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Cross-border Successions. The New Commission Proposal: Contents and Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier

Eveline Ramaekers[1]

The Hague Programme, adopted by the European Council on 4 and 5 November 2004, emphasises the necessity to adopt an instrument aimed at the harmonisation of conflict of law rules in the area of cross-border successions. Within the internal market, EU citizens should have the possibility to plan their succession in advance. Currently, the differences in the Member States' conflict of law rules on international successions sometimes make it difficult for people to assert their rights, which hinders the free movement of persons.[2] The proposed Regulation on Cross-border Successions[3] (hereafter 'the Regulation') aims to remove these obstacles. The conference at the Academy of European Law in Trier, organised by *Angelika Fuchs*, revolved around the Commission's proposal. The content and future impact of the Regulation were elaborately discussed during the different presentations.

1. The conference was opened with a presentation by SALLA SAASTAMOINEN, Head of the civil justice unit, DG Justice, Freedom and Security, of the European Commission. She started by commenting on the Impact Assessment, highlighting that approximately 8 million Europeans have used their right of free movement under the Treaty. That makes it likely for those persons' estates and heirs to be spread over several Member States. It follows from the Impact Assessment that there are about 450 000 international successions in Europe per year, with an average value of € 275 000. That means that international successions occurring in Europe *every year* involve an amount of no less than € 124 billion. This indicates once more how important it is to regulate these successions within the internal market.[4]

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[1] Eveline Ramaekers is a PhD researcher in the field of European property law at Maastricht University, Faculty of Law, and resident fellow at the Maastricht European Private Law Institute (*M*-EPLI).

[2] See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, recitals 5 and 6.

[3] COM(2009) 154 final.

[4] The objectives set on the basis of the Impact Assessment are: to allow EU citizens to plan successions in advance; to increase the likelihood that the rights of potential heirs and creditors are protected in an efficient way; to prevent parallel proceedings; to prevent the application of different substantive laws to the same succession; to provide a (limited) choice of law to the testator; to ensure the recognition of rights and decisions; to increase accessibility to information on the existence of wills; to create a European registration of wills.

Because conflict of laws rules differ from Member State to Member State, it is difficult to know in advance how a court will deal with an international succession. For instance, the law applied to immovables may differ from that applied to movables, which is for instance the case under English law, where immovables are subject to the *lex rei sitae* but movables are subject to the *lex domicilii* of the deceased.[5] These problems led to a policy objective set at Union level: on 30 November 2000 the Council adopted a draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.[6] The programme provides for the drafting of an instrument relating to successions and wills.[7]

The idea behind the Regulation is that the entire estate of the deceased will be considered as one and be subjected to one single law applied by one authority. This will promote simplification, and improve legal certainty and legal clarity. There will be more party autonomy: the testator will have a limited choice to choose the applicable law (i.e. that of his nationality) in deviation from the standard connecting factor of permanent residence. The legal basis underlying the Regulation is Article 81(2) TFEU, ex Article 61(c) and 2nd indent of 67(5) EC. SAASTAMOINEN explicitly stated that succession is considered to be property law and not family law.[8] She was also keen to stress that the Regulation does not aim at harmonisation of the substantive law of succession, nor shall there be any effect on national tax laws. The Regulation therefore only makes a decision as to the applicable law.

2. The second speaker of the morning, JONATHAN HARRIS, Professor at the University of Birmingham and Barrister, Serle Court, London, addressed the scope of application of the proposed Regulation and the exclusion of rights *in rem* and trusts.

With regard to the scope of application of the Regulation, HARRIS drew attention to Article 25, which states: 'Any law specified by this Regulation shall apply even if it is not the law of a Member State.' In his opinion, this article broadens the scope of the Regulation dangerously wide. In practical terms, it means having to take into account the law of any country in the world. One could also ask how effectively decisions from Member States' courts could be enforced in non-Member States.

Next to that, Article 1(3)(j) excludes 'the nature of rights *in rem* relating to property and publicising these rights' from the scope of application of the Regulation. HARRIS asked the question, what this Article exactly means, and whether the *content* of rights *in rem* must be recognised, as opposed to their nature, whatever the latter may mean. Furthermore, he wondered whether personal rights affecting land, such as lease, were excluded as well. In any case, Article 1(3)(i) of the Regulation excludes 'the constitution, functioning and dissolving of trusts'. This could lead to an unbalanced outcome, if the UK would need to recognise other foreign property rights, but the other Member States would not need to recognise a trust created under a will.

