

OPINION OF ADVOCATE GENERAL WATHELET AND JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-673/16, CONCERNING THE CONCEPT OF "SPOUSE" IN EUROPEAN UNION LAW

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Abstract

The interpretation given by the Court of Justice of the European Union to the concept of "spouse", after Advocate General Wathelet submitted his conclusions, represents a breakthrough on gender equality and same-sex couples concerning the provisions of EU legislation on the right of residence of Union citizens and their family members. The CJEU judgment is a recognition of the rights granted to same-sex couples legally married in a Member State who wish to exercise their freedom of movement and who, thus have the opportunity to be accompanied by their spouses, under the same conditions as those applicable to couples of different sexes. The judgment does not force states to legislate same-sex marriage but requires them to recognise the effects of this type of marriage on their territory solely for the purpose of exercising the derived rights that European Union citizens have).

Keywords: *the concept of "spouse"; European Union Law; Court of Justice of the European Union; case-law; Opinion of Advocate General.*

1. Introductory aspects

On 5 June 2018, the Court of Justice of the European Union¹ ruled for the first time on the concept of "spouse" within the meaning of Directive 2004/38² in the context of a marriage between two people of the same sex. As Advocate General Melchior Wathelet also observed, the action was "delicate, involving in the case of marriage, a legal institution, within the specific and limited context of freedom of movement of citizens of the European Union"³. The Court's definition of the concept of "spouse" will necessarily affect not only the very identity of the men and women concerned - and therefore their dignity - but also the personal and social concept that citizens of the Union have of marriage, which may vary from one person to another, from one Member State to another"⁴.

2. The context of the request for interpretation of the concept of 'spouse' within the meaning of Directive 2004/38

The need to interpret the concept of "spouse" in the above-mentioned meaning appeared in the context in which the Court of First Instance, District 5, Bucharest requested the Constitutional Court⁵ of Romania to rule on that plea of unconstitutionality raised in a litigation for settlement. In that case, Adrian Coman, a citizen with dual citizenship (Romanian and American), lived in New York (United States) between 2005 and 2009, together with Robert Clabourn Hamilton, an American citizen. They were married in November 2010. Between 2009-2012, Mr. Coman lived in Brussels (where he worked at the European Parliament) and Mr. Hamilton stayed in New York.

In December 2012, Mr. Coman and his spouse began administrative proceedings with the Romanian authorities in order to obtain the necessary documents for Mr. Hamilton, who was not a national of the Union⁶,

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¹ On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitraşcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182-188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridic*, Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

² 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, For a comment regarding the Directive 2004/38, OJ L158, 30.4.2004 For a comment regarding the Directive 2004/38, see Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 205-219.

³ Opinion of Advocate General Melchior Wathelet delivered on 11 January 2018, Case C-673/16, EU:C:2018:2, point 2.

⁴ *Idem*.

⁵ As stated in the doctrine, "the Constitutional Court of Romania creates the right through its activity" (Elena Emilia Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, *Drept Public Journal*, no. 2/2017, p. 91). "According to art. 147 of the Constitution, the decisions of the Constitutional Court are binding and have power only for the future" (Elena Emilia Ștefan, *Drept administrativ. Partea I, Curs universitar*, Universul Juridic Publishing house, Bucharest, 2014, p. 36).

⁶ A "national" means a natural or legal person having the citizenship or nationality of that State in accordance with its domestic law "(Article 3 (a) of Law no. 157/2005 for ratification of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic

