



ADF INTERNATIONAL



Court of Justice of the European Union
Registry of the Court of Justice
Rue du Fort Niedergrünwald L-2925
Luxembourg

12 April 2017

INTERVENTION (Written Observations)

Concerning the Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării

C-673/16

Coman and others

Legal Counsel

Adina Portaru, PhD
Robert Clarke
Paul Coleman

ADF International Address
Telephone

Rue Guimard 15, 1040, Bruxelles, Belgium
0032488808896

Une alliance consacrée à la défense juridique de la liberté

Vienna | Brussels | Geneva | Strasbourg | London | New York | Washington DC | Mexico City

Rue Guimard 15

1040 Brussels, Belgium

Phone: + 32 2 899 98 70 | Fax: + 32 2 899 98 76

ADFinternational.org

(a) Brief account of the facts*Facts of the case*

1. On 30 December 2016 the Constitutional Court of Romania (CCR) submitted a reference for a preliminary ruling to the Court of Justice of the European Union in the case *Coman and others*, C-673/16. The referred questions concern the definition of 'spouse' in Article 2 (2) (a) and 'family member' in Article 3 (2) (a) of Directive 2004/38/EC in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union (EU).
2. The preliminary reference concerns the case of a same-sex couple, Mr Relu Adrian Coman (Romanian citizen) and Mr Robert Clabourn Hamilton (American citizen). The two have been engaged in a longterm relationship, and were legally married in Belgium in 2010. They are challenging the refusal of the host State, Romania, to recognize and give effect to the marriage contracted in Belgium. They argue that this impedes Mr Hamilton from receiving a permit to reside legally in Romania on the grounds of family life. Romania defines marriage as the union of one man and one woman and specifically prohibits same-sex marriage, and the recognition of same-sex marriage or civil partnerships concluded abroad.
3. The question at the heart of this case is whether EU Member States acting as host States are under an obligation to give legal effect to civil acts concluded under the conditions and legal order of another Member State, despite the fact that such an act could not be legally and validly concluded under the internal legal rules of the host State. More precisely, this case asks whether EU Member States (including Member States which specifically prohibit same-sex marriage) are required by EU law to recognize cross-border marriages concluded between two persons of the same sex.

Name and address of the intervener

4. ADF International is a legal organization dedicated to protecting fundamental freedoms including the right to life, marriage and the family, and freedom of religion. In addition to holding ECOSOC consultative status with the United Nations (registered as 'Alliance Defending Freedom'), ADF International has accreditation with the European Commission and the European Parliament, the Organization of American States, and works with the Fundamental Rights Agency of the European Union and the Organization for Security and Co-operation in Europe. ADF International has argued, co-counseled and intervened in over 50 significant cases before the European Court of Human Rights.
5. ADF International has its headquarters in Landesgerichtstrasse 18/10 Vienna, Austria ADF International and is hereby represented by Adina Portaru PhD, Robert Clarke, and Paul Coleman.¹

¹ Adina Portaru, PhD is a Romanian lawyer admitted to the Bucharest Bar. Robert Clarke is Director of European Advocacy of ADF International and is a Barrister, admitted to the Bar of England and Wales. Paul Coleman is Senior Counsel and Deputy Director of ADF International and is a Solicitor of the Senior Courts of England and Wales.

Main parties

6. The main parties in this case are Mr Relu Adrian Coman, Mr Robert Clabourn Hamilton, Asociația ACCEPT (Applicants) and Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării (Defendants). ADF International is a third party intervenor.

Overview of the form of order sought

7. ADF International is submitting written observations, in accordance with Article 23 (2) of the Statute of the Court of Justice of the European Union and Articles 96 and 97 of the Consolidated Version of the Rules of Procedure of the Court of Justice (25 September 2012).

Summary of the pleas in law

8. This intervention will argue that host EU Member States are not under an obligation to recognize cross-border marriages. To do so, it will review the manner in which marriage and family are regulated and understood by EU and European human rights law including Article 12 of the European Convention on Human Rights, Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 23 of the International Covenant on Economic, Social and Cultural Rights, and Article 9 of the Charter of Fundamental Rights of the European Union (EU Charter).
9. Further, it will show that the regulation of marriage falls within the competence of the Member States, according to the jurisprudence of this Court in *Maruko v. Germany*, *Römer v. Germany* and *David L. Parris v. Trinity College Dublin*, and the jurisprudence of the European Court of Human Rights (ECtHR) in *Schalk and Kopf v. Austria*, *Gas and Dubois v. France*, *Chapin and Charpentier v. France*. This is further supported by the wording and scope of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States and paragraphs 10 and 11 of Council Directive 2003/86/EC of 22 September 2003.
10. It will also outline that there is no international or European right to same-sex marriage, according to the jurisprudence of this Court in *Römer v. Germany*, and the jurisprudence of the ECtHR in *Schalk and Kopf v. Austria*, *Chapin and Charpentier v. France*.
11. This intervention will show that the non-recognition of a same-sex marriage contracted abroad would not infringe upon the right to free movement, according to this Court in *McCarthy*, *Dereci and O*, *S and L*. The right to free movement of persons is not unlimited: it can be circumscribed where necessary to protect certain elements that are deeply linked to national competence, such as public policy, public security and national identity.² (Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, Chapter

² EU Directive on free movement of persons, para 22, Chapter VI, Article 27 et seq.

