds for a Third Country

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18. Case C-6/64, *Costa v. Enel*, 1964 E.C.R. 587, 599–600.

19. See Case C-28/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (colloquially *Van Gend en Loos* or *Van Gend*), 1963 E.C.R. 2, 16.

20. *Id.* at 13 (noting that “[t]his obligation, moreover, is not qualified by any reservation on the part of [Member] [S]tates which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.”). However, the European Commission may adopt directives requiring allowing the twenty-seven Member States to implement the object of the directive in accordance with domestic law (with latitude to so do insofar as permitted by the EU institutions).

21. Case C-41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, ¶ 12.

22. *Coman*, *supra* note 3, ¶ 9.

23. *Id.* ¶ 11.

24. *Id.*

25. *Id.* ¶ 12. The Civil Code of Romania explicitly forbids the legal recognition of same-sex marriages in Romania. See also, *Coman*, *supra* note 3, ¶ 7 (referencing the Civil Code of Romania, art. 277 (1)-(2), (4)). The request, as explained in the decision, was only with respect to rights of residence solely by virtue of marriage and not by other means of securing residence in Romania. U.S. citizens are able to travel to Romania (and any EU Member State) for tourist purposes for ninety days visa-free before



citizen to reside in a Member State. Coman then lodged a legal action against Romania in accordance with his right as an EU citizen to vertically invoke EU law against Romania.<sup>26</sup> The civil action was commenced in the Judecătoria Sectorului 5 București, a district court of first instance in Romania's capital, Bucharest.<sup>27</sup> Coman argued, *inter alia*, that the Romanian government's refusal to recognize Hamilton's right to reside in Romania on the basis of marriage infringed his EU right of Free Movement.<sup>28</sup> The Bucharest District Court then referred the matter to the Curtea Constitutională, the Romanian Constitutional Court.<sup>29</sup> The Romanian Constitutional Court determined that the matter involved genuine and ambiguous issues of EU law and therefore sought a preliminary reference from the CJEU pursuant to its obligation under Article 267 TFEU.<sup>30</sup> In the preliminary reference, the Constitutional Court requested that the CJEU consider two central questions, summarized as:

- (1) Whether, for the purposes of Free Movement provisions of the TFEU, the term "spouse" in Article 2(2)(a) of the Citizens' Rights Directive is gender-neutral and applies to Third Country nationals who entered into a same-sex marriage with an EU citizen in a Member State,<sup>31</sup> and if so, is the Member State of which the EU citizen has citizenship required to grant a derived right of residence to the Third Country same-sex spouse for a period greater than three months,<sup>32</sup> pursuant to Articles 2 and 7 of the Citizens' Rights Directive.<sup>33</sup>
- (2) Whether, if the answer to the previous question is no, the aforementioned couples are captured under other recognized relationships

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requirement to be granted an exception to stay beyond that duration. However, the U.S. does not reciprocate and nationals of Romania (as well as Bulgaria, Cyprus and Croatia) are not able to enter the U.S. without a visa, a policy which has created long-standing contentious political impasse between the U.S. and the EU. *See* Joint Statement by Commissioner Avramopoulos and Elaine C. Duke, Deputy Secretary of the U.S. Department of Homeland Security, on Advancing Towards Full Visa Waiver Reciprocity Between the E.U. and U.S., EUROPA.EU (Jun. 16, 2017), [http://europa.eu/rapid/press-release\\_STATEMENT-17-1671\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1671_en.htm); *The List of Countries Whose Nationals are Exempted from the Romanian Visa Requirement*, MAE.RO, [https://www.mae.ro/sites/default/files/file/anul\\_2018/2018.06.20\\_anexa\\_2\\_en.pdf](https://www.mae.ro/sites/default/files/file/anul_2018/2018.06.20_anexa_2_en.pdf). In November 2019, the U.S. added Poland to the visa-waiver program. JDSUPRA, "Poland Admitted to the Visa Waiver Program Starting November 11: Polish Citizens Eligible for Visa-Free Travel to the United States," (Nov. 8, 2019), <https://www.jdsupra.com/legalnews/poland-admitted-to-the-visa-waiver-16056/>.

26. *See e.g., Direct Applicability and Direct Effect*, UNIV. PORTSMOUTH, <http://hum.port.ac.uk/europeanstudieshub/learning/module-3-governance-in-a-multi-level-europe/direct-effect-and-direct-applicability/> (last visited Apr. 9, 2019) (noting how vertical direct effect allows EU Member States to invoke issues of EU law "vertically" against a state. Horizontal direct effect allows EU citizens to invoke EU law "horizontally" against each other).

27. *Coman*, *supra* note 3, ¶ 13.

28. *Id.* ¶ 13–14.

29. *Id.* ¶ 15.

30. *Id.* ¶ 16–17; TFEU, *supra* note 10, art. 267, at 164.

31. *See Coman*, *supra* note 3, ¶ 17(1).

32. *Id.* ¶ 17(3).

33. Citizens' Rights Directive, *supra* note 6, art. 7, at 93.

such as “family members” or “partners” in Articles 3(2)(a)-(b) of the Citizens’ Rights Directive, thereby requiring the host Member State recognize a derived right of residence for the Third Country partner,<sup>34</sup> and if so, whether this entitles the Third Country spouse for a derived right of residence for a period greater than three months<sup>35</sup> in accordance with the Citizens’ Rights Directive.<sup>36</sup>

#### D. *Relevant Holdings in the Judgment of the European Court of Justice*

In *Coman*, the CJEU established two policy precedents under EU law, essentially bifurcating its conclusion into two holdings. While the Court does not offer reasoning for how it has organized its ruling, it appears that Court did so because it was confronted with essentially two different questions. The first one concerns the Citizens’ Rights Directive, the EU legislation which concerns the rights of an EU citizen in a foreign EU Member State,<sup>37</sup> and another concerned more abstract Free Movement Rights under Article 21 TFEU, which impacts the relationship between a Member State and its own citizens.

On June 5, 2018, the CJEU ruled that “spouse” in Article 2 of the Citizens’ Rights Directive is gender-neutral, and thus applies to same-sex married spouses. Additionally, although the Citizens’ Rights Directive does not govern the rights of EU citizens in his or her own Member State of citizenship, having determined that “spouse” is gender-neutral for the purposes of the Citizens’ Rights Directive, the court held that when certain conditions are met, Article 21 TFEU nevertheless requires that Member States provide a derived right of residence to Third Country spouses in certain cases. Therefore, if at least one partner is an EU citizen, that EU citizen benefits from the rights enumerated in the Citizens’ Rights Directive.<sup>38</sup>

### III. PRELIMINARY CASE ANALYSIS

#### A. *The Citizens’ Rights Directive and Same-Sex Marriage*

Because the Citizens’ Rights Directive concerns the rights of an EU citizen in foreign Member States, in order to determine if a same-sex marriage undertaken in a Member State is a “marriage” in EU law, the court first

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34. These defined terms include “partner with whom the Union Citizen has a durable relationship, duly attested” and “any other family member.” See *Coman*, *supra* note 3, ¶ 17(3).

35. *Id.* ¶ 17(4).

36. Citizens’ Rights Directive, *supra* note 6, art. 7, at 93.

37. Citizens’ Rights Directive, *supra* note 6, art. 3(1), at 88; Case C-165/16, *Lounes v. Sec’y of State for the Home Dep’t*, 2017 E.C.R. 862, ¶ 35 [hereinafter *Lounes*].

38. Only EU citizens technically possess EU rights. The right of residence to the Third Country spouse of an EU citizen through marriage is, strictly legally, a right possessed by the EU citizen. Case C-456/12, *O. & B. v. Minister voor Immigratie, Integratie en Asiel*, 2014 E.C.R. 135, ¶ 36 [hereinafter *O. & B.*]; *Lounes*, *supra* note 37, ¶¶ 32, 47. However often times, Third Country Citizens enjoy derived EU rights by virtue of a recognized relationship to an EU citizen.

answered whether a same-sex spouse is a spouse for the purposes of Article 2 (2)(a) or other relative under Article 3(2)(a)-(b) of the Citizens' Rights Directive.

The court held that the term "spouse" under the Citizens' Rights Directive is gender-neutral,<sup>39</sup> with the result that the familial rights of EU citizens enumerated in the Citizens' Rights Directive and applying in EU Member States other than those of which he or she has citizenship,<sup>40</sup> also apply to same-sex spouses.<sup>41</sup> The court did not answer the question Romania posed concerning whether "any other family member" under Article 2 of the Citizens' Rights Directive would compel a Member State to recognize a derived right of residence to a Third Country partner of an EU citizen carrying the nationality of the host Member State because it already interpreted an Article 2(2)(a) "spouse" as gender-neutral, rendering an interpretation of "any other family member" moot.<sup>42</sup>

B. *Article 21 and "Genuine Residence" for the Purpose of "Strengthening Family Life"*

However, the question of the recognition of such a marriage in one's own Member State remained. For the purpose of determining whether or not Free Movement Rights are implicated under Article 21 TFEU in a case where an EU citizen returns home to his or her non-recognizing Member State with a same-sex spouse married in the EU, it is not sufficient that the marriage was validly concluded in accordance with the law of a Member State. Rather, for the purposes of Article 21 TFEU, the Court sought to determine whether "family life is created or strengthened in that Member State"<sup>43</sup> during a period of "genuine residence."<sup>44</sup> This logic is based on *Coman's* jurisprudential progeny, *O. & B. v. Minister voor Immigratie*, which held that EU citizens are entitled to a derived right of residence for their Third Country citizen family members (as so defined by the Citizens' Rights Directive) in cases where which family life is created or strengthened in another Member State.<sup>45</sup> The logic of the *O. & B.* decision ensures that Free Movement Rights are truly in play and prevents an EU citizen from performing an end-run around his or

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39. *Coman*, *supra* note 3, ¶ 35.

40. For brevity, all EU Member States in which the EU citizen spouse does not hold citizenship are referred to as "foreign Member States" and those in which the EU citizen has citizenship are "home Member States."

41. *See Coman*, *supra* note 3, ¶ 55.

42. *Id.* ¶¶ 17(3)-(4), 57.

43. *Id.* ¶ 58(1).

44. *Id.* ¶¶ 24, 26, 27, 40.

45. "An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country [sic] national necessarily confers a derived right of residence on that family member." *O. & B.*, *supra* note 38, ¶ 51.

her Member State's law, whereby the EU citizen engages in "marriage tourism," by simply traveling briefly to another Member State which allows same-sex marriage with the intent to marry a Third Country citizen, and then demand that the home Member State provide a derived right of residence for the Third Country Spouse on this basis.<sup>46</sup> In such a case, it may be inappropriate to claim Free Movement Rights are violated if a Member State subsequently refuses a derived right of residence to the spouse. This is because there would be no genuine link between the EU citizen and the Member State in which the marriage was created and hence very likely not the sort of situation which Free Movement Rights were designed to protect, a principle to which the *O. & B.* decision referred.<sup>47</sup>

In any case, the court established that "genuine residence is a requirement" to "carry" a Member State's marriage law into the EU citizen's home country. Therefore, it is important to understand how "genuine residence" is to be determined. The *Coman* court did not elaborate on this requirement in any concrete measure, and while the *O. & B.* court punted on the matter, simply stating that it is "for the referring court to determine whether [petitioners] "settled and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence,"<sup>48</sup> the court did provide some guidance. *O. & B.* suggests that one and a half years could be sufficient in some cases.<sup>49</sup> Furthermore, the *O. & B.* court noted that the possession of a residence permit is not dispositive evidence of having "strengthened" or "created" family life in an EU Member State.<sup>50</sup> Additionally, while *O. & B.* affirmed that the "referring court" may decide what constitutes genuine residence, there are likely limits to the latitude or margin of appreciation. Courts and other judicial organs can design reasonable and objective criteria in such an assessment of genuineness, for example an employment or residential rental contract of a certain minimum duration, or even simply a minimum term of legal residence, and *O. & B.* appears to pave the way for individual Member States to develop judicial tests for genuine residence.

Of course, an EU citizen possessing citizenship of a non-recognizing Member State may exercise his or her Free Movement Rights motivated by an intention to reside in another Member State with a more progressive legal regime, *a fortiori* after *Coman*. Unless or until Europe becomes a politically singular entity, at least with respect to equal protection under the law for

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46. *Id.* ¶ 58 (noting that "[i]t should be added that the scope of Union law cannot be extended to cover abuses . . . Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it . . ."). See also *id.* ¶ 59.

47. See generally, Citizens' Rights Directive, *supra* note 6.

48. *O. & B.*, *supra* note 38, ¶ 57.

49. *Id.* ¶ 40.

50. *Id.* ¶ 60.

opposite- and same-sex couples, this is an inevitable, and perhaps desired, consequence of a partially integrated legal system. For these reasons, same-sex couples who anticipate a need to return to one of the eight EU Member States which do not generally recognize the legal rights of same-sex couples should ensure that they can solidly demonstrate having “strengthened” family life in an EU state rather than in a Third Country.

C. *Greater than Three Months. . . But for How Long?*

In *Coman*, the CJEU held that EU Member States must provide a derived right of residence for qualifying Third Country spouses under conditions no stricter than those provided in the Citizens’ Rights Directive Article 7, meaning a term at least exceeding three months.<sup>51</sup> However, the ruling made no reference to the required amount of time. It is then reasonable to assume that the Court’s motivation was to compel Member States to preserve the family life built in a foreign Member State in an EU citizen’s home Member State. Further, this suggests that the type of residence permit which a Member State must grant should either be permanent or at least provide a means for the Third Country spouse to obtain permanent residence. In line with the principles of subsidiary, it may be under the discretion of the Member State to administer this procedure.

Regardless, the *Coman* court must be contemplating an indefinite general permanent basis in its conception of a derived right of residence. It would not make sense if the court reasoned that EU citizens must be able to settle their Third Country spouses for a term greater than three months, or else be discouraged from exercising their Free Movement Rights,<sup>52</sup> but at the same time, such a derived right of residence could be limited, for example, to a duration of six months. A fixed term, especially a rather short one, would certainly discourage Free Movement according to the court’s reasoning, and thus fail to uphold the teleological purpose of the derived right of residence, at least as contemplated by the CJEU case law. In view of this reasoning, a concrete path towards permanent residency for the Third Country spouse is the only interpretation of the temporal requirement that fulfills the logical purpose of the rule. In all cases, it should be noted that a derived right of residence, while likely accelerating the process does not provide, *ipso facto*, the right to access the labor market—even within the EU, there remain some controls between western EU Member states and post-2004 accession states, such as those between the EU and Croatia.) Therefore, in view of the court’s understanding of the purpose of Article 21 TFEU as explained in previous cases, genuine residence is likely to be understood as an indefinite term.

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51. Citizens’ Rights Directive, *supra* note 6, arts. 7(2)(a), 7(1), at 88–89.

52. *Coman*, *supra* note 3, ¶ 24; *O. & B.*, *supra* note 38, ¶ 46.

## D. Immediate Practical Effects of *Coman* within the EU

### 1. Effect on Individual Member States

There are seven EU Member States which do not formally recognize same-sex marriage in their law, but nevertheless support a derived right of residence for foreign same-sex partners. Austria,<sup>53</sup> Croatia,<sup>54</sup> the Czech Republic/Czechia,<sup>55</sup> Estonia,<sup>56</sup> Hungary,<sup>57</sup> Italy,<sup>58</sup> Slovenia,<sup>59</sup> (and also the

53. Austria's same-sex marriage law did not take effect until 2019, and thus was not in effect at the time of the *Coman* ruling, which is why it is included in the second tier of this analysis. However, a derived right of residence provided to a same-sex partner was possible prior to the ruling. Austrians could provide a derived right of residence to a same-sex partner prior to *Coman* through the inclusion of "domestic partner" to family reunification law. EINGETRAGENE PARTNERSCHAFT-GESETZ – EPG UND ÄNDERUNG DES ALLGEMEINEN BÜRGERLICHEN GESETZBUCHES, DES EHEGESETZES, DES FORTPFLANZUNGSMEDIZINGESETZES . . . [Registered Partnership Law and Changes of the General Civil Code, Marriage Law, Reproductive Medical Law. . .] BUNDESGESETZBLATT [BGBl I] No. 135/2009, [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2009\\_I\\_135/BGBLA\\_2009\\_I\\_135.pdf](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_135/BGBLA_2009_I_135.pdf)sig. Full marriage equality was introduced on January 1, 2019.

