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EU LAW TRAINING IN ENGLISH LANGUAGE:
BLENDED AND INTEGRATED CONTENT AND LANGUAGE TRAINING
FOR EUROPEAN NOTARIES AND JUDGES

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Practical cases on public order

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CASSA NAZIONALE DEL NOTARIATO

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Notary Chamber of Bulgaria

International Association of Judges
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Public policy

In accordance with art. 35 of Regulation 650/2012, the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

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Public order in European law

The content of public order

- The EC treaty did not provide a definition
- The ECJ followed a traditional viewpoint by stating that **public policy:**
  - ✓ is a territorial concept /specific for each MS/
  - ✓ may evolve over time /could change if it necessary with the evolution of the society/.

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The content of public order

Two uniform criteria according ECJ:

- It must address a real and severe enough danger;
- to protect a fundamental interest of the society.

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Public order

Case C-673/16

Coman and Hamilton v. Inspectoratul General pentru Imigrari

REQUEST for a preliminary ruling under Article 267 TFEU from the Constitutional Court of Romania.

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Public order

The facts

- **Mr Coman** - Romanian and American citizen, and **Mr Hamilton**- an American citizen, met in New York in 2002 and lived there together from 2005 to 2009.
- in 2009 Mr Coman took up residence in Brussels to work at the European Parliament, while Mr Hamilton continued to live in NY.
- They were married in Brussels on 5 November 2010.
- In March 2012, Mr Coman ceased to work but continued to live in Brussels, where he received unemployment benefit until January 2013.
- In December 2012, Mr Coman and Mr Hamilton asked the Inspectorate about the procedure under which Mr Hamilton, **a non-EU national, as member of Mr Coman's family**, could obtain the right to reside lawfully in Romania for more than three months

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Case C-673/16

In relay to that request, the Inspectorate informed them that:

- Mr Hamilton had only a right of residence for **three** months
- under the Civil Code of Romania, marriage between people of the same sex is not recognised;
- an extension of Mr Hamilton's right of temporary residence in Romania could not be granted on grounds of family reunion;
- Mr Coman brought an action against the decision of the Inspectorate before the Court of First Instance seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the EU.

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Case C-673/16

LEGAL CONTEXT

European Union law

- Directive 2004/38/EC of the EP on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
- Art. 2 For the purpose of this Directive:

"family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a MS if the legislation of the host MS treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host MS;

Romanian Law

- Civil Code states as follows:
  - Marriage is the union freely consented to of a man and a woman;
  - Marriage between persons of the same sex shall be prohibited;
  - Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania.

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- Coman and Others maintain that failure to recognise marriages between persons of the same sex entered into abroad constitutes infringement of the Romanian Constitution that protect the right to personal and family life;
- Court of First Instance referred the matter to the Constitutional Court of Romania for a ruling on that plea of unconstitutionality.
- The Constitutional Court states that recognition of a marriage lawfully entered into abroad between a Union citizen and his spouse of the same sex, in the light of the right to family life and the right to freedom of movement, must be 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 several terms in the relevant provisions of Directive 2004/38 in the light of the Charter of Fundamental Rights ('the Charter') and of the recent case-law of this ECJ and of the European Court of Human Rights.

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In those circumstances, the Constitutional Court decided to refer the following questions to the ECJ for a preliminary ruling:

1. Does the term "spouse" in Art.2(2)(a) of Directive 2004/38 in the light of the Charter, **include the same-sex spouse**, from a State which is not a MS, of a citizen of the EU to whom that citizen is lawfully married in accordance with the law of a MS other than the host MS?

2. Does the Directive 2004/38 in the light of the Charter, require the host MS **to 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 EU?

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Case C-673/16

Consideration of the questions referred:

- the term ‘spouse’ within the Directive 2004/38 is gender-neutral and may cover the same-sex spouse;
- **a person’s status** is a matter that falls within the competence of the MS; they are free to decide whether or not to allow marriage for persons of the same sex;
- in exercising that competence, **MS must comply with EU law**, in particular the Treaty provisions **on the freedom** conferred on all Union citizens to move and reside in the territory of the MS;
- a MS cannot rely on its national law for refusing to recognise for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another MS in accordance with the law of that state, because it may interfere with the right of that citizen to move and reside freely in the territory of the MS.

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Consideration of the questions referred:

- **a restriction** on the right to freedom of movement, is independent of the nationality of the persons concerned, may be justified if it is **based on objective public-interest** considerations and if it is **proportionate to a legitimate objective** pursued by national law;
- the EU respects the national identity of the MS, inherent in their fundamental structures, both political and constitutional;
- The concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each MS without any control by the EU institutions;
- It follows that public policy may be relied on only if there is **a genuine and sufficiently serious threat to a fundamental interest** of society;
- a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified **only it is consistent** with the **fundamental rights** guaranteed by the Charter.

