



Freedom of movement and same-sex couples in Romania

The Coman case – a briefing note

In December 2016, the Romanian Constitutional Court referred several questions to the Court of Justice of the European Union (CJEU). The case in question involves a same-sex couple, whose marriage (contracted in Belgium) was not recognised in 2013 by the Romanian authorities when they tried to exercise their freedom of movement and establish long term residency in Romania.

Throughout 2016, while that particular case had been making its way through the court system, a signature collection campaign had been operating in parallel. Initiated in 2015 by the Coalition for Family (23 NGOs purporting to support family values), the campaign's overall aim is to amend the constitutional definition of family, limiting it to the marriage of a different-sex couple.

All of these factors combined to put the situation faced by same-sex couples in Romania firmly in international headlines. This briefing note aims to clarify what the court case is all about and what the CJEU referral means in practice.

(This briefing note is for general information purposes. For more information on the case itself and the subsequent submissions, please contact ILGA-Europe and ACCEPT)

The legal situation for same-sex couples in Romania

Same-sex couples in Romania [currently have no legal protection](#). They do not have the right to enter civil marriage or civil partnerships together. No cohabitation agreements are provided for in law and there are no legal guarantees for *de facto* families.

Article 277(2) of the Romanian Civil Code states: “Same-sex marriage contracted abroad, whether between Romanian citizens or by foreign citizens, is not recognised in Romania.” So even when same-sex couples have married abroad, if they travel to Romania they are not recognised as family. This can have serious consequences. For example, if one of the partners is ill and requires medical care, their partner is not legally recognised as a spouse and may not be involved in decisions around treatment.

The Coman case

This was the scenario faced by Adrian Coman and Clai Hamilton. Adrian (a Romanian national) and Clai (a US citizen) were married in 2010. The wedding took place in Belgium. Two years later, after the Romanian consulate in Belgium refused to transcribe their marriage certificate in the national registry, the couple asked Romanian immigration authorities about the legal procedure to ensure that Clai would be able to join Adrian, and to live and work in Romania, as the spouse of an EU citizen. Romanian immigration authorities notified Clai he cannot apply for a residency permit as a spouse because Romania does not recognise same sex marriages conducted abroad. If Adrian has been married to an American woman, she would have immediately been granted a residency permit under EU rules on freedom of movement.

The couple, considered this differentiated treatment to be discriminatory and, with the support of ACCEPT Association, sued the General Inspectorate for Immigration and the Ministry of Internal Affairs in 2013, and deliberations over which court would hear the case at first instance began. In 2015, the first hearings took place in Bucharest. Human rights lawyer Iustina Ionescu, who represents the Coman-Hamilton family and ACCEPT, challenged the constitutionality of Civil Code Article 277, which denies recognition to married same-sex couples married abroad in Article 277(2), while Article 277(4) notes that freedom of movement provisions remain applicable.

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For further information on [Adrian and Clai's family](#), as well as details on ACCEPT Association, please see the [Who are Adrian, Clai and ACCEPT document](#) prepared by ACCEPT Association.

The Constitutional Court process

The Coman case (*Coman, Hamilton and ACCEPT Association v. General Inspectorate for Immigration and Ministry of Home Affairs*) was referred to the Constitutional Court in December 2015 for constitutional review. The Romanian Constitutional Court first heard the case on 20 July 2016, on the same day the Court declared that the citizens' initiative (excluding same-sex couples from the definition of family in the Romanian fundamental law¹) was constitutional.

On 20 July 2016, the couple argued their constitutional right to family life and non-discrimination were violated. The Court postponed its decision until 20 September, and on that date it decided to hold another hearing, in October 2016. On 27 October, the couple and ACCEPT asked the Constitutional Court to refer questions for a preliminary ruling to the CJEU.

On 29 November, the Constitutional Court decided it has an obligation to refer questions to CJEU, and suspended national proceedings until the Luxembourg court had an opportunity to clarify the meaning of the term `spouses` in EU rules on freedom of movement. This was the first time that this Court has referred questions to the CJEU.

Five NGOs filed submissions with the Constitutional Court of Romania in April and July 2016. The specific NGOs involved are the AIRE Centre (Advice on Individual Rights in Europe), the European Commission on Sexual Orientation Law (ECSOL), FIDH (Fédération Internationale des Ligues des Droits de l'Homme), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and the International Commission of Jurists (ICJ).