54. It appears that the decision will have limited effect in Croatia. This is because Croatia provides Third Country same-sex partners a derived right of residence no stricter than that provided in the Citizens' Rights Directive to those married pursuant to the laws of another country. The 2014 "Life Partnership" statute provides a temporary derived right of residence to a same-sex partner. ZAKON O ŽIVOTNOM PARTNERSTVU OSOBA ISTOG SPOLA (NN 092/2014) [Law on Life Partners of the Same Sex (NN 092/2014)], arts. 70(1)–(2) (2014); *Croatian Parliament Passed Same Sex [sic] Life-Partnership*, ZAGREBPRIDE.NET (July 18, 2018), <https://www.ilga-europe.org/sites/default/files/Attachments/croatian-parliament-passed-the-life-partnership-act.pdf>. This temporary residence permit is only available for a period of one year. *Third-Country Nationals*, MIGRACIJEJER HR, <https://migracije.hr/third-country-nationals/?lang=en#1523525163688-30b7e69c-b9a9>. However, it is available for renewal. Upon five years of legal residence in Croatia, the Third Country citizen has the right to permanent residence in accordance with Family Reunification Directive. See Family Reunification Directive, *infra* note 89, arts. 16(1)–(2).

55. The situation in the Czech Republic prior to *Coman* is very confusing and unclear as a matter of law. As of late March 2019, the Czech Republic has not yet passed its currently pending same-sex marriage bill into law. Tom Gosling, *Can the Czech Republic Tear Down Europe's Rainbow Curtain?*, FOREIGNPOLICY.COM (Mar. 21, 2019), <https://foreignpolicy.com/2019/03/21/can-the-czech-republic-tear-down-europes-rainbow-curtain/>. Family reunification visas through marriage are not available to same-sex couples in the Czech Republic; only "spouses" are the only type of marriage-type relationship entitled to family reunification visas. MINISTRY OF INTERIOR CZECH, *Long Term Residence* (Dec. 23, 2019), <https://www.mvcr.cz/mvcren/article/third-country-nationals-long-term-residence.aspx?q=Y2hudW09Ng%3d%3d>. Nevertheless, legal scholars contend that family reunification was available to same-sex couples Czech law prior to *Coman*. Ondrej Plesmid, *Migration and legal family formats in Czech Republic 5*, (LawsAndFamilies Database) <https://www.ined.fr/Xtradocs/lawsandfamilies/LawsAndFamilies-CZ-Section4.pdf>.

56. *Court: Partner in Same Sex [sic] Partnership has Right to Residence Permit*, NEWS.EER.EE (Sept. 17, 2018), <https://news.eer.ee/862075/court-partner-in-same-sex-partnership-has-right-to-residence-permit>.

57. 2009. Évi XXIX. törvény a Bejegyzett Élettársi Kapcsolatról, az Ezzel Összefüggő, Valamint az Élettársi Viszony Igazolásának Megkönnyítéséhez Szükséges Egyes Törvények Módosításáról [Act XXIX of 2009 Law on Registered Partnerships and the Amendment of Certain Laws Relating Thereto and Necessary to Facilitate the Verification of Partnerships] § 3(1) (Hung.), WOLTERS KLUWER, *available at* <https://net.jogtar.hu/jogszabaly?docid=a0900029.tv>; HÁTTÉR SUPPORT SOC'Y FOR LGBT PEOPLE -HUNGARIAN LGBT ALLIANCE, REGISTERED PARTNERSHIP GUIDE FOR GAY AND LESBIAN COUPLES 10, [http://en.hatter.hu/sites/default/files/dokumentum/kiadvany/guide-regpartnership-2011jul\\_1.pdf](http://en.hatter.hu/sites/default/files/dokumentum/kiadvany/guide-regpartnership-2011jul_1.pdf).

58. MINISTERO DELL'INTERNO DIPARTIMENTO PER LE LIBERTÀ CIVILI E L'IMMIGRAZIONE DIREZIONE CENTRALE PER LE POLITICHE DELL'IMMIGRAZIONE E DELL'ASILO [MINISTRY OF THE INTERIOR DEPARTMENT FOR CIVIL LIBERTIES AND IMMIGRATION CENTRAL DIRECTORATE FOR IMMIGRATION AND ASYLUM POLICIES] (Aug. 5, 2016), [http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/circ.\\_prot.\\_nr.\\_3511\\_del\\_05.08.2016.pdf](http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/circ._prot._nr._3511_del_05.08.2016.pdf). Despite the fact that family reunification visas are only available to "spouses," rights afforded to spouses for the purpose of family reunification are considered gender-neutral; CONSULATE GEN. OF ITALY BOSTON, *Family Visa Requirements*, <https://consboston.esteri>.

UK jurisdiction of Northern Ireland)<sup>60</sup> do not recognize full legal equality at the time as of December 2019, yet nevertheless provide legal recognition to foreign same-sex partners which is sufficient to settle a partner in that state through a derived right of residence based on family ties on grounds, or at least parity insofar as settling an opposite-sex spouse.

Such partners can secure a derived right of residence under the domestic law of these Member States, independent of EU law, because these legal relationships are sufficient to establish a derived right of residence under the domestic law of these Member States. Furthermore, same-sex unions in these aforementioned countries probably qualify as “registered partnerships” under Article 2(2)(b) of the Citizens’ Rights Directive because the rights granted thereunder are, in essence, “equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.”<sup>61</sup> Therefore, like the Member States which recognize same-sex marriage,<sup>62</sup> *Coman* will likely have little or no practical effect within these Member States unless these states unexpectedly repeal same-sex marriage or equivalent rights or derived rights of residence for same-sex couples.

The Member States which *Coman* will certainly affect are Bulgaria,<sup>63</sup> Cyprus,<sup>64</sup> Greece,<sup>65</sup> Latvia,<sup>66</sup> Lithuania,<sup>67</sup> Poland,<sup>68</sup> Romania,<sup>69</sup> and Slovakia.<sup>70</sup>

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it/consolato\_boston/it/i\_servizi/per\_chi\_si\_reca\_in\_italia/family-visa-requirements.html (referencing the requirements for family reunification visas).

59. Pravno-informacijskega sistema Republike Slovenije (Legal-Informational System of the Republic of Slovenia), *Se Začne Uporabljati Zakon o Partnerski Zvezi*, RS, št. 33/16, (Civil Partnership Act), art. 2, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7434>.

60. *Getting a Visa for Your Partner to Live in the UK*, CITIZENSADVICE.ORG.UK, <https://www.citizensadvice.org.uk/immigration/visas-family-and-friends/getting-a-visa-for-your-partner-to-live-in-the-uk/>. Although UK law has recognized same-sex marriage since 2014 in England, Scotland, and Wales, the law did not apply to Northern Ireland. However, civil partnership law in Northern Ireland provided for a derived residence for same-sex couples therein. Therefore, *Coman* was unlikely to affect Northern Ireland in this respect and provided that this independent derived right of residents for the foreign partners of Northern Ireland citizens in accordance with Northern Ireland law and the developments with respect to Brexit are unlikely to change such rights with respect to same-sex couples. In any case, after *Coman*, Northern Ireland legislated formal marriage equality effective January 2020.

61. Citizens’ Rights Directive, *supra* note 6, art. 2(2)(b) at 88.

62. *Id.*, art. 4(4) at 15.

63. Конституция на Република България [CONSTITUTION OF THE REPUBLIC OF BULGARIA], Dec. 30, 2015, [DV] 2015, No. 100, art. 46. Bulgaria prohibits same-sex marriage and does not recognize rights for same-sex couples sufficient to settle a same-sex spouse under national law nor that contemplated by art. 2(a)(b) of the Citizens’ Rights Directive prior to *Coman*. See Семейен кодекс [FAMILY CODE], art. 5, (Bulg.). Although there are no provisions in the Bulgarian Family Code pertaining to marriages abroad, Article 5 thereof appears to preclude same-sex marriages which are conducted abroad from recognition in Bulgaria. YOSIFOVA, IYANOV & PETROV, *Long-Term Bulgarian Visa/ Bulgarian Visa D*, <http://lexsofia.com/bulgarian-visa-d/> (last visited Apr. 10, 2010). The long-term D Visa can be accessed through a familial relationship only through marriage to a permanent resident of Bulgaria.

64. Επιστημη Εφημεριδα Τησ Κυπριακης Δημοκρατίας Παράρτημα Πρωτο Νομοθεσια - Μερσ Ι, No. 15, art. 431 (2015). Cyprus recognizes civil unions between same-sex couples, but not marriage, and according to the Cypriot Civil Marriage and Registry Department, it does not appear, at least explicitly from available sources, that a derived right of residence would be available through civil union rather than a “spouse” through marriages. CIVIL REGISTRY AND MIGRATION DEPARTMENT, *Family Reunification for Third Country Nationals* (updated Apr. 11, 2019), [http://www.moi.gov.cy/moi/CRMD/crmd.nsf/0/3849e56d42544efc2257d2c00371e45?OpenDocument&ExpandSection=4#\\_Section4](http://www.moi.gov.cy/moi/CRMD/crmd.nsf/0/3849e56d42544efc2257d2c00371e45?OpenDocument&ExpandSection=4#_Section4); See also Σάββας Σάββα ν. Κυπριακή Δημοκρατία, Ανώτατο Δικαστήριο Κύπρου – Αναθεωρητική

Δικαιοδοσία, 1582/2008, 22 Ιουλίου 2010 [*Savvas Savva v. The Republic of Cyprus*, Decision No. 1582/2008, 22 July 2010] (Supp. Ct. Cyp. App. 2010), [www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2010/4-201007-1582-08.htm&qstring=1582](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2010/4-201007-1582-08.htm&qstring=1582).

65. Law No. 4251, G.G. A' 80 of 2014, Code for Migration and Social Integration and Other Provisions (Apr. 1, 2014), art. 7(2) available at <http://www.refworld.org/docid/54eb40114.html>. Greece offers residence permits through family reunification through marriage. See CONSTANDINIDOU-STAVROPOULOS-STAVROPOULOUS LAW FIRM, *Family Law in Greece: Overview*, THOMPSON REUTERS PRACTICAL LAW, [https://uk.practicalaw.thomsonreuters.com/3-571-0094?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicalaw.thomsonreuters.com/3-571-0094?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1). However, Greece does not recognize same-sex marriages solemnized abroad. Therefore, Greece appears to provide no derived right of residence to same-sex couples nor that contemplated by art. 2(a)(b) of the Citizens' Rights Directive.

66. LATVIJAS REPUBLIKAS SATVERSME [CONST. OF LATVIA] LV 204 (6290) Oct. 4, 2018, art. 110. (The Latvian constitution prohibits same-sex marriage and does not recognize rights for same-sex couples sufficient to settle a same-sex spouse nor that contemplated by art. 2(a)(b) of the Citizens' Rights Directive prior to *Coman*.)

67. LIETUVOS RESPUBLIKOS CIVILINIS KODEKSAS, [LR CK][CIVIL CODE OF LITHUANIA] art. 3.12. (Lithuania prohibits same-sex marriage and does not recognize rights for same-sex couples sufficient to settle a same-sex spouse nor that contemplated by art. 2(a)(b) of the Citizens' Rights Directive prior to *Coman*.)

68. It is extraordinarily unlikely, given the statutory and political environment in Poland, that such rights would rise to the level of a derived right of residence to a Third Country same-sex partner. Poland only grants residence permits on grounds of marriage if the marriage is valid in Poland. MAIOPOLSKA PRZYJAZNA, CUDZOZIEMCOM, UNIA EUROPEJSKA FUNDUSZ AZYLU MIGRACJI INTEGRACJI, WOJEWODA MAIOPOLSKI, "Lesser Poland Friendly to Foreigners -Support for Integration and Adaptation of Third Countries Citizens," (2019), [https://malopolska.uw.gov.pl/mpc/guide/RESIDENCE\\_ENG.pdf](https://malopolska.uw.gov.pl/mpc/guide/RESIDENCE_ENG.pdf); WROCLAW.PL, "Permanent Residence," (Dec. 20, 2018), <https://www.wroclaw.pl/en/permanent-residence; Marriage to a Polish Citizen>, MIGRANTINFO.PL, <http://migrant.info.pl/marriage-to-a-polish-citizen.html>. Additionally, Poland does not recognize marriage or registered partnerships between persons belonging to the same sex under Polish law. KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 2, 1997, DU no. 78, item 483, art. 18; EUROPA.EU, "Civil Unions and Registered Partnerships," (Updated Feb. 25, 2020), [https://europa.eu/youreurope/citizens/family/couple/registered-partners/index\\_en.htm](https://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm).

It is therefore presumable that no derived right of residence through a same-sex relationship existed in Poland prior to *Coman*.

69. See CONSTITUȚIA ROMÂNIEI [CONSTITUTION OF ROMANIA] Oct. 18, 2003, MONITORUL OFICIAL [sic], Part 1 no. 758, art. 48. Romanian law does not recognize same-sex marriage nor provided an avenue to settle a same-sex spouse in Romania prior to the ruling. CODUL CIVIL AL ROMÂNIEI [NOUL COD CIVIL] [CIVIL CODE OF ROMANIA] art. 277. After the *Coman* ruling, Romania held a referendum on whether or not to amend the Romanian constitution to define legally recognized marriage as that between one man and one woman. The referendum failed on procedural grounds as it failed to garner a quorum to validate the proposal under Romanian law. *Romania Marriage Poll: Referendum to Ban Gay Unions Fails*, BBC (Oct. 8, 2018), <https://www.bbc.com/news/world-europe-45779107>.

70. ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION OF THE SLOVAK REPUBLIC] CR 460, Feb. 23, 2019, art. 41. The legal situation prior to *Coman* in Slovakia is unclear, however it appears that Slovakia would not have provided a derived right of residence for a same-sex partner. Slovakia prohibits same-sex marriage and does not appear to recognize rights for same-sex couples sufficient to settle a same-sex spouse nor that contemplated by art. 2(a)(b) of the Citizens' Rights Directive prior to *Coman*, at least for a period greater than three months. [Slovakia: Act No 404/2011 on Residence of Aliens and Amendment and Supplementation of Certain Acts], 404/2011 Coll., arts. 5(a), (g) at 3–4, 27(1)–(2) at 17–18. Family reunification visas apart from parents are children are only available to "spouses," and Slovak law distinguishes between "spouse" and "partner;" a "partner" recognized as a "family member," but not a "family member" eligible for family reunification.

See IOM IMMIGRATION INFORMATION CENTRE, *Permanent Residence for the Purpose of a Family Reunion* (Jan. 14, 2019), <https://www.mic.iom.sk/en/family/permanent-residence-for-the-purpose-of-a-family-reunion.html>. Family reunification long-term visas are available to those married in Slovakia and abroad. The Act of 4 December 1993 No. 97 Collection of Laws on Private International Law and Rules of International Procedure, 2007, art. 20(a). However, foreign marriages must be ratified by local Slovak authorities. *Id.* Furthermore, "[m]arriage concluded abroad by a Slovak national before an authority other than an authority of the Slovak Republic duly authorised is valid in the Slovak Republic provided it is valid in the state in which it was concluded and none of the circumstances excluding the conclusion of marriage under the Slovak substantive law existed." See also EUROPEAN MIGRATION NETWORK, EMN



Through the court's determination that "spouse" in Article 2(2)(a) of the Citizens' Rights Directive, which governs the rights of EU citizens in foreign Member States, is gender-neutral, a foreign EU citizen who legally resides in accordance with the Citizens' Rights Directive can now settle a same-sex spouse in these eight EU Member States, as the conditions of Article 2 and 7 are satisfied and an analysis of genuine residence and more abstract considerations of Free Movement Rights vis-à-vis Article 21 are not necessary.

