THE INTENDED AND UNINTENDED EFFECTS OF THE UK'S NOT OPT-IN TO REGULATION 650/2012 ON CROSS-BORDER SUCCESSION

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Abstract

The European Commission adopted a "Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of succession." One of the most important issues that this Regulation addresses is the determination of the law applicable to a given succession for nationals of one member state with habitual residence in another member state. The Regulation provides that in such cases, the governing law to the succession will be the law of the state in which the deceased had his or her habitual residence at death.

The UK, together with Ireland and Denmark, did not opt-in to this Regulation. This paper analyzes the impact of the UK's decision not to opt-in to the Regulation and argues that the UK will manage to preserve its system of private international law but will not avoid being affected by the provisions of the Regulation. In this sense the UK will minimize, but not escape, the effects of the European Regulation on cross-border succession.

Keywords: European Regulation on cross-border successions, succession, harmonization, forced inheritance shares, endowment effect, transaction costs.

JEL classification: Law and Economics, family and personal law

1. Intra-European migration and default rules in cross-border successions

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The growing mobility of Europe's citizens has important implications for a wide range of legal issues. Among these, one of the thorniest is the question of cross-border succession. Whereas lives and deaths were once largely centered in single states, it is now increasingly common for the citizens of one EU state to reside in a second, own property in a third, and maybe even die in a fourth. The process of inheritance is complicated by differences in each state's laws on estate administration,[2] on the contours of deceaseds' property, and on the identification of beneficiaries. It is for this reason that the European Commission sought to simplify cross-border succession through Regulation 650/2012.[3]

The Regulation aims to do five important things. First, it simplifies and unifies cross-border succession rules, guaranteeing the rights of heirs, legatees, and creditors with the aim of avoiding succession disputes. Second, it provides a conflict of laws rule that makes a single law applicable to each given succession. Third, it unifies the rules of jurisdiction. Fourth, it provides criteria for recognition and enforcement of the various instruments of succession used in European member states and finally, it creates a "European Certificate of Succession" that is to be given effect in all member states.[4] The Regulation will fully enter into force on August 17, 2015.[5]

One of the most important issues that this Regulation addresses is the determination of the law applicable to a given succession. At present, cross-border successions may be governed by different laws depending on the forum state and on the type of property being transferred: Under the doctrine of scission, applied in some member states, succession to movable assets is governed by the law of the deceased's residence while succession to immovable assets is governed by the law of the state in which these assets are located. Such regulatory diversity raises important issues regarding forced inheritance shares (if any), and regarding heirs', legatees' and creditors' rights.

In line with the goal of simplifying the legal issues arising from cross-border successions, the Regulation aims to unify the law governing successions regardless of the type of property being transferred. Hence, the Regulation provides a default conflict of laws rule whereby the applicable law in a succession involving a cross-border element is

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[2] For the purpose of this paper, the deceased's assets at death subject to transmission to the deceased's heirs will be referred as estate. In this sense this paper will use estate as equivalent to patrimony even though both concepts are remarkably different: while patrimony refers to the present and future assets and liabilities of the deceased, estate refers to the assets that belong, at a given moment in time, to a particular person. For the purpose of this paper, though, the deceased's estate will not be distinguished from the general concept of patrimony. See PAUL MATTHEWS, The Problem of Clawback and the EU draft Regulation on Succession, *mimeo working paper*, noting the important differences between both concepts.

[3] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Hereinafter the Regulation. The Regulation is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF (last visited 17 February 2014).

[4] It should be noted that the Regulation applies to the acquisition of rights *in rem* with respect to inherited property but not to the content of these rights (see article 1.2 (k) excluding within the scope of application of the Regulation the definition of the nature of rights *in rem)*. So the Regulation does not affect the "*numerus clausus*" of property rights in the member states, the classification of property rights, or the determination of the prerogatives of rights' holders (see Preamble (15) of the Regulation). These elements of the Regulation are beyond the scope of this paper.

[5] Article 83 of the Regulation provides that the Regulation will apply to the succession of persons who die on or after August 17, 2015.

the law of the State in which the deceased had his or her habitual residence at the time of death—in other words, the last (or final) habitual residence. [6] The default rule largely governs the entire succession, without regard to the type of asset involved.[7]

This Regulation was adopted by most EU member states except for the UK and Denmark that did not opt-in, for different reasons. The UK government claimed the risks presented by the Regulation outweighed its benefits. With this decision, the UK government will manage to preserve intact its system of private international law, as it intended, but will not be able to avoid unintended effects of the adoption of the Regulation by the other member states such as for example, the effects on property located in the UK as well as for UK citizens with habitual residence in other member states. This paper argues that the UK, through its decision, has only managed to minimize its exposure to the Regulation but has not managed to shield itself from it.

This paper is structured as follows. Section 2 presents relevant characteristics of the succession laws of the different EU member states before the Regulation was adopted. Section 3 presents the evolution of international and European initiatives to regulate, at the supranational level, specific issues on cross-border successions. Section 4 discusses the main legislative novelties introduced by the Regulation. Section 5, presents the arguments offered by the UK government to justify its not opt-in from the Regulation and Section 6 presents and discusses the intended and unintended effects of the UK's government. The paper ends with preliminary conclusions.

2. Regulatory context before Regulation 650/2012: The diverse nature and approach of the succession laws in the European member states

The Regulation's adoption of a harmonized conflict of laws rule for cross-border successions is significant because choice of succession law can influence individuals' decisions on questions ranging from where to reside to whether to draft a will. In the absence of the Regulation, choice of succession law falls to each member state, and the existing rules point in different directions. Moreover, the diversity of substantive succession laws within the EU means that these different directions can make a big difference in succession outcomes.

Some member states, like the Regulation, apply the law of the deceased's last habitual residence,[8] but this is the minority approach. Most look to the deceased's

[6] Article 21.1 of Regulation provides that

> *"Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death."*

However, this article also allows a person to choose the law of his nationality at the time of making the choice or at the time of death as the law governing his succession.

[7] It should be noted that Article 21.2 of the Regulation allows for an exception in cases where it is possible to prove that the deceased was manifestly more closely connected with another State different from the one of his residence at the time of death.

