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Type A Report – Developments linked to the Court's judgment in *Coman*

Recognition of same-sex marriage as marriage for the purpose of Dir. 2004/38/EC

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List of abbreviations and definitions

Abbreviation	Definition
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

1. Introduction

In its judgment of 5 June 2018 in the case of *Coman*,[1] the Court of Justice of the European Union (CJEU) decided that a same-sex[2] marriage legally concluded in a Member State has to be recognized for the purpose of granting a derived residence right for a third-country national spouse in accordance with Directive 2004/38/EC where the EU citizen sponsor returns with the spouse to his Member State of nationality in accordance with Article 21 TFEU.

In this analysis, there will be primary discussion as to what the most recent legal developments are concerning same-sex marriage in the European legal orders. Hereafter, an analysis of the *Coman* judgment will follow in which the issues that Member States may be confronted with will be highlighted. This will be followed by an overview of measures and judgments that have been passed on the subject in Member States subsequent to the *Coman* judgment.

1.1. Developments in the European legal orders

As a first point in this section, ECtHR case-law since 2010 concerning the question as to whether states are under an obligation to introduce same-sex marriage will be discussed. This will be followed by CJEU case-law concerning the recognition of same-sex marriage established abroad, including the *Coman* judgment.

No duty to introduce same-sex marriage

In its judgment of 4 June 2010 in *Schalk and Kopf v. Austria*,[3] the European Court of Human Rights (ECtHR) stated that even though the institution of marriage had undergone major social changes since the adoption of the Convention, there is no European consensus regarding same-sex marriage.[4] The ECtHR considered that Article 12 ECHR had to be interpreted in light of the newly amended Article 9 of the European Charter of Fundamental rights, which does not specifically mention "men and woman" and, consequently, Article 12 ECHR would be applicable to same-sex couples. However, the court considered that as matters stand, the question whether to extend the rights of marriage to same-sex couples is still subject to regulation by the national law of Contracting States.[5] Importantly, this judgment of the ECtHR further recognized that same-sex relationships do not solely fall within the ambit of Article 8 ECHR under the heading of private life, but also under family life.[6] The applicants had also complained, based on Article 8 in conjunction with Article 14 ECHR, that there was no access to a status alternative to marriage. While the Court did not assess in detail the differences between marriage and the form of registered partnership that Austria had introduced in the meantime, it did hold that States enjoy a certain margin of appreciation as regards the exact status conferred by means of recognition alternative to marriage.

[1] C-673/16 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2018:385.
[2] In this study the terms 'same-sex' and 'opposite-sex' are used to describe couples of the legal same gender or of legal different genders, since these are the terminologies used in legislation and case-law. This is not an endorsement for gender binarism. Since the issue of gender identification is outside of the scope of this study, the position of transgender, queer and inter-sex persons will not be considered.
[3] ECtHR judgment of 04.06.2010 in *Schalk and Kopf v. Austria*, Appl. No. 30141/04.
[4] ECtHR *Schalk and Kopf v. Austria*, Appl. No. 30141/04, para. 54.
[5] ECtHR *Schalk and Kopf v. Austria*, Appl. No. 30141/04, para. 61.
[6] ECtHR *Schalk and Kopf v. Austria*, Appl. No. 30141/04, para. 94.

In follow-up cases the assessment that there still remains no European consensus regarding the introduction of same-sex marriage has been continuously confirmed. First in *Hämäläinen v. Finland*, which concerned the question as to whether the marriage as a *de facto* same-sex marriage, after the gender change of one of the spouses, could continue to exist. The ECtHR considered "*that the applicant's claim, if accepted, would in practice lead to a situation in which two persons of the same sex could be married to each other. […] no such right currently exists in Finland. Therefore the Court must first examine whether the recognition of such a right is required in the circumstances by Article 8 of the Convention."*[7] For this reason the court considered that it should refer to its case-law on the right of same-sex couples to marry and came to the conclusion that the Schalk and Kopf ruling still applied and therefore no obligation could be placed on Contracting States to establish such marriage.[8] The court, furthermore, considered that the differences in Finland between marriage and the registered partnership primarily concerned parentage, adoption and the family name and that these exceptions only apply in so far that they have not been settled beforehand. The court, therefore, considered that the differences are not such as to involve essential changes to the applicant's legal situation and she would in practice enjoy the same legal protection under a registered partnership as had been afforded to her in marriage.[9]

The most recent ECtHR case on the question of the right to marry is *Chapin and Charpentier*[10]. It reaffirmed *Schalk and Kopf* and *Hämäläinen* in that there is no duty upon the State to extend the rights of marriage to same-sex couples, especially not when another civil status is available.[11]

Also, in its *Coman* judgment, the CJEU stated that a person's status is a matter of competence reserved to the Member States and it is therefore subject to the decision of the Member States whether or not to extend the rights of marriage to couples of the same sex.[12]

Right to a status other than marriage

In *Oliari v. Italy*, the question was raised whether same-sex couples have a right to a status other than marriage, if a Contracting State has not introduced same-sex marriage. An important factor in this case was that in *Schalk and Kopf*, as noted above, the ECtHR had decided that same-sex relationships do not only fall within the ambit of private life, but also within that of family life. In *Oliari*, in essence, the ECtHR considered that where family life is lived, the state must provide for a status which enables a couple to prove their relationship without having to prove family life. This status is therefore protected by private life.[13]