3. The third speaker of the morning, ANDREA BONOMI, Professor at the University of Lausanne**,** discussed how to balance party autonomy under the Regulation and the protection of certain family members. The reason for limiting the testator's choice of law under the Regulation to the law of his or her nationality is to protect the reserved portion for certain heirs that is provided for under the law of several Member States. Too broad a choice of law could create an opportunity to circumvent such rules. Moreover, a choice of law can only be made for the entire estate.

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[5] L. Garb and J. Wood (eds.), *International Succession* (3rd edn., Oxford: OUP, 2010), p. 243 at 15.99 and 15.102.
[6] [2001] OJ C 12/1.
[7] Proposal for a Regulation on matters of succession, Recital 4.
[8] This also follows from section 3.1 of the Explanatory Memorandum to the Regulation.

In BONOMI's opinion, the conflict of laws rules laid down in the Regulation do reflect a substantive policy, regardless of SAASTAMOINEN's statement that the proposed Regulation does not affect substantive national succession law. The approach of the Regulation favours party autonomy and promotes foreseeability, making it easier to plan ahead. However, according to BONOMI, last habitual residence as the main connecting factor is an unstable one, in contrast to the classical, more stable connecting factors such as nationality or situs. The choice of habitual residence as connecting factor is not very favourable for estate planning either. In answering a question from the audience, BONOMI stated that people with more than one nationality should be able to choose any of the nationalities they possess. This was confirmed by SAASTAMOINEN. As far as timing is concerned, a testator can probably choose the nationality he has at the moment he makes the choice of law; this could be changed at a later stage.

4. The second half of the day started with a presentation by MICHAELA NAVRÁTILOVÁ, Kanzlei JUDr Zdeněk Hromádka, Zlín, concerning the question which court has the competence to decide on a cross-border succession.

Jurisdiction is regulated in Chapter II of the Regulation. Currently, the national rules indicating the competent court are so diverse, that they lead to either positive competence conflicts, where a variety of courts is competent, or negative competence conflicts, where no court considers itself to be competent. This also opens up the possibility of forum shopping, which NAVRÁTILOVÁ considered to be an undesirable effect. Her solution to the competence issue would be to harmonise the rules on international jurisdiction as much as possible in sink with the harmonisation of the rules on the applicable law, in other words, harmonise the *ius* and the *forum* simultaneously. She therefore favours the Commission's choice for the last habitual residence as connecting factor and would propose to use the same connecting factor when deciding on the competent court. This would achieve the coincidence of *ius* and *forum*. An added advantage is that the majority of the succession property and the potential heirs will usually be located at the habitual residence of the deceased. Two disadvantages are, that the 'last habitual residence' has not been defined in the Regulation, and that the testator can alternatively choose the law of his nationality, but he cannot make a choice of forum. However, Article 5 of the Regulation, which makes it possible to refer a case to 'a court better placed to hear the case', could ensure the coincidence of *ius* and *forum* after all.

5. The first day ended with a workshop from CHRISTIAN HERTEL, notary, Weilheim i. O.B. The topic was regulation of succession by last will, succession contract (*Erbvertrag*), or common/joint last will in cross-border cases. HERTEL presented remarkably detailed research in the form of case studies on cross-border successions, thereby showing how the current divergences in conflict of law rules cause problems.

His first example was that of the famous composer Chopin, who died in France. According to (modern-day) French law, Chopin's last habitual residence would determine the law applicable to his succession. That would be French law. Polish law, on the other hand, uses nationality as a connecting factor. That would make Polish law applicable to Chopin's succession. A positive competence conflict arises.

In a second example, a French citizen dies in Poland. According to French law, the last habitual residence determines the applicable law. That would indicate Polish law. According to Polish law, however, French law would be applicable as the law of the nationality of the deceased. Here, a negative competence conflict arises. To avoid 'ping-ponging' the case back and forth between the Polish and the French courts, the matter will stay before the French court after the first renvoi (*Rückverweisung*).

HERTEL further showed, that some countries split up the succession (*Nachlassspaltung*), for instance by applying the law of the deceased's last habitual residence to the movable assets and the *lex rei sitae* to the immovable assets of his estate.