[8] For the purpose of this paper and for simplification, I will not distinguish between habitual residence and domicile. Denmark and Estonia are examples of states that apply the law of the habitual residence of the deceased at the time of death. See CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions

nationality, either at the time of death[9] or at the time of drafting the will.[10] Others apply the law of the deceased's habitual residence at the time of drafting the will.[11] For the majority of EU member states, therefore, the Regulation will change the applicable succession law for individuals who die while residing outside of their country of nationality.

The choice of law issue has an additional complication that the Regulation addresses and this is the question of whether one choice of law rule governs all assets or whether movable and immovable assets are governed by different rules. Under the monist approach, only one choice of law determination is made, and the chosen law is applied to the overall estate, regardless of the type of asset involved or its geographic location.[12] This is the approach taken by Austria,[13] the Czech Republic,[14] Germany,[15] Greece,[16] Hungary,[17] Italy,[18] Poland,[19] Portugal,[20] Slovakia,[21] Slovenia,[22] Spain,[23] Sweden,[24].Denmark,[25] and Estonia.[26]

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according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010).

[9] See for example, article 25, par.1 of the German BGB, establishing the deceased's nationality as the law governing the succession. Other examples of member states that apply the law of the deceased's nationality are Austria, the Czech Republic, Greece, Hungary, Italy, Poland, Portugal, Rumania, Spain, Sweden, Slovakia, Slovenia and most Central and European countries. For a review of the objectively applicable law in succession see CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010). See also PAUL TERNER, Perspectives of a European Law of Succession, *Maastricht J. Eur. & Comp. L.,* 24 (2007): 149 discussing the diversity of connecting factors in the succession laws of the different European member states.

[10] This choice of law is allowed under Finnish, Italian, Dutch and Belgian succession laws. See DAVID HAYTON, European Commission's Green Paper Consulting on Succession with an International Dimension. This consultation document may be found at http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ls_appb_en.pdf (last visited 17 February 2014).

[11] This choice of law is allowed under Dutch and Belgian succession laws See DAVID HAYTON, European Commission's Green Paper Consulting on Succession with an International Dimension. This consultation document may be found at http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ls_appb_en.pdf (last visited 17 February 2014).

[12] See Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's 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', 61, summarizing the conflict of laws of the member states. This commentary can be found in http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf (last visited 17 February 2014).

[13] See Sec. 28(1) in connection with Sec. 9(1) sentence 1 of the Austrian Private International Law Act.

[14] See Sec. 17 of the Czechoslovakian Private International Law Act.

[15] See Art. 25(1) of the German Introductory Act to the Civil Code.

[16] See Art. 28 of the Greek Civil Code.

[17] See Sec. 36(1) sentence 1 of the Hungarian Legislative Decree on Private International Law.

[18] See Art. 46(1) of the Italian Private International Law Act.

[19] See Art. 34 of the Polish Private International Law Act.

[20] See Art. 62, 31(1) of the Portuguese Civil Code.

In contrast, the dualist approach applies different laws to different assets. The succession of movable property under this approach, for example, is generally governed by the law of the deceased's nationality, habitual residence, or domicile, while the succession of immovable property is subject to the law of the place in which it is located.[27] The dualist approach is followed by Belgium,[28] Bulgaria,[29] Rumania,[30] France,[31] Lithuania[32] and Luxembourg.[33] It is also followed to some extent by England, although the English approach becomes monist when English law is implicated.[34]

The new Regulation will change the succession law for these dualist states, requiring that they apply the law of the deceased's last habitual residence to the whole estate.

A final question with regard to choice of law is whether the testator can control the matter. The new Regulation allows the testator to choose the law to be applied to his or her succession through a "*valid declaration in the form of a disposition of property upon death*."[35] In contrast, this is not permitted under the current law of most EU member states,[36] presumably to avoid forum shopping and ensure an appropriate connection between the circumstances of the succession and the law applied to it.

All of these choice-of-law questions are important because the underlying, substantive succession laws of the European member states vary substantially. Two substantive issues are critical to explain the UK's position: forced inheritance and the so-called "clawback" provisions.

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[21] See http://www.successions-europe.eu/en/slovakia/topics (last visited April 17, 2014) for information on Slovakian succession law provided by Slovakian authorities.
[22] See Art. 32(1) of the Slovenian Private International Law Act.
[23] See Art. 9(1) and (8) sentence 1 of the Introductory Title to the Spanish Civil Code.
[24] See Sec. 1(1) of chapter 1 of the Swedish International Successions Act.
[25] See the Danish Act on Probate adopted on 22 May 1996.
[26] See the Estonian Private International Law Act § 24.
[27] See CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010).
[28] See Article 73.2 of the Belgian Civil Code. Also see article 78 Sec. 1 and Sec. 2(1) of the Belgian Private International Law Act 43.
[29] See Art. 89(1) and (2) of the Bulgarian Private International Law Code.
[30] See Art. 66 of the Romanian Private International Law Act.
[31] See Art. 3(2) of the French Civil Code and Cass. civ. 19. 6. 1939, Rev. crit. d. i. p. 34 (1939) 480; 14. 3. 1961, Rev. crit. d.i.p. 50 (1961) 774.
[32] See Art. 1.62(1) of the Lithuanian Civil Code.
[33] See, for example, art. 3(2) of the Civil Code and Trib. Luxemburg 11. 6. 1913, Pas. 9, p. 478.
[34] See Rules 141 and 146 of DICEY, MORRIS & COLLINS, *On the Conflict of Laws*, (Sweet & Maxwell, 2012).
[35] Article 22.2 of the Regulation. See also paragraph 39 of the Preamble of the Regulation.
[36] The scope of the limitation of choice of law rules by the testator varies across Member States. For example, Austria, Cyprus, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Czech Republic do not accept choice of law clauses in the testator's will. In contrast, Italy, Finland and The Netherlands accept choice of law clauses in the wills drafted in those states. See the Commission Staff Working Document *Accompanying the* 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 successions and on the introduction of a European Certificate of Succession, *Impact Assessment,* {COM(2009) 154 final), {SEC(2009) 410}. This document can be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0410:FIN:EN:PDF (last visited 17 February 2014).

The forced inheritance, also referred to as mandatory inheritance, mandatory share, or *legitim*, is the part of an estate distributed to certain individuals specified by law. The beneficiaries of the forced inheritance are generally the deceased's descendants and ancestors, and, in some cases, the deceased's spouse. The shares to which these people are entitled are established, either as fixed amounts, or as proportions of the full estate.