VI; Treaty on European Union Article 4(2); the jurisprudence of this Court in *Commission v. Luxembourg*).

12. The intervention will outline the effects of imposing same-sex marriage on unwilling States: an entire rewriting of family codes and civil law in areas such as, marital relations, adoption, blood bonds, employment, and social benefits. The existence of two definitions of 'spouses' or 'marriage' (one established internally, through democratic voices, including referenda), and one 'imported' from other Member States would create legal chaos and a conflict of norms that would have the effect of overriding national Constitutions.
13. This intervention will therefore argue that this Court should refrain from advancing an autonomous interpretation of 'spouse' in Article 2 (2) (a) of the EU Directive on free movement of persons. Even more so, it should not advance a definition that is at odds with current constitutional provisions of EU Member States which define marriage as the union of one man and one woman, and that define 'spouses' accordingly. Additionally, the definition of 'any other family member' cannot be interpreted expansively by this Court, since this would entirely undermine the wording of Article 3 (2) of the EU Directive on free movement of persons, which the referring party seeks to clarify. Article 3 (2) of the Directive mentions clearly that 'the host Member State shall, *in accordance with its national legislation*, facilitate entry and residence...' Therefore, this area should be left to the competence of Member States, as was the clear intention of the drafters of the EU Directive on free movement of persons.

Legal standing

14. According to Article 23 (2) of the Statute of the Court of Justice of the European Union (CJEU), "parties"...shall be entitled to submit statements of case or written observations to the Court.'
15. Romanian case 'File 78D/2016,' which resulted in this preliminary reference, is connected to an ongoing citizens' initiative to enshrine marriage as the union of one man and one woman in the Constitution of Romania (citizens' initiative). The citizens' initiative was initiated by the Coalition for Family (*Coaliția pentru Familie*),³ and seeks to replace the word 'spouses' in the Constitution of Romania with 'one man and one woman,' thus aligning the constitutional definition of marriage with that given by the Civil Code of Romania, which already provides that marriage is 'the freely consented union between one man and one woman.'⁴ The citizens' initiative has gathered the support of three million Romanians. These citizens would like to express their democratic sovereignty in a direct and democratic manner, through a referendum, in accordance with Article 2 of the Constitution of Romania, which states that: 'national sovereignty appertains to the Romanian people, who express it through... referendum.'

³ For more information, see the website of the Coalition for Family (*Coaliția pentru Familie*) <<http://coalitiapentrufamilie.ro/>>.

⁴ Article 259 (1) Civil Code.

16. Under Romanian civil procedure, intervenors are considered parties after their request is admitted.⁵ ADF International intervened before the CCR in *Coman and others* on 21 November 2016,⁶ and in the Case regarding the citizens' initiative.⁷ The CCR itself made reference to the ADF International submission in its ruling regarding the citizens' initiative as an 'intervention.'⁸ *Mutatis mutandis*, given that the interventions in the two cases followed the same procedures, ADF International is a party in *Coman and others*.

17. The position of ADF International is further supported by the fact that:

a) ADF International has a significant legal interest to intervene in the case, since the preliminary questions are seeking an interpretation that would impact another case in which ADF International has intervened (the citizens' initiative). ADF International is individually concerned by the ruling in this case, since, by reason of our intervention in the citizens' initiative, this Court's judgment has, or is liable to have, a substantial adverse effect on the interpretation of 'spouses' in Romanian and EU legislation. The two cases are interlinked. The application in *Coman and others* seeks to argue that the notion of 'spouses' in both Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States (EU Directive on free movement of persons), and the Romanian Constitution, includes same-sex couples.

Accordingly, the existing Civil Code provisions forbidding the recognition of same-sex marriage contracted abroad would not be constitutional and in accordance with EU law. This line of reasoning runs contrary to the ongoing citizens' initiative, which seeks to strengthen marriage as the union of one man and one woman in the Constitution of Romania, and to align it (in the other direction) in accordance with the Civil Code. It is therefore obvious that the answers given to the preliminary questions have a direct impact on the citizens' initiative. Agreeing with the contentions of the Applicants in this case would block the democratic expression of sovereignty, as triggered by the citizens' initiative. The link between the two matters is derived with clarity from the fact that the CCR initially decided to rule on the two matters in the same hearing (20 July 2016). The CCR ultimately unanimously approved the citizens' initiative and postponed the ruling in the *Coman and others* case.

b) The CCR does not have specific formal rules on the admission of intervenors and hence the common rules of civil procedure should apply to the proceedings before the CCR.

⁵ Article 65 New Code of Civil Procedure of Romania.

⁶ Curtea Constituțională, Registratura Jurisdicțională, Nr. 11415/21 noiembrie 2016.

⁷ Dosarul de dezbatere a inițiativei legislative a cetățenilor, intitulată „Lege de revizuire a Constituției României”, prin care se propune modificarea articolului 48 alineatul (1) din Constituția României. ADF International intervention was registered on 6 July 2016: Curtea Constituțională, Registratura Jurisdicțională, Nr. 6472/06.