[7] ECtHR *Hämäläinen*, Appl. No. 37359/09, para. 70.
[8] ECtHR *Hämäläinen*, Appl. No. 37359/09,, para. 91. It has been argued in the literature that the ECtHR should not have compared it to establishment of same-sex marriage, but should have examined whether Article 12 ECHR also includes a right to stay married. See also: D'AMICO, M.; NARDOCCI, C. (2016), "LGBT rights and the way forward: the evolution of the case law of the ECtHR in relation to transgender individuals' identity", *ERA Forum* (2016) 17:191–202, p. 199.
[9] ECtHR *Hämäläinen*, Appl. No. 37359/09,, para. 83.
[10] ECtHR judgment of 09.06.2016, *Chapin and Charpentier v. France*, Appl. No, 40183/07.
[11] ECtHR *Chapin and Charpentier*, Appl. No, 40183/07, para. 36-39.
[12] C-673/16 *Coman*, para. 37.
[13] DE GROOT, D.A.J.G. (forthcoming), *Civil Status Recognition in the European Union* (PhD Thesis, Bern). The author shows that all civil statuses are primarily governed by private life. Due to the fact that the ECtHR accepted that individuals are free to choose their sexual partners based on private life, this mend that in turn these couples in time would create family life. This family life would have to be proven all the time. Consequently, the state is again under an obligation to create a form of civil

The ECtHR considered that only in very limited instances could same-sex couples gain basic rights under Italian law and mostly only after a judicial process the outcome of which was not always certain. The ECtHR therefore decided "*that in the absence of marriage,"* – which the court noted may still be reserved for opposite-sex couples – *"same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance."*[14] In deciding what rights should be attached to this status, the court reiterated that Contracting States have a wide margin of appreciation.[15] In the literature on *Oliari* it is often noted that nothing specific has been said by the court on the scope and form of the status, which left room for considering that a cohabitation agreement might suffice. However, in *Oliari* the ECtHR also stated that these forms of cohabitation agreements "*fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship*." The court also stated that basic rights should be ensured[16] and that cohabitation may not be required as a condition for the establishment of such a status.[17]

Interestingly, AG Jääskinen already in 2010 in the case *Römer* stated that, *"It is the Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals, an obligation to recognise their right to conduct a stable relationship within a legally recognised commitment."*[18] AG Jääskinen, however, also considered that it was outside the scope of Union law.

Recognition of a same-sex marriage established abroad

As stated above, the ECtHR has decided in multiple cases that there is no obligation on Contracting States to extend the rights of marriage to same-sex couples. However, if they refrain from doing so, the Contracting States are under an obligation to provide for another status that ensures that same-sex couples can prove their relationship and which guarantees certain rights.

In this context, the ECtHR decided the case *Orlandi and Others v. Italy* on 14 December 2017.[19] The case concerned five same-sex couples who had married abroad[20] and wanted their marriages to be recognized in Italy.

status, which would exempt these couples from proving family life. Rights like family reunification – which is a family life right – are attached to this status. The same principle applies to other civil statuses, like parentage. See as an example for the latter: ECtHR judgment of 28.06.2007 in *Wagner and JM.W.L. v. Luxembourg*, Appl.No. 76240/01.

[14] ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para 174.

[15] ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para. 177

[16] Mentioning non-exhaustive moral and material support, maintenance obligations and inheritance rights.

[17] ECtHR *Oliari*, Appl. No. 18766/11, 36030/11, para. 169.

[18] Opinion of AG Jääskinen deliver on 15.07.2010 in C-147/08 *Römer* ECLI:EU:C:2010:425, para. 76.

[19] ECtHR judgment of 14.12.2017 in *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12.

[20] Two couples had married in Canada, one couple in the United States (California) and two couples in the Netherlands.

The ECtHR first stated that Contracting States are still free to decide whether or not to provide for same-sex marriage. However, it also considered that it had held in *Oliari* that Contracting States are under an obligation to provide for a status for same-sex couples, if they do not provide for same-sex marriage. [21] The ECtHR considered that there is still no consensus as to same-sex marriage and consequently, "*the States must in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad."*[22] The ECtHR has elaborated on it, stating that "*the Court can accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognise from a Convention perspective. Indeed the refusals in the present case are the result of the legislator's choice not to allow same-sex marriage - a choice not condemnable under the Convention. Thus, the Court considers that there is also a State's legitimate interest in ensuring that its legislative prerogatives are respected and therefore that the choices of democratically elected governments do not go circumvented."*[23] However, the ECtHR then considered that by not having provided for any legal framework before the introduction of civil unions, which occurred after the *Oliari* judgment, there was nothing that would have allowed for the recognition of the foreign marriages in some form, as such the state had left the applicants in a "legal vacuum."[24] Consequently, the state had failed to strike a fair balance as to the competing interest by failing "*to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions."*[25]

Thus, according to the *Orlandi* judgment, the ECtHR considers that there was no duty to recognize a same-sex marriage as a marriage, if such a marriage was not provided for under domestic law. However, another legal status, , must be available for same-sex couples, including a framework which allows for foreign same-sex marriages to be recognized within the scope of such a status.

In its *Coman* judgment the CJEU came to a rather different conclusion on the question as to whether same-sex marriage had to be recognized as marriage for the purpose of the residence rights derived from Article 21 TFEU.

The *Coman* judgment addressed a two-fold issue. On the one hand, it concerned the case of a returner, meaning an EU citizen who had made use of their free movement rights and later returned to their Member State of nationality. Since Article 3(1) of Directive 2004/38/EC stipulates that it is only applicable to EU citizens residing in a Member State of which they are not a national, it is a matter of consistent case-law that Article 21 TFEU is applicable in such cases and that the Directive has to be applied by analogy.[26]

The Court considered that the term 'spouse,' as used in Article 2(2)(a) of the Directive, refers to a person joined to another person by the bonds of marriage and that its meaning is gender-neutral and consequently also covers same-sex spouses of the EU citizens concerned.[27]

[21] ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 192.
[22] ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 205.
[23] ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 207.
[24] ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 209.
[25] ECtHR *Orlandi and Others v. Italy*, Appl. No. 26431/12, 26742/12, 44057/12, 60088/12, para. 210.
[26] C-673/16 *Coman*, para. 18-24.
[27] C-673/16 *Coman*, para. 34-35.