to be able, as a member of Mr. Coman's family, to obtain the right to lawfully reside in Romania for a period of more than three months. "On 11 January 2013, the Inspectorate informed Mr. Coman and Mr. Hamilton that the latter only had a right of residence for a period of three months, because, under the Civil Code, marriage between people of the same sex is not recognised, and that an extension of Mr Hamilton's right of temporary residence in Romania could not be granted for the purposes of family reunion"⁷. Following the reply received, Mr. Coman and others brought an action against the Inspectorate "seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the European Union, and requesting that the Inspectorate be ordered to end the discrimination and to pay compensation for the non-material damage suffered"⁸. According to the applicants, the provisions of Art. 277 par. (1), (2) and (4)⁹ are unconstitutional as long as they fail to recognise same-sex marriages concluded abroad so that the right of residence cannot be exercised. Therefore, the article invoked "is an infringement of the provisions of the Romanian Constitution that protect the right to personal life, family life and private life and the provisions relating to the principle of equality"¹⁰. On 18 December 2015, the Court of First Instance, District 5, Bucharest notified the Constitutional Court of Romania to rule on the exception. "The latter court considered that the present case related exclusively to recognition of a marriage lawfully entered into abroad between a citizen of the Union and his or her spouse of the same sex, a national a third country, in the light of the right to family life and the right to freedom of movement, viewed from the perspective of the prohibition of discrimination on grounds of sexual orientation. In that context, that Court had doubts as to the interpretation to be given to several terms employed in the relevant provisions of Directive 2004/38, read in the light of the Charter of Fundamental Rights ('the Charter') and of the recent case-law of this Court and of the European Court of Human Rights on the right to life family.

Consequently, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling"¹¹.

3. Preliminary questions asked by the Constitutional Court

As we have already stated, the Romanian Constitutional Court started its legal reasoning from the legal instruments of the European Union in force, namely Directive 2004/38 and the Charter of Fundamental Rights.

Article 2 point 2 (a) of Directive 2004/38 provides that "within the meaning of the (...) Directive [...] (...) "family member" means: the spouse (...)". In addition, Article 7 of the Charter of Fundamental Rights recognises the right to respect for private and family life, home and communications secrecy, where "the right to marry and the right to found a family are guaranteed under the domestic laws governing the exercise of these rights"¹². As it is well known, European Union law prohibits "discrimination of any kind based on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Within the scope of application of the Treaties and without prejudice to their special provisions, any discrimination on grounds of nationality shall be prohibited"¹³. The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories¹⁴. One of the rights of

of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Republic of Portugal, the Republic of Slovenia, the Republic of Slovakia, the Republic of Finland, Sweden, the United Kingdom (EU Member States) and Bulgaria and Romania on the accession of Bulgaria and Romania to the EU, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005.

⁷ Point 12 of the Judgment of 5 June 2018, *Relu Adrian Coman and Others v. the General Inspectorate for Immigration and the Ministry of Internal Affairs*, C-673/16, EU:C:2018:385.

⁸ *Ibid.*, point 13.

⁹ Article 277 (1), (2) and (4) of the Civil Code reads as follows: "(1) The same-sex marriage is prohibited. (2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognised in Romania. [...] (4) The legal provisions on the free movement on the territory of Romania of the citizens of the Member States of the European Union and of the European Economic Area remain applicable".

¹⁰ Point 14 of the Judgment *Relu Adrian Coman and Others v. the General Inspectorate for Immigration and the Ministry of Internal Affairs*, C-673/16, EU:C:2018:385

¹¹ Point 18 of the Opinion of Advocate General C-673/16, EU:C:2018:2.

¹² Article 9 of the Charter of Fundamental Rights.

¹³ Article 21 of the Charter of Fundamental Rights.

¹⁴ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, apud Elena Emilia Ștefan, *Opinions on the right to non-discrimination*, in CKS e-Book 2015, p.540, http://cks.univnt.ro/cks_2015_archive/cks_2015_articles.html.

citizens of the Member States of the European Union is the freedom of movement and residence within the territory of the Member States. Article 45 (2) of the Charter of Fundamental Rights provides that "freedom of movement and residence may be granted, in accordance with the Treaties, to third-country nationals of legally residing in the territory of a Member State.