If, however, the EU citizen is a citizen of one of these eight Member States and wishes to settle a same-sex spouse in a non-recognizing<sup>71</sup> home Member state, more stringent requirements must be met. Applying a gender-neutral interpretation of "spouse" would not be sufficient because, even if "spouse" is gender-neutral for the purposes of EU law, the Citizens' Rights Directive cannot be invoked against an EU citizen's home Member State.<sup>72</sup> Here, it must be reiterated that Article 21 governs EU Free Movement rights, and for the EU citizen to return to the home non-recognizing Member State, the marriage must have been conducted in a European Union Member State.<sup>73</sup>

The court struck a compromise among the Member States, allowing them to continue not to recognize same-sex marriages under domestic law and thus precluding the other attendant benefits and responsibilities of marriage under a Member State's domestic law such as pension, inheritance, communal property rights, power of attorney, adoption rights, legal privileges, and the life, usually derived from marriages. However, the court has directed Member States to recognize a same-sex marriage performed in a Member State insofar, and only insofar, as it requires the home state to provide a derived right of residence for the spouse.<sup>74</sup>

## 2. *Coman as Applied Between Two EU citizens*

*Coman* does not address the implications of a gender-neutral interpretation of "spouse" as applied between two EU citizens, probably because EU citizens already *generally* enjoy the right to reside in any EU Member State, and therefore the rights to reside under *Coman* are likely minimal. *Coman* holds that Member States cannot deny Third Country citizens residence rights

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Synthesis Report for the EMN Focussed [Sic] Study 2016 Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices, Migrapol EMN Doc. 382 (Apr. 2017) 21, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_family\\_reunification\\_synthesis\\_report\\_final\\_en\\_print\\_ready\\_0.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_synthesis_report_final_en_print_ready_0.pdf). Because same-sex marriage is prohibited in Slovakia, and marriages require domestic registration, foreign same-sex marriages would not be recognized under Slovak law, precluding long-term residence permits through marriage for same-sex couples.

71. While this distinction is made for precise for legal clarity, as a shorthand, Member States which do not offer marriage, civil union, civil partnership, registered partnership or any other type of legally recognized partnership to same-sex couples which, as a direct result of that union, would provide residence rights for the spouse who is not a citizen of the Member State in question, will be referred to hereinafter as "non-recognizing."

72. Citizens' Rights Directive, *supra* note 6, art. 3(1) at 88; *O. & B. supra* note 38, ¶ 37.

73. See *Coman, supra* note 3, ¶¶ 24, 26, 27, 40, 58(1).

74. Whether the gender-neutral interpretation of spouse may implicate other harmonizing directives, such as tax and totalization agreements under EU law, remains to be seen.

greater than three months on the basis that they do not recognize same-sex relationships, without respect to other grounds for rejection. The rights of EU citizens under the Citizens Rights Directive, however, clearly envelop and surpass this right. There are very narrow grounds to preclude the right of a foreign EU citizen to reside in a foreign Member State,<sup>75</sup> for example, where deportation of a foreign EU citizen would be a “proportionate” measure to safeguard health or safety of the hosting Member State.<sup>76</sup>

However, *Coman* could have salient implications in cases where two same-sex EU citizens married in the EU wish to reside in a foreign Member State and the foreign EU citizen (an EU citizen who does not possess citizenship of the Member State in which he or she resides) cannot fulfill the requirements set forth in the Citizens’ Directive to reside long-term in a foreign Member State. The ability to settle a same-sex dependent EU citizen in a non-recognizing Member State under Article 7(d) for a period of time exceeding three months could necessarily require a gender-neutral interpretation of Article 2(2)(a).<sup>77</sup> EU citizens who wish to reside in another Member State for a term greater than three months must fulfill certain eligibility requirements related to self-sufficiency and not posing a risk of becoming a public charge of the hosting Member State.<sup>78</sup> The exception to these provisions are “family members” joining an EU citizen who meet the [self-sufficiency] conditions referred to Article 7(1) (a), (b), and (c).<sup>79</sup> “Family Members” who are not children or parents must be either “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.”<sup>80</sup> This would preclude a same-sex spouse in a non-recognizing EU Member State. Therefore, a dependent<sup>81</sup> EU citizen “family member” *must be a spouse*.

A financially dependent, non-student EU citizen partner wishing to reside in an EU Member State other than his or her own Member State would need a derived right of residence as a “family member” in Article 7(d) of the Citizens’ Rights Directive because he or she does not fulfill the general requirements to reside in a foreign EU Member State.<sup>82</sup> For example, a financially dependent, disabled, or unemployable French citizen spouse unable to fulfill the conditions set forth in Article 7(a)(1)-(c) of a Latvian citizen spouse

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75. See Citizens’ Rights Directive, *supra* note 6, art. 7 at 93–94; Case C-430/10 *Gaydarov v. Direktor na Glavna direktsia ‘Ohranitelna politisia’ pri Ministerstvo na vateshnite raboti*, 2011 E.C.R. I–11639, ¶ 43 [hereinafter “*Gaydarov*”].

76. *Gaydarov*, *supra* note 75, ¶ 43.

77. See Citizens’ Rights Directive, *supra* note 6, art. 7(1)(a)–(d) at 93.

78. *Id.*, art. 7(1)(a)–(c) at 93–94.

79. *Id.*, art. 7(d) at 94.

80. *Id.*, art. 2(b) at 88.

81. Defined by not meeting the criteria of Citizens’ Rights Directive, *supra* note 6, art. 7(1)(a)–(c).

82. *Id.*, art. 7(1)(a)–(d) at 93–94.

likely requires a derived right of residence as an Article 7(d) “family member” to legally reside in non-recognizing Latvia for a period exceeding three months.<sup>83</sup> This is because the burden to demonstrate financial self-sufficiency is on the hosting EU citizen, not the joining “family member.”<sup>84</sup> Therefore, *Coman* could be legally, and thus practically, significant even as applied between two EU citizens.

#### IV. WHO IS A SPOUSE? INTERPRETATION OF DEFINITIONS AND RIGHTS IN PRIMARY AND SECONDARY LAW EU

##### A. *The Definition of a Spouse is Gender-Neutral under EU Law*

In *Coman*, the court noted the lack of reference to gender in the definition of “spouse” in the Citizens’ Rights Directive,<sup>85</sup> and turned to the Charter of Fundamental Rights to inform its interpretation of the Citizens’ Rights Directive. The court examined the anti-discrimination provision of the Charter, noting the mandate to avoid discrimination based on sexual orientation in Recital 31 of the Directive.<sup>86</sup> Accordingly, a gender-neutral interpretation of “spouse” is supported by a teleological interpretation of the Citizens’ Rights Directive in view of the objectives of the TFEU<sup>87</sup> and the Charter of Fundamental Rights.<sup>88</sup>

One argument in favor of the court’s determination is that the omission was not an oversight, but rather an intentional omission by the drafters of the Family Reunification Directive—the European Union adopted this Directive only a year prior to the Citizens’ Rights Directive, and were mindful about the definition of a “spouse.” For example, the Family Reunification Directive specifically excludes polygamous marriages as qualifying marriages.<sup>89</sup> Furthermore, although the Family Reunification Directive provides in Recital 11 that “[t]he right to family reunification should be exercised in proper *compliance with the values and principles recognised by the Member States*,”<sup>90</sup> it is noteworthy that both the Family Reunification Directive *and* the Citizens’ Rights Directive do not define “spouse.” Both contain language instructing Member States to interpret the Directive on a nondiscriminatory basis with

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83. *Id.*

84. *Id.*

85. *Coman*, *supra* note 3, ¶ 35–36.

86. *Id.* ¶ 3.

87. “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.” TFEU, *supra* note 10, art. 10.

88. “Any discrimination based on any ground such as sex, race, colour, 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.” CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 9, art. 21(1) at 13.

89. Council Directive 2003/86, art. 4(4), 2003 O.J. (L 251) 12, 15 [hereinafter “Family Reunification Directive”].

90. *Id.* ¶ 11, (L 251).

respect to sexual orientation.<sup>91</sup> The only significant difference between the two directives in this context is that the latter-adopted Citizens' Rights Directive omits the text "compliance with the values and principles," suggesting, *a fortiori*, that the Citizens' Rights Directive contemplates a gender-neutral interpretation of "spouse," in contrast to the Family Reunification Directive. Perhaps the drafters of the Citizens' Rights Directive intentionally left the term undefined, mindful of the limitations of Article 2(2)(b) and leaving room for the CJEU to interpret "spouse" at a time when norms would have substantially changed. In such case, the court's conclusion that "spouse" is gender-neutral is the correct reading of the legislative intent of the drafters of the Citizens' Rights Directive.

Finally, if "registered partnerships" as applied within Article 2 of the Citizens' Rights Directive (which does not contain an analogous clause like that in Article 52(2) of the Charter of Fundamental Rights) could be accepted or rejected on the basis of Member State law, a derived right of residence through EU law would be a circular and pointless provision because it would offer no more protection than whatever rights are available under the Member State's domestic law. Perhaps the Court utilized the non-discrimination recital of the Citizens' Rights Directive and Article 21 of the Charter of Fundamental Rights to "correct" or culture "norm" the Citizens' Rights Directive. In this way, the court seized a narrow opportunity to exploit the crafty or, alternatively, non-comprehensive, drafting of Article 2.

## B. *Alternative Positions: Has the CJEU Materialized New Rights by Judicial Fiat?*

### 1. *Protection for "Spouses" but not "Registered Partners" in the Greater Context of the Citizens' Rights Directive*

Article 2(2)(b) of the Citizens' Rights Directive defines "family member" as a "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.*"<sup>92</sup> In view of the Vienna Convention on the Law of Treaties,<sup>93</sup> the distinction between a "spouse," not requiring Member

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91. *Id.* ¶ 5, (L 251).

92. Citizens' Rights Directive, *supra* note 6, art. 2(2)(b) at 88 (emphasis added).

93. An internationally recognized mode of interpretation of agreements between states crystalizing customary international law, and one to which most EU Member States are bound. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433-34, 443-45, 447-48 (2004). *Cf. id.* at 444 n.55 (citing *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, 1985 I.C.J. 13, 29-30 (June 3)) (affirming that provisions of a treaty may be enforced as customary international law despite the parties to a dispute having not ratified them); *id.* at 444 n.56 (citing *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 71 (Feb. 20)); *see also* Patricia Bauer, *Vienna Convention on the Law of Treaties*, ENCYC. BRITANNICA (May 16, 2019), <https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties>.

state interpretation, and “registered partner,” requiring Member State interpretation, suggests that the drafters intended that different meanings be ascribed to the term in accordance with a Member State’s domestic law.<sup>94</sup> One could argue that it therefore appears clear that the drafters of the Citizens’ Rights Directive intended for rights under the Citizens’ Directive to apply to those in marriage or substantially marriage-like legal relationships *as recognized by the host state*. It is obvious that the proviso in Article 2(2) (b) was intended to give effect to Member State law in the interpretation of which legal relationships to recognize for the purpose of rights under the Citizens’ Rights Directive. Therefore, if the host state does not recognize same-sex marriage nor a registered partnership (or other similar legal relationship) substantially tantamount to marriage, it may be incorrect to conclude that rights should attach to same-sex couples under the Citizens’ Rights Directive in a Member State without any substantial protections to same-sex married couples. To subvert the clear purpose of Article 2(b), which is intended to be defined by Member State law of the host state, by relying on the fact that “spouse” is not defined in Article 2(a), could appear disingenuous—as if the Court performed an act of legalistic sophistry to achieve an equitable, yet ultimately specious result.

It is odd that the Member States that do not wish to provide a derived right or residence to same-sex spouses on the basis of marriage, would not have inserted language into the relevant draft legislation indicating that “spouses” are to be construed as opposite-sex couples for the purpose of EU legislation. Perhaps this is because in 2004, when the European Commission promulgated the Directive, “registered partner” imbued more of a same-sex connotation, whereas spouse still did not. Poland contends that at the time the Citizens Rights Directive was adopted, only two Member States recognized same-sex marriage and the CJEU cannot “dynamically” interpret the definition of spouse.<sup>95</sup> However, given that the Citizens’ Rights Directive was, by Poland’s own admission, implemented at a time at which “spouse” could mean a same-sex spouse in two Member States, the drafters knew, or at least should have known, that “spouse” could potentially mean a same-sex spouse in at least some Member States, and therefore the drafters should have

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94. According to the convention, “[a] special meaning shall be given to a term if it is established that the parties so intended.” Vienna Convention on the Law of Treaties art. 31(4), May 29, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter “Vienna Convention on the Law of Treaties”]. By including both the term “spouse” and “registered partner” the parties clearly intended for “registered partner” to have a “special meaning” apart from that of a “spouse.” All EU Member States are party to the Vienna Convention.

95. “Warto zauważyć, że dyrektywa 2004/38/WE była przyjmowana w czasie, gdy jedynie w dwóch państwach członkowskich – Holandii i Belgii – prawo krajowe przewidywało możliwość zawarcia małżeństwa przez osoby tej samej płci . . . Nawet jednak jeżeli także obecnie coraz więcej państw członkowskich uznaje możliwość zawarcia małżeństwa przez osoby tej samej płci, pojęcie, wspo’lmażonek’ nie może być z tego powodu interpretowane dynamicznie. *O treści tego pojęcia w danym państwie członkowskim nie może decydować rozumienie tego pojęcia w innych, a nawet w większości innych państw członkowskich.*” See Uwagi Na Piśmie Rzeczypospolitej Polskiej, [Amicus Curiae Brief of the Republic of Poland] available (in Polish) at [https://mnw.org.pl/app/uploads/2017/11/Uwagi\\_prejudycjalne\\_Polski.pdf](https://mnw.org.pl/app/uploads/2017/11/Uwagi_prejudycjalne_Polski.pdf).

explicitly have clarified “spouse” as only pertaining to an opposite-sex couple had that so been their intention.

## 2. *The Directive Versus the Regulation in Secondary EU Law*

The credibility of the court’s determination of a gender-neutral interpretation of “spouse” is somewhat watered down by the fact that the European Commission adopted the Citizens’ Rights Directive as a directive rather than a regulation. If the Citizens’ Rights Directive was enacted as a regulation, it would become immediately and uniformly applicable in Member State law with no deferential application afforded to the Member State.<sup>96</sup> Directives, such as the Citizens’ Rights Directive, at issue in this case, are transposed into the domestic law of the Member State through the domestic legislative process of the Member State, and the directives allow the Member State to decide how it chooses to implement it within its national procedure.<sup>97</sup>

Because the Citizens’ Rights Directive was adopted as a directive rather than a regulation, it cuts in favor of allowing non-recognizing Member States to apply it at their discretion. Additionally, non-recognizing Member States have a strong argument that “spouse” remained undefined in the Directive because the drafters of the Directive intended for Member States to reserve some discretion in how an Article (2)(2)(a) “spouse” was to be defined and in accordance with the Member State’s *own* domestic law. This is supported by the observation that, when then Citizens’ Rights Directive came into force in 2004, recognition of same-sex couples as “spouses,” even within EU Member States, was the exception rather than the norm. Moreover, “registered partner,” which likely connoted more of a same-sex meaning than spouse in 2004, is to be interpreted in accordance with the law of the Member State hosting the couple seeking rights under the Citizens’ Rights Directive.<sup>98</sup> Indeed, the fact that the Commission was even able to enact the Directive,<sup>99</sup> in 2004 suggests that the representatives of Member States, which did not grant derived rights of residence to same-sex couples, did not envision that they would be required to recognize same-sex couples as family members

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96. *Regulations, Directives and other Acts*, EUROPA.EU, [https://europa.eu/european-union/eu-law/legal-acts\\_en](https://europa.eu/european-union/eu-law/legal-acts_en) (updated July 24, 2017).