The Court furthermore considered that whereas Article 2(2)(b) of the Directive concerning registered partners contains a reciprocity clause, Article 2(2)(a) does not. The Court considered that "[i]*t follows that a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.*"[28]

The Court admitted that a person's status is a matter for Member States to decide upon and that Member States are therefore free to decide whether or not to allow same-sex marriage. However, the Member States must still comply with EU law. Allowing Member States to grant or refuse entry to the third-country national same-sex spouse of an EU citizen, where the marriage was concluded in another Member State, on grounds that same-sex marriage did not exist in the Member State of destination, would result in a patchwork, where it would vary from Member State to Member State whether a right of residence was to be guaranteed, dependant on the relevant national provisions on marital law. The Court considered that such a situation would be at odds with its case-law and would deprive the Directive of its effectiveness.[29]

The Court stated that "[i]*t follows that the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. Indeed, the effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse.*"[30]

Concerning the argument of public policy, the Court considered that the EU has to respect the national identity of the Member States in accordance with Article 4(2) TEU. However, it also considered that it has ruled that the concept of public policy has to be interpreted strictly where it concerns free movement rights and that a uniform interpretation is required. It can therefore only be invoked if it concerns a genuine and sufficiently serious threat to a fundamental interest of society. The Court, however, considered that the recognition of a same-sex marriage solely for the purpose of residence rights does not undermine the institution of marriage, as it does not require that the Member State provide for such marriages under national law. Consequently, the argument of public policy was not considered as a valid justification.[31]

The Court therefore ruled that, as a matter of EU law, a same-sex marriage concluded in one Member State has to be recognized by another Member State for the purpose of granting a right of residence to the spouse that is derived from the EU citizen. Consequently, this judgment concerns 'single purpose recognition,' whereas the *Orlandi* judgment of the ECtHR concerned recognition for general effect.

Furthermore, where *Orlandi* applied to a marriage contracted in any state, the *Coman* judgment seemed to restrict its scope to marriages concluded in a Member State during genuine residence there.

[28] C-673/16 *Coman*, para. 36.
[29] C-673/16 *Coman*, para. 37-39.
[30] C-673/16 *Coman*, para. 40.
[31] C-673/16 *Coman*, para. 42-46.

This could, however, also be attributed to the 'return' scope of the case.[32] It should be noted here that in *Metock* the CJEU stated that "*Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.*"[33] This was repeated by the Court in *Deniz Sahin*.[34] A differentiation as to the acceptance of foreign marriage certificates based on the respective genders of the spouses and for the purpose of a residence right derived from Directive 2004/38/EC would be a violation of Article 21(1) Charter of Fundamental Rights.[35]

It also has to be considered that since the marriage might not have to be recognized for civil purposes, it will also not be considered to exist for such a purpose. This could consequently mean that if a same-sex marriage is not recognized for civil purposes as a registered partnership, it will also have the effect that it cannot be considered an impediment to concluding another (opposite-sex) marriage or entering into a registered partnership in the host Member State.

2. Developments in Member States without any status for same-sex couples

The *Coman* judgment had the largest impact in Member States that have not provided for any equivalent status for same-sex couples. Many of these Member States have constitutional prohibitions on same-sex marriage. Since the *Coman* judgment has been referred to in most of these Member States, the highest courts have been required to rule on similar cases.

2.1. Romania

Applicable law

Article 277(2) of the new Romanian Civil Code provides that same-sex marriages contracted abroad whether between Romanian citizens or by foreigners are not recognized. Article 277(4) of the new Romanian Civil Code, limits the scope of this Article stating that the free movement rules shall not be impeded.

Emergency Ordinance No. 194/2002

Law No. 119/1996

Developments since the *Coman* judgment

The preliminary reference in the *Coman* judgment of the CJEU originated from the Constitutional Court of Romania (*Curtea Constituțională* – CCR). Article 277(2) of the Romanian Civil Code provides for a specific prohibition on the recognition of same-sex marriages and registered partnerships concluded abroad, by Romanian nationals. Article 277(4) CC provides that this will not impede free movement rights.

[32] See the wording used in C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* ECLI:EU:C:2014:135 and C-230/17 *Altiner and Ravn* ECLI:EU:C:2018:497.
[33] C-127/08 *Metock*, ECLI:EU:C:2008:449, para. 99 (Emphasis added by DdG).
[34] C-551/07 *Deniz Sahin*, ECLI:EU:C:2008:755, para. 32.
[35] See also: JESSURUN D'OLIVEIRA, H.U. (2018), "Het Europese Hof omarmt eindelijk het huwelijk van mensen met hetzelfde geslacht - Een stap in de goede richting", *Nederlands Juristenblad* 2018/1426, pp. 2060-2064.

In its judgment of 18 July 2018,[36] which was published on 3 October 2018,[37] the Romanian Constitutional Court decided by a majority that these provisions were constitutional in so far as they permit the granting of residence rights.

The CCR also considered that Romania was under a positive obligation based on Article 8 ECHR and implicitly from Article 7 CFR, to provide an equivalent status for same-sex couples which would provide for legal recognition and protection.[38]

In a separate opinion to the CCR judgment,[39] while considering the case inadmissible on procedural grounds, some points of note were made as to other laws that were not challenged, but which will have a major impact. These issues are of a technical nature and mostly relate to certain aspects of procedure in applying for a residence right.

