



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Romania
<b>Title:</b>	Romanian Constitutional Court issues decision on recognition of same sex marriage in the context of free movement of citizens
<b>Date:</b>	5 September 2018
<b>Expert:</b>	Iordache, Romanița
<b>Context</b>	
<b>Issue at stake:</b>	Recognition of same sex marriages
<b>Ground of discrimination:</b>	Sexual orientation
<b>Source:</b>	Decision of the Romanian Constitutional Court
<b>Field:</b>	Other – freedom of movement, right to residence, right to family life
<b>Applicable law:</b>	Art.277 (2) and Art. 277 (4) of the Romanian Civil Code

### Content

**Case development:** Adrian Coman (a Romanian citizen) and Robert Clabourne Hamilton (a US citizen) were married in 2010 in Belgium. Two years later, the couple applied to the Romanian authorities for a residence permit so that the US citizen could join the Romanian citizen, to live and work in Romania, as his spouse. This request was refused under the justification that the Romanian Civil Code prohibits in Art. 277(2) the recognition of same-sex marriages or partnerships. The couple filed a discrimination complaint in 2013 against the Romanian Immigration Inspectorate. For two years the couple, represented by the NGO ACCEPT Romania, went before different courts for deliberations over which court would hear the case as court of first instance. In 2015, the first hearing took place in Bucharest before Sector 5 Court of First instance. In the first instance court, the Coman-Hamilton family challenged the constitutionality of the Civil Code Article 277(2) denying recognition to married same-sex couples, and Article 277(4) which provides for a theoretical exception in case of the application of freedom of movement.

At the request of ACCEPT and Coman-Hamilton family, the Romanian Constitutional Court (RCC) suspended the case and referred four questions for a preliminary ruling<sup>1</sup> to the

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<sup>1</sup> Questions referred by the RCC to the CJEU under C-673/16: "1. Does "spouse" in Article 2(2)(a) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, include a spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State?  
2. If so, do Articles 3(1) and 7(1) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence on its territory for a period of longer than three months to a spouse of the same sex as the European Union citizen?  
3. If the answer to the first question is negative, can the spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State, qualify as "any other family member," as per art. 3(2)(a) of Directive 2004/38/EC or as "the partner with whom the EU citizen has a stable relationship, which can be properly documented," as per 3(2)(b) of

Court of Justice of the European Union basically asking the CJEU to define the term “spouse” in Article 2(2)(a) of the Free Movement Directive (2004/38)<sup>2</sup> and whether it includes same-sex couples. The CJEU Grand Chamber issued its judgment on 5 June 2018 in case C-673/16. In July 2018, after a new round of hearings and deliberations, the Romanian Constitutional Court announced on 18 July 2018<sup>3</sup> that it admitted the complaint challenging the constitutionality of Art. 277(2) and Art. 277(4) of the Civil Code and stated that these provisions are constitutional only if they are applied in a way which allows granting the right to stay on Romanian territory to the spouses citizens of EU Member States or citizens of third states in a marriage with an EU citizen, if the marriage was concluded in an EU Member State, in accordance with EU law.

**Decision of the Court:** Though the full reasoning of this interpretative decision is not published yet, the press release issued by the Romanian Constitutional Court mentioned that the Court relied on the arguments in C-673/16. The RCC found that the provisions of the Civil Code cannot provide the legal basis for the Romanian authorities to refuse granting the right to stay to the spouse of a Romanian or foreign citizen, who is an EU citizen or a citizen of a non-EU state, in a same-sex marriage legally entered into on the territory of an EU Member State, solely with the justification that the domestic legislation does not provide for and does not recognize same sex marriages. The RCC decision is final and mandatory.

**Key points of analysis:** From the information so far available, it seems that the Court emphasized the recognition of the same sex marriage in the context of the exercise of the freedom of movement. Once the decision is published it will be possible to assess how it applies to other rights.

**Internet link source:** Press release of the Romanian Constitutional Court available at <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-319>.

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

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

<sup>2</sup> Citizens Directive (2004/38), governing free movement and residence rights of EU citizens, and family reunification rights of migrant Union citizens with their third-country national family members

<sup>3</sup> Press release of the Constitutional Court available at: <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-319> (18 July 2018). The reasoning of the decision is not published yet.