⁸ CCR (CCR) <https://www.ccr.ro/files/products/Decizie_580.pdf> para 17. ADF International intervention regarding the citizens' initiative was registered as Curtea Constituțională, Registratura Jurisdicțională, Nr. 6472/06 iulie 2016.

18. In conclusion, it is submitted that ADF International is a party to the present case. As a party domestically, ADF International is therefore entitled under Article 23 (2) of the Statute of the CJEU to submit written observations.

(b) Marriage and Family in European and International Jurisprudence

19. This section will outline the legal understanding of marriage within a European and international law context. It will show that there is no supra-national obligation to introduce same-sex marriage in domestic legal orders, as marriage falls within the competence of Member States
20. Explicit protections for marriage and family are contained in international and European human rights conventions, such as Article 12 of the European Convention on Human Rights (ECHR), Article 16 of the Universal Declaration of Human Rights (UDHR), Article 23 of the International Covenant on Civil and Political Rights (ICCPR), Article 23 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 9 of the Charter of Fundamental Rights of the European Union (EU Charter).
21. These international instruments outline that ‘men and women of marriageable age have the right to marry and to found a family,’⁹ and that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’¹⁰
22. According to the established case-law of the ECtHR, Article 12 [the right to marry] ‘enshrines the traditional concept of marriage as being between *one man and one woman*.’¹¹
23. Furthermore, States ‘enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition’ of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage.¹²
24. The ECtHR found that:

Although the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that *there is no European consensus regarding same-sex marriage*.

...

[T]he reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriages to the States.

...

[T]he attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by Convention States of biological criteria for determining a person’s sex for the purpose of marriage.

⁹ Article 12 ECHR; see also Article 23 (2) ICESCR and Article 16 (1).

¹⁰ Article 16 (3) UDHR, Article 23 ICCPR.

¹¹ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014), paras 71 and 96, referred to also in *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 37 (emphasis added).

¹² *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 48.

...

In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court re-iterates that *it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society*.¹³

25. The ECtHR has repeatedly and explicitly ruled out any other possible interpretation of Article 12, based on the plain reading of the Convention and the context in which it was originally drafted.
26. This view was upheld by the European Commission for Democracy through Law (the Venice Commission).¹⁴
27. The same understanding is reflected by the United Nations Human Rights Committee, which, in interpreting the phrase 'men and women of marriageable age,' clearly stated that:

Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.¹⁵

28. Additionally, the ECtHR has consistently held that the ECHR does not guarantee a right to, and a corresponding obligation on, Member States to introduce same-sex civil partnerships or same-sex marriage. In *Hämäläinen v. Finland*,¹⁶ the Grand Chamber of the ECtHR ruled that neither Article 8 protecting private and family life, nor Article 12 guaranteeing the right to marry, can be understood 'as imposing an obligation on Contracting States to grant same-sex couples access to marriage.'¹⁷ This interpretation was consolidated by the recent judgment in *Chapin and Charpentier v. France*.¹⁸ Therein, recalling *Hämäläinen v. Finland* and *Oliari and*

¹³ *Schalk and Kopf v. Austria*, no. 30141/04 (2010), paras 58, 60, 51 and 62 (emphasis added).

¹⁴ Committee of Ministers, Reply to Written Question No 647 (Doc. 13369), Prohibition of same sex Marriage in Croatia (24 March 2014), <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20576&lang=en>>, European Commission for Democracy Through Law (Venice Commission), Opinion No 621/2011 (2 August 2011) on the New Constitution of Hungary and Opinion No 779/2014 (13 October 2014), Opinion on the Seven Amendments to the Constitution of Former Yugoslav Republic of Macedonia (13 October 2014).

¹⁵ *Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, UN Doc A/57/40 at 214 (2002) paras 8.2 and 8.3.

¹⁶ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014).

¹⁷ *Id.*, para 71.

¹⁸ *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016).

Others v. Italy, the ECtHR unanimously confirmed the non-existence of a right to same-sex marriage.¹⁹

29. In two recent judgments, *Oliari v. Italy* and *Vallianatos v. Greece*, the ECtHR found Italy and Greece to have discriminated against same-sex couples for reasons that are not applicable to the present legal situation of Romania. Very importantly, both cases referred to civil partnerships and not to the regulation of marriage. Additionally, in *Vallianatos v. Greece*, the domestic legal system already had civil partnerships in place, which were limited only to heterosexual couples. This limitation was considered discriminatory by the ECtHR.²⁰ Notwithstanding, this reasoning cannot be applied *mutatis mutandis* to marriage, as is made clear in the case-law of the ECtHR.²¹
30. In the recent case of *Taddeucci and McCall v. Italy*,²² the main legal question revolved around the issuance of a residence permit. This case, despite being quoted extensively by the Applicants in the instant case, did not rule on the recognition or legal definition of a same-sex spouse in a Member State which did not regulate same-sex marriage.
31. Furthermore, in *Taddeucci and McCall v. Italy*, the interpretation of ‘family member’ represented *an insuperable obstacle* to the granting of a residence permit, the couple being therefore prevented from continuing to live together in Italy. According to the CCR, this was not the case in *Coman and others*. This case does not involve a situation in which a couple of the same sex would be separated, as, under Romanian law, a residence permit could be requested on grounds other than family life.
32. In sum, the ECtHR and other international bodies have been unwavering on the marriage question, upholding Member States’ competence to protect and strengthen marriage as the union of one man and one woman.