The issue relates mostly to the fact that Romanian citizens can only provide Romanian documents or foreign documents which have been transcribed by the Romanian authorities.

In the case of a visa application being required to obtain the derived right of residence, Article 46(17) of Emergency Ordinance No. 194/2002 as amended by paragraph 67 of Law No. 157/2011 states: "*The visa application submitted by the persons mentioned in par. (16) lit. a)[40] -e) will be accompanied by the marriage certificate issued by the Romanian authorities or transcribed according to the law or, as the case may be, by the proof of the kinship or the quality of a partner.*"

However, paragraph 41(7) of Law No. 119/1996 states that "*It is forbidden to transcribe / register civil certificates or extracts issued by foreign authorities regarding same-sex marriage or civil partnerships concluded or contracted abroad, either by Romanian citizens or by foreign citizens.*"

All of these articles have, as far as the author is aware, not been amended since the judgment of the CCR. Consequently, even though a right of residence may be guaranteed, and both Article 277(2) and 277(4) CC should be applied in such a way that a right to residence should be granted, many hurdles still exist preventing one from being able to submit the required documents to apply for a document certifying the residence right, especially when it concerns a returning Romanian national.[41] While technically it may be possible to have the same-sex marriage established abroad recognized for the purpose of residency rights, it is unclear whether such a marriage would at all be recognized as a matter of civil law, and if so, whether as a marriage or rather as a "partnership."

2.2. Bulgaria

In Bulgaria the Administrative Court of Sofia decided on case 3500/2018, which concerned a French national married to an Australian national, who had married each other in France during 2016.

[36] CCR, Decizia Nr. 534 din 18 iulie 2018 referitoare la excepția de neconstituționalitate a dispozițiilor art.277 alin.(2) și (4) din Codul civil. Nr.Dosar 78D/2016.
[37] Monitorul Oficial, Partea I nr. 842 din 03.10.2018.
[38] CCR, Decizia Nr. 534/2018, para. 29.
[39] By judge Pivniceru.
[40] Article 46(16)(a) of the Emergency Ordinance concerns spouses of Romanian nationals.
[41] On the website of the IGI it still mentions that a marriage certificate must originate from the Romanian authorities. If the marriage has been concluded abroad, it must have been transcribed according to the law.

This judgment was appealed before the Supreme Administrative Court.[42] The government considered that the *Coman* judgment only applied to returning nationals under Article 21 TFEU, but not as regards Directive 2004/38/EC. The Supreme Administrative Court did not accept this argument and decided that "*the applicant is a member of the family of an EU citizen, and it should be explicitly emphasized that solely for the purpose of granting a derivative right of residence to a third country national - marriage between persons of the same sex, concluded in another Member State, in accordance with its law, shall be without prejudice to the institution of marriage in the host Member State, in this case the Republic of Bulgaria, as defined in national law.*[43]

Consequently, the Supreme Administrative Court has followed the *Coman* judgment to the letter.

2.3. Latvia

Applicable law

Article 110 of the Latvian Constitution states:

"The State shall protect and support marriage - a union between a man and a woman, the family, the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence."

Article 2^1 of the Immigration Law[44] reads as follows:

> Art 2^1. (1) The citizens of the Union and their family members are subject to this Law Article 4, third, fifth, sixth, eighth and ninth parts of Article 5 of the third paragraph of Article 10, Article 11, Article 13, second and fourth parts of the 14th, 15, 16, 17,, 18 of the second parts 20, 21,, 46, fifth paragraph, 50^4, 50^5, paragraph, Article 51, Part Five 52, 53, 54, 54. ^{1}, 55, 56, 57, 58, 59, 59, ^{1}, 59, ^{2}, 59, ^{3}, 59, ^{4}, 59, ^{5}, 60. Articles 65, ^{1}, 65, ^{2}, 65, ^{3}, 65, ^{4}, 65, ^{5}, 66, 67 and 70 rules.
> (2) The Cabinet shall determine the procedures by which citizens of the Union and their family members enter and stay in the Republic of Latvia, as well as restrictions on the stay of such persons.

Directive 2004/38/EC has been implemented in Latvia based on Article 2^1(2) of the Immigration Law by Cabinet Regulation No 675 of 30 August 2011 on the procedures for the entry and residence in the Republic of Latvia of citizens of the Union and their family members."[45]

Para. 37.2 of Cabinet Regulation No 675 provides that, "In order to apply for a registration certificate or a permanent residence document if the family member is a Union citizen or a residence card or a permanent residence card if the family member is not a Union citizen, the family member of the Union

[42] Decision of the Supreme Administrative Court of 24.07.2019, No. 11351.
[43] "*заявителката е член на семейството на гражданин на ЕС като изрично следва да се подчертае, че единствено за целите на предоставянето на производно право на пребиваване на гражданин на трета страна – бракът между лица от един и същ пол, сключен в друга държава членка, в съответствие с нейното право, не накърнява института на брака в приемащата държава – членка, в случая Република България, който е дефиниран в националното право.*"
[44] Imigrācijas likums. https://likumi.lv/ta/id/68522
[45] Ministru kabineta 2011. gada 30. augusta noteikumi Nr. 675 "Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā". https://likumi.lv/ta/id/235499

citizen shall present a valid travel document and submit: 37.2 a document certifying the fact of marriage, relationship or registered partnership."[46]

Developments since the *Coman* judgment

As far as the author is aware, there have been no new policy documents or legal developments in Latvia concerning the *Coman* judgment. There have been instances reported after the judgment, where a residence right in Latvia was granted to the same-sex spouse.[47] How the application procedure is applied is unclear.