There are different approaches regarding the legal nature of forced inheritance shares across the member states:[37] One approach is to make forced inheritance mandatory such that its beneficiaries become heirs by operation of the law even if the testator's will does not provide for them and even if they themselves do not claim their shares. This is the approach adopted by Bulgaria, the Czech Republic,[38] Greece,[39] Lithuania[40] and Slovakia.[41] A second approach is to allow forced inheritance but require that the shares be claimed by their beneficiaries within a certain period of time—ranging from a few months to several years. If not claimed, testamentary dispositions contrary to the forced inheritance shares become valid. This is the approach adopted in Belgium,[42] Cyprus,[43] Estonia,[44] France,[45] Italy,[46] Latvia,[47] Luxemburg,[48] Portugal,[49] Romania,[50] Slovenia,[51] Spain[52] and Sweden.[53] Another approach is the one adopted by countries such as Austria,[54] Denmark,[55] Finland,[56] Germany,[57] Hungary,[58] Ireland,[59] Malta,[60] the Netherlands,[61] Poland[62] and Scotland, whereby forced inheritance creates a monetary claim against the heir. Finally, there are states that do not provide for what we understand

[37] See CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010) describing the legal nature of the different approaches of mandatory shares in the European member states.
[38] Article 479 of the Czech Civil code.
[39] Article 1829 of the Greek civil code.
[40] Article 5.20 ocf the Lithuanian civil code.
[41] Article 479 of the Slovakian civil code.
[42] Article 920 of the Belgian civil code.
[43] Section 42 of the Cyprus Wills and Succession Law.
[44]Section §§ 104 ss. of the Succession Act of Estonia.
[45] Article 920 of the French Civil Code.
[46] Article 457 of the Italian Civil Code.
[47] Article 693 of the Latvian Civil code.
[48] Article 920 ss of the Civil code of Luxembourg.
[49] Article 2156 ss of the Portuguese Civil Code.
[50] Article 841 ss. of the Romanian Civil Code.
[51] Article 40 of the Succession act of Slovenia.
[52] Article 806 ss of the Spanish Civil Code.
[53] Chapter 7 § 3 of the Swedish Succession act.
[54] Article 762 ss. of the Austrian BGB.
[55] Article 25 of the Danish Succession Act.
[56] Chap. 7 of the Finnish Succession Act.
[57] Section 2303 ss. of the German Civil Code (BGB).
[58] Article 666 ss. of the Hungarian Civil Code.
[59] Article 111 of the Irish Succession Act of 1965 provides for a monetary claim for the deceased's spouse.
[60] Article 615 of the Maltese Civil Code.
[61] Article 4:63 ss. of the Dutch Civil Code.
[62] Article 991 ss. of the Polish Civil Code.

as forced inheritance but establish "reasonable financial provisions for dependants."[63] The states following this approach are England, Ireland and Northern Ireland.

The size of the share of forced inheritance over the estate also varies greatly across the member states, ranging from 100% of the deceased's estate in, for example, Slovakia,[64] to 25% of the estate in, for example, Denmark.[65]

One of the main issues arising in legal systems with forced inheritances is how the share is to be calculated, who its beneficiaries are, and how it is to be transmitted. In order to avoid the payment of forced inheritance shares, people often make lifetime gifts or give away assets during their lifetimes, leaving little remaining estate upon death. In order to counter this rather simple strategy, most legal systems include what are called clawback provisions by which assets given away by the deceased are returned to the estate and a fictional estate is created. The forced inheritance is then calculated with respect to this fictional estate.[66] The deceased's fictional estate generally includes the assets remaining at death, some or all of the deceased's *intervivos* gifts, and the deceaseds' liabilities at death.[67]

The process by which those assets are returned to the estate in order to assess their value, establish the value of the fictional estate and determine the value and assets that will be used for complying with forced inheritance provisions varies greatly, especially in terms of the periods of time in which gifts are considered,[68] the nature of the gifts included,[69] the statute of limitations during which any clawback claim may be made, whether clawback claims should be made against the donee or against third parties who

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[63] See the Inheritance Act of 1975, Provision for Family and Dependants providing a mechanism for the deceased's family members to claim for easonable financial provisions from the deceased's estate. Under the Act a court can et aside a gift intending to defeat a claim under the Act and made within 6 years of the death of the deceased.

[64] Article 479 of the Civil Code of Slovakia.

[65] Article 10 of the Danish Succession Act.

[66] It should be noted that most regimes with forced inheritance, forced inheritance rights depend on the applicable law at death and not the law at the time when the gift was made. See ALBERT LAMARCA, *Colación de donaciones y sucesión en Derecho Catalán*, La Notaria 1/2011, 44-61. this article can be found in http://www.colnotcat.es/fitxers/lanotaria/ln2011_01_cat.pdf (last visited 17 February 2014) thoroughly discussing the relationship between clawback, gifts and forced inheritance under Catalan succession law.

[67] This mechanism functions as a protection for beneficiaries of forced inheritance, who can, in various different forms depending on the member states, bring claims with respect to gifts of property made by the deceased during his or her lifetime.

[68] So for example, gifts can be subject to clawback when made two years before the deceased's death in Austria; five years in the Netherlands or ten years in France, Belgium, Luxembourg, Malta, Portugal and Spain. See PAUL MATTHEWS, The Problem of Clawback and the EU draft Regulation on Succession, *mimeo working paper*, discussing the different clawback periods existing in the different European member states. See also AARON SCHWABACH, Of Charities and Clawbacks: The European Union Proposal on successions and Wills as a Threat to Charitable Giving, *Columbia Journal of European Law* 17 (2011), 5; Thomas Jefferson School of Law Research Paper No. 1866461. Available at SSRN: http://ssrn.com/abstract=1866461.