97. *Id.* “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” TFEU, *supra* note 10, art. 288, at 171–72.

98. Citizens’ Rights Directive, *supra* note 6, art. 2(2)(b) at 88.

99. See TFEU, *supra* note 10, art. 23(2) at 58 (providing for directives under art. 21 be enacted in accordance with the “special legislative procedure.”); *id.*, art. 289(2) at 172. While less stringent than the ordinary legislative procedure, the “special legislative procedure” would still require the approval of the European Parliament or the European Council. *Special Legislative Procedures*, CONSILIUM.EUROPA.EU, <https://www.consilium.europa.eu/en/council-eu/decision-making/special-legislative-procedures/#>. It is therefore difficult to imagine that in 2004 the European Parliament or European Council would have interpreted the Directive as requiring all Member States to grant a derived right of residence to same-sex couples.

under the Citizens' Rights Directive simply because other Member States recognize same-sex couples as family members or spouses. It is therefore unlikely that the EU Commission, Council or Parliament would have ratified a provision if it would compel Member States to provide a derived right of residence to a same-sex spouse at a time when the recognition of the validity and rights of same-sex couples in EU Europe, at least as reflected in law, were still emerging and not the prevailing norm.

### 3. *Conclusion*

Given the fragmentation of Member States' definition of a "spouse," the ambiguous use of the term in the Citizens' Rights Directive was either a rather egregious drafting oversight or a strategic omission paving the way for future advancement in the rights of sexual minorities in the EU, as manifested in *Coman*. In any case, the general lack of clarity calls into question the conclusiveness of a determination and promises future litigation on related matters.

## V. JURISDICTIONAL ASPECTS OF EU FREE MOVEMENT RIGHTS AS APPLIED TO *COMAN*

### A. *Article 21 TFEU, the Citizens' Rights Directive, and Jurisdictional Limitations in EU Law*

What is interesting about *Coman* and its jurisprudential predecessors is how it has applied Article 21 TFEU. In *Coman* and previous cases dealing with similar issues, the CJEU does not merely assert Free Movement Rights as applied in foreign Member States, but rather invokes Free Movement Rights against one's *own* Member State. The court accomplishes this by incorporating a broader and more philosophical understanding of EU Free Movement Rights, especially in cases concerning a Member State, the state's own citizen, and a Third Country citizen, a situation generally outside the scope of EU law as a "wholly internal situation."

In the EU system, the CJEU will only decide matters concerning sole or shared competence and has no jurisdiction on matters with no connecting factor to EU law,<sup>100</sup> for example situations with no effect on the Single Market.

As a general rule, in the immigration context, a "wholly internal situation" is a situation in which there is no connecting factor to EU law. This would

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100. The Treaty on the European Union contains provisions similar to the Tenth Amendment to the U.S. Constitution whereby all areas of competence not enumerated in the EU treaty documents as within the sole or shared competence of the EU are reserved for the Member States. See Treaty on the European Union, 2012 O.J. (C 326) 13, arts. 4(2), 5(2) at 16–17 [hereinafter TEU]. GRÁINNE DE BÚRCA & PAUL CRAIG, EU LAW TEXTS CASES, AND MATERIALS 73–74 (6th ed. 2015).

generally concern, for example, a dispute between an EU citizen and his or her home Member State<sup>101</sup> or that between a Third Country Citizen and a Member State<sup>102</sup> (unless a provision of EU law stipulates otherwise). Additionally, apart from the fact that regulating legal relations purely between a Member State and a Third Country citizen would represent a “wholly internal situation,” the CJEU acknowledged that the Citizens’ Rights Directive only applies to EU citizens in foreign Member States because international law compels a state to admit its own citizens.<sup>103</sup> Article 3(1) of the Citizens’ Rights Directive applies this principle and states explicitly that this Directive “shall apply to all Union citizens who move to or reside in a Member State *other than that of which they are a national*, and to their family members as defined in subsection 2 of Article 2 who accompany or join them.”<sup>104</sup> As such, a Third Country citizen could not invoke a provision or principle of EU law except indirectly as an infringement on the rights of an EU citizen who benefits from the protection of EU law.<sup>105</sup>

In *O. & B.*, the court affirmed that the Citizens’ Rights Directive “refer[s] to the right of residence of a Union citizen and to the derived right of residence conferred on the family members of that citizen either in ‘another Member State’ or in ‘the host Member State’ and thus confirm that a third-country [sic] national who is a family member of a Union citizen cannot invoke, on the basis of that directive, a derived right of residence in the Member State of which that citizen is a national . . . .”<sup>106</sup> Accordingly, the family reunification provision of the Citizens’ Rights Directive would only apply to a person with sole Romanian citizenship in the *other* twenty-seven EU Member States. More generally, in *Marat Deceri v. Ministerium für Inneres*, the CJEU held that Member States are not compelled under EU law to grant residence rights to a Third Country national with which the Member State’s EU citizen has a relationship, if such grant is not dispositive to determining whether the EU citizen can exercise his or her right to reside within the EU.<sup>107</sup> The court also upheld this principle in *McCarthy*, whereby Free Movement Rights were not applied where the petitioner did not exercise Free Movement Rights in her attempt to compel her home Member State to legally recognize her relationship with a Third Country national in order for the Third Country national to reside in the UK with McCarthy.<sup>108</sup>

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101. Case C-175/78, *R v. Vera Ann Saunders*, 1979 E.C.R. 1129, ¶ 10.

102. Case C-64/96 & 65/96, *Land Nordrhein-Westfalen v Uecker and Jacquet v. Land Nordrhein-Westfalen*, 1997 E.C.R. 3182, ¶ 24.

103. *Id.* ¶ 42; *Lounes*, *supra* note 37, ¶ 37.

104. Citizens’ Rights Directive, *supra* note 6, art. 3(1) at 88.

105. *See O. & B.*, *supra* note 38.

106. *Id.* ¶ 40.

107. Case C-256/11, *Murat Deceri v. Ministerium für Inneres*, 2011 E.C.R. 11339, ¶ 68.

108. Case C-434/09, *McCarthy v. Sec’y of State for the Home Dep’t*, 2011 E.C.R. 3393, ¶¶ 14–17, 59(1)-(2).



B. *The Application of Article 21 between an EU Citizen and His or Her Own Member State*

Provided that disputes between one EU Member State and a Third Country national are generally “internal” matters, one may wonder how *Coman* could invoke Free Movement Rights against his own state. Even if the court determined that a same-sex spouse is a “spouse” for the purposes of the Citizens’ Rights Directive (or other legal relationship governed by Article 3 thereof), granting him or her rights in foreign Member States, *Coman* sought recognition of his marriage in his *own* Member state of citizenship, Romania; this situation is outside the scope of the Citizens’ Rights Directive.<sup>109</sup> Additionally, the Family Reunification Directive, which, unlike the Citizens’ Rights Directive, does govern the settlement of family Members of EU citizens in the EU citizen’s home Member State, would not apply here because its provisions conform to the public policy of the state granting the derived right of residence.<sup>110</sup>

On its face, it may appear that the facts of *Coman* involve an internal situation—an EU citizen involved in a dispute with his home Member State concerning his relationship with a Third Country national. However, to understand why this case concerns EU law via Free Movement rights, it is necessary to revisit *Coman*’s proximate predecessor case in the context of Article 21 TFEU, and in particular, *O. & B v. Minister voor Immigratie, Integratie en Asiel*. *Coman* was able to invoke his Free Movement Rights against Romania because he asked the court to determine whether or not Romania’s refusal to recognize his marriage conducted in another Member State (that he resided in) constitutes an infringement of his rights vis-à-vis Article 21 TFEU.<sup>111</sup> Article 21 guarantees “the right to move and reside freely within the territory of the Member States . . . .”<sup>112</sup> The court determined that, under relevant conditions, Article 21 TFEU requires the home Member State of the EU citizen to provide a derived right of resident when a marriage is conducted according to the laws of the host Member State.<sup>113</sup>

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109. *O. & B*, *supra* note 38, ¶ 42; *Lounes*, *supra* note 37, ¶ 37 (holding that “under a principle of international law, a Member State cannot refuse its own nationals the right to enter its territory and remain there and since those nationals thus enjoy an unconditional right of residence there, Directive 2004/38 is not intended to govern the residence of a Union citizen in the Member State of which he is a national. Consequently, in view of the case-law referred to in paragraph 32 of this judgment, nor is the directive intended to confer, in the territory of that Member State, a derived right of residence on family members of that citizen who are third-country nationals . . . .” (internal citations omitted)). De Búrca & Craig note, in a similar case, that “had [Petitioners] been nationals of any other Member State . . . they would have been so entitled [to a derived right of residence] under Article 2 of the Directive 2004/38 (then Article 10 of Regulation 1612/68).” DE BÚRCA & CRAIG, *supra* note 100, at 78.

110. Family Reunification Directive, *supra* note 89, ¶ 11 (noting “[t]he right to family reunification should be exercised in proper compliance with the values and principles recognized by the Member States . . . .”). Therefore, if the Member State does not recognize same-sex marriage, a same-sex couple cannot rely on this Directive to assert a right of residence.

111. *Coman*, *supra* note 3, ¶ 23–24.

112. TFEU, *supra* note 10, art. 21(1) at 57.

113. “In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive

In *O. & B.*, the CJEU determined that an EU citizen's home Member State must provide a derived right of residence to a Third Country national family member, who essentially became a family member while the EU citizen exercised his or her Free Movement Rights in a host Member State, on grounds no stricter than those of the Citizens' Rights Directive because failure to do so would frustrate the telos of Article 21 and infringe on Article 21 Free Movement Rights.<sup>114</sup> The court noted that "[i]f that third country [sic] national did not have such a right, a worker who is a Union citizen *could be discouraged from leaving the Member State of which he is a national* in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, *a way of family life which may have come into being in the host Member State as a result of marriage or family reunification.*"<sup>115</sup> In other words, the court reasoned that an EU citizen would be potentially discouraged from exercising his or her rights for fear that he or she may cultivate a family life with a Third Country national and face indefinite separation from his or her family member/spouse or partner if the couple were unable to remain in the host Member State and the EU citizen may have to return to his or her home Member State in a way which severs his or her family life.<sup>116</sup>

When more than one EU country is involved in a legal dispute concerning EU law, or the ability to reside in the EU itself is at stake, the CJEU has, in its past decisions, adhered to a relatively broad constructivist interpretation.<sup>117</sup> Rather than construing anything short of physical removal from the EU as a deprivation of residence rights, the CJEU created what can be described as an

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2004/38/EC of the European Parliament and of the Council of 29 April 2004 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, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country [sic] national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, 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 that third-country [sic] national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognize marriage between persons of the same sex." *Coman*, *supra* note 3, ¶ 58(1).

114. *O. & B.*, *supra* note 38, ¶ 45–65.

115. *Id.* ¶ 46 (emphasis added).

116. "Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of [the Citizens' Rights Directive], family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country [sic] national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State . . . ." *Id.* ¶ 54.

117. In this case, constructivist means a teleological method of interpretation of EU law which looks beyond the narrowest textualist approach, but rather gives effect to the general purpose, or telos, of the provisions of law.

“EU common law” version of a “constructive eviction” principle. In the view of the CJEU, a genuine manifestation of one’s EU residence rights requires that the EU citizen enjoy the appropriate familial financial and support and spousal consortium within the EU in order to genuinely manifest his or her Free Movement Rights. Perhaps the CJEU best illustrated this point in its *Lounes* decision, remarking that “it would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU” to do otherwise.<sup>118</sup>

Following this “constructive eviction” model in *Zambrano v. Office de L’emploi*, the court determined that an EU citizen-child’s loss of financial maintenance from his or her parents, as a result of the fact that the child’s parents cannot reside in the EU, is a functional deprivation of the child’s EU rights because the child could not practically remain in the EU without his or her parents supporting him or her in the EU.<sup>119</sup> Read in a similar constructivist vein, it is not too deep a leap of logic to conclude that an EU citizen, faced with a choice of either returning to his home Member State, indefinitely separated from his or her spouse, or leaving the EU in order to retain his or her family life, is constructively “forced”<sup>120</sup> to leave the EU. As such, this would be an impermissible deprivation of EU Free Movement Rights under the line of jurisprudence recognized in *Zambrano/O. & B.*<sup>121</sup> Through this line of cases, the court has constructed a rule whereby Article 21 TFEU and the Citizens’ Rights Directive operate in tandem with each other as the court constructs a model whereby the gender neutrality of the Citizens’ Rights Directive is “imported” into the philosophical and teleological reading of Article 21 TFEU, and therefore family life acquired in a host Member State must be allowed to continue in the host Member State.

### C. *Commentary on the Court’s Teleological Interpretation of Article 21 TFEU*

*Coman* is particularly interesting from the perspective of developing EU family law jurisprudence because it applies the philosophy of *O. & B.* to a gender-neutral interpretation of the Citizens’ Rights Directive. While neither the minor child in *Zambrano*, the Dutch citizens in *O. & B.*, nor *Coman* in the present case, are compelled through an affirmative act of law to “leave” the

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118. In this context, Article 21 TFEU safeguarded EU Free Movement Rights for the petitioner, which were threatened in a different legal context, however, *mutatis mutandis*, the same principle applies. See *Lounes*, *supra* note 37, ¶ 58 (“[I]t would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights . . . .”)

119. Case C-34/09, *Ruiz Zambrano v. Off. Nat’l de L’emploi*, 2011 E.C.R. I-1232, ¶ 44.

120. *Id.*

121. However, for this analogy to *Zambrano* to hold, it would have to be construed more narrowly in that the inability to return to one’s *own* Member State with his or her spouse falls short of a true and full exercise of EU direct residence rights under the TFEU and the Citizens’ Rights Directive. In fact, states generally appear to recognize this as most states grant derived right of residence to spouses and offer visas for close family members, perhaps establishing a customary international norm, at least in Europe. See discussion *infra* Section VI(B).

EU, any practical understanding of a right of a minor child to reside in a jurisdiction would necessarily entail financial support from either the state or family for that child to reside therein. Such reasoning is evident in *Coman*. While the *Coman* court does not explicitly state the case in such practically stark terms as in *Zambrano* (the need for financial support rather than spousal support), it certainly appears to echo such reasoning. Like in *Zambrano*, in which the denial of the Third Country relative's rights is not a *de jure* expulsion of the EU citizen from the EU, the court appears to imply that, although an EU citizen may still technically reside in the EU without his or her same-sex spouse, it is not a true and full exercise of EU direct residence rights. Similar to *O. & B.*, *Coman* created "family life which may have come into being in the host Member State as a result of marriage or family reunification" through his marriage, thereby "strengthening of family life,"<sup>122</sup> while exercising his Free Movement Rights in Belgium.