2.4. Lithuania

Applicable law

Article 38(3) of the Lithuanian Constitution states that, "*Marriage shall be concluded upon the free mutual consent of man and woman.*"

Article 43(1)(5) of the Law on the Legal Status of Aliens provides that, "*A temporary residence permit may be issued to a foreign national in the event of family reunification if* 5) *the foreign national's spouse or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit;*"

Developments since the *Coman* judgment

According to information received from the Lithuanian authorities, before the *Coman* judgment same-sex marriages were not recognized at all.

In its judgment of 11 January 2019 the Constitutional Court of Lithuania[48] decided on;

> "whether Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Republic of Lithuania's Law on the Legal Status of Aliens, insofar as the said item does not stipulate that, in the event of family reunification, a temporary residence permit in the Republic of Lithuania may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a person – a citizen of the Republic of Lithuania – residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on concluding a same-sex marriage or same-sex registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family, is in conflict with Paragraphs 1 and 4 of Article 22, Paragraph 1 of Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution of the Republic of Lithuania, as well as with the constitutional principle of a state under the rule of law."

The Constitutional Court summarized the legal issues extensively, declaring that;

[46] "Lai pieprasītu reģistrācijas apliecību vai pastāvīgās uzturēšanās apliecību, ja ģimenes loceklis ir Savienības pilsonis, vai uzturēšanās atļauju vai pastāvīgās uzturēšanās atļauju, ja ģimenes loceklis nav Savienības pilsonis, Savienības pilsoņa ģimenes loceklis uzrāda derīgu ceļošanas dokumentu un iesniedz: 37.2. dokumentu, kas apliecina laulības, radniecības vai reģistrētu partnerattiecību faktu;"

[47] https://www.delfi.lv/delfi-plus/latvija/es-tiesas-spriedums-laulato-draugu-adriana-un-kleija-izcinita-kopabusana.d?id=50124366.

[48] Case 16/2016, KT3-N1/2019

"16. Summarising the impugned legal regulation, laid down in Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, and the related legal regulation relevant in connection with this constitutional justice case, it should be noted that:
– the item in question lays down one of the grounds for granting a temporary residence permit for reasons of family reunification (within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law) to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association – in cases where the spouse of such a foreign national or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit; a temporary residence permit is granted on the said grounds to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association in order to allow the said foreign national, who has concluded a marriage or registered partnership with a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit, to enter the Republic of Lithuania and reside there for the purposes of preserving the family;
– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of the Law, or any other provisions of the Law does not explicitly stipulate that a foreign national and his/her spouse or the person with whom the foreign national has concluded a registered partnership and who is a citizen of the Republic of Lithuania or a foreign national holding a residence permit must be persons of opposite sexes;
– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, or any other provision of the Law does not explicitly stipulate that a marriage or registered partnership of a foreign national with a citizen of the Republic of Lithuania or with a foreign national holding a residence permit must be recorded in the Civil Registry Office of the Republic of Lithuania;
– under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national in the event of family reunification if the foreign national (save the exception envisaged in Paragraph 3 (wording of 9 December 2014) of Article 26 the Law) complies with the general conditions for the issue of a residence permit, as laid down in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law, where the said general conditions are linked with a valid health insurance, sufficient means of subsistence, and the possession of suitable residential premises, or if a person who is joined for the purpose of family reunification ensures, in accordance with the procedure established in legal acts, that his/her family member to whom a temporary residence permit is issued complies with the said conditions; under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification, a temporary residence permit may be refused to a foreign national on the general grounds (established in Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law) for refusal to grant a foreign national a residence permit, such as those related, inter alia, to a possible threat to national security, public order (public policy), or public health, or non-compliance with the above-mentioned general conditions for granting a temporary residence permit, or the conclusion of a marriage of convenience or a registered partnership of convenience;
– the impugned legal regulation is to be interpreted taking into account the provisions of the legal acts of the European Union, inter alia, the Directive, that are implemented by the Law."

The Constitutional Court, in 2011, had already considered that the protection of the family unit, as stipulated in the Constitution not only governs marriage and that the concept of family can also encompasses other formats. The court considered that;

> "under the Constitution, inter alia, the constitutional principle of a state under the rule of law, the Seimas, as the institution of legislative power, when exercising its constitutional powers and regulating family relationships by means of legal acts, must pay regard to the requirements stemming from the Constitution, inter alia, those of the equality of the rights of persons, as well as respect for human dignity and private life; under the Constitution, inter alia, the constitutional principle of a state under the rule of law, in the course of regulating family relationships by means of laws and other legal acts, the duty arises for the Seimas, as the institution of legislative power, to take account of the specific character of these relationships, inter alia, the particularities of the subjects of these relationships, as the said particularities objectively determine the necessity to define these subjects in the context of those concrete relationships the participants of which they appear to be (the Constitutional Court's ruling of 28 September 2011)."

The Constitutional Court further held that the right to return is guaranteed by Article 32 of the constitution;