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Case C-673/16

Consideration of the questions referred

- The ECJ finds that the obligation for a MS to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first MS.
- Such recognition does not require that MS to provide, in its national law, for the institution of marriage between persons of the same sex.
- It is confined to the obligation to recognise such marriages, concluded in another MS in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

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Case C-673/16

On those grounds, in judgment of 5 June 2018, the Court rules:

- When a Union citizen has used his freedom of movement by moving to and taking up genuine residence, in accordance with in Article 7(1) of Directive 2004/38, in a MS other than that of which he is a national, and,
- whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host MS
- Article 21(1) TFEU must be interpreted as precluding the competent authorities of the MS from refusing to grant that third-country national a right of residence in the territory of that MS on the ground that the law of that MS does not recognise marriage between persons of the same sex;
- A third-country national of the same sex as a Union citizen, whose marriage was concluded in a MS in accordance with the law of that state, has the right to reside in the territory of the MS of which the Union citizen is a national for more than three months.

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Case C-558/16

Case C 558/16

The request has been made by the Higher Regional Court of Berlin in proceedings relating to an application to have a **ECS** drawn up which have been brought by **Mrs Mahnkopf** following the death of her husband and concern succession to his estate.

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Case C-558/16

The dispute in the main proceedings

- Mr and Mrs Mahnkopf were married. They both had German nationality and were habitually resident in Berlin.
- The spouses were subject to the statutory property regime of community of accrued gains and had not entered into a marriage contract.
- Mr Mahnkopf died on 29 August 2015. He had made no disposition of property upon death. His sole heirs were his wife and their only son.
- Mr Mahnkopf possessed assets in Germany and also a half share estate in the co-ownership of a property in Sweden.

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Case C-558/16

German law

Civil Code /BGB/ of Germany states:

- The surviving spouse as an heir on intestacy shall be entitled to one quarter of the estate as against relatives of the first degree;
- If the property regime is ended by the death of a spouse, the equalisation of the accrued gains shall be effected by increasing the surviving spouse's share of the estate on intestacy by one quarter of the estate;

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- At the request of Mrs Mahnkopf, the **Local Court** issued a national certificate of inheritance according to which the surviving spouse and her son each inherited one half of the deceased's assets pursuant to the intestacy succession laid down by German law.
- Mrs Mahnkopf also applied to a **notary** for the issue to her, pursuant to Regulation No 650/2012, of a ECS designating her and her son as coheirs, in respect of half of the estate each in accordance with the national rule of intestacy succession. She wished to use that certificate for the purpose of registration of their right of ownership of the property in Sweden.
- The notary submitted Mrs Mahnkopf's application to the Local Court.

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The court rejected the application for a ECS on the ground that the share allocated to the deceased's spouse was based:

- as regards one quarter of the deceased's estate- on a regime governing **succession** and,
- as regards another quarter of his estate- on the **matrimonial property regime** provided for in Civil Code of Germany

In its view, the rule under which that last quarter was allocated, which relates to a matrimonial property regime and not a succession regime, **does not fall within** the scope of Regulation No 650/2012.

Mrs Mahnkopf brought an appeal against that decision before the Higher Regional Court.

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Case C-558/16

The Higher Regional Court decided to refer the following question to the ECJ for preliminary ruling:

Is Article 1(1) of [Regulation No 650/2012] to be interpreted as meaning that **the scope of the regulation** ("succession to the estates of deceased persons") also covers provisions of national law which, like Paragraph 1371(1) of the [BGB], settle questions **relating to matrimonial property** regimes after the death of one spouse by increasing the other spouse's share of the estate on intestacy?

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The ECJ considers that the referring court asks:

"Whether Article 1(1) of Regulation No 650/2012 must be interpreted as meaning that a national provision, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate, falls within the scope of that regulation.

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The court considers that:

- in accordance with its wording, Article 1(1) of Regulation No650/2012 provides that the regulation is to apply **to succession to the estates of deceased persons.**
- Article 1(2) lists exhaustively the matters excluded from the regulation's scope, which include, in Article 1(2)(d), '**questions relating to matrimonial property regimes'.**
- Article 3(1)(a) states that such succession covers 'all forms of transfer of assets, rights and obligations **by reason of death**, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession'.
- It is also apparent from recital 9 of Regulation that the scope of the regulation should include all civil-law aspects **of succession** to the estate of a deceased person.

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The court considers that:

- the BGB concerns **not the division of assets** between spouses but **the issue of the rights of the surviving** spouse in relation to assets already counted as part of the estate;

- that provision does not have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but **rather determination of the size of the share of the estate** to be allocated to the surviving spouse as against the other heirs;

- Such provision principally **concerns succession to the estate** of the deceased spouse but not the matrimonial property regime. Consequently, such rule of national law relates to the matter of succession for the purposes of Regulation No 650/2012;

- Nor is that interpretation inconsistent with the scope of Regulation 2016/1103 because in particular as a result of the couple's separation or the death of one of the spouses, it expressly excludes from its scope, pursuant to Article 1(2)(d), the 'succession to the estate of a deceased spouse';

- classification of the share falling to the surviving spouse under a provision of national law as succession-related allows information concerning that share to be included in the ECS, with all the effects described in Article 69 of Regulation No 650/2012.

