

# Opinion of AG de la Tour in C-713/23, Trojan: A step forward in the cross-border recognition of same-sex marriages in the EU?

*Dr. Carlos Santaló Goris, Postdoctoral researcher at the University of Luxembourg, offers an analysis of the Opinion of Advocate General de la Tour in CJEU, Case C-713/23, Trojan*

## **From Coman to Trojan**

On 5 June 2018, the Court of Justice of the European Union ('CJEU') rendered its judgment in the case C-673/16, *Coman*. In this landmark ruling, the CJEU decided that Member States are required to recognize same-sex marriage contracted in another Member State to grant a residence permit to the non-EU citizen spouse of an EU citizen under the EU Citizens' Rights Directive. The pending case C-713/23, *Trojan* goes a step further than C-673/16, *Coman*. On this occasion, the CJEU was asked whether EU law requires a civil registry of Poland, a Member State that does not provide any form of recognition to same-sex couples, to transcribe the certificate of same-sex marriage validly contracted in another Member State. A positive answer would imply that the same-sex marriage established under German law would be able to deploy the same effects as a validly contracted marriage under Polish law. While the CJEU has not yet rendered a judgment, on 3 April 2025, Advocate General de la Tour issued his Opinion on the case. While the CJEU might decide differently from AG de la Tour, the Opinion already gives an idea of the solution that might potentially be reached by the CJEU. This post aims to analyse the case and explore its implications should the CJEU side with AG de la Tour.

## **Background of the case**

Mr. Cupriak-Trojan, a German-Polish citizen, and Mr. Trojan, a Polish national, got married in Germany, where they used to live. Then, they moved to Poland, where they requested to transcribe the German marriage certificate in the Polish civil registry. Their request was rejected on the ground that marriage is not open

to same-sex couples under Polish law. It was considered that the transcription of the certificate would go against Polish public policy. Upon the rejection, the couple decided to contest the decision before Polish administrative jurisdiction. They considered that refusal to transcribe the certificate contravenes the right to freedom of movement and residence enshrined in Article 21 of the Treaty on the Functioning of the European Union ('TFEU') and Article 21 of the EU Charter of Fundamental Rights ('EUCFR') in light of the principle of non-discrimination under Article 7 of the EUCFR. In other words, when they decided to move to Poland, the non-recognition of their marriage under Polish law hindered their right to freedom of movement and residence. Eventually, the case reached the Polish Supreme Administrative Court, which decided to submit the following preliminary reference to the CJEU:

'Must the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7 and Article 21(1) of [the Charter] and Article 2(2) of Directive [2004/38], be interpreted as precluding the competent authorities of a Member State, where a citizen of the Union who is a national of that State has contracted a marriage with another citizen of the Union (a person of the same sex) in a Member State in accordance with the legislation of that State, from refusing to recognise that marriage certificate and transcribe it into the national civil registry, which prevents those persons from residing in the State in question with the marital status of a married couple and under the same surname, on the grounds that the law of the host Member State [(18)] does not provide for same-sex marriage?'

### **AG de la Tour's analysis**

AG de la Tour starts his analysis by acknowledging that matters concerning the civil status of persons depend on the national law of the Member States. However, the right of freedom of movement and residence imposes on Member States the recognition of the civil status of persons validly established in other Member States. In this regard, he recalls that the CJEU adopted a two-fold approach to civil status matters. In matters concerning an EU citizen's identity (e.g. name or gender), Member States are required to include those identity details in the civil registries. However, in civil status matters concerning ties legally established in other Member States (e.g. marriage or parenthood), there is no such obligation, and recognition of those ties is limited to the 'sole purpose of exercising the rights which the person concerned derived from EU law' (para. 29).

In the present case, AG de la Tour considers that the non-recognition of the same-sex marriage amounts to a 'restriction on the exercise of the right' to freedom of movement and residence under EU law (para. 32). Subsequently, he proceeds to examine whether such restriction is compatible with the right for respect for private and family life guaranteed by Article 7 of the EU Charter of Fundamental Rights ('EUCFR'). He examines this issue through the lens of the European Court of Human Rights ('ECtHR') case law on Article 8 of the European Convention of Human Rights ('ECHR'), the equivalent provision of Article 7 of the EUCFR. It should be reminded that the EUCFR expressly acknowledges in its Article 53 the ECHR and the ECtHR case law as the term of reference for establishing the minimum standards for its interpretation. In this regard, the ECtHR has repeatedly stated that Article 8 of the ECHR requires its contracting States to provide same-sex couples with a 'specific legal framework'. Nonetheless, contracting States are not required to legalize same-sex marriages and enjoy a margin of discretion to decide how the recognition of the same-sex couple provided.

Based on the referred ECtHR case law, it appears that the non-recognition would constitute a restriction on the right to freedom of movement and residence incompatible with the EUCFR. At this point, the question arises whether such recognition should be done by entering the same-sex marriage certificate into the civil registry. Here, AG de la Tour considers that EU law does not require the marriage licence transcription. As he mentioned at the beginning of his reasoning, 'Member States' obligations in terms of civil status relate only to the determination of a Union citizen's identity' (para. 38). In his view, the registration of foreign marriage certificate 'falls within the exclusive competence of the Member States' (para. 42). Member States can thus refuse the transcription of the marriage certificate if the recognition of the same-sex marriage can be achieved through other means. This discretion is given to Member States to decide whether they enter a foreign same-sex marriage in their civil registry or not would also be in line with the ECtHR case law, which acknowledges States a wide margin of appreciation on how to recognize foreign same-sex marriages.