(c) Marriage and Family in EU law

33. Under EU law, the area of marriage and the family is clearly reserved to national competence and the definitions in each Member State’s domestic legal order. Furthermore, such competence is expressly recognized and permeates the language of arguably the most important Union documents in relation to the free movement of persons.
34. Foundational EU Treaties are, quite deliberately, almost silent on the topics of marriage and family. Article 9 of the Charter of Fundamental Rights of the EU (EU Charter) provides that ‘the right to marry and the right to found a family shall be

¹⁹ *Id.*, para 39.

²⁰ *Vallianatos and others v. Greece*, nos. 29381/09 and 32684/09 (7 November 2013), para 92.

²¹ The legislative proposal 340/2015 concerning civil partnerships was rejected by the Senate on 31 March 2015 and on 9 December by the Chamber of Deputies (Cdep) <http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=14867>.

²² *Taddeucci and McCall v. Italy*, no. 51362/09 (30 June 2016).

guaranteed in accordance with the national laws governing the exercise of these rights.’

35. Furthermore, according to Article 6 (3) of the Treaty on European Union (TEU), the EU Charter shall be interpreted ‘with due regard’ to the Explanations related to the Charter. It is important to note that these highlight, in relation to Article 9 (the right to marry and to found a family) that ‘this Article neither prohibits *nor imposes* the granting of the status of marriage to unions between people of the same sex).’²³

36. The Commentaries of the Charter of Fundamental Rights of the EU also make it clear that:

It may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages.²⁴

37. This has also been confirmed by the jurisprudence of this Court. In *Römer*, this Court was asked to rule upon the difference in the calculation of the supplementary retirement pension between a person who had entered into life partnership with another person of the same sex, on the one hand, and married persons, on the other. Considering the marital and civil situation at hand, this Court outlined that ‘legislation on the marital status of persons falls within the competence of Member States.’²⁵

38. In a similar case concerning the non-recognition of the pension claim of the survivor of a same-sex couple, this Court ruled that ‘civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence.’²⁶

39. Recently, in *David L. Parris* this Court was called upon to decide on the provision of same-sex partners’ benefits on death. On this occasion, this Court restated that ‘Member States...are free to provide or not provide for marriage for persons of the same sex, or an alternative form of recognition of their relationship.’²⁷

The EU Directive on Free Movement of Persons

40. When the EU Directive on free movement of persons was originally drafted, the Commission did not consider marriage to mean anything other than opposite-sex spouses.²⁸ The European Parliament’s proposal for the EU Directive on free movement of persons to include a direct reference to same-sex spouses was rejected because of the recognition that the definition of these terms fell within the

²³ Fundamental Rights Agency (*FRA*) <<http://fra.europa.eu/en/charterpedia/article/9-right-marry-and-right-found-family>> (emphasis added).

²⁴ EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union (June 2006).

²⁵ *Jürgen Römer v. Freie und Hansestadt Hamburg*, C-147/08 (10 May 2011), para 38.

²⁶ *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06 (1 April 2008), para 59.

²⁷ *David L. Parris v. Trinity College Dublin*, C-443/15 (24 November 2016), para 59.

²⁸ COM (2001) 257 final.

national competence.²⁹ The EU therefore recognized that marriage is a matter reserved to EU Member States and their sovereign interpretation. This is in accordance with the principle of subsidiarity, proportionality³⁰ and conferral, which outlines that the EU can only exercise the powers which have been conferred upon it.³¹ Hence, if a matter falls outside the scope of EU law, it cannot be regulated by the EU.

41. The EU Directive on free movement of persons makes reference to national competence in a number of provisions.

42. Paragraph 6 of the recital states:

In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State *on the basis of its own national legislation*, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

43. Article 3 (2) highlights:

Without prejudice to any right of free movement and residence the persons concerned may have in their own right, the host Member State shall, *in accordance with its national legislation*, facilitate entry and residence ...

44. Furthermore, with specific application to the notion of family members, the EU Directive on free movement of persons says in Article 2 (2) (b) that:

²⁹ See COM/2003/0199 final - COD 2001/0111- Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See also Case C-59/85 Reed [1986] ECR I-1283, para 13.

³⁰ Article 5 TEU provides that '(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. (4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

³¹ Koen Lenaerts, *Federalism and the rule of law: perspectives from the European Court of Justice*, in 33 *Fordham International Law Journal* (2010), 1338–1387, 1340.

Family member means...the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host State.

45. The EU Directive on free movement of persons reserves the area of marriage and family to national competence, implicitly with regard to the term of 'spouses' and more explicitly in the wording with regard to registered partnerships and the facilitation of entry and residence of persons other than 'spouses'. A systematic, coherent and consistent interpretation of the EU Directive on free movement of persons indicates that the national competence of the host State should not be overlooked or overridden. It would be self-contradictory if the Directive required the recognition of same-sex civil partnerships to comply with domestic legislation, but did not pose the same requirement to an even more contentious issue (the recognition of same-sex marriage).
46. The same understanding is reflected by the Council Directive 2003/86/EC of 22 September 2003 (EU Directive on family reunification),³² which states in paragraph 10:

It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.