In view of those legislative issues, the Constitutional Court wished to find out whether the notion of "spouse" in Art. 2 pt. (a) of Directive 2004/38, in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights also included the same-sex national who was a citizen of a third country to whom a citizen of the European Union was lawfully married in accordance with the law of a Member State other than the host Member State.

Next, the Court requests, if the first question is answered in the affirmative, whether the host Member State must grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union. The question takes into consideration the provisions of Article 3 par. (1)¹⁵ and Article 7 par. (2)¹⁶ of Directive 2004/38, read in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights. If the answer to the first question is in the negative, the Court wishes to know whether the same-sex spouse, from a State which is not a Member State of the Union, of an Union citizen to whom he or she is lawfully married, in accordance with the law of a Member State other than the host State, can be classified as "any other family member" within the meaning of Article 3(2)(a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3(2)(b) of that directive, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between people of the same sex and provides no alternative form of legal recognition, such as registered partnership. If the answer to this

question is in the affirmative, the Constitutional Court raises another question whether the host Member State must grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a Union citizen under the provisions of Art. 3 par. (2) and Art. 7 par. (2) of Directive 2004/38, read in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights.

4. The relevance of invoking the provisions of Directive 2004/38

Before analysing and formulating a possible answer to the questions referred, both Advocate General and the Court of Justice examined whether the provisions of Directive 2004/38 can be relied on in the main proceedings, since, according to Art. 3 par. (1) of the Directive, they are applied to all citizens of the Union who move to or reside in a Member State other than that of which they are a national, as well as to their family members, as defined in point 2 of Article 2 of the directive, who accompany or join them", which means, at a first reading, that Mr. Hamilton cannot rely on the directive in his favour because it "is not capable of constituting the basis of a derived right of residence on him"¹⁷.

The provision of Article 3 par. (1) of the Directive has been the subject of several interpretations given by the Court of Justice, which held on a number of occasions that the provisions of Directive 2004/38 governed only the conditions determining whether a citizen of the Union could enter or reside in Member States other than that of which he was a national"¹⁸ and did not confer a derived right of residence to third-country nationals who were family members of a citizen of the Union in the Member state of which that citizen was a national"¹⁹.

However, the Court held that an obstacle to the freedom of movement and the right of establishment

¹⁵ "1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to 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 for the following persons: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

¹⁶ Article 7(1) and (2) of Directive 2004/38, entitled 'Right of residence for more than three months', states: "1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c). 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

¹⁷ Judgment *Coman and Others*, C-673/16, EU:C:2018:385, cited above, point 21.

¹⁸ Judgment of 10 May 2017, *Chavez Vilchez and Others*, C 133/15, EU:C:2017:354, point 53.

¹⁹ Judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, point 37.

would occur "where the Union citizen's residence in the host Member State is sufficiently effective to enable him to start or to live a family life"²⁰ in that Member State. Thus, "any stay of a Union citizen in the host Member State accompanied by a member of his family who is a national of a non-Member State necessarily implies the grant of a derived right of residence to that family member in the Member State of which that citizen is a national when he returns to that Member State"²¹. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he/she will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State"²². That is why, according to the Court, "the spouse of a [Union] national who made use of those rights must, when the latter resides in his country of origin, have at least the same rights of entry and residence as well as those which it would be entitled to [the Union] 's right to have his spouse choose to enter and reside in another Member State"²³. Accordingly, "the right to freedom of movement and the right of establishment recognised to the Union's national by the Treaties [could] not have full effects if that national [citizen] could be embezzled from exercising them by obstacles in his own country of origin, in the way of her/his spouse's entry and stay".

