The "Coman" Case (C-673/16): Some reflections from the point of view of private international law

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On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of '*spouse*' within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code, marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary ruling. One of the questions referred to the ECJ was as follows:

Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as "PIL"). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras. 33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was

the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a 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 (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage' (paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term 'spouse', as the Advocate General did in his observations. In fact, the use of the words 'recognition of marriage' must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal

provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of 'spouse' within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a 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 (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L'interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General's opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely 'spouse' (Article 2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre

ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply the autonomous interpretation of the term 'spouse' instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term 'spouse' shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by

simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.