47. In the context of family reunification (which does not involve EU citizens), within some relationships, there will be countries which recognize particular things for the purpose of 'movement' – including polygamous marriages – and others which do not. And the fact that some do, cannot be used to force those that do not to change their position precisely because it is an area of national competence.
48. Paragraph 11 makes it clear that 'the right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States.'
49. Accordingly, the non-recognition of a same-sex marriage contracted abroad would not infringe upon the right to free movement. In *McCarthy, Dereci and O, S and L* this Court ruled that the fact that a Member State denies its own nationals the possibility of family reunification with a third-country national family member does not mean that the EU citizen will be forced to leave the Union. Hence the EU citizen

³² This is not applicable to the case at hand, which involves one EU citizen. However, it is relevant insofar as it reflects the EU approach to subsidiarity and national competence in what regards family matters and status.

would not be deprived of the genuine enjoyment of the substance of his citizen's rights.³³

50. Furthermore, the free movement of persons is not unlimited: it can be circumscribed where necessary to protect certain elements that are deeply linked to national competence, such as public policy, public security, public health, and national identity.³⁴ Additionally, it cannot be used as a tool to limit or intentionally distort the most important aspects of social life and their core institutions.
51. Public policy is a justification for a derogation from the right to free movement of persons. It seeks to protect Member States' competence in areas where the EU cannot harmonize legislation, and to shield them from other Member States' who might want to 'export' their own system of values. The concept of public policy is deeply linked to that of national competence. According to this Court's case-law, the concept of public policy may vary from one Member State to another and thus competent national authorities must be allowed a margin of discretion.³⁵
52. In *Commission v. Luxembourg* this Court held that the preservation of a national identity 'is a legitimate aim respected by the Community legal order,' which could in principle justify a restriction to the free movement provisions.³⁶ Since Maastricht, respect for Member States' national identity is based in the TEU. Article 4 (2) of the TEU requires the EU to respect national identities 'inherent in their fundamental structures, political and constitutional.'³⁷ This provision has been interpreted by commentators as a means of fostering dialogue, endorsing a 'pluralistic vision of the relationship between EU law and domestic constitutional law,'³⁸ ensuring pluralism and diversity.
53. Additionally, in the context of private international law, the host State is not under an obligation to recognize legal relationships established abroad, moreover, it can regard such cross-border relationships as non-existent. Non-recognition refers mainly to situations where the domestic law does not provide for the legal institution for which recognition is sought (for example, divorce was unlawful in Malta until five years ago), or when one or more conditions are missing to establish the validity of the institution (in the case of marriage, such conditions are age, the sex of the partners, or kinship). Therefore, it is not sufficient that the marriage is valid in the

³³ *McCarthy*, C-434/09 (5 May 2011), para 49; *Dereci*, C-256/11 (15 November 2011), para 68; *O, S and L*, Joined cases C-356/11 and C-357/11 (6 December 2012), para 52.

³⁴ EU Directive on free movement of persons, para 22, Chapter VI, Article 27 et seq.

³⁵ *Omega*, C-36/02 (14 October 2004) [2004] ECR I-9609, para 31 and *Sayn-Wittgenstein*, C-208/09, (22 December) 2010 [2010] ECR I-13693 para 87. Compare with the approach under the ECHR: *Handyside v. the United Kingdom*, no. 5493/72 (7 December 1976), para 48.

³⁶ *Commission v. Luxembourg*, C-473/93 (2 July 1996) [1996] ECR I-3207, para 35. See also *Groener*, C-379/87 (28 November 1989) [1989] ECR 03967, which was the first case dealing with national identity. Therein, the promotion and conservation of the Irish language was recognized as an expression of national identity and culture, which justified a restriction to free movement.

³⁷ For CJEU interpretation of Article 4 (2) TEU, see *Sayn-Wittgenstein*, judgment of 22 December 2010 [2010] ECR I-13693 and *Runevic-Vardyn*, C-391/09 (12 May 2011).

³⁸ Gerhard van der Schyff, The constitutional relationship between the European Union and its Member States: the role of national identity in Article 4(2) TEU, in 37 *European Law Review* (2012), 563–583, 583, and Armin von Bogdandy / Stephan Schill, Overcoming absolute primacy: respect for national identity under the Lisbon Treaty, in 48 *Common Market Law Review* (2011), 1–38, 3.

Member State of origin, it must also be valid in the host Member State. Otherwise, elements that are foreign to the domestic legal system can be 'imported,' eschewing democratic processes and creating tensions between different jurisdictions. This practice is sometimes called 'marriage shopping,'³⁹ though the principle could be applied to many other scenarios in which Member States have varying national provisions.