[69] Not all gifts made by the deceased are taken into account when calculating the fictional estate that will be the basis for calculating the forced inheritance. See AARON SCHWABACH, Of Charities and Clawbacks: The European Union Proposal on successions and Wills as a Threat to Charitable Giving, *Columbia Journal of European Law* 17 (2011), 5; Thomas Jefferson School of Law Research Paper No. 1866461. Available at SSRN: http://ssrn.com/abstract=1866461.

have acquired or received entitlements to the disputed gifts, and whether clawback entails return of the property itself or monetary compensation.[70]

One of the most important criticisms of clawback provisions is that they create uncertainty for donees who, at least during a certain period of time, do not know whether their gifts may be reclaimed by family members.[71] It is also argued that clawback provisions can also affect the payment of taxes and even creditor protection.[72]

Some member states, such as England, Wales and Northern Ireland do not have forced inheritance shares as such and hence have no clawback provisions. These countries' courts will not entertain a claim for a forced inheritance share or for a clawback even if the succession law the courts are applying includes it. In fact, forced inheritance shares and clawback provisions have been the most controversial part of the Regulation, leading the UK and Ireland to decline to opt-in.[73] Denmark has also declined to opt-in, but for other reasons.[74]

3. The road to Regulation 650/2012: international initiatives dealing with complex aspects arising from cross-border successions

The divergence of succession laws makes dealing with a succession with cross-border implications potentially very complex. It is an area ripe for international Regulation and a number cross-border succession instruments had been adopted at the international and European levels even before the promulgation of most recent EU Regulation. These instruments did not aim at harmonizing or regulating successions as a whole, but rather focused on simplifying specific issues arising in cross-border successions. Although the

[70] Some legal systems allow the gifts to be returned in value - this is the case of for example, Germany, Greece, the Netherlands or Spain - while others require their devolution to the estate in specie. Returning the assets that eventually have been sold to third parties involves remarkable transaction costs as well as great uncertainty. See PAUL MATTHEWS, The Problem of Clawback and the EU draft Regulation on Succession, *mimeo working paper*.

[71] ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 583.

[72] HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last accessed 17 February 2014).

[73] See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[74] Denmark voted no in the Maastricht Treaty referendum in 1992. As a result, Denmark was granted out-outs from European cooperation in the areas of defense policy, justice and home affairs, the euro and union citizenship. See the "National Compromise" stating the relationship between Denmark and the other member states regarding certain policies. This document can be found in http://www.eu-oplysningen.dk/upload/application/pdf/97ca9e4c/EU%20kompromis.pdf%3Fdownload%3D1 (last visited 17 February 2014). These opt-outs have been maintained in the Treaty of Amsterdam and the Treaty of Lisbon, that opened the possibility of Denmark, if approved, cooperating in justice and home affairs on a case-by-case basis.

success of these instruments has been limited, it is important to review their terms in order to understand the EU Regulation.

3.1 International and European Conventions on succession law

Most of the existing international conventions related to successions have been adopted within the framework of the Hague Conference on Private International Law.[75] The first was the 1961 *Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions*,[76] which entered into force in 1964 and provides rules for determining the validity of testamentary dispositions. It was followed by the 1973 *Hague Convention Concerning the International Administration of the Estates of Deceased Persons*, although this convention did not enter into force until 1993.[77] This second convention is aimed at facilitating the international administration of the estates of deceased persons through the creation of a model certificate that is to be accepted as internationally valid when issued by the authority of a contracting state with jurisdiction under the rules set out in the convention. A third instrument, the 1989 *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*[78] is aimed at increasing the predictability of the applicable law of successions with international elements through the establishment of choice of law rules. This third convention, however, has been signed by only four states and ratified by only one, and as a result it has yet to enter into force. Although the other two are in force, they have likewise received only small numbers of signatures and even smaller numbers of ratifications, giving them very limited practical impact.

In parallel with these Hague Conventions, the Institute for the Unification of Private Law (UNIDROIT) concluded the *Convention Providing a Uniform Law on the Form of*

[75] See the Convention of 5 October 1961 on the Conflict of Laws relating to the Form of Testamentary Dispositions has been ratified by 16 European Union member states. This convention can be found in http://www.hcch.net/upload/conventions/txt11en.pdf, http://www.hcch.net/index_en.php?act=conventions.status&cid=40#legend (last visited 17 February 2014); the Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons, ratified by three European Union member states (this convention can be found in http://www.hcch.net/index_en.php?act=conventions.status&cid=83, http://www.hcch.net/index_en.php?act=conventions.text&cid=83 (last visited 17 February 2014); and finally, the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, that has been ratified only by the Netherlands (this convention can be found in http://www.hcch.net/index_en.php?act=conventions.text&cid=62 (last visited 17 February 2014).

[76] Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (in force since 1964). The convention is available http://www.hcch.net/index_en.php?act=conventions.text&cid=40 (last visited 17 February 2014). This Convention has been ratified by 17 out of the 28 European member states: Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Luxembourg, Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom.

[77] Convention concerning the international administration of the estates of deceased persons (in force since 1993). The text of the convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=83 (last visited 17 February 2014).

[78] Hague Convention on the Law Applicable to Succession on Estates of Deceased Persons (concluded in 1989). The text of the convention is available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=62 (last visited 17 February 2014).

an International Wills[79] in Washington in 1973. The goal of this convention was providing a set of criteria for determining a will's formal validity regardless of the place where it was made, the location of the assets at issue, or the nationality, domicile or place of residence of the testator. This convention entered into force in 1978 but, like the others, it has attracted only a small number of states parties.

At the European level, the Council of Europe's 1972 *Convention on the Establishment of a Scheme of Registration of Wills*[80] aims to facilitate the discovery of the existence of a will by creating national will registries that can be easily consulted. This Convention has been adopted by eleven member states of the Council of Europe, but it has not yet entered into force.

Also relevant at the European level, although more general in scope, is the 1968 Brussels *Convention on jurisdiction and enforcement of judgments in civil and commercial matter*,[81] the "Brussels I" Regulation (44/2001) that superseded this convention in 2000,[82] the "Brussels II" Regulation (1347/2000) that addressed jurisdiction and recognition and enforcement of judgments in matrimonial and parental matters, and the "New Brussels II' Regulation (2201/2003) that superseded "Brussels II."[83] Although wills and succession issues are expressly excluded from the scope of these instruments, they are applicable to a number of issues relevant to succession.[84] For example, these instruments govern *inter vivos* gifts, which are relevant to succession questions in that such gifts are treated as anticipatory payments of forced inheritance shares in many jurisdictions.

3.2 Towards the adoption of Regulation 650/2012

[79] The Convention providing a uniform law on the form of an international will (adopted in October 1973). The text of the convention is available at http://www.unidroit.org/english/conventions/1973wills/convention-succession1973.pdf (last visited 17 February 2014).