The submissions are available at: <http://bit.ly/ComanIE> (Coman and others (before the Constitutional Court of Romania) and Coman and others (supplementary submissions)).

¹ The citizens' initiative is still being analyzed in the Romanian Parliament, the legislative body trusted to decide if the proposed constitutional amendment should be put to a vote in a national referendum. The process is ongoing with no deadline in sight.

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For a full timeline of the case, please see [ACCEPT's document Case Timeline](#) and <http://coman.acceptromania.ro>

What is a reference for a preliminary ruling to the CJEU?

Judges in national courts in any of the EU's member states can refer questions to the CJEU. Those courts of last resort, which issue decisions that cannot be appealed, have an obligation to refer questions to CJEU when the application of EU rules in a national legal context is unclear. The questions must strictly refer to the application of EU law. The CJEU will then give an answer to this question – it cannot make a ruling on any other parts of the original case. **The reference for a preliminary ruling seeks clarification of existing EU law, and whether these laws are being uniformly applied throughout the EU.** The CJEU can refuse to answer a question if it does not fall within its competence, but on principle the CJEU must answer the question put to it².

What are the questions in the Coman case?

The Constitutional Court of Romania referred four questions for a preliminary ruling. (*The full list of questions is provided in the annex at the end of this briefing.*)

The CJEU has been asked to define the term “spouse” in Article 2(2)(a) of the Free Movement Directive (2004/38)³ and whether it includes same-sex couples. If it does include same-sex couples, Member States would be required to provide the right of residence to a same-sex spouse of a Union citizen on the same footing as they would for a different-sex spouse.

Alternatively, the reference seeks to clarify whether the same-sex spouse of a European Union citizen, would qualify as unregistered partner or any other dependent family member under Article 3(2)(a) of the Directive 2004/38. This would mean, a down-graded status compared to spouse, and the host Member State would only be required to facilitate entry and residence of the spouse and not grant them a derivative right.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3AI14552>

³ Citizens Directive (2004/38), governing free movement and residence rights of EU citizens, and family reunification rights of migrant Union citizens with their third-country national family members

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The legal team

The legal team representing Adrian Coman, Clai Hamilton and ACCEPT Association is comprised of human rights lawyer Iustina Ionescu, anti-discrimination legal expert Romanița Iordache, human rights law professor Robert Wintemute. White & Case LLP provided pro bono support to ACCEPT in respect of the oral hearing in the Coman case before the Court of Justice of the European Union. (For further details, see the ACCEPT document entitled [The legal team.](#))

What is the prospect of a positive ruling from the CJEU?

While it is difficult to predict the outcome of the case, the following considerations provide encouraging grounds for a possible positive result.

- The term spouse in the Free Movement Directive (2004/38) must be applied and interpreted in the light of Article 21 of the Charter of Fundamental Rights of the European Union, which states: “[a]ny discrimination based on ... sexual orientation shall be prohibited”. Interpreting “spouse” as including only a “different-sex spouse” and excluding a “same-sex spouse” would amount to discrimination based on sexual orientation.
- There are existing CJEU judgments that are of relevance to the Coman case. (For example, the freedom of movement case “Cassis de Dijon”, and *Surinder Singh* (case C-370/90) and *Roman Angonese* (case C-281/98) on returning nationals.) In line with these cases, the CJEU should interpret “spouse” in Directive (2004/38) as meaning “spouse according to the law of the home member state of the EU citizen who is exercising their rights under the Directive in the host member state, or the law of the member state in which a national of the host member state has exercised their free movement rights (in this case Belgium) prior to returning to the host member state (in this case Romania)”.
- It is also relevant that 22 of the current 28 EU member states already recognise a same-sex partner in their immigration legislation- with the exception of Latvia, Lithuania, Poland, Slovakia, Romania and Bulgaria.
- Article 52(3) of the Charter of the Fundamental Rights stipulates that the Charter should be interpreted as providing at least the same protection as the case law of the European Court of Human Rights (ECtHR) under the European Convention on Human Rights. The ECtHR has ruled in *Oliari and Others v. Italy* (2015) that

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Council of Europe member states must provide “a specific legal framework” to recognise the unions of same-sex couples. In the subsequent judgment of *Taddeucci and McCall v. Italy* (2016) the Court established that member states must (as part of this framework or otherwise) provide a means for a same-sex partner who is not a national of the member state (and not an EU citizen) to qualify for a residence permit that would otherwise be restricted to a different-sex spouse. Similarly, in *Pajić v. Croatia* (2016) the ECtHR found that discrimination solely based on sexual orientation between unmarried same-sex couples and unmarried different-sex couples in obtaining family reunification constitutes prohibited discrimination under the Convention.