In the light of these considerations, Advocate General Wathelet, in his Opinion, stated: "Mr. Coman and Mr. Hamilton did, indeed, consolidate a family life while Mr. Coman, a citizen of the Union was residing in Belgium. When they had lived together for four years in New York and, in so doing, founded a family life, their relationship was indisputably consolidated by their marriage, in Brussels, on 5 November 2010"²⁴. The fact that Mr. Hamilton did not live uninterruptedly with Mr. Coman in that city, did not (...) make him capable of rendering their relationship ineffective. Thus, in a globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children's education. That lack of cohabitation cannot in itself have any effect on the existence of a proven stable relationship (...) and, consequently, on the existence of a family

life"²⁵. Therefore, the fact that the Constitutional Court invokes the provisions of Directive 2004/38 is correct and that is why "the questions asked by the referring court remain relevant since the interpretation of the provisions referred to in the request for a preliminary ruling may be useful in resolving the case before the Constitutional Court"²⁶.

5. Interpretation of the notion of "spouse"

Relevant to our approach are the opinion of Advocate General and the answer of the Court of Justice to the first question formulated by the Romanian Constitutional Court, namely whether the notion of "spouse" in Article 2 point (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights also includes the same-sex national who is a citizen of a third country to whom a citizen of the European Union is legally married under the law of a Member State other than the host State. That is why the study will not analyse the other two preliminary questions.

It should also be noted that the Commission, the Dutch, Romanian, Latvian, Hungarian and Polish governments submitted observations in the file. The Union Executive and the Dutch Government consider that "Article 2 (2) (a) of Directive 2004/38 must be interpreted autonomously and uniformly"²⁷ in the sense that "a third-country national of the same sex as the Union citizen to whom he is legally married under the law of a Member State is covered by the concept of "spouse". Advocate General Wathelet himself states that "a literal, contextual and teleological interpretation of the term "spouse" used in Directive 2004/38 lead to an autonomous definition independent of the sexual orientation of that term"²⁸. On the other hand, "the Romanian, Latvian, Hungarian and Polish Governments consider that this concept is not subject to EU law but must be defined in relation to the law of the host Member State"²⁹.

The Court's reasoning takes as its starting point the perspective expressed in time that "the rights granted to nationals of Member States include [also] the right to live a normal family life both in the host Member State and in the Member State whose Member State citizenship they possess, and on the occasion of their return to that Member State, they shall benefit from the presence of members of their families with them in the territory of that Member State"³⁰. The phrase "members of their families" includes, according

²⁰ Judgment, *O. and B*, C-456/12, EU:C:2014:135, *cited above*, point 51.

²¹ *Idem*.

²² Opinion of Advocate General Melchior Wathelet, *cited above*, point 25.

²³ Judgment of 7 July 1992, *Singh*, C-370/90, EU:C:1992:296, point 23.

²⁴ Opinion of Advocate General Melchior Wathelet, *cited above*, point 27.

²⁵ *Ibid.*, point 28.

²⁶ *Ibid.*, point 29.

²⁷ *Ibid.*, point 31.

²⁸ *Ibid.*, point 77.

²⁹ *Ibid.*, point 31.

³⁰ Judgment *Coman and Others*, C-673/16, EU:C:2018:385, *cited above*, point 31.

to Article 2 (a) of Directive 2004/38, also the spouse, namely "a person linked to another person by marriage"³¹. The Court rightly finds that the concept of 'spouse' in the Directive "is gender neutral and is therefore liable to include the same-sex spouse of the concerned citizen of the Union"³². Furthermore, the Court observes that the Union legislature, when referring to a 'family member' as the partner, with whom the Union citizen contracted a partnership registered under the legislation of a Member State, refers to the conditions laid down by the relevant legislation of the Member State in which this citizen intends to move or reside"³³, which is not the case for the "spouse".

In interpreting the notion of "spouse", the Court referred to the observations of the governments which argued that the refusal to recognise same-sex marriages concluded in another Member State constituted a restriction on free movement under the Treaty on European Union³⁴, but such a restriction was justified by grounds of public policy and national identity provided in the Treaty on European Union, Article 4 (2). With regard to such a comment, the Luxembourg Court pointed out that "the obligation of a Member State to recognise a same-sex marriage concluded in another Member State under the law of that State solely for the purpose of granting a derived right of residence to a third-country national, does not affect the institution of marriage in that first Member State, which is defined by national law"³⁵. In other words, the Court assures Member States that the institution of same-sex marriage "is limited to the obligation to recognise such marriages contracted in another Member State under the law of that State solely for the purpose of exercising the rights conferred by Union law on such people"³⁶.