[80] Convention on the Establishment of a Scheme of Registration of Wills, adopted in Basel on 16 May of 1972. The text of the Convention may be found in http://www.conventions.coe.int/Treaty/en/Treaties/Html/077.htm (last visited 17 February 2014).

[81] Convention on jurisdiction and enforcement of judgments in civil and commercial matters, also known as the Brussels Convention, was adopted in 1968. The text of the Convention may be found in http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm (last visited 17 February 2014). In 1988, the Lugano Convention, was adopted with the then six members of the European Free Trade Association (EFTA), except for Liechtenstein.

[82] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters. The text of the Regulation may be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT (last visited 17 February 2014).

[83] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. *O.J.* L 338, 23/12/2003 P. 01 – 29. The text of the Regulation may be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF (last visited 17 February 2014).

[84] Article 249 of the EC Treaty provides for the direct application of Regulations in all member states.

The EU's recent succession Regulation reflects an assessment that the legal complications of European cross-border succession have important practical consequences. Although the data on this issue are limited, the European Commission has estimated that around 4.5 million people die in the European Union every year and that the assessed value of the average estate is about 137,000 euros.[85] The Commission estimates that around 10% of European successions involve an international element and that the assessed the value of the estates in these cases is approximately 274,000 euros—double that of the overall average. Consequently, the European Commission estimates that the total value of European cross-border successions is around 123.3 billion euros per year.[86] So far this is the first official attempt to quantify the importance of cross-border successions in Europe.

Combined with the overall value of the estates at issue in these successions is the fact that their cross border elements present complex legal issues that carry higher expenses and greater inconvenience than ordinary successions.[87] In 2002, the Germany Notary Institute prepared a document that established the importance of practical problems involved in cross-border successions in Europe.[88] With this analysis in the background and following the priorities of the 1998 Vienna Action Plan,[89] the European Commission concluded that it was necessary to promulgate legislation to simplify European cross-border successions and minimize their transaction costs.[90] This legislative action would

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[85] It should be noted that a cross-border succession is not only a succession involving different states of the European Union but could also involve third states as long as the deceased had his or her habitual residence in a member state that opted-in to the Regulation.

[86] Commission Staff Working Document Accompanying the 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 successions and on the introduction of a European Certificate of Succession, *Impact Assessment,* {COM(2009) 154 final), {SEC(2009) 410}. This document can be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0410:FIN:EN:PDF (last visited 17 February 2014).

[87] HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[88] German Notary Institute, *Study on Conflict of Law of Succession in the European Union* (2002). This document can be found in http://ec.europa.eu/justice/civil/document/index_en.htm (last visited 17 February 2014).

[89] Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 19, 23.1.1999. This document can be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:019:0001:0015:EN:PDF (last 17 February 2014). The Vienna Action Plan included a program to adopt a series of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters and examine "the possibility of drawing up a legal instrument on international jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes and those relating to succession." The Program of measures adopted by the Council and the Commission was adopted in 2000. More recently, the Hague Program - http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm (last visited 17 February 2014) - called on the Commission to present a Green Paper covering, among other issues, the creation of a genuine European area of justice that would include measures to be adopted in the area of succession and wills.

[90] See Preamble 32 of the Regulation.

be based on Article 81(2) of the Treaty on the Functioning of the European Union,[91] within the broadly defined area of judicial cooperation in civil matters, which provides the European Commission with powers to adopt measures concerning family law with cross-border implications.[92]

In March 2005, the European Commission issued a Green Paper[93] seeking opinions and comments on what action might be taken at the European Union level regarding the law that should govern in cross-border successions. In this paper, the Commission identified a "*clear need for the adoption of harmonised European rules*,"[94] a view that was echoed in the replies to the paper by the European Economic and Social Committee and the European Parliament.[95]

This groundwork ultimately led, in 2009, to the Commission's adoption of a *Proposal for a Regulation 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*.[96] The legal basis of this proposed Regulation is article 61 of the Treaty establishing the European Community,[97] which establishes a common area of freedom, security and justice through, among others, the adoption of measures in the field of judicial cooperation in civil matters.[98]

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[91] See article 81(2) of the Treaty Functioning European Union (hereinafter TFEU), OJ C 306, 17.12.2007, also known as the Lisbon Treaty was ratified in 13 December 2007 and entered into force on 1 December 2009. The text of the article may be found in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF (last visited 17 February 2014).

[92] Despite of the powers attributed by article 81 TFEU, the European Union does not have exclusive competence on issues within the area of Freedom, Security and Justice and hence the principle of subsidiarity applies.

[93] Green Paper, Succession and wills {SEC(2005) 270}, COM (2005) 65.The Green Paper can be found in http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf (last visited 17 February 2014).

[94] Green Paper, Succession and wills {SEC(2005) 270}, COM (2005) 65.The Green Paper can be found in http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf (last visited 17 February 2014).

[95] The position of the European Parliament in its resolution regarding the Regulation did not materially differ from the Commission's approach. The Parliament stressed the need first, for simple and clear rules on private international rules on succession as well as on the recognition and enforcement of judgments and of public documents issued by foreign authorities and second, for new and reliable community instruments that could simplify cross-border successions. See the European Parliament resolution with recommendations to the Commission on succession and wills (2005/2148(INI)) adopted on November 2006. This document is available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0496&language=EN&ring=A6-2006-0359 (last visited 17 February 2014).

[96] 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. The proposal can be found in http://ec.europa.eu/civiljustice/news/docs/succession_proposal_for_regulation_en.pdf (last visited 17 February 2014).

[97] See the Treaty on European Union (TEU), O.J. C 191, also known as the Maastricht Treaty, was signed in Maastricht on 7 February 1992 and in force since 1 November 1993. The text of the Treaty can be found in http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html (last visited 17 February 2014).