> "35. Summarising the constitutional regulation from the aspect relevant in the case at issue, it should be noted that, under the Constitution, inter alia, the constitutional principle of a state under the rule of law, the legal regulation governing family reunification in the context of the free movement of persons within the EU and migration must be based on the principle of respect for human dignity and the private and family life of a person, as well as the principle of the equality of the rights of persons. Establishing this legal regulation, under the Constitution, inter alia, the constitutional principle of a state under the rule of law, the legislature must also pay regard to the specificity of the relationships in question, inter alia, the specificity of the free movement of persons within the European Union and migration, inter alia, to the fact that the family of a citizen of the Republic of Lithuania, of a citizen of any other EU Member State, or of a third-country national lawfully residing in Lithuania, whose family members wish to enter Lithuania and reside there for reasons of family reunification, may have been founded not only in the Republic of Lithuania, but also under the law of another EU Member State or under that of a third country, which may also allow marriages or registered partnerships, inter alia, between two persons of the same sex."
>
> "35.1. In view of the aspect relevant in the constitutional justice case at issue, it should also be noted that, under the Constitution, inter alia, the above-mentioned provisions of Paragraphs 2 and 3 of Article 21, Paragraphs 1 and 4 of Article 22, Article 29, and Paragraphs 1 and 2 of Article 38 thereof and the constitutional principle of a state under the rule of law, the legislature must lay down such a legal regulation related to the free movement of persons within the EU and migration that would provide for the right to reunification for a family founded by two same-sex persons in another state through a legally concluded marriage or registered partnership, i.e. the right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state. With respect to a foreign national who is a family member of a citizen of the Republic of Lithuania or a family member of a non-national Lithuanian entering Lithuania for residence, with whom the foreign national has lawfully concluded a marriage or registered partnership in another state, the said duty of the legislature also arises from the provisions of Article 32 of the Constitution."
>
> it should be held that, although the objective to protect the constitutional concept of marriage, as concluded upon the free mutual consent of a man and a woman, as well as the historically

> established model of the family, which is based on this concept, may be considered constitutionally important, under the Constitution, such an objective may not serve as justification for a legal regulation whereby, solely on the grounds of gender identity and/or sexual orientation, a foreign national would not be allowed to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state, i.e. such a legal regulation whereby a foreign national would be allowed to enter Lithuania and reside there exclusively in cases where he/she has lawfully concluded a marriage or registered partnership in another state with an opposite-sex citizen of the Republic of Lithuania or an opposite-sex foreign national lawfully residing in Lithuania.
>
> 35.3. In this context, it should be noted that the above-mentioned duty stemming from the Constitution for the legislature to lay down such a legal regulation related to the free movement of persons within the EU and migration that would provide for the right to reunification for a family founded in another state by two same-sex persons through a legally concluded marriage or registered partnership may not be interpreted as changing the concept of marriage consolidated in Paragraph 3 of Article 38 of the Constitution.

The Constitutional Court, therefore, concluded, that;

> "41.3. […], contrary to what is claimed by the petitioner, under the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national who is not a citizen of a Member State of the European Union or the European Free Trade Association not exclusively in cases where an opposite-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit, but also in cases where a same-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit."

The Constitutional Court of Lithuania has thus gone further than *Coman*, by extending the judgment not only to same-sex marriages concluded in an EU Member State, but in any state and also by extending it to registered partnerships. Furthermore the Constitutional Court has extended the scope of *Coman* to third country national sponsors and as such has not only reserved the right to EU citizens.

According to information received from the Lithuanian authorities, this judgment is also applied to cases where the sponsor is not a Lithuanian national, but a citizen of another Member State. The authorities also considered that the marriage recognized for the purpose of a residence right, would also be recognized to all other purposes. The authorities considered that private international law is applicable to the consideration of the validity of the marriage. To this purpose, the law of the country of celebration is applied.

2.5. Poland

Applicable law

Article 18 of the Polish Constitution states "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

Art. 1 § 1 of the Family and Guardianship Code, contained in Title I on "Marriage," Section I also on "Marriage," defines a marriage as concluded when a man and a woman present at the same time submit to the head of the registry office a declaration that they are getting married.

Art. 7 of the Act of 4 February 2011. Private international law, foreign law shall not apply if its application would have effects contrary to the basic principles of the legal order of the Republic of Poland.

Article 107(3) of the Act of November 28, 2014 Law on Marital Status Files[49] provides that transcription of marriage certificate shall be refused, if it is contrary to the basic principles of the legal order of the Republic of Poland.

Ordinance of the Minister of the Interior of January 29, 2015 regarding sample documents issued in the field of marital status registration contains the specimen documents concerning transcription of foreign marriage certificates.[50]

Developments since the *Coman* judgment

According to information received from the Polish authorities, before the *Coman* judgment a same-sex marriage would have been accepted as proof for a durably attested relationship. Since the judgment, no new policy documents have been issued, nor has the law been changed. The authorities considered that term 'spouse' in the implementation of Directive 2004/38/EC is gender neutral and can, therefore, be interpreted in line with the *Coman* judgment. The authorities also stated that a same-sex marriage would not be recognized for any other purposes and would also not be considered an impediment to conclude a marriage with a third party. The authorities also stated that only same-sex marriages concluded in a Member State would be considered and, consequently, do not grant a right of residence on the basis of a same-sex marriage concluded in a third country.

There have been no instances where the *Coman* judgment has been invoked in the case law of Polish courts where it concerned the issue of a residence card. However, there have been multiple instances where the judgment was invoked concerning the transcription of a foreign marriage certificate for a same-sex couple. Only in one situation, where it concerned the transcription of a marriage certificate for the purpose of the acquisition of nationality by a child of the couple, was this considered problematic.[51] In all other instances, where it solely concerned the transcription of the marriage certificate, this transcription was refused.