The Regulation purports to solve the kind of problems exemplified by HERTEL's case studies, by adhering to one connecting factor, notwithstanding of course the limited choice of law for the testator. And even in case a choice of law is made, it is only possible to make a choice of law for the entire estate; a *Nachlassspaltung* would thus no longer be possible. After entry into force of the Regulation, many Member States would have to give up the connecting factor that they currently use. However, the choice of law facilitated by the Regulation will provide citizens with the possibility to choose the law of their nationality after all. As of yet, no transitional arrangements have been made. This can cause problems after entry into force of the Regulation: people could find that their succession is suddenly governed by a different law, even though they have not even moved.

7. The second day started with a presentation by SJEF VAN ERP, Professor of European Private Law at Maastricht University. He examined the role of the *lex rei sitae* rule in the law of succession, and the interplay between European law and national succession law and general property law.

The Regulation seems to contain conflicting conflict rules: the *lex successionis* in Articles 16 ff., adhering to the last habitual residence as connecting factor, and the *lex rei sitae*, amongst others to be found in Recitals 10, 21 and 22 and Articles 1(j), 19(f), 21 and 22. The *lex successionis* and the *lex rei sitae* will not always point to the same applicable law.

Next to this, the Regulation excludes from its scope of application 'the nature of rights *in rem* relating to property and publicising these rights'.[9] The Explanatory Memorandum (p.5) and Recital 10 say the same: the *numerus clausus* of property rights remains a matter for national law and land registries are also to be governed by local law. The idea behind this, is that the regulation does not aim at harmonising substantive succession law, but, according to *Van Erp*, private international law (PIL) and substantive law cannot be separated. For instance: if a surviving spouse has a right under the last will of the deceased to a usufruct of a house, then what is to happen if that house is located in England? The Regulation does not touch the national *numerus clausus*; English law does not know a right of usufruct, so the result would be that the surviving spouse could not claim his or her right under the will. Such an outcome would not be in accordance with the fact that the right to property is seen as an integral part of the fundamental rights respected by the ECJ and the ECHR. If a property right acquired via a will ought to be protected as a human right, it cannot be denied simply because that right does not exist in the *numerus clausus* of a particular country.

In conclusion, it is a bit of an illusion to assume that it is possible to regulate the conflict of law rules in a particular area without in any way touching upon the substantive law. Not only will the substantive law indirectly be affected through the integration of the PIL rules, it is also in general affected by the EU's negative integration in the form of the four freedoms,[10] prohibiting Member States from applying national rules of property law or succession law. Finally, national property law is also not exempt from the influence of secondary law, i.e. direct, positive integration. Article 345 TFEU (ex Article 295 EC), which states that '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership', is not to be interpreted in such a way that it denies a competence for the European Union to legislate in the area of property law.

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[9] *Supra*, section 2.

[10] Free movement of persons, services, goods and capital.

8. The presentation by PAUL MATTHEWS, Consultant, Withers LLP, Professor at King's College London, started with an account of the history of matrimonial property law and the law of succession. He sketched the differences between the Roman system and the Germanic system. Cultural differences and the impact – or lack thereof – of the feudal system eventually led to four main regimes in the modern European systems: (1) complete separation of property; (2) community of acquisitions (income and capital); (3) community of movables and acquisitions; and (4) universal community. MATTHEWS thereafter discussed the English position in more detail. He highlighted the absence of a general law on the matrimonial property regime in English law; the fact that the law does not provide for reserved shares; and the fact that much use is made of joint tenancy, especially when it comes to land. Joint tenancy has the notion of survivorship: the rights of every joint tenant are regarded as a burden on every other joint tenant. This burden disappears upon death, leaving the surviving joint tenant automatically as sole tenant.

The Regulation excludes from its scope questions regarding the matrimonial property regime.[11] *Matthews* disapproves of this, given that matrimonial property regime and succession are so closely connected. He ended his presentation by pointing out that there is a – rather serious – incorrect translation in Article 1(3)(f) of the Regulation. This Article excludes 'rights and assets created or transferred other than by succession to the estate of deceased persons, including gifts, such as in joint ownership with right of survival, pension plans, insurance contracts and or arrangements of a similar nature, notwithstanding Article 19(2)(j)' [emphasis added]. 'Notwithstanding' is the complete opposite of the French version, which uses the words 'sous réserve de'. It is important to take note of this error, for it changes the meaning of this Article entirely.