[98] See the explanatory memorandum of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments

The Commission's proposed Regulation was amended and approved by the European Parliament in March 2012,[99] and finally adopted in July 2012, based on the powers conferred by Article 81(2) of the Treaty on the Functioning of the European Union.[100] It should be noted that the United Kingdom, Ireland and Denmark are not bound by the provisions of the Regulation, as it is generally the case for these states with respect to judicial cooperation matters.[101]

The Regulation has been entering into force in phases, with some elements becoming effective in August 2012, others in July 2013 and January 2014,[102] and the remainder slated for entry by August 17, 2015.[103]

4. The EU's Regulation on Cross-Border Successions

The Regulation aims not harmonize the substantive law of succession in the different member states,[104] but rather to simplify the law[105] for those who die having exercised their right to free movement by migrating between member states or buying property in a member state outside of their country of nationality.[106] This simplification is to be achieved through the introduction of legal elements that increase the level of certainty

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in matters of succession and the creation of a European Certificate of Succession – COM (2009) 154 final. See also article 65 of the TEC stating as a goal the adoption of measures

> "*improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases*" and "*promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*".

[99] See the Report delivered by Kurt Lechner of the Committee of Legal Affairs of the European Parliament, A7-0045/2012. This report can be found in http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120313+ITEM-008-03+DOC+XML+V0//EN&language=en&query=INTERV&detail=2-137-000 (last visited 17 February 2014).

[100] It should be noted that under the TFEU, the European Union does not have exclusive competence over these issues so the principle of subsidiarity applies so that the European Union may act as long as the objectives of such policy might not be achieved by the Member States alone.

[101] Denmark special situation is framed within the particularities of its position regarding judicial cooperation matters of the TFEU. See *supra*.

[102] Most of the Regulation entered into force on August 2012. However, Articles 79, 80 and 81 entered into force on 5 July 2013 and articles 77 and 78 on 16 January 2014.

[103] See article 83 of the Regulation.

[104] See the European Commission, Green Paper Succession and wills, {SEC(2005) 270} COM (2005) 65 final noting that full harmonization of substantive succession rules in the Member states is inconceivable. See also HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[105] See Regulation 650/2012, preamble (32). See also HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[106] A cross-border succession is not only a succession involving different states of the European Union but could also involve third states as long as the deceased had his or her habitual residence in a member state that opted-in to the Regulation.

about succession outcomes in these cases and, hence, reduce their transaction costs,[107] enable mobile European citizens to organize their successions before dying, and protect the rights of their heirs and legatees, as well as those of other relatives and creditors.[108] The European Commission concluded that the variation in succession rules across the Union prevented the full exercise of private property rights, which are fundamental to EU law.[109]

The focus of the Regulation is the harmonization of conflict of laws rules as opposed to the harmonization of substantive succession law. This approach allows member states to retain their own substantive succession laws, modifying instead their private international law rules regarding choice of law when cross-border elements are present in a succession.[110]

The determination of the law governing a succession is based, under the Regulation, on the habitual residence of the deceased at the time of his or her death. This reliance on last habitual residence as a choice-of-law rule is one of the main novelties of the Regulation. The Regulation also includes harmonization criteria with respect to jurisdiction and to recognition and enforcement of judgments. It also introduces a European Certificate of Succession that is to be given effect in all member states.[111]

The Regulation, thus, applies to the acquisition of rights *in rem* with respect to inherited property but not to the content of these rights.[112] So the Regulation does not affect the "*numerus clausus*" of property rights in the member states, the classification of property rights, or the determination of the prerogatives of rights' holders.[113]

Assessing the implications of this Regulation requires a closer look at its details.

a) Being pragmatic: the Commission's monist approach

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[107] See the Regulation.
[108] See the Regulation.
[109] The European Commission, cited cases C-200/96 Metronome Musik [1998] ECR I-01953 and the joined Cases C-154 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-06451 in the 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 as examples of European Court of Justice jurisprudence regarding the protection afforded to the fundamental right to private property in the European Union.
[110] It should be noted that the Regulation does not deal or affect the rules of private international law of plurilegislative member states such as Spain and the UK. Hence, once the Regulation determines the succession law applicable to a succession is the law of a state with a plurilegislative structure, the determination of the internal law to be applied will be done through the internal rules of private international law. Spain has seven different succession laws: the succession law of Aragon, the Balearic Islands, Catalonia, Navarra, Galicia, the Basque Country and the law of the Spanish Civil Code applied in those territories without their own succession law. In the case of the UK, England and Wales, Scotland, and Northern Ireland have separate laws of succession. See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 10 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014). For simplicity and for the purpose of this paper, however, reference will be made to Spanish succession law and to UK succession law and not to the specific succession laws finally applied.
[111] These other elements of the Regulation are beyond the scope of this paper.
[112] See article 1.2 (k) excluding within the scope of application of the Regulation the definition of the nature of rights *in rem*.
[113] See Preamble (15) of the Regulation.

The Regulation adopts a monist approach to a succession,[114] applying a single choice of law rule to the whole estate, regardless of the nature of each asset or its geographical location.[115] As noted above, the monist approach is not new or unique.[116] Indeed, in this regard, the Regulation can be seen as following a recent trend European succession law.[117]

The Regulation's monist approach has been generally well received.[118] Placing each succession under a single jurisdiction's law[119] arguably facilitates succession planning as well as the administration of estates after death.[120] In contrast, the dualist approach of splitting applicable law according to the type and location of each asset is often seen as having higher transaction costs, especially in terms of estate planning and

[114] The approach adopted by the European Commission has been widely supported by the doctrine as well as by different governments of the member states. See DAVID HAYTON, Determination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates, DNotl, Les Successions Internationales dans l'UE. This article can be found in http://www.dnoti.de/eu_studie/08_Hayton.pdf (last visited 17 February 2014) arguing that one law of succession applicable to the whole estate should be simpler and cheaper than having different laws applicable to different types of assets. See also Ministry of Justice, European Commission proposal on succession and wills – a public consultation, Consultation Paper CP41/09, 21 October 2009.

[115] See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 555 claiming that the European approach should perceive the estate as a unity and hence in favor of adopting a monist approach at the European level.

[116] See article 7(1) of the Hague Succession Convention also adopting a monist approach to the succession.

[117] See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 555 noting that the most legal systems have adopted a monist approach and that substantive laws will assume their application to all the assets of the deceased's estate.