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Case C-558/16

On those grounds, in judgement of 1st March 2018 the Court rules:

Article 1(1) of Regulation (EU) No 650/2012 must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which **prescribes, on the death of one of the spouses,** a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate **falls within the scope of that regulation.**

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Case C-218/16

Case C -218/16

The request has been made by the Regional Court, Gorzów Wielkopolski, Poland in the context of proceedings brought by Aleksandra Kubicka concerning a notary established in Słubice (Poland) and the execution of a notarially recorded will setting up a legacy ‘by vindication’.

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The facts in the main proceedings:

- Ms Kubicka is a Polish national; resident in Frankfurt (Germany); married to a German national.
- The spouses are joint owners, each with a 50% share, of land in Frankfurt on which their family home is built. They have two minor children
- In order to make her will, Mrs Kubicka approached a notary practicing in Poland.

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Case C-218/16

The dispute in the main proceedings

Ms Kubicka wishes:

- to include in her will a legacy ‘by vindication’, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt;
- The remainder assets of her estate to leave in accordance with the statutory order of inheritance, whereby her husband and children would inherit it in equal shares.
- Not to use an ordinary legacy (legacy ‘by damnation’), as provided by the Civil Code of Poland, since such a legacy would entail difficulties in relation to the representation of her minor children, who will inherit.

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The dispute in the main proceedings

- The notary refused to draw up a will containing the legacy ‘by vindication’ on the ground that creation of a will containing such a legacy is contrary to German legislation;
- He stated that, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property;
- Foreign legacies ‘by vindication’ will, by means of ‘adaptation’, be considered to be legacies ‘by damnation’ in Germany, under Art. 31 of Regulation No 650/2012.

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Case C-218/16

Polish law

1. Civil Code of Poland states:

- legacy **“by vindication”**- the testator can decide that an asset shall pass to a specified person upon the opening of the succession; the asset of such legacy may a share in the right of ownership of immovable property, constituting a transferable property right;

- “**legacy by damnation**” –for this type of legacy, the heir has an obligation to transfer the right in the property to the legatee, who may also enforce execution of the legacy by the heir.

2. Under the Law on notaries:

- notaries are required to refuse to execute unlawful notarial instruments;

-the applicant may appeal against that refusal.

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Case C-218/16

Art. 31 of the Regulation, entitled **'Adaptation of rights *in rem*'** is about:

- a right *in rem* under the law applicable to the succession;
- and the law of the MS in which the right is invoked does not know such right *in rem*;
- that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that MS;
- taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

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The ECJ considers that:

- for legal certainty and in order to avoid the fragmentation of the succession, that law must govern the succession as a whole, irrespective of the nature of the assets and regardless of whether the assets are located in another MS.

- the regulation does not affect the limited number (‘*numerus clausus*’) of rights *in rem* known in the national law of some MSs, which should not be required to recognise them relating to property located there if such right *in rem* is not known in its law

- Therefore, Art. 1(2)(k) of Regulation must be interpreted as precluding a refusal to recognise, in a MS whose legal system does not provide for legacies ‘by vindication’, the material effects produced by such a legacy when succession takes place, in accordance with the chosen law governing succession.

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In the second place the ECJ considers that:

- according to art. 1(2)(l) of Regulation, any recording in a **register of rights** in immovable or movable property, including the legal requirements for such recording and the effects of recording or failing to record such rights in a register, **are excluded from the scope of that regulation**;

- art. 1(2)(l) of Regulation must be interpreted as **precluding refusal to recognise**, in a MS whose legal system does not provide for legacies 'by vindication', the material effects produced by such a legacy upon the opening of succession in accordance with the chosen law;

- Regulation provides for the creation of a **certificate** which must allow every heir, legatee or entitled person mentioned in it, to prove in another MS **his status and rights** and to demonstrate the attribution of a specific asset to the legatee mentioned in that certificate.

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In the third place, regarding to interpretation of art 31 the ECJ considers that:

- where the law of the MS does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, **be adapted to the closest equivalent right *in rem* under** the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it;
- art. 31 of Regulation does not concern the **method** of the transfer of rights *in rem*, including, inter alia, legacies 'by vindication' or 'by damnation', but only the respect of **the content** of rights *in rem*, determined by the law governing the succession and their reception in the legal order of the MS in which they are invoked.
- It follows that Art. 31 must be interpreted **as precluding refusal** of recognition, in a MS whose legal system does not provide for legacies 'by vindication', of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law.

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Having regard to the foregoing, the art. 1(2)(k) and (l) and Art. 31 of Regulation must be interpreted as precluding refusal, by an authority of a MS to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession, chosen by the testator in accordance with Art. 22(1) where that refusal **is based on the ground** that the legacy concerns the right of ownership of immovable property located in that MS, whose law does not provide for legacies with direct material effect when succession takes place.

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