In light of these three judgments of the ECtHR, and the fact that three out of four EU member states would be likely to grant a residence permit to Mr. Coman’s husband, there is a good chance that the Court of Justice will interpret EU law as requiring Romania to grant him a residence permit.

This case is about the right to free movement of EU citizens, one of the four fundamental freedoms guaranteed within the EU.

While it touches upon recognition of same-sex marriages and/or unions, the case would not place an obligation on Member States to do that (outside the freedom of movement and residence matter) if they do not wish so.

What would a positive CJEU decision mean in practice?

A positive judgment from CJEU would clarify the term “spouse” in Article 2(2)(a) of the Directive 2004/38 to include same-sex couples.

This would cover unions of EU citizens and their spouses (third-country nationals as in the present case). Interpreting the term spouse as including same-sex partners, would require all EU Member States to recognise such unions for the purposes of freedom of movement and residence in the EU. The directive currently leaves couples in legal uncertainty and the judgment of the CJEU could finally remove a major obstacle to the freedom of movement of EU citizens who are workers and have same-sex spouses.

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How could the CJEU ensure a neutral (and thus inclusive) interpretation of the notion of spouses in the context of freedom of movement, across various member states, each having its own societal challenges and various degrees of LGBTI acceptance?

According to the legal team at ACCEPT and the information they have gathered, there are four major possibilities:

1. The CJEU decides the term “spouses” should have an autonomous definition in the context of EU law, a definition which includes same-sex spouses. This autonomous definition may, however, be difficult to enact by the Court, as several member states ban same-sex marriage in their constitution.
2. The CJEU may decide it does not need to give the term “spouses” an autonomous definition in EU law for the purpose of freedom of movement, but rather suggest that the immigration authorities have to define it by reference to the law of the state in which the marriage was entered into. Practically, the CJEU could ask member states to simply recognize as such any marriage that is valid under the law of another member state – which would amount to actual recognition. Member states would not have the possibility to refuse the right to move freely across the EU to same sex couples.
3. The CJEU may decide the principle of mutual recognition could be applied in the field of family relationships for the purpose of freedom of movement. Thus, the application of this principle means the term spouse will be defined by reference to the host Member State recognising marriages entered into or registered in the home Member State, subject to overriding reasons of general interest. This, in practice, could mean that member states currently offering no legal protection and recognition for the purpose of freedom of movement to married same-sex couples could continue their practice, unless each would be individually challenged on the fact that traditional values cannot constitute overriding reasons of general interest. Therefore, such a decision would continue the current legal uncertainty faced by married same-sex couples, and their treatment as second-hand European Citizens.
4. Although highly unlikely, the CJEU may decide the term “spouses” should be defined by deferring to the law of the host Member State, meaning countries such as Poland or Romania could continue to refuse residency rights to third-country nationals who are married to same-sex European citizens intending to

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reside there, thus maintaining the legal uncertainty and making freedom of movement an illusory right.

What would a positive CJEU decision mean for the applicants in this case?

The Romanian Constitutional Court will need to take into account the CJEU decision, in order to establish if the Romanian Civil Code ban on the recognition of same-sex marriages conducted abroad is constitutional. If the RCC finds the ban unconstitutional, the RCC will strike the article from the Civil Code.

The lower instance court which referred the case to the RCC may ask national immigration authorities to grant Mr. Hamilton a residence permit, on the same terms as to the different-sex spouse of an EU citizen, which would give him the right to work. After five years of residence in Romania, he would qualify for permanent residence.