In the case of Poland, since there is no kind of legal framework for same-sex couples in this Member State, the only possible solution appears to be the registration of the marriage certificate. Therefore, as an exception, and given the specific Polish circumstances, AG de la Tour considers that Poland would be

required to entry into its civil registry of the same-sex marriage.

### **Recognition yes, transcription no**

The fil rouge of AG de la Tour's reasoning was to find a manner to provide recognition for same-sex marriages without overstepping on the Member States' competences in matters concerning the civil status. Finding that right to freedom of movement and residence entails an obligation to transcribe the marriage certificate would not be 'in strict compliance with the division of competences between the European Union and the Member States' (para. 55). That would imply that an understanding of the 'freedom of movement and residence of Union citizens which may be exercised without limit so far as concerns personal status' (para. 56). Such a solution that would depart from the well-established CJEU case law on this matter, moving 'from an approach based on the principle of free movement of a Union citizen that is limited to his or her identity, to an approach based solely on the right to respect for his or her family life' (para. 57). This why AG de la Tour adopted a solution that allows recognition without the need for transcription of the marriage licence in the civil registry.

Regarding the recognition of same-sex marriages, it should also be noted that AG de la Tour leaves the Member States with wide discretion on how same-sex marriage is recognized. This means that the marriage does not necessarily need to be recognized as a marriage. They could be recognized in the form of a civil partnership. That is, for instance, the solution that exists under Italian law. Article 32bis of the Italian Private International Law Act provides that 'a marriage contracted abroad by Italian citizens with a person of the same sex produces the effects of the civil union regulated by Italian law'. Based on AG de la Tour's reasoning, had Poland had a similar, he would have accepted the recognition of a same-sex marriage in the downgraded form of a civil partnership and the transcription of the marriage certificate would have been required.

### **Promoting the effectiveness of the ECtHR case law through EU law**

On its reasoning, AG de la Tour strongly relies on the ECtHR case law. This does not come as a surprise. Other LGBT rights cases involving civil status matters and the right to freedom of movement contain similar references to the ECtHR jurisprudence. The most recent example is the C-4/23, *Mirin* in which the CJEU found that Romania had to recognize the gender change that occurred in another

Member State. The main basis of this ruling was the ECtHR judgment, in which Romania had been found in violation of Article 8 of the ECHR because Romanian law did not provide a clear procedure to obtain legal gender recognition (*X and Y v. Romania*).

Such reliance on the ECtHR case law also serves to expose that Member States do not duly implement the ECtHR rulings. Poland has been found twice in violation of Article 8 of the ECHR for not providing same-sex couples with any kind of formal legal recognition (*Przybyszewska and Others v. Poland* and *Formela and Others v. Poland*). While the Polish government has proposed an act introducing a civil partnership regime open to same-sex couples, it has not been approved yet. Furthermore, such an initiative only appeared after a more progressive government emerged out of the 2023 Polish general election. The situation is similar in other Member States such as Romania or Bulgaria. These Member States have been also called out by the ECtHR (*Buhuceanu and Others v. Romania* and *Koilova and Babulkova v. Bulgaria*) for not providing any sort of legal recognition for same-sex couples. However, unlike in Poland, no legislative changes are expected on this matter in the near future. If the CJEU adopts AG de la Tour's solution, all these Member States would have to allow the recognition of same-sex marriages contracted in other Member States, even if in the downgraded form of civil partnership. Unlike the Council of Europe with regards to the ECtHR rulings, the EU counts with more effective means to ensure that CJEU rulings are followed by Member States. Formally, the Commission could even trigger an infringement procedure against them in case they do not comply with the judgment in C-713/23, *Trojan*. Therefore, EU law would become the indirect path to make Member States comply with the ECtHR rulings.

### **The potential for reverse discrimination**

The solution proposed by AG de la Tour entails the risk of recreating a situation of reverse discrimination of same-sex couples that have not left Poland against those who have obtained certain legal status for the relationship in other Member States while exercising the right to freedom of movement. A same-sex couple moving who married or entered a civil partnership in a Member State would be able to attain the recognition of their marriage or civil partnership in a Member State that does not provide any legal framework for same-sex relationships. This is as far as EU law can go in this matter, given domestic family law matters strictly fall within the scope of Member States competencies.

It should also be noted that going to another Member State to get a marriage licence because the Member State where the same-sex couple resides does not provide any legal recognition would not be sufficient to achieve the recognition of such marriage in the Member State of residence. As AG de la Tour pointed out in his Opinion in C-4/23, *Mirin*, a close link needs to exist between the person and the Member State where the legal gender recognition is obtained (para. 71 and 72). Otherwise, there would be an abuse of EU law. The same would apply in the case of a marriage. Going to another Member State with the only purpose of obtaining a marriage licence and circumventing domestic law that does not provide a legal status for same-sex couples. The same-sex couple would have to establish a close link with the Member State where they seek to contract their marriage.