While unclear from the facts provided in the CJEU decision, it is plausible that when *Coman's* employment with the EU Parliament terminated, he did not have any concrete employment prospects in a Member State which recognizes same-sex marriage or a derived right of residence for his spouse. Moreover, it is possible that *Coman* had to return to his Member State because he did not have the ability to relocate to an EU jurisdiction where he could live with his Third Country spouse on a permanent basis. If *Coman* was compelled to return to Romania, his Third Country spouse would have to attempt to independently secure residence rights within the Member State as a Third Country national, with no guarantee of success. In a situation in which an EU citizen (1) is married to a Third Country national who has no EU citizenship and (2) must return to his non-recognizing home Member State and (3) the non-EU spouse is unable to secure a long-term residence rights, the EU citizen would be faced with the choice of indefinite separation from his spouse, or live with his spouse elsewhere. Accordingly, EU citizens who may benefit from the *Coman* ruling should take care not to read *Coman* too broadly. There must still be a territorial connecting factor to the EU through a marriage validly concluded in an EU Member State; if an EU citizen of a non-recognizing state marries a Third Country national in a country in which neither spouse has a right to reside, there is no guarantee that there is a plausible path to cohabitation if neither spouse has independent residence rights in the other spouse's country of citizenship. For example, if a Polish national meets, and after a long period of time, subsequently a Russian national of the same sex in Canada, while their marriage may be valid and recognized under Canadian law,<sup>123</sup> there is no justification under EU law securing their familial rights together as neither Poland nor Russia provide a derived right of residence to same-sex spouses. This is a necessary limitation

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122. *Coman*, *supra* note 3, ¶ 58(1).

123. *See infra* note 124.

under EU law because there is no legitimate hindrance of the EU citizen's Free Movement Rights in such a situation given that the "strengthening" of family life occurred in Canada, outside the EU.

In Coman's case, Adrian Coman held U.S. citizenship, which recognizes same-sex marriages. However, in cases where two spouses hold citizenship of non-recognizing states and do not share citizenship of the same state, there may be no legal basis for them to reside together. In order to live together, one spouse would need to secure an independent basis to legally reside in the other spouse's home jurisdiction.<sup>124</sup> Even if it is assumed that the language of the Citizens' Rights Directive is gender-neutral, Coman would still have no basis to settle a same-sex spouse in his home Member State, absent the court's reading of Article 21 TFEU. Accordingly, it may be unreasonable to conclude that a citizen *truly* enjoys Free Movement to reside in a foreign Member State, build a family life there, but then must live apart from his or her spouse if he or she ever chooses, or is compelled to return home. In fact, provided the general right of citizens to pursue a derived right of residence to very close family members in many Western states, such as spouses or parents, the right to spousal consortium may be becoming crystalized as customary international law, at least insofar as state practice, if not yet through *opinio juris*.<sup>125</sup>

The distinction between *Deceri/McCarthy* and *O. & B./Zambrano* makes sense. Whereas in the latter set of cases in which multiple EU countries were involved, the former set of cases involved the domestic immigration and family law of an EU Member state and his or her citizen and a Third Country national. Furthermore, in the latter set of cases, none of the fundamental EU Fundamental Freedoms were at stake as the EU citizen spouse did not strengthen family life in a foreign Member State and the EU citizen was not compelled to leave due to practical inability to remain in the EU, like in *Zambrano*. However, even though this distinction is material as a matter of EU law, the distinction feels artificial and slightly absurd as a practical matter. If it is true that one is "compelled" to leave the EU because he is unable to live in the EU either, through lack of familial consortium or familiar support, then it makes little if any practical distinction whether the family was "created" in one's own Member State or in a Member State other than that which he is a citizen. Applying this principle to *Coman*, if Coman never left Romania and met his partner in his home country of Romania, and they had lived together for the same amount of time in Romania, Coman would still be

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124. Although Coman was a U.S. citizen, it would be possible for him to live with his spouse in the U.S., who was also a U.S. citizen. However, a couple married in a jurisdiction that does not require residency for either spouse to marry may result in a situation whereby the marriage creates no legal right for the couple to live together in any country. For example, Canada allows non-resident and non-citizen same-sex couples to marry. Civil Marriage Act, S.C. 2005 c. 33, art. 5(1) (Can. 2005). Two foreigners married in Canada may be legally married under Canadian law, but the marriage creates no ability for the couple to actually live together if neither spouse's country would recognize a same-sex legal relationship.

125. See discussion *infra* Section VI(B).

faced with the same choice of either severing his family life or leaving Romania, and hence, the EU,<sup>126</sup> akin to the situation in *Zambrano*.

The court's determination in *Coman* that assurance that "genuine" family life and marriage in another Member State will be recognized in one's home Member State, "encourages" sexual minority EU citizens to exercise their Free Movement Rights to avoid this situation. But it belies belief that that an EU citizen would truly be discouraged from working or residing abroad in another EU Member State because she would consciously fear being unable to return to her home Member State with a potential spouse whom she *might* meet and marry in the host Member State. It is inconceivable that an EU citizen's decision whether or not to exercise his or her Free Movement Rights would ever significantly turn on whether he or she anticipated strengthening family life in another EU Member State through "genuine residence" and marriage and, with that in mind, contemplate the risk of being forced to sever such life, should the EU citizen need to return to his or her home Member State. It is simply not reasonable to assume that many if any EU citizens undertake such an analysis in a determination of whether or not to exercise their Free Movement Rights. The fact that that *Coman* met or married his spouse in Belgium is a matter of happenstance and likely not related to any decision to exercise Free Movement Rights.

It is a tall order to accept that the Free Movement Rights articulated in Article 21 TFEU truly require an EU citizen's home Member State to settle a spouse married abroad when that marriage would not even have been recognized under the domestic law of the home Member State.

However, what the court in *Coman* did well is navigate very narrow waters by clearly applying on-point CJEU precedent in a way that conforms to the Charter of Fundamental Rights and the Recital of Citizens' Rights Directive by applying the *O. & B.* holding in a non-discriminatory fashion. It also did so in such a way as to avoid violating the EU treaties or overtly contravene existing Secondary Law. The conclusion that Article 2(2)(a) of the Citizens' Directive is gender-neutral, while tenuous, is bolstered by solid legal reasoning and makes use of convincing relevant evidence. Although it is clear that compelling all EU Member States to recognize foreign same-sex spouses would infringe upon EU Member States' rights and would be an act *ultra vires* of the EU's legal mandate, failure to recognize a same-sex couple's union would still run afoul of EU law because the EU citizen could potentially be faced with a situation in which he or she would have to leave the EU if he or she could not settle a spouse in a foreign EU Member State pursuant to the Citizens' Rights Directive. Perhaps the true fault lies in the interpretation of *O. & B.* and related cases interpreting Article 21 TFEU, and the *Coman* court simply applied these principles in a more equitable fashion which conform to values enshrined in the EU law.

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126. Cf. *Lounes*, *supra* note 37, ¶ 53–54.

D. *Harmonization and Coherence: The Tension Between EU Competences and Member State Competences over Family Law*

Another theme the *Coman* court stressed is the need for harmonization and coherence in the exercise of the EU citizens' rights. The decision does appear to strengthen and crystalize principles of harmonization, insofar as it affirms a mutual recognition between the several Member States, but *only* within the confines of what is permissible under EU law; that is, for the purposes of allowing the EU citizen a derived right of residence on accord of a marriage in another Member State. This helps create legal clarity and coherence across the EU. With respect to this point, the court makes reference to *Grunkin and Paul* as precedent that, even though family law is within the competence of the Member State, a Member State's regulation cannot unduly frustrate the exercise of EU Free Movement Rights through application of its family laws.<sup>127</sup> In *Grunkin and Paul*, Germany's national legislation prohibiting double-barreled surnames frustrated the Free Movement Rights of a Danish EU citizen due to the result of unreasonable bureaucratic impediments to practically split life and travel between Denmark and Germany,<sup>128</sup> a situation which the court required Germany to rectify.<sup>129</sup> Accordingly, there is indeed precedent for more abstract notions of what it means to truly manifest one's Free Movement Rights.

Another feature of *Coman* is its occupation with issues traditionally reserved within the competence of the Member State.<sup>130</sup> In *Coman*, the court did affirm that recognition of marriage falls under the competence of the Member state,<sup>131</sup> but nevertheless concluded that compelling Member States to narrowly "recognize" same-sex marriages as is necessary to protect the rights of EU citizens enshrined in Article 21(1) TFEU.<sup>132</sup> Opponents of the holding in *Coman* may argue that the decision is *ultra vires* of the EU's competences, overstepping its jurisdiction because it impermissibly exerts jurisdiction over the family law of Member States. While EU law always preempts Member State law, which would be on matters concerning

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127. *Coman*, *supra* note 3, ¶ 38–39.

128. The court noted that "many everyday dealings, in both the public and the private spheres, require proof identity, which is usually provided by a passport." Due to German marriage law, "[e]very time the child crosses the border between Denmark and Germany, he will bear a different name." and that "[e]very time the child concerned has to provide his identity in Denmark . . . he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis . . . and the name in his German passport," and "this discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels which creates [a]n obstacle to freedom of movement." Case C-353/06, *Grunkin-Paul v. Leonhard Matthias Grunkin-Paul & Standesamt Stadt Niebüll*, 2008 E.C.R. I-07639, ¶¶ 23, 26, 29, 32.

129. *Id.* ¶ 40.

130. TEU, *supra* note 100 arts. 4(2), 5(2), at 16–17.

131. *Coman*, *supra* note 3, ¶ 37.

132. *Id.* ¶ 40.

exclusive or shared competence,<sup>133</sup> it is a difficult case to make that the EU's mandate to promote harmonization and protect Free Movement can be applied to the extent that it essentially requires a Member State to recognize rights<sup>134</sup> contrary to the public policy or public morality of the Member State with respect to its law.<sup>135</sup>

With regard to the application of the principle of non-discrimination based on sexual orientation in EU law, the Treaty on Fundamental Rights of the European Union, while existing as a core document upon which EU law is based, cannot itself serve as a freestanding basis for any rights.<sup>136</sup> This decision does appear to create, at least symbolically, a conflict between competencies. For example, Poland's declaration attached to its accession to the TFEU "affirm [s] their rights to legislate on matters pertaining to family law."<sup>137</sup> Read in a harmonizing vein, *Coman* does not conflict with such declarations if the ruling does not change or require Member States to alter provisions in their domestic family law codes in any way. However, it is obvious that *Coman* does in practice "affect in any way the right of Member States to legislate in the sphere of . . . family law" insofar as it confers rights which the Member State must constructively recognize in its domestic law through the grant of a residence permit based on a same-sex marriage. In light of *Coman*, it would be impermissible for a Member State to "legislate in the sphere of . . . family law" where the Member State attempts to pass a law limiting the residence rights of those not deemed spouses under the domestic law of the Member State.

It would therefore appear that *Coman* creates an obvious conflict between interpretation of "spouse" in the Citizens' Rights Directive on one hand and the competence of Member States to legislate on family law on the other, and therefore necessarily infringes upon Member State competences,<sup>138</sup> a point which Poland has reiterated extensively in this case in its *amicus* submission.<sup>139</sup> In its brief, Poland reminded the *Coman* court that family law is strictly within Member State competence,<sup>140</sup> and that matters concerning

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133. TFEU, *supra* note 10, art. 2(1)–(2), at 9–10.

134. By facilitating a derived right of residence to a same-sex spouse through its immigration ministry.

135. See *infra* note 147.

136. Charter of Fundamental Rights, *supra* note 9, art. 21. Poland noted this in its *amicus* submission in *Coman*; Uwagi Na Piśmie Rzeczypospolitej Polskiej, *supra* note 95, ¶ 24–25, at 11.

137. See TFEU, *supra* note 10, at 231 (affirming that "[t]he Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."). However, the legal effect of declarations in domestic and international law is ambiguous. See e.g., Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L. J. 170, 174 (2016); *Treaties and International Agreements*, RICH. SCH. L., <https://law-richmond.libguides.com/treaties/> (last visited Apr. 20, 2019).

138. See TFEU, *supra* note 10, at 231; *Coman*, *supra* note 3, ¶ 42.

139. Latvia and Poland submitted *amicus curiae* on behalf of Romania. See *Coman*, *supra* note 3, ¶ 42; Uwagi Na Piśmie Rzeczypospolitej Polskiej, *supra* note 95, ¶ 48. Poland has reiterated this point several times.

140. Uwagi Na Piśmie Rzeczypospolitej Polskiej, *supra* note 95, ¶ 4.



cross-border immigration requires the “special legislative procedure.”<sup>141</sup> Poland also noted that anti-discrimination provisions in EU law only apply to Member States which have sought to place same-sex and opposite-sex couples on an equal footing.<sup>142</sup>

Furthermore with respect to coherence, the Polish government suggests that the court would create incoherence were it to rule that Member States are to treat same-sex married couples as “spouses” because a coherent legal system cannot recognize two persons as spouses for some purposes and not for other purposes.<sup>143</sup> Poland’s argument here, however, is unconvincing. Were the CJEU to mandate total coherence of rights granted under marriage in Member States, it would wildly infringe upon the competence of Member States to derive their own domestic policies regarding marriages on issues not concerning EU rights, which would be *ultra vires* of its powers pursuant to Article 4(1) TEU.<sup>144</sup> If the CJEU were to keep the status quo, the EU legal system concerning Free Movement would remain “incoherent” due to varying views on what constitutes a legal spouse. In any case, the CJEU is not instructing non-recognizing Member States to legally consider same-sex couples married in other EU jurisdictions “spouses.” As demonstrated in the present case, the court does not require Romania to consider Coman and Hamilton “spouses” according to Romanian law. It requires Romania to give effect to *Belgium’s* law by simply providing a derived residence to a Third Country national.

Poland also contends that the interpretation of a marriage (*i.e.* gender-neutral) cannot be imported into the law of other Member States.<sup>145</sup> Poland essentially argues against treating the Citizens’ Rights Directive as a treaty granting same-sex couples a sort of “most-favored nation”-type treatment, allowing them to import rights from progressive Member States to more conservative Member States, (like the importation of economic rights through a bilateral investment treaty.) This argument is more convincing than the former, especially because this case concerns domestic family law. Poland correctly notes<sup>146</sup> that family law is within the competence of the Member State

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141. *Id.* ¶ 5. In contrast to the “ordinary legislative procedure, the “special legislative procedure” may be utilized for particularly “sensitive” topics. CONSILIUM.EUROPA.EU, “Special Legislative Procedures,” (Accessed Apr. 20, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0016>. Although, there is significant thematic overlap between potentially “sensitive” matters and matters covered by the “ordinary legislative procedure.” *See id.*

142. *See id.* ¶ 22.

143. *See id.* ¶ 48 (noting “[w]spólnym systemie prawnym niedopuszczalna jest sytuacja, w której osoba fizyczna uznawana byłaby za małżonka na gruncie przepisów dotyczących wjazdu i pobytu, a jednocześnie nieuznawana za małżonka na gruncie wszystkich innych regulacji krajowych.”).

144. “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.” TEU, *supra* note 100 art. 4(1). Family law is generally outside such competence of the EU. *See* Overview of Family Matters: International Families, EUROPA.EU, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters_en).

145. Uwagi Na Piśmie Rzeczypospolitej Polskiej, *supra* note 95 (“O treści treści tego pojęcia w danym państwie członkowskim nie może decydować rozumienie tego pojęcia w innych, a nawet w większości innych państw członkowskich.”) (emphasis added).

146. *See generally id.*

and therefore the term “spouse” is to be interpreted by the Member State and reliance on more general principles of EU law is insufficient, *ergo* the Recital 31 of the Citizens’ Rights Directive and the non-discrimination provisions in the EU Treaties. Indeed, much of its *amicus* submission repeatedly focuses on the exclusive competence of Member States to regulate marriage. In respect to this argument, the court may have been swayed by a stronger showing of well-reasoned arguments demonstrating how settlement of a Third Country spouse is not necessary to fulfill an EU citizen’s Article 21 TFEU rights, how granting residence permits to same-sex couples *does* necessarily mean a “recognition” of same-sex marriage in a non-recognizing Member State’s domestic law, thereby genuinely implicates domestic public policy.