[49] Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego
[50] Rozporządzenie Ministra Spraw Wewnętrznych z dnia 29 stycznia 2015 r. w sprawie wzorów dokumentów wydawanych z zakresu rejestracji stanu cywilnego
[51] II SA / After 1169/17 - Judgment of the Provincial Administrative Court in Poznań; Supreme Administrative Court judgment of October 10 2018, II OSK 2552/16

The main grounds for refusal lay in the fact that there is a separate column for the man and the woman to register their details on a marriage certificate. The courts considered it impossible to register a man's data in the woman's column or visa versa, as required for a same-sex marriage. When concerning a child born in such a marriage this issue was solved by not registering the other parent and leaving the space blank. Such a method for a marriage certificate was considered impossible, since the marriage shows a connection between two people, in which case no one can be anonymous.[52]

Different courts have often mentioned that according to Art. 1138 of the Code of Civil Procedure, foreign official documents, and thus also documents denoting marital status, have evidential value as well as Polish official documents. The evidentiary power does not depend on entering the document into the Polish marital records. A foreign civil status file proves that a given event has taken place and produces legal effects in accordance with the rules provided for a given legal system. This does not mean, however, that under Polish law, the probative value of this document may have the same effect as a Polish marital certificate, and thus can act to document the occurrence of a specific event using a Polish official document. If the content of a foreign marital status certificate is contrary to the existing legal order in Poland, then there is a premise to waive the application of the principle of equivalent probative value of a foreign marital status certificate, based on Art. 7 of the Private International Law Act, expressing the so-called public order clause, according to which foreign law shall not apply if its application would have effects contrary to the basic principles of the legal order of the Republic of Poland and which is also explicitly stated in art. 107 p.a.s.c.

In accordance with Art. 107 point 3 above. of the Act, the head of the registry office may refuse to transcribe a document if the transcription would be contrary to the basic principles of the legal order of the Republic of Poland. In other words, the existence of a contradiction as to the legal effects documented by a civil status file between the domestic and foreign order allows for the transcription not to be undertaken, in order to avoid a situation where a Polish civil status document would recognise an event occurring under another law, but which could not shape the legal situation of the given person or persons in the light of the Polish legal order. The previously mentioned public order clause thus sets a barrier for the free use of a foreign marital status document due to respect for the values protected under national law, understood as the basic principles of this order, i.e. the fundamental principles of the socio-political system, i.e. constitutional principles, but also primary rules governing individual branches of law.[53]

One can understand from this that while, contrary to the situation in Romania, for example, in Poland where the transcription of the marital status document is not necessarily a requirement, the effects of it might still be considered against *ordre public*.

2.6. Slovakia

Applicable law

With amendment 161/2014 Article 41(1) of the Constitution of Slovakia was changed to read, "*Marriage is a unique union between a man and a woman. The Slovak Republic protects marriage in all*

[52] IV SA / Wa 2717/18 - Judgment of the Provincial Administrative Court in Warsaw, para. VII.6
[53] IV SA / Wa 2618/18 - Judgment of the Provincial Administrative Court in Warsaw from 01/08/2019,

of its aspects and supports its welfare. Marriage, parenthood and family are under the protection of the law. Special protection of children and juveniles is guaranteed."[54]

Developments since the *Coman* judgment

While no laws have been changed and no judgments given concerning residence rights for same-sex couples, the Ministry of Interior has confirmed that it will abide by the judgment.[55] While stating that it will not recognize same-sex marriages or registered partnerships, they will give effect to selective consequences as compatible with the Slovakian legal order.

The Ministry of Interior has even considered that it may be possible to claim more beneficial inheritance rights in court, if such rights had been opted for.

The Slovak authorities stated that private international law would be applied to the marriage. The law of the place of celebration would consequently be applicable to the validity of the marriage. When applying for a residence right, a decision or confirmation of the conclusion of the marriage would have to be provided. If the marriage has been concluded in a third-country, all documents have to be accompanied with apostille or higher verification.

3. Analysis

While most Member States without any status for same-sex couples state that they will adhere to the *Coman* judgment, there are still many issues left unresolved.

The primary issues that still remain concern the practical ability to file the applications for the required residence documents. In this instance there are generally two types of issue: (1) a requirement for the documents of nationals to be transcribed, and (2) other issues concerning forms.

Concerning the requirement for transcription, this requirement can only affect returning nationals, whereas for other EU citizens such an issue would, at least in first instances, not arise. This requirement involves, that in order to give effect to or to prove the existence of a given civil status, such a status must have been entered in the national civil status register. If such a civil status, like same-sex marriage, cannot be recognized under national law, such a registration is impossible. However, the documents certifying the marriage as registered under national law are obligatory to accompany any application for the residence documents of a national's spouse.

This remains an issue in Romania, for example. While the Constitutional Court has ruled, as previously addressed, that the same-sex spouse of a national has a right to residence based on EU law, the forms and laws have not been adapted to allow for this. While it has been considered that the immigration laws have to be interpreted in such a way that the right of the same-sex spouse is guaranteed, this interpretation has not yet been applied to the laws on the registration of civil status documents, in which an explicit prohibition of the registration of same-sex marriages continues to exist. Consequently, it is impossible to legally apply for a residence document for the same-sex spouse of a national, since it is impossible to have this marriage transcribed in the national registries. While transcription as such is not a violation of EU law, obliging the transcription of civil status of one's own nationals in all circumstances, even where such a transcription is impossible can result in a violation of EU law, should

[54] Translation from https://www.constituteproject.org/constitution/Slovakia_2014.pdf.
[55] https://domov.sme.sk/c/20842954/slovensko-neuznava-homosexualne-manzelstva-reaguje-na-rozhodnutie-eu.html

Union law oblige the recognition of the foreign documents in order to acquire a certain right derived from EU law.

The second issue concerning forms relates mainly to the issue described in Poland, where registration of foreign same-sex marriages was primarily refused on grounds that it was not possible to register the data concerning one of the spouses, since it would have to be registered in a column reserved for the other gender. While the Polish authorities have notified that they will interpret the term spouse in a gender neutral manner for the purpose of a residence right it is unclear how this will be applied in practice, since such gender specific forms will be considered an obstacle. Technically seen, this issue can be classified as a matter of administrative convenience which cannot be a ground of justification to undermine free movement law.[56] However, since all cases in Poland concerned the transcription of same-sex marriages into the national registers for the purpose of establishment of parentage, which is not strictly an EU competence,[57] it is yet only a matter of speculation as to whether Poland will adhere fully to the judgment as to the grant of residence permits.

