

**Text of presentation by Robert Wintemute, Professor of Human Rights Law,  
King's College London (UK), at the Workshop on LGBTI+ Rights in the EU,  
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Thank you very much for the invitation to present the Study I have co-authored with Professor Tryfonidou. My focus will be on same-sex married couples and same-sex registered partners, in situations where there is an exercise of EU free movement rights.

### **SAME-SEX MARRIED COUPLES**

I would like to start by going back 18 years to the Santini Report of the 23<sup>rd</sup> of January 2003, on what later became Directive 2004/38 on free movement of EU citizens and their family members. If the Commission and the Council had accepted the European Parliament's proposed amendments, the Directive would read today as follows:

"Family member" means: ... the spouse, irrespective of sex, according to the relevant national legislation; ... [and] the registered partner, irrespective of sex, according to the relevant national legislation<sup>1</sup> ...

The *Coman & Hamilton* case would not have been necessary, because "spouse" would clearly include a same-sex spouse, and same-sex registered partners would be treated like spouses. Instead, the final version of the Directive reads:

"Family member" means ... the spouse [not defined]; ... [and] the partner with whom the Union citizen has contracted a registered partnership, ... if the legislation of the host Member State treats registered partnerships as equivalent to marriage ...

The assumption in 2004 was probably that no Member State would ever be required involuntarily to recognise a same-sex couple for the purpose of a residence permit, because the "spouse" category would never be interpreted as including a same-sex spouse (only 2 of 25 Member States allowed same-sex couples to marry in May 2004), and because the "registered partner" category only applies to Member States in which a registered partnership law for same-sex couples already exists.

In 18 of 25 Member States (in May 2004), where same-sex couples did not have access to marriage or registered partnership, the "consolation prize" for same-sex couples would be the category "partner with whom the Union citizen has a durable relationship" or "unregistered partner", which Professor Tryfonidou will discuss. This category does not give rise to an automatic right of residence, but only to a still poorly defined obligation to "facilitate ... residence".

Between May 2004 and May 2018, the rights of same-sex couples under the legislation of the Member States changed dramatically. By May 2018, they had (or would soon have) access to

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<sup>1</sup> See <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0009+0+DOC+PDF+V0//EN&language=EN>, p. 14.

marriage in 14 of 28 Member States (50%) and access to marriage or registered partnership in 22 of 28 Member States (78.6%). The extent of reform to national legislation made it much easier for the Court of Justice to interpret “spouse” in the Directive as including a same-sex spouse, in its *Coman & Hamilton* judgment of the 5<sup>th</sup> of June 2018.

*Coman & Hamilton* clearly removed a major obstacle to the free movement of rainbow families in the EU. But has Mr. Hamilton received his Romanian residence permit? Unfortunately, the answer today is still “No”, more than 2 years and 9 months after the judgment of the Court of Justice.

The failure of the Romanian authorities to comply with the judgment, by issuing residence permits to Mr. Hamilton and other same-sex spouses in the same position, is a serious challenge to the supremacy of EU law. The Commission has yet to start an infringement procedure against Romania in the Court of Justice.

The combined inaction of Romanian and Commission officials has forced Mr. Coman and Mr. Hamilton to take their case to the European Court of Human Rights, which communicated their application to the Government of Romania on the 9<sup>th</sup> of February 2021. It should be a matter of great embarrassment to the EU institutions that an EU citizen and his husband have had to turn to the Strasbourg Court to enforce their rights under EU law.

The Study recommends that the Commission take enforcement action against Romania and any other Member State that is found not to be complying with the *Coman & Hamilton* judgment, by refusing to grant a residence permit to the same-sex spouse of an EU citizen.

### **SAME-SEX REGISTERED PARTNERS**

In some Member States, such as Italy, same-sex couples have access only to registered partnership (known as civil union in Italy) and not to marriage. The Study found that, because Article 2(2)(b) of Directive 2004/38 makes recognition contingent on the host Member State’s legislation on registered partnership (there is no such condition in the case of marriage), same-sex registered partners risk not being recognised for the purpose of a residence permit if they move to 8 Member States. These Member States are 5 of the 6 that do not offer marriage or registered partnership to same-sex couples (Bulgaria, Latvia, Poland, Slovakia, and Romania, but not Lithuania if a decision of the Constitutional Court is consistently applied), and a further 3 Member States that allow same-sex couples to marry but have never had a registered partnership law (Portugal), have repealed the law (Ireland), or seem unwilling to recognise a registered partnership from another Member State (France).

The Study recommends that the obstacle to the free movement of same-sex registered partners in Article 2(2)(b) of the Directive (the “legislation of the host member state” requirement) be removed. The Commission should bring judicial review proceedings under Article 263 TFEU against the European Parliament and the Council, seeking the annulment of this condition as indirect sexual orientation discrimination contrary to Article 21 of the Charter of Fundamental Rights of the EU (compare Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v. Conseil des ministres*, 1 March 2011).

## RIGHTS OF SAME-SEX SPOUSES AND REGISTERED PARTNERS BEYOND RESIDENCE PERMITS

The *Coman & Hamilton* judgment requires recognition of a same-sex marriage (or implicitly a same-sex registered partnership) “for the sole purpose of granting a derived right of residence to a third-country national”. Non-recognition in many areas of national law other than immigration law, such as family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law (e.g. hospital visitation and consultation), might “preclude or deter” a same-sex couple from moving to another Member State, and therefore constitute an obstacle to their freedom of movement. To remove this obstacle, the Study recommends that the Commission propose (on the basis of Articles 18, 21(2), 46, 50(1), and 59(1) TFEU, the same legal basis as for Directive 2004/38) legislation requiring all Member States to recognise a marriage (or a registered partnership) formed in another Member State for the purposes of national law, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the European Court of Human Rights.