### 1. *The Public Policy Derogation in EU Primary Law*

A major theme of law interlaced through the four Fundamental Freedoms of the European Union is the legal right of the Member State to derogate from these rights as a matter of public safety or morals.<sup>147</sup> In the present case, the court addressed public policy arguments against compelled recognition of married same-sex couples. Member States, notably Latvia, submitted that preclusion of a derived right of residence to same-sex spouses is justified “on grounds of public policy and national identity in accordance with Article 4(2) TEU.”<sup>148</sup> To this challenge, the court replied that the right of Member States to invoke “public policy” grounds turns on “genuine and sufficiently serious threat to a fundamental interest of society” and such a derogation “cannot be determined unilaterally by each Member State without any control by the EU institutions.”<sup>149</sup> Pursuant to this analysis, the court concluded that the gender-neutral interpretation of Article 2(2)(a) of the Citizens’ Rights Directive does not compel full recognition of marriage in the eyes of the Member State (a point the court made effort to clarify),<sup>150</sup> and therefore falls short of a legitimate public policy derogation because it “does not undermine the national identity or pose a threat to the public policy of the Member State

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147. See, e.g., TFEU, *supra* note 10 art. 36 (providing that “Articles 34 and 35 [the free movements of goods provisions] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”); see also TFEU, *supra* note 10 art. 45(3), (providing for “subject to limitations justified on grounds of public policy, public security or public health . . .”); *Gaydarov*, *supra* note 75, ¶ 43, (similarly restricting Free Movement of Persons within the EU on public safety grounds based upon a three-pronged proportionality test).

148. *Coman*, *supra* note 3, ¶ 42.

149. *Id.* ¶ 44.

150. See *id.* ¶ 45.

concerned.”<sup>151</sup> However, in Latvia’s defense, the core of the court’s reasoning is that a public policy derogation must *truly* concern public policy, which lends itself to an ultimately arbitrary determination which must be made.<sup>152</sup>

Infringement upon a Member State’s competence is a much stronger argument against *Coman* than notions of public policy and identity. In light of the cited Council of Europe Jurisprudence in *Coman*, the public policy arguments advanced by objecting Member States were insufficiently persuasive.<sup>153</sup> Indeed, it is difficult to objectively conclude that the ruling jeopardizes national identity and harms public policy.<sup>154</sup> Even if the CJEU accepts state claims that protecting, and strengthening the institutional of monogamous heterosexual marriage is a vital state interest, the Member States still have to rationally demonstrate how providing a derived right of residence to same-sex spouses is detrimental to this objective<sup>155</sup> or undermines state interests. States could have advanced arguments which clearly demonstrated, through their state civil codes and constitutions, that their societies overwhelmingly reject homosexual relationships and affirm that heterosexual marriages are the only legitimate type of non-blood-related kinship relationship that the state should recognize. They could have defended a “legitimate public policy derogation” on grounds that to do otherwise would undermine cohesive society or national identity in some other demonstrable fashion or risk undermining a core institution of the state’s society and culture, and is therefore required for the protection of a vital state interest. They could argue further that, through the facilitation of a derived right of residence to same-sex spouses in their territories, *Coman* essentially compels Member States to countermand the will of their populations by tacitly signaling approval of, or even promoting, relationships their societies find immoral. While perhaps a good faith justification on public policy grounds, such an argument would be difficult to advance considering that the Member States have acceded to various EU treaties and Secondary Law explicitly signaling disapproval for discrimination on the grounds of sexual orientation with respect to Free Movement. Whether or not such arguments would ultimately

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151. *Id.* ¶¶ 44–46. Similarly, the petitioner in *Pajić v. Croatia* claimed that “[a]ny possible argument concerning the protection of family in the traditional sense was inapplicable in this context since there had been various other less restrictive means for achieving that aim.” Evidently, Croatia had not sufficiently demonstrated that restricting the residence rights for same-sex couples had been necessary for “the protection of the family.” *Pajić v. Croatia*, App. No. 68453/13, 67 Eur. H.R. Rep. 410, ¶ 50 (2016). *Pajić* noted that “a difference in treatment based solely or decisively on considerations regarding the applicant’s sexual orientation would amount to a distinction which is not acceptable under the [European Convention on Human rights].” *Id.*

152. Such a conundrum harkens back to an analogous case in U.S. civil procedure in which the court was tasked with discerning whether a rule was procedural or substantive in nature by determining “whether a rule really regulates procedure.” *Sibbach v. Wilson*, 312 U.S. 1, 14, (1941).

153. See *infra* Section VI. a. ii.

154. For more analysis, see *infra* Section VI. a. ii.

155. Cf. *Vallianatos and Others v. Greece*, [hereinafter “*Vallianatos*”], 2013-VI Eur. Ct. H.R. 125, 144 (2013) (explaining that it was necessary to show, in order to protect the family, that treating people different on the basis of sexual orientation was a proportional response to that goal).

be convincing before the court, objecting Member States certainly could have nevertheless mounted a more robust case on their behalf.

## VI. *COMAN* IN THE CONTEXT OF REGIONAL HUMAN RIGHTS LAW

### A. *Parallel Norms: Disparate Treatment Based on Sexual Orientation in the European Human Rights System*

#### 1. *Applicability of ECtHR Jurisprudence to the Court's Analysis in Coman*

All EU Member States participate in the European human rights system through their membership in the Council of Europe (CoE) and are therefore bound by the European Convention on Human Rights (ECHR),<sup>156</sup> and subject to the binding rulings of European Court of Human Rights (ECtHR), which adjudicates complaints from CoE Contracting States for alleged infringements of the ECHR.<sup>157</sup> Although ECtHR decisions are persuasive before the CJEU, the broad rights to which citizens are afforded under the European Charter are much less specific than the rights of EU citizens, so the analysis of rights in both systems is considerably different. Nevertheless, the CJEU cross-references the case law of ECtHR with considerable frequency, contributing to pan-European, transatlantic, and even worldwide consensus-building on issues of human rights.<sup>158</sup> While the right to Free Movement among European states is an EU law concept, the CJEU made significant reference to ECtHR case law in *Coman* on the aspects of discrimination and applicability of a gender-neutral interpretation of the Citizens' Rights Directive. The court's use of ECtHR case law to inform its analysis under EU law is particularly interesting given that Article 8 ECHR in the European

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156. Although the CJEU references court decisions of the Council of Europe (European Court of Human Rights (ECtHR)) case law it is an institution separate from that of the EU and care should be exercised not to confuse the two.

157. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 19 at 234, 32 at 241–42, 44 at 246 Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter "ECHR"].

158. In a sense, the law of regional systems is creating a general "international common law." EU case law binding twenty-seven Member States cites the wider Council of Europe case law created by the ECtHR, binding forty-seven Member States. And the ECtHR in turn even references U.S. Supreme Court and state decisions. *See, e.g.,* and *Others v. Italy*, [hereinafter "Oliari"], App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R., ¶¶ 63, 134–35, 178, (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> (*citing* the U.S. Supreme Court decision *Obergefell v. Hodges*, various U.S. state court decisions, an analysis of U.S. state same-sex marriage laws on balance, Canadian provincial decisions, and decisions from various others "in European and other democratic societies" including Argentina, Australia, Canada, Mexico, New Zealand, South Africa and Uruguay an attaching "some importance" to this observation and that "the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of [CoE] States on this issue. The Court had therefore to take account of this evolution and any further development until the date of its judgment."). In this sense there is a web of Anglo-Eurasian law informally linked to each other. *See also* de BÚCA & CRAIG, *supra* note 100 at 425 (noting that "We have seen . . . how the CJEU cites and sometimes pays close attention to ECHR rulings, particularly now in cases in which similar rights under the EU Charter are invoked . . . It is certainly evident that the number of cases in which the CJEU hears claims based on fundamental rights, whether the provisions of the Charter or of the ECHR or both, is continually increasing.").

human rights system is analogous, in fact nearly identical, to Article 7 of the EU Charter of Fundamental Rights of the European Union.<sup>159</sup>

## 2. *Adequate Justifications for Disparate Treatment*

In its analysis, the *Coman* court referenced two ECtHR cases, *Vallianatos & Others v. Greece* and *Orlari & Others v. Italy* to inform its interpretation of the Citizens' Rights Directive with respect to a right to "family life" or "private life" guaranteed in the Europe human rights system,<sup>160</sup> and also in the EU system vis-à-vis the Charter of Fundamental Rights of the European Union.<sup>161</sup> In *Vallianatos*, a case in which petitioners alleged discrimination against homosexuals in the Greek civil code in violation of Articles 8 and 14 ECHR,<sup>162</sup> Greece argued that its civil union law was drafted with the intent to protect the interests of children in cases where their parents had chosen not to marry.<sup>163</sup> While the court accepted this justification unreservedly, it held that its law was nevertheless discriminatory under Article 14 ECHR because the law was not proportionate; Greece failed to demonstrate that "in order to achieve that [legitimate] aim, [it was necessary] to exclude certain categories of people—in this instance persons living in a homosexual relationship—from the scope of application of the provisions in issue."<sup>164</sup> Similarly, in *Oliari*, in which petitioners challenged Italy's prohibition of marriage between persons of the same sex in the Italian civil code,<sup>165</sup> Italy was tasked with justifying its disparate treatment of opposite- and same-sex couples in its municipal law. Petitioners in *Oliari* also argued that "[t]he applicants noted that the Government had failed to demonstrate how recognition of same-sex unions would adversely affect actual and existing 'traditional families.'" The ECtHR concluded in its *per curiam* judgment that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition . . ."<sup>166</sup> and in a separate opinion, that "the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole" in order to explain the omission of the Parliament to legislate so as to implement the fundamental constitutional right identified by the Constitutional Court.<sup>167</sup> The court further remarked that "[n]either had the

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159. Compare Charter of Fundamental Rights, *supra* note 9, art. 7, at 10 with ECHR, *supra* note 157, art. 9, at 11.

160. *Coman*, *supra* note 3, ¶ 50; see also generally ECHR, *supra* note 157.

161. Charter of Fundamental Rights, *supra* note 9.

162. See *Vallianatos*, *supra* note 155, 131–32.

163. *Id.* at 143–44. Greece also proffered another argument, basically that same-sex couples have comparable rights under contract. See *id.* at 143. However, this argument is not particularly relevant in the present discussion.

164. *Id.* at 144–45.

165. *Oliari*, *supra* note 158, ¶¶ 3, 14.

166. *Id.*

167. *Id.*

Government explained that prevention of any adverse effects could not be attained through less restrictive means,<sup>168</sup> (although the court did not seem to address this point directly).

In another related ECtHR case, *Pajić v. Croatia*, a Croatian (EU citizen) national who attempted to secure a residence permit for her same-sex Bosnian national partner (Third Country) alleged that Croatia had unlawfully discriminated against her in denying the permit under applicable Croatian and regional law. In *Pajić*, the court recognized that Croatia had not advanced sufficiently compelling justifications for discrimination on family reunification visas based on domestic and regional (EU) law applicable to Croatia.<sup>169</sup> However, in *Pajić*, the argument that Croatia's denial of a reunification visa to a same-sex partner was stronger than that under *Coman* because Croatia's domestic law recognized same-sex couples whereas the state concerned in *Coman*, Romania, does not.<sup>170</sup>

### B. *The Margin of Appreciation*

In ECtHR and CJEU jurisprudence, the concept of the margin of appreciation determines the latitude with which an individual Member States is free to interpret rights under the ECHR.<sup>171</sup> In the European human rights system, the more uniform or harmonized policy is among the Member States, the smaller the margin of appreciation, whereas when there is no uniform policy, the margin of appreciation is wide.<sup>172</sup> In its *amicus* submission in *Coman*, Poland referenced ECtHR jurisprudence, noting that Member States of the Council of Europe are afforded a wide margin of appreciation when there is a lack of consensus among states regarding a subject of law implicated under the European Charter of Human Rights.<sup>173</sup> However, at least in the European human rights system, the ECtHR concluded that this margin of appreciation is relatively small when the rights interest concerns protections which impact aspects of a person's identity and family life.<sup>174</sup> The court further noted a strong trend with respect to granting rights to same-sex couples under the

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168. *Id.*

169. *Pajić v. Croatia*, App. No. 68453/13, 67 Eur. H.R. Rep. 410, ¶¶ 35–37, 83 (2016). However, in *Pajić*, the argument that Croatia's denial of a reunification visa to a same-sex partner was stronger than that under *Coman* because Croatia's domestic law recognized same-sex couples, whereas the state concerned in *Coman*, Romania, does not.

170. *See id.* ¶¶ 22–25, 69–76.

171. *See, e.g., Oliari, supra note 158, ¶¶ 163–64* (July 21, 2015); *Lautsi & Others. v. Italy*, 54 Eur. H.R. Rep. 60, ¶¶ 68, 70 (2011).

172. *See Charter of Fundamental Rights, supra note 9, arts. 51–53 at 21.* Poland noted this in its *amicus* submission in *Coman*. *Uwagi Na Piśmie Rzeczypospolitej Polskiej, supra note 95, ¶¶ 33, 35.*

174. *Söderman v. Sweden*, 2013-VI Eur. Ct. H.R. 203, 232 (finding “[w]here a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed . . .”).

ECHR framework,<sup>175</sup> suggesting that the margin of appreciation was not Poland's best argument, at least in an ECtHR context (especially considering Poland previously lost a case concerning sexual orientation discrimination and the margin of appreciation).<sup>176</sup> In an EU context, the margin of appreciation to interpret "spouse" in accordance with domestic policy may, *a fortiori*, be considered narrower as compared with the Council of Europe. This is because only eight of the twenty-seven Member States do not offer rights to same-sex couples with the full scope of rights of marriage, or a legal relationship substantially similar thereto,<sup>177</sup> and that number appears to be shrinking with time as EU Member States march towards full legal equality. Indeed, the bulk of Council of Europe Contracting States which recognize such rights are Members of the European Union, and those Contracting States which do not provide such rights tend to be outside the European Union, suggesting that the margin of appreciation with which to interpret EU anti-discrimination provisions with respect to sexual orientation is much smaller than that under CoE jurisprudence. In any case, both the CJEU and the ECtHR Courts will undoubtedly take this trend into consideration when undertaking decisions concerning ambiguous decisions on the margins.

## VII. INTO THE ABYSS: BREXIT AND *COMAN*

### A. *Implications of this Question on Brexit*

#### 1. *Coman Marriages After Brexit*

On January 31, 2019, the UK became a Third Country. It appears that non-recognizing Member States will not have to recognize marriages for the purposes of *Coman* which are concluded immediately after January 31, 2020 because such marriages will now be concluded in a Third Country and not an EU Member State. In the absence of an EU-UK agreement on the matter, marriages concluded in the UK after Brexit will no longer be applicable under *Coman*. This means that EU citizens who marry non-EU citizens in the UK will no longer be able to assert their Free Movement Rights to settle a Third Country spouse in the home country of the EU citizen if it is non-recognizing, unless an EU-UK deal stipulates otherwise. Such a situation would

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175. *Oliari & Others v. Italy*, App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R. ¶ 178 (July 21, 2015) (noting "of relevance to the Court's consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe . . . The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia . . . The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance . . ."). See also Vallianatos, *supra* note 155, ¶ 91. (2013).

176. *Kozak v. Poland*, App. No. 13102/02, Eur. Ct. H.R. ¶ 92 (March 2, 2010) (noting that "[w]here a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.").

177. See *supra* Section III(D)(1).

arise in the case where an EU27 citizen, for example, a citizen of Bulgaria marries a U.S. citizen while both took up “genuine residence” in the UK, and then attempted to move to the EU27 spouse’s country of nationality, Bulgaria.