54. If Member States are forced to recognize same-sex marriage contracted abroad, they cannot possibly maintain their own legal orders on the issue of marriage. One main implication is that the domestic definitions of marriage would become all but meaningless. Given that some EU Member States have constitutional protections of marriage as the union of one man and one woman, imposing the recognition of same-sex marriage contracted abroad by way of this Court's interpretation would create a grave conflict of norms. There would be at least two definitions of marriage effective in one Member State, which would lead to a normative chaos, and an ongoing erosion of Member States' competence on related matters.
55. The words 'marriage,' 'family member,' 'husband,' 'wife,' 'mother,' 'father,' 'spouse' appear thousands of times in domestic legislation. For example, before the redefinition of marriage in the UK, the word 'marriage' appeared 3,000 times in UK legislation, and associated words appeared several thousand times.⁴⁰ All these instances were tweaked, redrafted, and redefined as a consequence of the national decision to redefine marriage.
56. The same will need to happen, on a much wider scale, if EU Member States are forced to import legal definitions that are foreign (or even opposite) to those in their domestic legal system. For example, it will be difficult for a Member State to uphold regulations by which only opposite-sex married couples can adopt. Regulations related to filiation and blood line would be impacted.⁴¹ Employment conditions, taxes, maternity leave, and paternity leave would need to be reconsidered. The Civil Code may need to be rewritten. Legal certainty, and predictability on the content of rights and obligations would be negatively impacted, leading ultimately to the imposition of same-sex marriage on unwilling States at a pan-European level.
57. To conclude, it is the Member States and not the EU or other international institutions or bodies that have the competence to define what marriage means within their own legal systems.
58. This Court's jurisprudence clearly outlines the competence of Member States in the field of marriage. The EU constitutional framework means that any legislation *must* respect national competence in this area. It is evident from the language permeating

³⁹ Roberto Virzo, *The Law Applicable to the Formation of Same-Sex Partnerships and Marriages*, in Daniele Gallo et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014), 343-358, 355. In a similar vein, see the 'abuse of freedom of circulation': *Akrich*, C-109/01 (23 September 2003) [2003] ECR, I-9607.

⁴⁰ Coalition for Marriage, Consultation Response (2012), <http://c4m.org.uk/downloads/consultationresponse.pdf>.

⁴¹ Nan D Hunter, *The Future Impact of Same-Sex Marriage: More Questions than Answers*, in Georgetown Public Law and Legal Theory Research Paper No. 12-146 (2012), 1855-1879.

the relevant Directives and regulations that national decisions within their area of competence must be respected by Union institutions.

59. In light of the foregoing, it is clear that neither international law, nor European law, recognizes a right to same-sex marriage. Since the EU does not have competence to intervene in substantive family law, this implies that the term 'spouses' must therefore be interpreted in accordance with national law.

(d) Marriage and family in other EU Member States

60. To date, fifteen out of twenty-eight Member States recognize only the union of a man and a woman as marriage, and of these, seven (Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia) have constitutionally enshrined this definition.⁴² Thirteen Member States recognize same-sex marriage (Belgium, Denmark, Finland, France, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Slovenia, Sweden and the United Kingdom – excluding Northern Ireland).
61. The Union is therefore deeply divided on the issue of marriage. While predominantly Western States have redefined marriage, there is also a visible trend in Eastern Europe of States seeking to constitutionally define marriage as the union of one man and one woman.⁴³ The Croatian, Slovenian and Slovak referenda on marriage⁴⁴ have shown the popular support on this matter, while different protests and manifestations all across Europe have sent out the message that EU citizens seek Member States to support and protect marriage as the union of one man and one woman. In 2013, over a million campaigners on the streets of Paris rallied to show their support for marriage between one man and one woman.⁴⁵ According to the organizers, *La Manif Pour Tous*, the movement is experiencing a revival, with tens of thousands of campaigners having again taken to the streets of Paris in October 2016 to demand that presidential candidates for the 2017 election support traditional family values.⁴⁶

(e) Marriage and family in the Romanian legal system

62. Not only is the definition of marriage as the union of one man and one woman consolidated in the Civil Code of Romania, but the domestic rules also specifically prohibit other forms of 'marriage'.

⁴² Constitution of the Republic of Bulgaria, Article 46(1); Constitution of Hungary, Article M(1); Constitution of the Republic of Latvia, Article 110; Constitution of the Republic of Lithuania, Article 38; Constitution of the Republic of Poland, Article 18; Constitution of the Slovak Republic, Article 43.

⁴³ Article L of the Fundamental Law of Hungary (25 April 2011), see also Decision of the Hungarian Constitutional Court No. 154/2008 (XII. 17); Article 46 of the Constitution of the Republic of Bulgaria (12 July 1991); Article 110 of the Constitution of the Republic of Latvia (as amended on 15 December 2005) Article 18 of the Constitution of the Republic of Poland (2 April 1997); Article 38 of the Constitution of the Republic of Lithuania (25 October 1992). See also the referenda held on this topic by Slovakia (7 February 2015) and Slovenia (20 December 2015).

⁴⁴ Croatia (1 December 2013), Slovakia (7 February 2015) and Slovenia (20 December 2015).

⁴⁵ John Lichfield, France: Huge gay marriage protest turns violent in Paris (*The Independent* 26 May 2013) <<http://www.independent.co.uk/news/world/europe/france-huge-gay-marriage-protest-turns-violent-in-paris-8632878.html>>.

