



## Global Employer Services Immigration

### Ground-breaking CJEU judgment on same-sex partner mobility

On 5 June 2018, the European Court of Justice of the European Union (CJEU) rendered a ground-breaking judgment, stating that a “spouse” within the meaning of EU law on freedom of residence of EU-citizens and their family members includes same-sex spouses.

#### Background

Mr. Coman (Romanian and US citizen) and Mr. Hamilton (US citizen) lived in the US for four years before moving to Belgium for Mr. Coman’s work. They got married in Brussels in 2010. When they inquired with the Romanian authorities on the immigration steps required for them to move as a couple to Romania, they were told that Mr. Hamilton could not enter Romania for more than 3 months.

#### The issue

EU-citizens and their family members enjoy free movement and a right of residency within the EU as per the Treaty of the Functioning of the EU (TFUE) and as per the Citizenship directive.

However, the Romanian authorities are of the opinion that Mr Hamilton cannot be considered a family member given that Romanian law does not recognise same-sex marriage. Hence, he cannot be granted a right of residence of more than 3

months in Romania despite being married to a Romanian national.

## What the CJEU says

The CJEU ruled that the term “spouse” in the citizenship directive is gender-neutral. However, this should include “same-sex spouse” from a marriage legally concluded in another Member State; otherwise, this would hamper free movement. It is less likely for an EU-citizen to move to a Member State if his/her non-EU spouse is unable to join, as the case at hand illustrates.

Such a restriction of free movement is only possible when based on objective public-interest considerations, proportionate to a legitimate objective, and if consistent with the Charter of Fundamental Rights of the European Union.

The Court does not accept the justification of public policy and national identity put forward by the Romanian authorities. The obligation to recognise a same-sex marriage concluded in another Member State, for the sole purpose of granting a derived right of residency, does not undermine the institution of marriage. The Court underlines that the obligation does not require Member States to legislate for same-sex marriage. Furthermore, this obligation does not undermine national identity nor does it pose a threat to public policy.

In addition, the Court reminds that a restriction of free movement can only be justified if consistent with the rights in the Charter of Fundamental Rights. A justification by the Romanian authorities fails this test, since a homosexual relationship is now protected under the notion of “family life” and “private life”, just as it does for heterosexual relationships, as recent case law from the European Court of Human Rights (ECHR) demonstrates.

## Why this is significant

This ground-breaking judgment should be noted by companies and their employees in relation to mobility, as same-sex married couples are no longer restricted to Member States that allow same-sex marriages.

## Deloitte’s view

Contrary to the US Supreme Court in Obergefell (2015), the CJEU does not establish an EU-wide same-sex marriage framework, as family law is a competency of individual Member States.

This judgment will have significant implications for same-sex couples who got married in the EU, as they will now be able to travel and live in any other Member State and will be able to work without a work permit. Their free movement will no longer be hindered, as was previously the case.

The CJEU requires Member States to recognise same-sex marriages for the purpose of free movement. However, the Court adds two conditions. Firstly, the couple needs to have used their free movement rights and need to have resided genuinely and legally in another Member State for at least 3 months to trigger the application of EU law. Secondly, the

Court refers to a same-sex marriage concluded within a Member State. This is contrary to the opinion of the Advocate-General Wathelet, who proposed to recognise all same-sex marriages.

Whether only same-sex marriages concluded in the EU should be taken into account for this case law may still be up for debate. Should Mr. Coman and Mr Hamilton have married in New York instead of Brussels they would have faced the same situation of hindered free movement as a same-sex couple. Considering the CJEU's reasoning behind this judgment, it can be argued that there is no reason for the CJEU to treat a same sex marriage concluded outside of the EU differently. It may be the Court's intention to leave this open for discussion.

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