[118] See Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's 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', 5, pointing to the need for a general part of European private international law that would also deal with preliminary questions. This commentary can be found in http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf (last visited 17 February 2014). See also PILAR BLANCO-MORALES LIMONES, El Ámbito de la Ley Aplicable, Incluída La Administración de la Sucesión, Cross-border Successions within the European Union. Bruselas (2010). This document can be found at http://www.successions-europe.eu/event-downloads/Blanco-Morales-ES.pdf (last visited 17 February 2014) arguing in favor of the adoption of a monist approach to the succession but questioning its scope given that there might be preliminary questions related to the succession that will be to be resolved – such as the for example, a filiation – on which the Regulation is silent and does not establish the conflict of laws rule that will be applied on such cases.

[119] See the CCBE (Council of Bars and Law Societies of Europe) Response to the Green Paper on Succession and Wills of the European Commission http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ccbe_en.pdf (last visited 17 February 2014) claiming the by choosing a monist approach to succession, the risk of multiple forums, different choice of laws and irreconcilable judgments is excluded. See also ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 567.

[120] It should be noted that there is a remarkable exception of this general rule in Article 1(2)(k) of the Regulation that excludes from the scope of this monist approach "*the nature of rights in rem*" so that a legal right over an immovable property is not introduced into a Member State which does not recognize such right under its domestic law.

administration, because legal costs must be incurred for each part of the estate separately.[121] Further, the coordination of multiple laws within one estate is often difficult and messy.

Nonetheless, there are inherent limitations to the monist approach. Despite its goal of applying a single succession law to each succession, there are sometimes mandatory rules, such as certain property regulations, that necessarily interfere with this outcome and complicate the legal landscape in practice. In addition, the application of *renvoi* may lead a seemingly monist choice-of-law rule to the law of a state that itself takes a dualist approach.[122]

b) Harmonizing conflict of laws rules: the reliance on the last habitual residence

The Regulation strongly relies on the deceased's connection to the state of his last habitual residence. In this sense, the Regulation provides the law of the habitual residence as the default succession law governing the deceased's succession,[123] even when there are circumstances involving a third country,[124] as well as gives the court's of the deceased's last habitual state of residence general jurisdiction of the deceased's succession.[125] It should be noted that the Regulation, in the second paragraph of article 21,[126] includes an exception to the default succession law of the deceased's habitual residence in favor of the succession law of the State with which the deceased was manifestly more closely connected. It remains to be seen the scope of this exception, its interpretation and its application.

The Regulation gives testators some autonomy to override this default rule and place their successions under the laws of their countries of nationality[127] as long as they do this

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[121] See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 555 further noting that the characterization of property as movable or immovable might often be difficult.

[122] See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 555.

[123] See Article 21.1 of the Regulation.

[124] See Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's 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', 64, pointing to the need for a general part of European private international law that would also deal with preliminary questions. This commentary can be found in http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf (last visited 17 February 2014). See also DAVID HAYTON, Determination of the Objectively Applicable Law Governing Succession to Deceased's' Estates, DNotl, Les Successions Internationales dans l'UE, 364. This article can be found in http://www.dnoti.de/eu_studie/08_Hayton.pdf (last visited 17 February 2014) in favor of the adoption of the habitual residence of the deceased's at the time of death and arguing that the habitual residence of the deceased at the time of death is the simplest and closest connecting factor to the deceased. Hayton claims that the law of the deceased's habitual residence allows for a predictable ascertainment of the law ruling the deceased's succession.

[125] Article 4 of the Regulation provides that

> "*The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole*."

[126] Article 21.2 of the Regulation.

[127] Article 22.1 of the Regulation allows testators to choose as the governing law of their succession the law of their nationality at the time of making the choice or at the time of death.

through a "*valid declaration in the form of a disposition of property upon death*."[128] The country of nationality, in these cases, can be the country of nationality at the time of death or at the time of making the declaration. In the absence of such a declaration, however, the Regulation's default rule is the law of the deceased's last habitual residence. This law is applied when the deceased dies intestate or leaves a will without making a valid declaration regarding choice of law under the terms of the Regulation.

Whereas the Regulation's monist approach has been well-received, the choice of laws of the deceased's last habitual residence has been controversial.[129] This rule has been criticized as creating a source of uncertainty because the Regulation does not include any definition of habitual residence or criteria by which it is to be established.[130] The concept of habitual residence in some European legislation may not be analogously applied in the succession context and its interpretation in the jurisprudence of the European Court of Justice is very context specific.[131] Further, the concept of habitual residence presents

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[128] Article 22.2 of the Regulation. See also paragraph 39 of the Preamble of the Regulation.

[129] HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[130] Article 2 of the Regulation, that defines the key concepts in it, omits the definition of habitual residence. There is a risk, then that its determination will vary across member states and that its interpretation by courts might also be different. It could be generally said, though, that, despite its variation across the legal systems, its determination generally tests or evaluates the intention of a certain individual in establishing a permanent home in a certain place. See DAVID HAYTON, Determination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates, DNotl, Les Successions Internationales dans l'UE, 364. This article can be found in http://www.dnoti.de/eu_studie/08_Hayton.pdf (last visited 17 February 2014) arguing that the Regulation should include a common definition of a person's habitual residence. Defining habitual residence is of special importance considering that the determination of what constitutes habitual residence and how it is to be established varies considerably and depends on different factors that vary from state to state. For example, Finland and the Netherlands, following the Hague Convention on the Law Applicable to Succession on Estates of Deceased Persons (concluded in 1989) - the text of the convention is available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=62 - try to strike a balance between nationality and habitual residence through applying the law of the nationality within the first five years of residence in a foreign country but switching to the application of the law of the habitual residence once these five years have gone through. See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 562.

[131] See, for example, the case C-66/08 Kozlowski, where the European Court of Justice interpreted the scope of article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender procedures between Member states (OJ 2002 L190 p1) and concluded that the concept of resident required a uniform interpretation and that a person is "resident" in a Member State when he has established his actual place of residence there. At the same time, in the case C-523/08, Kokott, the European Court of Justice, in the context of family matters, interpreted the concept of habitual residence under article 8(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1). In this context, the European Court of Justice concluded that habitual residence should be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. So conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. In the case C-497/10, Barbara Mercredi v. Richard Chaffe, the European Court of Justice interpreted the concept of habitual residence under articles 8 and 10 of Council Regulation (EC) No

major challenges in the case of individuals who live for half a year in a member state and the other half in a different member state or even, to a non-member state. In these cases, it remains to be seen the interpretation that the European Court of Justice will offer of such concept.