⁴⁶ Anti-gay marriage protesters return to streets of Paris (*France 24* 17 October 2016), <<http://www.france24.com/en/20161016-anti-gay-marriage-protesters-hit-streets-paris>>.

63. Article 48 (1) of the Romanian Constitution states that: 'The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.'
64. The intention of the drafters to include man and woman in the notion of spouses is illustrated by the Civil Code which was drafted subsequently to the Constitution and which speaks, in Article 258 (4), about 'the man and the woman united through marriage.' Article 259 (1) Civil Code states, beyond any doubt, that marriage is 'the freely consented union between one man and one woman.'
65. Furthermore, Article 277 (1) of the Civil Code emphasizes that 'marriage shall be prohibited between persons of the same sex.'
66. Article 277 (2) of the Civil Code provides that Romania shall not recognize same-sex marriage contracted abroad (either by Romanian or foreign citizens). Article 277 (3) provides the same in respect of civil partnerships.
67. Article 277 (4) of the Civil Code states that EU free movement rights are applicable on the territory of Romania.
68. On this basis, the request to have the Romanian authorities recognize marriage contracted abroad is subject to clear domestic legal provisions, namely: 1) the definition of marriage as the union between one man and one woman, and 2) the express prohibition of the recognition of same-sex marriage contracted abroad. The Applicants' request to have their marriage recognized by Romania was therefore lawfully denied as not being in conformity with domestic legislation regulating marriage.
69. Traditions and values related to the family form part of the national identity of the Romanian people. The expression of this national identity is further strengthened by the ongoing citizens' initiative to enshrine marriage as the union between one man and one woman in the Constitution of Romania. This initiative, which was unanimously approved by the CCR, has gathered three million signatures, the largest support for such a petition in the history of Romania. The support for a citizens' initiative is unprecedented at the EU level, where, for example, the support needed for a European citizens' initiative is of one million signatures for a pool of citizens that surpasses the population of Romania by around 25 times.⁴⁷
70. The diverging interpretations of marriage among EU States demonstrates the national competence of Member States on this issue. If this Court interprets 'spouses' as including same-sex couples, it would be contrary to the definition of

⁴⁷ A European citizens' initiative requires one million signatures to be gathered before it is considered by the European Commission. One million signatures represents approximately 0.2% of the population of the EU. In Romania the three million signatures gathered represents approximately 15% of the overall population. No European citizens' initiative has or is likely to receive such overwhelming support as that received by the Romanian citizens' initiative on marriage and family. For more information, see Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.

marriage established legally in fifteen Member States, pitting a judgment of this Court against the Constitutions of its Member States.

(f) Answers to the preliminary questions

71. For the reasons highlighted above, it is respectfully argued that this Court should respond to the preliminary questions as follows.
72. In response to Question 1: ***Does the term ‘spouse’ in Article 2(2)(a) of Directive 2004/38/EC, in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, 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 under the law of a Member State other than the host Member State?***

The definition of ‘spouse’

73. The EU does not have competence to harmonise Member States’ family law. This Court should therefore refrain from advancing an autonomous interpretation of ‘spouse’ in Article 2 (2) (a) of the EU Directive on free movement of persons. Even more so, it should not advance a definition that is at odds with current constitutional provisions of EU Member States which define marriage as the union of one man and one woman, and that define ‘spouses’ accordingly. Such an approach would have profound implications across a significant number of Member States which continue, according to their constitutional orders, to recognize marriage as the union of one man and one woman.
74. In host States which do not recognize same-sex marriage, such as the case at hand, same-sex marriage contracted abroad does not produce effects, since it is an institution foreign to the domestic legal order (it lacks one of the essential requirements for the validity of marriage: the opposite sex of the spouses).
75. If this Court interprets the notion of ‘spouse’ extensively, such an interpretation will become binding on all EU Member States, despite the express prohibition that exists in this regard in the domestic law of many Member States – including at a constitutional level. For example, the prohibition in the Romanian system of the recognition of same-sex ‘marriages’ contracted abroad would be rendered moot. Not only would such a judgment erode Member States competence, but it would lead to harmonization, on the part of the EU, in the area of marriage and family, which is expressly prohibited. Member States would no longer be able to refuse to recognize same-sex ‘marriages’ that were contracted abroad creating a consequential infringement of any conditions pertaining to the validity of marriage, as provided under domestic law. Moreover, a decision by this Court to accept the Applicants’ contentions would inadvertently legitimise ‘marriage shopping’, as a tool to eschew democratic and accountable processes.
76. The Applicants can exercise their freedom of movement and choose the jurisdictions which gives the optimal legal recognition and social benefits to their union, but they cannot force a Member State to offer them a more advantageous status than that of other national citizens. If this Court interprets the notion of

‘spouse’ extensively, it would, in reality, create a difference in treatment that would lead to claims of discrimination. Concerning the current State refusal to recognize same-sex marriage contracted abroad, the difference of treatment is based exclusively on the civil status and not on the sexual orientation.⁴⁸ However, if the notion of ‘spouse’ is deemed to include same-sex spouse and therefore Member States are obliged to recognize same-sex ‘marriages’ contracted abroad, despite their specific interdictions under domestic law, then this would open claims to reverse discrimination in the future. The recognition of foreign relationships would create a perceived difference in treatment on grounds that have been protected by the Union, with regard to foreign citizens who get married abroad with a national of the host State and return to the home State, compared to the situation of the nationals of the host State. Such a perceived difference in treatment would be based on nationality and would be prohibited by Article 21 of the Charter of Fundamental Rights of the European Union.