9. The last speaker, MARIUS KOHLER, Director, Federal Chamber of German Civil Law Notaries, Berlin/Brussels, discussed the recognition and enforcement of judgments and authentic instruments. The European Court of Justice defined the term 'authentic instrument' in the *Unibank* case: 'Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.'[12] This definition has been taken up by the Commission for the succession Regulation in Article 2(h).

The concept of "mutual recognition" is a core policy of the EU to ensure cross-border circulation of judicial decisions. It can *inter alia* be found in the EU Council Conclusions of Tampere 1999, and in the 2004 Hague Programme. The concept of mutual recognition does, however, in general not apply to authentic instruments in the way in which it applies to judgments. KOHLER put forth that mutual recognition in the case of authentic instruments is not necessary anyway. In his opinion, all that is needed to recognise an instrument as authentic is a clear-cut definition of "authentic instrument" and a provision on the conditions of its cross-border enforceability. Both have already been provided for: the *Unibank* case provides the definition, and conditions for cross-border enforceability can already be found in

[11] Art. 1(3)(d).

[12] Case C-260/97, *Unibank A/S v Flemming G. Christensen*, [1999] ECR I-3715, para. 15. The definition is based on the *Jenard Möller*-Report on the Lugano Convention, [1990] OJ C 189/57: 'A document in which the debtor acknowledges his debt in a private deed cannot be qualified as an authentic instrument, since the authentic instrument presupposes that a public officer entrusted by the State with public authority draws up the instrument.'

the Brussels I Regulation.[13] Article 35 of the proposed Regulation on matters of succession refers to Article 57 of the Brussels I Regulation, providing for cross-border enforceability.

KOHLER also signalled a danger in applying the concept of mutual recognition to authentic instruments, in that it could lead to circumvention of private international law rules. A last will or succession contract would, under the concept of mutual recognition, need to be recognised as valid in all Member States purely based on the fact that they had been laid down in an authentic instrument. Applicable PIL rules on form, validity and effects of the legal transaction might thereby be set aside. The Commission has apparently also realised that, as far as mutual recognition is concerned, authentic instruments and court decisions cannot be treated alike. Recital 26 to the Regulation reads: '[A]uthentic instruments cannot be treated as court decisions with regard to their recognition. The recognition of authentic instruments means that they enjoy the same evidentiary effect with regard to their contents and the same effects as in their country of origin, as well as a presumption of validity which can be eliminated if they are contested. This validity will therefore always be contestable before a court in the Member State of origin of the authentic instrument, in accordance with the procedural conditions defined by the Member State.'

10. The conference was concluded with a discussion around the creation, content and effects of the European Certificate of Succession (ECS). The discussion was presided over by HUGUES LETELLIER, Managing Partner, Hohl & Associés, Paris. The Regulation introduces the ECS, which is meant to 'constitute proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators'.[14] The use of the certificate is optional, and in accordance with the principle of subsidiarity, it will not replace internal procedures of the Member States.[15] However, it is supposed to be recognised automatically in all the Member States 'with regard to the capacity of the heirs, legatees, and powers of the executors of wills or third-party administrators'.[16] As MARI AALTO (Legal Officer, DG Justice, Freedom and Security) pointed out, the idea behind the ECS is to avoid the lengthy procedures citizens sometimes have to go through now, in order to prove, in the Member State where the assets are located, their capacity of heir, to be recognised as the owner of certain assets, to have a local administrator appointed, etc. The ECS is drawn up in a standard form, which will be available in all the EU languages, so that it will be able to circulate freely.

A final, yet important, remark during the discussion was made by RAFAEL GIL NIEVAS, Permanent Representation of Spain with the EU in Brussels. He drew attention to the fact that nowhere in the Regulation – or anywhere else in the surrounding documentation – is there a definition of cross-border succession (with emphasis on *cross-border*). One would expect this to be an essential element in a proposal for a Regulation on international successions. Whether a particular situation is cross-border or not, is a question that needs to be answered in any part of European law. It is *the* trigger for its application. Many problems of interpretation could arise, if this is not taken into account before the Regulation is adopted in its final form.

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[13] Article 57 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1.
[14] Article 36(1).
[15] Recital 27.
[16] Article 42(1).