B. *UK-EU Marriages in Great Britain<sup>178</sup> and Northern Ireland between the Legalization of Marriage Equality in the Respective Jurisdictions until Brexit*

Another issue which could face EU Member States is whether or not the twenty-seven Member States will be obliged to “recognize” same-sex marriages conducted in England, Scotland and Wales, for the purposes of the application of *Coman* to the Citizens’ Rights Directive,<sup>179</sup> from the time same-sex marriage became legal in England, Scotland, and Wales,<sup>180</sup> and up until which time the UK left the EU. Similarly, the same questions remain for same-sex marriages conducted in the eighteen-day window from January 13, 2020, when same-sex marriage became legal in Northern Ireland, until January 31, 2020. If the couple in question subsequently resides in another non-recognizing EU27 Member State pursuant to the Citizens’ Rights Directive after *Coman*, it is possible that the non-recognizing state could try to “cancel” the derived right of residence after Brexit because the marriage occurred in what is currently Third Country, even though at the time of the marriage, the marriage was conducted within the EU; it is an open question whether the UK would be treated as an EU Member State in such cases because the marriage occurred at the time when the UK was a Member State. The CJEU may allow non-recognizing Member States to refuse to “grandfather” in such marriages concluded in the UK pre-Brexit in the EU27 for the purposes of a derived right or residence, effectively retroactively cancelling recognition of such marriages, because the Free Movement concerns upon which the decision is based are now moot; as the UK is no longer part of the European Union, refusal to “validate” such marriages in the UK for the purposes of the derived right of residence cannot “discourage” Free Movement within the EU. However, this may implicate state obligations pursuant general principles of international law,<sup>181</sup> a question meriting its own independent study, but outside the scope of this note.

Another more nebulous issue that could arise is the “genuine residence” requirement. If the couple had married in the UK shortly prior to Brexit and

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178. Northern Ireland is excluded because, although its registered partnership law offers benefits akin to marriage, same-sex marriage is not legal in Northern Ireland, precluding the rights of a “spouse” under the Citizens Rights Directive. *See supra* note 60.

179. Provided there was also genuine residence and family life “strengthened” in Great Britain (England, Scotland and Wales) and the couple attempts to move to an EU27 Member State of which one of the spouses is a citizen.

180. On March 13, 2014 (or other unions solemnized earlier if civil unions are converted automatically into marriages).

181. *See e.g.*, Vienna Convention on the Law of Treaties, *supra* note 94, art. 40 at 342.



had started to “strengthen[] family life”<sup>182</sup> and establish “genuine residence” prior to Brexit, but continued the “strengthen[ing] of family life”<sup>183</sup> and “genuine residence” post-Brexit, how much of the “strengthening of family life” and “genuine residence” need occur while the UK remains a Member State? These are only a few of the uncertainties courts may be tasked with addressing after Brexit.

One solution would be an agreement between the EU and the UK that all marriages solemnized in the UK (apart from Northern Ireland until it recognizes same-sex marriage)<sup>184</sup> prior to Brexit would be recognized as a marriage in a Member State for the purposes of the Citizens’ Rights Directive, and in view of Article 21 TFEU. In order to avoid legal uncertainty, the EU should clarify whether, and how, marriages concluded and “family life strengthened” in the UK while the UK was an EU Member State shall be treated as having been concluded in the EU. Given the interconnectedness of the European Union and unprecedented mobility of its citizens, it is likely merely a matter of if, not one or all of these situations will arise. All that is certain is such situations will create headaches for the migration ministries of the Member States concerned and delight for family law lawyers.

#### VIII. ADDITIONAL UNRESOLVED QUESTIONS ON THE MARGINS: EFTA AND EEA

##### A. EFTA and EU Citizen

One unanswered question is whether citizens of Member States of the European Economic Area (EEA) and European Free Trade Area (EFTA)<sup>185</sup> will be affected by *Coman*. There are two ways in which this could manifest. The first involves a situation in which an EU citizen marries a same-sex citizen who is a citizen of an EEA/EFTA country which is not in the EU, in an EU Member State, under conditions meeting the *Coman* criteria, and then they move to a non-EU EFTA/EEA country. The second involves the reverse, in which a non-EU EFTA/EEA citizen marries a same-sex EU citizen in a Member State under *Coman* conditions and relocate to a non-recognizing Member State.

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182. *Coman*, *supra* note 3, ¶ 58(1).

183. *Id.*

184. Chris Page, *Northern Ireland Abortion and Same-Sex Marriage Laws Change*, BBC NEWS (Oct. 22, 2019), <https://www.bbc.com/news/uk-northern-ireland-50128860>.

185. The European Free Trade Area comprises of (1) the EU Member States, (2) the European Economic Area States (Iceland, Norway, and Liechtenstein) and, (3) Switzerland. Switzerland is in EFTA, but not the EEA, which is significant because it is significantly less legally connected to the EU in terms of an integrated single market and its degree of adherence to EU rules as is the EEA. The relationship between the non-EU EEA and EFTA States is complicated but forms a sort of “Diet Europe” which wishes to benefit from the European Single Market without assuming all the obligations of EU Membership.

1. *EEA/EFTA Scenario I: Coman in the Context of EEA/EFTA Jurisprudence*

At first glance, there is no application of the case to a same-sex marriage between an EU national and non-EU EEA/EFTA national residing in a non-EU EEA/EFTA Member State. *Coman* applies to an interpretation of the Citizens' Rights Directive for Article 21 of the TFEU and Charter of Fundamental Rights, documents which are binding only upon the EU Member States. However, states of the EEA are obliged to honor Free Movement of Persons,<sup>186</sup> which could require that they adhere to the *acquis communautaire* on Free Movement of Persons, which, of course, includes decisions of the CJEU. The EEA is obligated to follow the Citizens Rights Directive in terms of workers,<sup>187</sup> which likely means it is also obliged to follow CJEU rulings interpreting it. However, for the purposes of following the EU law *acquis* strictly on the issue of the right to family reunification in EEA/EFTA, the conclusion is less clear, and at this juncture the analysis shifts to the supreme judicial organ of the non-EU States, the EFTA Court. First, the EFTA Court can be relied upon to *generally* follow the CJEU,<sup>188</sup> and the EFTA Court ruled less than two years prior to *Coman*, in *Jabbi v. Norway*, a case with a strikingly simpler fact pattern and series of applicable law nearly identical to that of *Coman*, (including, *inter alia*, Article 21 TFEU and the Citizens' Rights Directive).

In brief summary, Yankuba Jabbi was a Gambian national who, although, married to his Norwegian national spouse in the EU/EEA country Spain, was nevertheless subject to additional independent requirements for residence in Norway pursuant to domestic law, which, in the eyes of the Norwegian authorities, he failed to fulfill.<sup>189</sup> He challenged Norway pursuant to a deportation proceeding against him, arguing that although there is no corresponding concept of EEA citizenship as there is EU citizenship, Article 7 of the relevant EEA directive<sup>190</sup> should be interpreted in such a way that his marriage to a Norwegian citizen granted him a derived right of residence in Norway because such interpretation secures the right of Freedom of Movement throughout the EEA on EFTA court precedent.<sup>191</sup> In language

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186. *Yankuba Jabbi v. Norwegian Government* [hereinafter "Jabbi"], Case E-21/15, Judgment, European Free Trade Association Court, ¶¶ 52–53 (Jul. 26, 2016), <https://eftacourt.int/download/28-15-judgment-of-the-court/?wpdmdl=1477>.

187. Agreement on the European Economic Area, art. 28, Jan. 3, 1994, 1994 O.J. (L 1). *See also id.* Annex V, ¶ 1 (noting "[t]he act referred to in point 3 of Annex VIII to this Agreement (Directive 2004/38/EC of the European Parliament and of the Council [the Citizens' Rights Directive]), as adapted for the purposes of the Agreement shall apply, as appropriate, to the fields covered by this Annex.").

188. *See* Carl Baudenbacher, *How the EFTA Court works – and why it is an option for post-Brexit Britain*, LONDON SCH. OF ECON. & POL. SCI. (Aug. 25, 2017), <http://blogs.lse.ac.uk/brexit/2017/08/25/how-the-efsa-court-works-and-why-it-is-an-option-for-post-brexit-britain/>.

189. *Jabbi*, *supra* note 186, ¶¶ 19–22, 24. (Jul. 26, 2016).

190. Council Directive 90/364/EEC, 1990 O.J. (L180) 26, 27 (EC).

191. *Jabbi*, *supra* note 186, ¶¶ 30–33 (Jul. 26, 2016).

strikingly similar to that used less than two years later in *Coman*, the court ruled that “when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State”<sup>192</sup> and “[w]here an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC, has created or strengthened a family life<sup>193</sup> with a third country [sic] national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.”<sup>194</sup>

Although Norway attempted to expel Jabbi from Norway for not meeting requirements of residence under domestic Norwegian law,<sup>195</sup> EEA law may be invoked to secure a derived right of residence for the Third Country spouse married elsewhere in EFTA while exercising Freedom of Movement, notwithstanding domestic provisions of EEA, thereby preempting the domestic law of the EEA state. While the decision does not address the definition of spouse, the fact that the court analyzed substantially the same provisions of EU law, that the Citizens’ Rights Directive applies in the EEA insofar as “[r]esidence rights . . . granted by the Directive to third country [sic] nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of Free Movement of EEA citizens.”<sup>196</sup>

The *Jabbi* court also noted that “the future development of independent rights of Third Country nationals which do not fall within the scope of the EEA Agreement,”<sup>197</sup> noted “the consideration of homogeneity . . . carries substantial weight,”<sup>198</sup> and referenced the 15th recital of the Preamble of the EEA Agreement, noting that the “objective is to reach and maintain a uniform interpretation and application of the EEA Agreement . . . to arrive at an equal treatment of individuals,”<sup>199</sup> with respect to such “uniform interpretation and application” in the EU. This strongly suggests that, *a fortiori*, in a post-*Coman* environment, even though the EFTA court is not strictly bound by EU law, it would almost certainly follow the decision. Any application of *Coman* to EEA/EFTA would, however, be practically irrelevant. Iceland and Norway recognize same-sex marriage, and Switzerland<sup>200</sup> and

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192. *Id.* ¶ 77.

193. *Id.* ¶ 82.

194. *Id.* ¶ 82.

195. *Id.* ¶ 24.

196. Decision of the EEA Joint Committee, No 158/2007 (Dec. 7, 2007) amending Annex V (Free movement of workers) and Annex VIII (right of establishment) to the EEA Agreement, 2008 O.J. (L 124) 20, 23 (EU).

197. *Jabbi*, *supra* note 186, ¶ 10 (Jul. 26, 2016).

198. *Id.* ¶ 60.

199. *Id.* ¶ 70.

200. Switzerland provides family reunification visas to spouses and those in “registered partnerships.” *Family Reunification for EU/EFATA Citizens Living in Switzerland*, CH.CH, <https://www.ch.ch/en/family-reunification-eu-efta/> (last visited Mar. 5, 2019). Switzerland provides for same-sex registered

Liechtenstein,<sup>201</sup> have provisions sufficient to settle a Third Country spouse, however *Jabbi* is interesting insofar as it underscores a substantially parallel development of European law in both the EU and EFTA system.

### B. EEA/EFTA Situation II: The Reverse Case

Any limitations to Free Movement Rights which are stricter for EEA/EFTA citizens than that for EU citizens to reside in foreign EU Member States could be relevant post-*Coman*. As previously stated, settling a foreign same-sex partner in EFTA is possible domestically without any recourse to regional law,<sup>202</sup> however one issue which could arise is a citizen of a non-recognizing EU Member State who marries an EEA/EFTA citizen in the EU, and the spouses subsequently wish to reside in the home non-recognizing EU Member State. For example, a citizen of Lithuania who marries a same-sex spouse, a citizen of Liechtenstein, in Sweden, and the Lithuanian citizen wishes to secure a derived right of residence for her Liechtenstein spouse in Lithuania, and that non-EU spouse does not fulfill criteria to independently reside in a non-recognizing EU Member State. Despite the fact that EEA/EFTA citizens have similar Free Movement Rights in the EU as do EU citizens, the rights are not identical or unlimited.

The EEA-EU Agreement (governing the relationship between the EU and Iceland, Norway, and Liechtenstein) and also Swiss-EU Agreement (hereinafter “Agreements”) guarantee the free movement of *workers* within the EU and non-EU EEA/EFTA states, but like the Citizens’ Rights Directive, do not provide for an restricted movement within the EU, EEA, and EFTA.<sup>203</sup> The application of *Coman* could therefore prove relevant if the EFTA citizen spouse seeking a derived right of residence in a non-recognizing EU Member

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partnerships. *How to Register a Same-Sex Partnership*, CH.CH, <https://www.ch.ch/en/register-same-sex-partnership/> (last visited Mar. 5, 2019).

201. Liechtenstein has a domestic partnership law for same-sex partners sufficient to settle a foreign spouse in Liechtenstein, but this is not strictly a legal “marriage.” Über die eingetragene Partnerschaft Gleichgeschlechtlicher Paare (Partnerschaftsgesetz; PartG) [Law on the Registered Partnership of Same-Sex Couples], LIECHTENSTEINISCHES LANDESGESETZBLATT [LL], Vol. 16 LR-Nr 212.41, arts. 1, 23 (Sept. 1, 2011); *Ausländer -und Passamt (APA), “Für Angehörige eines Drittstaats,”* LANDESVERWALTUNG FÜRSTENTUM LIECHTENSTEIN, <https://www.llv.li/inhalt/1723/amtstellen/fur-angehorige-eines-drittstaats> (last visited Apr. 15, 2019); *Ausländer -und Passamt (APA), “Für Angehörige eines EWR- und CH Staatsangehörigen,* LANDESVERWALTUNG FÜRSTENTUM LIECHTENSTEIN, <https://www.llv.li/inhalt/117535/amtstellen/fur-angehorige-eines-ewr-und-ch-staatsangehorigen> (last visited Apr. 15, 2019).

202. Iceland and Norway recognize same-sex marriage; *see also infra* notes 205–206.

203. For EEA citizens planning to reside in the EU, *see* Agreement on the European Economic Area, arts. 28-30, repromulgated Jan 1, 2017 O.J. (L 1), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21994A0103\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21994A0103(01)&from=EN) [hereinafter Agreement on the European Economic Area]. For non-EEA EFTA citizens planning to reside in the EU, *see* Agreement Between the European Community and Its Member States, of the One Part, and the Swiss Confederation, of the Other, on the Free Movement of Persons, Annex I, art. 3(2)(a),(c) at 27, updated Jan. 1, 2017, O.J. (L 144) [hereinafter Agreement on the Free Movement of Persons], [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02002A0430\(01\)-20170101&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02002A0430(01)-20170101&from=EN).

State is financially dependent, not unemployable, a job-seeker, student, an apprentice, or otherwise cannot justify his or her residence in the EU through the Agreements alone,<sup>204</sup> in similar fashion to the situation described in Section III(D)(2). Therefore, *Coman* could impact those nationals of the EU Member States which did not grant a derived right of residence to same-sex spouses married to EFTA/EEA citizens who, for one reason or another, do not fulfill the requisite requirements under the Agreements.

## IX. POLITICAL ASPECTS AND LEGAL CONSEQUENCES

### A. *Possible Additional Legal Consequences of the Court's Interpretation of "Spouse" on Other Matters of EU Law*

There are substantial legal implications for the interpretation of a gender non-specific definition of "spouse." If "spouse" is gender-neutral for the purposes of the Citizens' Rights Directive, then it would logically follow that "spouse" applies generally to same-sex couples in the context of *all* EU regulations and directives in which the sex of the spouses is unspecified. For example, this could have implications for inter-EU (or inter-EEA/EFTA)<sup>205</sup> tax and pension totalization agreements, and other agreements within the European systems concerning property and other legal matters involving marriage. The ruling may also crystalize the gender-neutral understanding of "spouse" in EU law for other purposes, and there already exists discussion within some Member States regarding the effect of gender-neutral interpretation of terms with respect to aspects of pension policy concerning the EU law's jurisdiction.<sup>206</sup>

Finally, the ruling is likely to impact the rights to family reunification and right to return home in crisis situations. The unprecedented, extreme measures undertaken by Member States, and indeed the EU itself, in response to the 2020 COVID-19 crisis, involved blanket bans on non-nationals, non-residents, and their closest kin, from entering countries for long periods of

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204. See Agreement on the European Economic Area, *supra* note 202; Agreement on the Free Movement of Persons, *supra* note 202.