77. Creating an obligation to recognise cross border same-sex marriage would create *de facto* same-sex marriage EU-wide,⁴⁹ despite the well-established competence of Member States to define marriage exclusively as the union of one man and one woman. It would also, in effect, create a new legal institution of ‘same-sex marriage contracted abroad’ in Member States without any proper legal basis – either domestically, or in EU law.

The Notion of ‘Family Member’

78. In response to Question 3: ***Can the same-sex spouse, from a State which is not a Member State of the European Union, of a European Union citizen, to whom the citizen concerned is lawfully married under the law of a Member State other than the host Member State, be classified as ‘any other family member’ within the meaning of Article 3(2)(a) of Directive 2004/38/[EC] or ‘partner with whom the Union citizen has a durable relationship, duly attested’ within the meaning of Article 3(2)(b) of Directive 2004/38/[EC], with the corresponding obligation for the host Member State to facilitate entry and residence for him, even though the host State does not recognise marriages between members of the same sex or provide for an alternative form of legal recognition, such as registered partnerships?***
79. The CJEU should not regard such a same-sex spouse as qualifying for ‘any other family member...’ within the meaning of Article 3 (2) (a) of the EU Directive on free movement of persons.
80. The definition of ‘any other family member’ cannot be interpreted expansively by the CJEU, since this would entirely undermine the wording of Article 3 (2) of the EU Directive on free movement of persons, which the referring party seeks to clarify. Article 3 (2) of the Directive mentions clearly that ‘the host Member State shall, *in accordance with its national legislation*, facilitate entry and residence...’ Therefore,

⁴⁸ See for example *Mata Estevez v. Spain*, no. 56501/00 (10 May 2001) and *Manenc v. France*, no. 66686/09 (21 September 2010).

⁴⁹ Martina Melcher, Private international law and registered relationships: an EU perspective, in 20 *European Review of Private Law* (2012), 1075–1096, 1085.

this area should be left to the competence of Member States, as was the clear intention of the drafters of the EU Directive on free movement of persons.

81. The citizen of a non-EU State who is registered as being in a same-sex marriage with an EU citizen according to the law of an EU Member State other than that of the host Member State could be qualified under Article 3 (2) (b) of the EU Directive on free movement of persons as 'the partner with whom the EU citizen has a stable relationship, duly attested.' On a case by case basis, the condition that the relationship be 'duly attested' can be assessed from the stability, length of the relationship, and from the couple's commitment to the relationship (but not as a result of a marriage contracted abroad, since this does have legal effect in a Member State which does not permit same-sex marriage).

(g) Concluding Remarks

82. The core notions of family law - 'spouses,' 'family member,' and 'marriage' - fall within the competence of EU Member States. This is well supported by the language of core EU Directives on the matter, and consolidated by CJEU jurisprudence. If this Court puts forward an autonomous definition of 'spouses' as the union of two same-sex people, national competence on the issue would be eradicated.
83. The free movement of persons is not unlimited; it cannot be used as a tool to limit or intentionally undermine the most important aspects of social life and their core institutions. Forcing a Member State, despite its democratically established position, to amend its national law to recognize the Applicants' marriage would communicate that the democratic expression of EU citizens on marriage and family (such as the three million Romanians who signed the citizens' initiative to strengthen marriage as the union of one man and one woman in the Constitution of Romania) is not worth protecting and respecting. Recognizing the Applicants' marriage would undermine the law in around half of the EU Member States, impede the democratic expression of EU citizens regarding marriage, family and parental rights and block the exercise of national sovereignty. It would clearly contradict the trend that is visible at the EU level by which Member States seek to incorporate the definition of marriage and spouses only as the union of one man and one woman.
84. A decision in favour of the Applicants' claims would call for an entire rewriting of family codes, civil law and civil procedure in what concerns, *inter alia*, marital relations, adoption, blood bonds, employment, and social benefits. The existence of two definitions of 'spouses' or 'marriage' (one established internally, through democratic voices, including referenda), and one 'imported' from other Member States would create a legal chaos and a conflict of norms that would even amount to overriding national Constitutions.

85. This Court is bound to respect national sovereignty and competence on the matter; doing otherwise and thus creating obligations which are not supported by the direct democratic process would set a dangerous precedent for democracy and the legitimacy of the EU project.

Respectfully Submitted:

Adina Portaru

Robert Clarke

Paul Coleman

Schedule of Annexes

Annex 1: ADF International intervention in the citizens' initiative case before the CCR

Annex 2: ADF International intervention in Romanian case 'File 78D/2016,' which resulted in the current preliminary reference

Annex 3: Registration of ADF International intervention in the citizens' initiative case before the CCR

Annex 4: Registration of ADF International intervention in Romanian case 'File 78D/2016,' which resulted in the current preliminary reference

Annex 5: CCR Decision 580/20 July 2016 referring to ADF International as having submitted 'interventions' in the case