Furthermore, there are still many legal questions that remain unanswered.

While some Member States (Romania, Bulgaria) have expressly stated that it concerns same-sex marriages contracted in another Member State, others (especially Lithuania) have given it a wider interpretation, also applying it to marriages contracted in third countries.

Concerning the scope of the judgment, most Member States have considered that the same-sex marriage will only be considered for the purpose of the right of residence. The Ministry of Interior of Slovakia has, however, also considered that this may be extended to inter-personal rights, like inheritance rights, where a more preferential system has been opted for. The Ministry, though, also stated, that this would have to be decided by national courts.

The issue is, however, that Article 24 of Directive 2004/38 guarantees equal treatment in all aspects within the scope of the EU Treaties, it is yet unclear whether the *Coman* judgment will also extend to other rights, beyond the right to reside, where married couples may be placed in a more favorable situation. This could concern matters of taxation or housing benefits, among others. For the moment, it seems that in the Member States discussed, such an extension of the judgment will not be applied. It should also be noted on this point that certain Member States that were not described in this report, that do provide for a registered partnership, will automatically transform a foreign same-sex marriage concluded by one of its nationals into such a registered partnership.[58] If the registered partnership is treated as equivalent to marriage for the purpose of Article 2(2)(b) of the Directive, then such a 'down-grading' of status will not make a difference as to the acquisition of the residence right. However, depending on future cases at the CJEU as to the scope of the *Coman* judgment to other matters, this may change.

It should also be noted, that in some Member States that provide for same-sex marriage, it is required that a marriage concluded in a third country by an EU citizen, has to be first registered in the Member

[56] C-353/06 *Grunkin and Paul v Standesamt Niebull*, [2008], ECR I-7639, para. 35-36.
[57] The refusal to grant the nationality and thus EU citizenship as a result of the refusal to recognize the parentage would fall within the scope of Articles 20 and 21 TFEU.
[58] E.g. Italy: based on Article 32-bis of the Private International Law Code (legge 31 maggio 1995, n. 218 as amended by DECRETO LEGISLATIVO 19 gennaio 2017, n. 7). The *Unione Civile* is treated equivalently to marriage as to Directive 2004/38/EC.

State of which the EU citizen is a national. If the Member State of which one is a national neither provides an option for same-sex marriage nor does it register marriages concluded abroad, it becomes impossible to acquire rights from the marriage.[59] One could argue that the refusal to accept same-sex marriages conducted in a third country could in this case constitute (in)direct discrimination based on nationality, as it can only affect nationals from Member States that do not provide for same-sex marriages.

Furthermore, in none of the Member States considered, was same-sex marriage recognized as a registered partnership for other purposes, since in the Member States examined no such partnership exists. Since in all of the Member States it has been explicitly stated that the marriages will not be recognized for civil purposes, one must wonder whether it could constitute an impediment to contract another (opposite-sex) marriage in the host Member State.

One could wonder whether the Court could have stated something similar as in *K.B.*[60], being that while a breach of the ECHR continues, conflicting rules or conditions should be set aside while applying Union law. This would mean that while a Member State, *in casu* Romania, continues in its practice of not creating registered partnerships as required by *Oliari* which would bring the same-sex TCN spouses within the group of privileged family members with a right to family reunification,[61] it is failing in its obligations according to Article 8 ECHR and, therefore, based on Union law it must bring these persons within this group. The only option for doing this is by recognizing same-sex marriages, as one can hardly do it via application of Art. 2(2)(c) or (d).[62] This does not mean, though, that the Court cannot apply such an argumentation in the future.

While the *Coman* judgment as such might not have a very great impact, the many implementing measures and changes that a correct application of it will require, will have far reaching impact in the Member States that do not provide for any status for same-sex couples. Follow-up cases will come, asking whether 'single purpose recognition' for residence provided by *Coman* will also be applicable to other rights.

[59] See: European Citizen Action Service (2018), *Freedom of Movement in the EU: A Look Behind the Curtain*, ECAS, p. 14 and 49.

[60] C-117/01 *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, ECLI:EU:C:2004:7

[61] The right to family reunification is an obligatory right attached to a registered partnership, if this is the maximum status available to same-sex couples. The ECtHR stated in *Taddeucci and McCall* that "*it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship which placed the applicants in a different situation from that of unmarried heterosexual couples […]. Even supposing that at the relevant time the Convention did not require the Government to make provision for same-sex persons in a stable and committed relationship to enter into a civil union or registered partnership certifying their status and guaranteeing them certain essential rights, that does not in any way affect the finding that, unlike a heterosexual couple, the second applicant had no legal means in Italy of obtaining recognition of his status as "family member" of the first applicant and accordingly obtaining a residence permit for family reasons*." ECtHR judgment of 30.06.2016 in *Taddeucci and McCall v. Italy*, Appl.No. 51362/09, para. 95 (Emphasis added by DdG).

[62] Article 2(2)(c) and (d) concern direct descendants and dependent direct relatives in ascending line, which are vertical connections. It would be rather irregular to recognize a same-sex marriage, being a horizontal connection, through a parentage paragraph, which is a vertical connection. It should be noted here though that, especially in the United States, before the introduction of same-sex marriage, in order to have a legal family relationship, there was the praxis where one of the partners in a same-sex relationship would adopt the other partner. When same-sex marriage was introduced with *Obergefell v. Hodges* these couples had the problem when trying to marry that the adoption is an impediment to marriage. Therefore, the adult adoption has to be annulled first, which is rather complicated as some codes did not provide for that option. See e.g. *In re Adoption of R.A.B.*, 2016 PA Super 295, 153 A.3d 332, 336.