The Court also resorts to the jurisprudence of the European Court of Human Rights, recalling that "the relationship of a homosexual couple is likely to fall within the notion of "private life" as well as within the notion of "family life" of a heterosexual couple who is in the same situation"³⁷.

Therefore, the Court considers that a Member State cannot rely on its national law to oppose the recognition in its territory, solely for the purposes of granting a derived right of residence to a third-country national, of the marriage entered into by a citizen of the Union of the same sex in another Member State in accordance with the latter's right"³⁸, even if the civil status of the persons, which includes rules on marriage,

is a matter which falls within the competence of the Member States"³⁹ (" thus, States are free to provide or not the same-sex marriage"⁴⁰).

However, the Court considers that the refusal by a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national with a Union citizen of the same sex legally contracted in another State Member State is likely to prevent the exercise of the right of the Union citizen to move and reside freely within the territory of the Member States. "This would make the freedom of movement to vary from one Member State to another according to national provisions governing same-sex marriage"⁴¹.

6. Conclusions

According to the conclusions of Advocate General Wathelet, the legal issue that the Court had to deal with in the Coman case, was not the legalisation of same-sex marriage but the free movement of Union citizens. Member States of the Union are free to regulate same-sex marriage, but they have to respect their obligations under the freedom of movement of citizens of the Union. Since Directive 2004/38 does not include any reference to the right of Member States to determine the status of 'spouse', the Court of Justice has had the task of providing that concept with an autonomous and uniform interpretation. According to the Court, the notion of 'spouse' within the meaning of the Directive is based on a marriage-based relationship but remains gender neutral no matter where the marriage was contracted. Consequently, such a person may therefore permanently reside in the territory of the Member State in which his/her spouse established himself/herself as a citizen of the Union after exercising his/her right to freedom of movement.

Therefore, "in a situation where a Union citizen made use of his or her freedom of movement by moving and actually residing (...) in a Member State other than that of which citizenship he or she owns, and established or consolidated, on that occasion, a family life with a third-country national of the same sex to which he is legally bound in the host Member State (...), the competent authorities of the Member State of which the citizen is a Union's national"⁴² do not have the power to refuse to grant a right of residence in the territory of that Member State to that national on the

³¹ *Ibid.*, point 34

³² *Ibid.*, point 35.

³³ *Ibid.*, point 36.

³⁴ Article 21 (1).

³⁵ Judgment *Coman and Others*, C-673/16, EU:C:2018:385, *cited above*, paragraph 45.

³⁶ *Ibid.*, point 46.

³⁷ *Ibid.*, point 50.

³⁸ *Ibid.*, point 36.

³⁹ *Ibid.*, point 37.

⁴⁰ *Idem.*

⁴¹ Court of Justice of the European Union, Press release no. 80/18 Luxembourg, 5 June 2018, p. 2 (<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180080ro.pdf>).

⁴² The operative part of the judgment in *Coman and Others*, C-673/16, EU: C: 2018: 385, *cited above*, point 1.

ground that the law of that Member State does not provide marriage between persons of the same sex. Furthermore, the concept of 'spouse' in Directive 2004/38 must be interpreted as meaning that 'in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as

the citizen of the Union, whose marriage to that was completed in a Member State under the law of that State, has a right of residence for more than three months in the territory of the Member State of which the Union citizen is a national"⁴³.

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- Judgment of 10 May 2017, *Chavez Vilchez and Others*, C 133/15, EU:C:2017:354, point 53.
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⁴³ *Ibid.*, point 2.