A judgment at the level of the CJEU in favour of Mr. Coman and his husband would not mean that Romania must necessarily recognise their marriage for all purposes of Romanian law, many of which fall outside the scope of EU law or that Romania and other member states should immediately legalise same sex marriages.

Can Romania choose NOT accept a ruling from the CJEU?

No. European Union law has supremacy over all parts of Romanian law, including the Constitution and the Civil Code. The Romanian courts must set aside (refuse to apply) all provisions of Romanian law that conflict with EU law, as interpreted by the Court of Justice.

Romania could ignore the ruling but then the European Commission would bring infringement proceedings under Article 228 of the EC Treaty. It provides for the imposition of penalty payments or lump sums on a Member State which fails to comply with a Court judgment as a breach of its obligations under EU law.

Individuals could also apply for damages against a Member State which has breached EU law. They would do that through the domestic courts of the relevant Member State.

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How soon can we expect a decision from the CJEU?

The RCC lodged the application initiating proceedings on 30 December 2016, and the case has been registered by the CJEU on 17 March 2017.

The hearing, requested by Adrian, Clai and ACCEPT Association, will be held on 21 November 2017, at 9:30 a.m.⁴. The hearing will be held by the Grand Chamber of the CJEU, a format reuniting 15 judges from different member states. The Grand Chamber only hears those cases it finds vital for the legal order and the future of the European Union - last year, less than 8% of all cases were heard by the Grand Chamber. The President of the Court, Honourable Judge Koen Lenaerts, will also preside over the hearing.

The average timeframe to get a ruling at the CJEU is about 18 months. The Court of Justice has ruled in four cases involving same-sex couples since 2008 and took between 15 and 28 months to do so in each case. However, we expect a decision significantly sooner, as the CJEU scheduled the hearing only 9 months after registering the application of the RCC.

How can the media attend a hearing at CJEU?

The court makes available the following information for journalists who wish to follow a case hearing⁵:

“Journalists are requested to use the entrance to the ERASMUS building situated in rue du Fort Niedergrünwald. Hearings are generally held in public.

Journalists wishing to attend a hearing or the delivery of a judgment are requested to **apply for accreditation in advance using the [accreditation form](#)**.

A press room is available to accredited journalists.

⁴ CJEU Court Calendar

https://curia.europa.eu/jcms/jcms/Jo1_6581/en/?dateDebut=21/11/2017&dateFin=21/11/2017

⁵ Guide for journalists, CJEU, https://curia.europa.eu/jcms/jcms/Jo2_7054/en/

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Sound and picture recordings in the courtrooms are permitted only when judgments or Advocates' General's Opinions are delivered or when a case is called. Photographers and cameramen may not move around the courtroom to take pictures.

Where there is a strong media interest, the number of cameras allowed in the courtroom will be reduced and a pool will be set up. The use of flash guns, mobile telephones, laptops or other electronic equipment is not permitted in the courtrooms.”

Getting in touch

For media requests regarding the plaintiffs (Adrian Coman, Claiborn Hamilton and ACCEPT Association) and the legal team, please get in touch with Teodora Roseti-Ion-Rotaru, Communication Officer, ACCEPT Association, at +40723503162, teodora@acceptromania.ro.

Media requests for ILGA-Europe should be directed to: Emma Cassidy, Communications and Media Officer at emma@ilga-europe.org or +32 2 609 56 50

Annex: Questions put forward for preliminary ruling to the CJEU by the Romanian Constitutional Court in the case of Coman and Others: C-673/16

"1. Does "spouse" in Article 2(2)(a) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, include a spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State?"

2. If so, do Articles 3(1) and 7(1) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence on its territory for a period of longer than three months to a spouse of the same sex as the European Union citizen?"

3. If the answer to the first question is negative, can the spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State, qualify as "any other family member," as per art. 3(2)(a) of Directive 2004/38/EC or as "the partner with whom the EU citizen has a stable relationship, which can be properly documented," as per 3(2)(b) of

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Directive 2004/38/EC, with the related obligation of the host Member State to facilitate entry and residence, even if the host Member State does not recognize same sex marriages and does not provide for any alternative form of legal recognition, such as civil partnership?

4. If the answer to the third question is affirmative, do art. 3(2) and 7(2) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence on its territory for a period of longer than three months to a spouse of the same sex as the European Union citizen?"

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