205. Jabbi, *supra* note 186, ¶ 82 (Jul. 26, 2016).

206. "Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation." Family Reunification Directive, *supra* note 89 at 12. The interpretation of "spouse" in this Directive would have been the natural issue before the case. However, it is unlikely that the court would have jurisdiction if it were not framed through Free Movement Rights for the EU citizen, and hence, through Article 21 of the Citizens' Rights Directive, because it would have lacked the sufficient connecting factors (recognition of same-sex marriages performed in another EU member State). However, the court *could* have also reached the same conclusion with the same logic through the meaning of "spouse" in art. (4)(1) of the Family Unification Directive. See also Lucas Němec, *Czech MPs Hold Historic Debate on Same-Sex Marriage*, EXPATS.CZ (Nov. 11, 2018), <https://news.expats.cz/weekly-czech-news/czech-mps-hold-historic-debate-on-same-sex-marriage/> (suggesting that gender-neutral interpretations of pension provisions could have an effect on state pension systems in cases where the EU would have competence).

time. The facilitation of a derived right of residence and recognition of same-sex spouses as “family members” provides greater certainty that Third Country spouses of EU citizens will be able to return home and be reunited in similar crisis situations. These are just some of the few foreseeable open questions which the ruling invites, and many unforeseen consequences likely remain.

Given the clear trend towards recognition of the rights of same-sex couples as that on par with opposite-sex couples in the Western world, particularly in the European human rights system and within EU law, *Coman* may nudge the door open further towards eventual universal recognition of legal equality for same-sex couples across the EU, based on *Coman*’s logic.

### B. *Political Effects of the Ruling*

Major judicial rulings often provoke a political response, or reactive “blowback.” Many undoubtedly celebrated the *Coman* ruling as a step towards legal equality for EU citizens and their Third Country spouses and moreover, towards harmonization of policy within the European Union. However, proponents of the European project have cause for concern that this ruling will further inflame hostility towards the EU institutions and center of EU-decision-making, known by its oft-maligned metonym, “Brussels.” While it is indeed a fundamental principle of the rule of law that the judiciary must retain the capacity to exercise independence with respect to judicial rulings without respect to the political environment at any given time, it is nevertheless inevitable that legal decisions have political consequences. It is of little doubt that this decision will energize the Eurosceptic wave sweeping Central Europe, exacerbating the rift between states like Hungary, Poland and EU institutions. The decision is likely to be received negatively among Member States with relatively low support for the rights of sexual minorities among their populations. Although the decision may help combat Euroscepticism among some EU critics, who now have another example of how the EU is instrumental in safeguarding the rights of minority EU citizens, *Coman* is likely to exacerbate East-West intra-EU cultural conflicts.

*Coman* comes to the fore against a backdrop of significant acrimony between Brussels and Central European Member states, notably the spat between Brussels and the Visegrád states, particularly Hungary and also Poland, over the refugee debacle beginning in 2015,<sup>207</sup> and the CJEU’s

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207. See Case C-643/15 & C-647/15, *Slovak Republic, Hungary v. Council of the European Union* (July 26, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=193374&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=517925>; Joey Millar, *EU Border Threat: Brussels Threatens to Fine, €250,000 for Every Refugee Refused Entry*, EXPRESS.CO.UK (May 6, 2017), <http://www.express.co.uk/news/world/666720/Brussels-to-fine-countries-for-EVERY-REFUGEE-refused-entry>; *Migrant Crisis: EU Plans Penalties for Refusing Asylum Seekers*, BBC (May 4, 2016), <http://www.bbc.com/news/world-europe-36202490>.

finding against Poland with regard to its “judicial reforms,”<sup>208</sup> and likely soon over Hungarian Prime Minister Viktor Orbán’s unprecedented consolidation of power.<sup>209</sup> In the current ruling Polish government’s attempts to envelop Poland in a nationalist, populist, conservative Catholic agenda, and in the process of consolidating its power, it has undertaken measures to undermine the rule of law, democratic principles and European norms deemed so alarming, the EU has attempted to suspend Poland’s EU voting rights for “serious breach” of EU norms and values.<sup>210</sup> The EU has acted in similar fashion against Hungary for its suppression of the media,<sup>211</sup> even before Prime Minister Orbán’s most extreme move in March 2020.

Moreover, predictably, Poland and Hungary have clashed with the EU over issues concerning sexual minorities and gender identity,<sup>212</sup> and Poland’s ruling party, Law & Justice, has focused its campaign on opposing the expansion of rights to sexual minorities and new attitudes towards gender

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208. Alexandra Brzozowski, *Poland’s Judicial Reforms Violate EU Law, Bloc’s Top Court Rules*, EURACTIV, (Jun. 25, 2019), <https://www.euractiv.com/section/justice-home-affairs/news/polands-judicial-reforms-violate-eu-law-blocs-top-court-rules/>.

209. Daniel Baer, “The Shocking ‘Coronavirus Coup’ in Hungary was a Wake-Up Call to Europe,” FOREIGNPOLICY.COM, (Mar. 31, 2020), <https://foreignpolicy.com/2020/03/31/viktor-orban-hungary-coronavirus-coup/>.

210. Poland, led by Prawo i Sprawiedliwość (Law and Justice), has clashed with Brussels, and indeed the wider world, notably the U.S., and Israel, over what many in the West see as its rejection of the rule of law, civil liberties and democratic norms, including its heavy-handed attack on foreign media; draconian Holocaust speech-restriction bill, which would provide for criminal penalties, including incarceration, on anyone within Polish jurisdiction who claims that *any* Pole was complicit in the Holocaust; measures related to “restructuring” the Polish court system; and media regulations. All of these measures are widely viewed throughout Europe as blatantly in contradiction to both the Polish constitution and minimum rule-of-law standards requisite for EU Member States. See *Eroding Checks and Balances, Rule of Law and Human Rights Under Attack in Poland*, HUMAN RTS. WATCH (Oct. 24, 2017), <https://www.hrw.org/report/2017/10/24/eroding-checks-and-balances/rule-law-and-human-rights-under-attack-poland>. See also Colin Dwyer, *Poland Passes Bill Criminalizing Claims of its Complicity in the Holocaust*, NPR (Feb. 1, 2018), <https://www.npr.org/sections/two-way/2018/02/01/581896647/poland-passes-bill-criminalizing-claims-of-its-complicity-in-the-holocaust>; Michał Broniatowski, *US Ambassador Clashes with Warsaw over Media Freedom*, POLITICO.EU (Nov. 27, 2018), <https://www.politico.eu/article/poland-us-ambassador-clashes-with-warsaw-over-media-freedom/>. In fact, the situation was deemed so dire with respect to “judicial reform” that the European Commission voted to invoke Article 7 TEU to suspend Poland’s voting rights, indicating that a majority of the EU considers Poland’s measures pose a “clear risk of a serious breach by a Member State of the values referred to in Article 2 [TEU],” which are “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” For reference to these provisions, see TEU, *supra* note 100, arts. 2, 7(1). See Maïa de la Baume (contributions by Michał Broniatowski and David M. Herszenhorn), *Brussels Puts Warsaw on Path to Sanctions Over Rule of Law*, POLITICO.EU (Updated Dec. 21, 2017), <https://www.politico.eu/article/frans-timmermans-brussels-puts-warsaw-on-path-to-sanctions-over-rule-of-law/>; Jan Cienski, *Poland Suspended from EU Judicial Organization*, POLITICO.EU (Sept. 18, 2018), <https://www.politico.eu/article/poland-rule-of-law-suspended-from-eu-judicial-organization/>; James Crisp, *EU Opens New Legal Case Against Poland for ‘Undermining Judicial Independence’ with Supreme Court Overhaul*, TELEGRAPH (July 2, 2018), <https://www.telegraph.co.uk/news/2018/07/02/eu-opens-new-legal-case-against-poland-undermining-judicial/>.

211. Rebecca Staudenmaier, *EU Parliament Votes to Trigger Article 7 Sanctions Procedure Against Hungary*, DW.COM (Sept. 12, 2018), <https://www.dw.com/en/eu-parliament-votes-to-trigger-article-7-sanctions-procedure-against-hungary/a-45459720>.

212. Lili Bayer & David Herszenhorn, *Hungary and Poland Say No to LGBTIQ*, POLITICO.EU (Dec. 9, 2018), <https://www.politico.eu/article/hungary-and-poland-say-no-to-lgbtq/>.

identity.<sup>213</sup> The populist right-wing *Prawo i Sprawiedliwość* or Law and Justice Party (*PiS*), which has ruled in Poland since 2015, is hostile to any expansion of “new” rights and seeks to mobilize the state against the promotion of such new conceptions of human rights, and education on such issues through legislative fiat.<sup>214</sup> The *Coman* decision will likely only exacerbate the conflict between Brussels on one hand and Poland and Hungary on the other, a relationship was already strained due to its alleged unconstitutional acts with respect to the Polish judiciary, recent acts curtailing media independence in Hungary,<sup>215</sup> and refusal to cooperate with Brussels on managing the European refugee crisis.<sup>216</sup> Provided this recent history, one wonders whether Poland, which has ignored EU norms, injunctions and warnings in the recent past,<sup>217</sup> may choose to simply flaunt this ruling in the future. However, given the apparent lack of interest in the case from Member State governments as reported in the press, it appears for the time being that *Coman* seems to have taken a back seat to larger disputes, such as the refugee crisis and domestic rule of law issues.

## X. CONCLUSION

While LGBTI-rights activists may celebrate the *Coman* decision, the practical effect will be increasingly limited. For nearly three decades, Member States have expanded the set of legal rights available to same-sex couples

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213. See, e.g., Marc Santora, *Poland's Populists Pick a New Top Enemy: Gay People*, N.Y. TIMES (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/world/europe/poland-gay-rights.html>; Yaroslav Trofimov, *The Culture War Dividing Europe*, WALL STREET J. (Mar. 29, 2019), <https://www.wsj.com/articles/the-culture-war-dividing-europe-11553872752>; Jo Harper, *PiS Picks LGBT Battleground in Poland*, FORBES (Mar. 23, 2019), <https://www.forbes.com/sites/joharper/2019/03/24/pis-picks-lgbt-battleground-in-poland/#6334586f2459>.

214. There is a widely reported campaign by PiS to shore up its support by presenting the set of political goals associated with the “LGBT” community political as an existential threat to Polish society. See, e.g., Joanna Plucinska & Anna Wlodarczak-Semczuk, *Poland's Ruling Party Picks LGBT Rights as an Election Battlefield*, REUTERS (Mar. 15, 2019), <https://www.reuters.com/article/us-poland-lgbt/polands-ruling-party-picks-lgbt-rights-as-election-battlefront-idUSKCN1QW0T7>. The PiS-controlled administration has attempted to prohibit schools from participating in an education program concerning sexual minorities called “Rainbow Friday.” See, e.g., Alina Pospisich, “*Tęczowy Piątek*” *Chcą Uczyc Akceptacji i Otwartości w Szkołach. Przeciwno Jest Radny PiS*, WYBORCZA.PL (Oct. 25, 2018), <http://lublin.wyborcza.pl/lublin/7,48724,24087290,chca-uczyc-akceptacji-i-otwartosci-w-szkolach-przeciwko-jest.html>. In an interview with the Catholic, conservative newspaper, *Nasz Dziennik*, current Polish president, Andrzej Duda, has expressed interest in a “gay propaganda” ban akin to that in place in the Russian Federation. Paweł Koźmiński, *Andrzej Duda Zainteresowany Ustawą Zakazującą “Prapagandy Homoseksualnej,”* WYBORCZA.PL (Oct. 10, 2018), <http://wyborcza.pl/7,75398,24150736,andrzej-duda-zainteresowany-ustawa-zakazujaca-propagandy-homoseksualnej.html>.

215. See *supra*, notes 211–213.

216. See, e.g., Shehab Kahn, *EU Launches Legal Proceedings Against Poland, Hungary, and the Czech Republic over Handling of the Refugee Crisis*, INDEPENDENT.CO.UK (June 14, 2017), <http://www.independent.co.uk/news/world/europe/eu-poland-hungary-czech-republic-refugee-crisis-handle-legal-proceeding-lawsuit-european-commission-a7789161.html>; Georgi Gotev, Lucie Bednářová & Zuzana Gabrizova, *Visegrád Countries Oppose Commission's Revamped Asylum Policy*, EURACTIV.COM (May 9, 2016), <http://www.euractiv.com/section/justice-home-affairs/news/visegrad-countries-oppose-commissions-revamped-asylum-policy/>.

217. See *supra* notes 135–137, 140; Agnieszka Berteczko, *Poland Vows to Keep Logging Ancient Forrest Despite EU Court Ruling*, REUTERS (Jul. 31, 2017), <https://www.reuters.com/article/us-poland-eu-logging-reaction/poland-vows-to-keep-logging-ancient-forest-despite-eu-court-ruling-idUSKBNIAG1K0>.



and the Member States directly affected by this ruling are ever shrinking. In the greater context of comparative and international law in Europe, this decision is perhaps most interesting in the way that it imports rights granted under the domestic law of one state to apply to the domestic law of another Member State and how different provisions of EU law function together to achieve a novel policy result. What is most striking in this case in terms of the evolution of European law is that such transposition of domestic law involves not simply the movement of workers or treatment of foreign goods within the EU, but family law, a highly politically sensitive matter; while the principle of mutual recognition among the Member States, for example of goods and services, has long been an established principle within the EU, and while this case does not concern the mutual recognition of marriages in a strict legal sense, the spirit of mutual recognition has never been applied in this way in the EU system with respect to Third Country citizens on such a controversial aspect of family law.

Progressive Europhiles will see this decision as one in a series of manifestations of how the EU affirms and protects the dignity of socially marginalized minorities in the exercise of their rights enshrined in the EU's core treaties. For the decision's proponents, despite the many uncertainties attendant to the *Coman* decision, it is clearly a breakthrough for the rights of same-sex couples, especially in Central and Eastern EU Member States. Eurosceptics, on the other hand, will likely view this as yet another vexing intrusion on state sovereignty and an imposition of Brussels's bureaucrats imposing unwelcome cosmopolitan values on Member States which could not have foreseen such an exercise of supranational power over their domestic family law. Whether EU citizens view this development as another step in the fulfillment of the lofty dream of a United States of Europe or a disastrous erosion of state sovereignty may be reflected in future national European parliamentary elections. However, in the context of COVID-19, the immigration crisis, Brexit, management of the financial situation of Member States, and the political crisis between Brussels and the Visegrád 4 Member States (V4)<sup>218</sup> the likeliest scenario is that *Coman* is, at least for now, a faraway afterthought in the minds of Member State politicians and their constituencies.

The most important lesson to draw from *Coman* is the realization that the decisions emerging from the minutia of determinations from EU's highest court are not simply the pedantic musings of legal professors handed down

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218. Czech Republic, Hungary, Poland, and Slovak Republic. These states gained notoriety as a bloc of EU states stridently opposed to EU policy, especially concerning the Refugee Crisis in the mid-2010s.

from an ivory tower in Luxembourg, but consequential determinations of law with real tangible policy decisions and direct impact on the most personal aspects of people's lives. Indeed, there are none to whom this reality has manifested with more salience than to the EU citizens who have just begun to exercise their newfound rights to safeguard their families and futures under the protection of European Union law.