Choice of law rules in European successions are generally dominated by the domestic laws of the member states.[132] The European Commission, being aware of this has acknowledged that "none of the criteria is without its drawbacks"[133] but justified the adoption of the law of the deceased's last habitual residence on the ground that this state is the one that has, in most cases, the closest links to the succession in terms of the location of the deceased's assets, creditors, heirs, and tax obligations.[134] Habitual residence is less certain than nationality, but it allows for the application of a single law to all family members residing together, regardless of their nationalities,[135] and it allows for a better connection between the circumstances of the succession and the law applied to it.[136]

2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, and concluded that habitual residence should be interpreted to the place which reflects some degree of integration by the child in a social and family environment and factors such as the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the move to that State. Finally, in the case C-452/93, Pedro Magdalena Fernández, the European Court of Justice interpreted the concept of habitual residence of the wording of article 4(1)(a) of Annex VII to the Staff Regulations that is the criterion for awarding an expatriation allowance and concluded that in this context the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests, taking all the factual circumstances of the case into account. It should be noted that the European Court of Justice established that a person cannot have two simultaneous habitual residences in two different Member States. See the case C-589/10, Janina Wencel v. Zaklad Ubezpieczeń Społecznych w Białymstoku interpreting Article 10 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008.

In light of the problems of interpretation of the concept of habitual residence, nationality is often considered to provide a higher level of certainty given that it is easier to establish and more difficult to manipulate.

[132] ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 552.

[133] See the Green Paper, Succession and wills {SEC(2005) 270}, COM (2005) 65.The Green Paper can be found in http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf (last visited 17 February 2014).

[134] See comment on article 4 of the 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 where the European Commission noted that the reason for choosing the habitual residence criteria for determining the jurisdiction of a member state is that this is the most widespread method used in the Member states that at the same time coincides in most cases with the location of the deceased's property.

[135] This issue might be important in cases of households whose individuals might have more than one nationality.

[136] HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

Another complication arises in cases of third-country nationals residing in the European Union. The Regulation's application of the law of last habitual residence to these people's successions can result in international discord, as many of these people come from countries like Turkey, Morocco, Albania and Algeria, that apply the law of nationality to successions. The result may be successions in which the country of nationality applies a law different from the one that EU member state courts must look to under the Regulation.[137]

c) The testator's scope of private autonomy: overriding the default rule

Article 22 of the Regulation allows individuals to establish, through validly drafted dispositions of property upon death,[138] the laws of their nationalities as the laws applicable to their successions.[139] Hence, the default rule of habitual residence can be overridden to this extent.

This power of testators to choose their own succession laws does not exist in the domestic laws of most member states. One reason for this is that states try to ensure as much of a connection as possible between the succession and the law governing it.[140] The Regulation's grant of autonomy, therefore, has been questioned on this ground. At the same time, questions have arisen as to whether the Regulation should or does limit testators' choices to their countries of nationality.[141] Likewise, there is the question of whether the testator will be able to specify that the succession be governed by a dualist approach, choosing one law for movable property and another for immovables (e.g. the law of the place in which the immovables are located).[142] These issues remain to be resolved as the Regulation is implemented.

d) Recognition and enforcement of wills.

One of the driving forces behind the European Commission's push for the succession Regulation was the desire to simplify not only the conflict of laws rules but also the recognition and enforcement of member states' courts' judgments and notarial instruments related to successions.[143] The Regulation provides that a decision issued by a

[137] See ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 564.
[138] Article 22.2 of the Regulation. See also paragraph 39 of the Preamble of the Regulation.
[139] See Article 22 of the Regulation.
[140] For example, the UK does not allow for the testator's choice of law. In contrast, Bulgaria and Estonia's succession laws allow for a choice of law of the testator's nationality as the law governing the testator's succession and Italian succession law allows the deceased to establish the application of the law of his or her habitual residence as the law governing his or her succession. See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).
[141] Article 22.2 of the Regulation. See also paragraph 39 of the Preamble of the Regulation.
[142] ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 577.
[143] See preamble (32) of the Regulation.

member state court must be recognized automatically by other member states[144] unless "manifestly contrary" to public policy,[145] unless the defendant lacked an opportunity to be heard in the prior proceeding,[146] or unless the decision is irreconcilable with an existing decision in a dispute involving the same parties.[147]

Although the recognition of EU-member succession decisions does not require any special procedure, the enforcement of such decisions generally requires a declaration of enforcement before the court of the member state in which enforcement is sought.[148] The court of the member state in which enforcement is sought may refuse to enforce the decision when the decision was "manifestly contrary" to public policy.[149]

e) Committed to the law of the deceased's habitual residence: The limited scope of *renvoi*

Renvoi takes place whenever the law of a member state establishes that the law of another state should govern a succession as a result of the application of the conflict of laws rules of that first member state. The Regulation, in its article 34, allows for renvoi as long as the application of the rules of private international law make a renvoi to the law of a member state or to the law of a third state that would apply its own law.[150]

Consistent with the commitment in favor of the application of the law of the deceased's habitual residence, the scope of renvoi is very limited. So except for these two cases announced in article 34.1, in the second part of the article the Regulation expressly excludes renvoi in specific cases determined by the Regulation where the law applicable to the succession would result a different one from the law of the habitual residence.[151]

The issue that remains to be clarified by the Regulation or its interpretation by the European Court of Justice is whether whenever there is renvoi, it is just the substantive law of the member state the succession law of which should be applied or also its private international law, that may result in the application of the succession law of a third state.[152] From the wording of the Regulation it does not seem possible to conclude which is the actual scope of the renvoi allowed by the Regulation.

f) The creation of a European Certificate of Succession

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[144] See article 39 of the Regulation. It should be noted that the recognition and enforcement of authentic instruments produced by notaries of third countries would not necessarily automatically be recognized.
[145] Article 40(a) of the Regulation.
[146] Article 40(b) of the Regulation.
[147] Article 40(c) of the Regulation
[148] The declaration of enforceability is established in articles 45 to 58 of the Regulation.
[149] Article 59.1 of the Regulation.
[150] See article 34 of the Regulation.
[151] Renvoi is excluded when the law applicable to the succession is for example, the law of the nationality of the deceased or the law of the state with which the deceased was manifestly more closely connected at the time of death. Article 34.2 expressly excludes renvoi whenever the applicable law to the succession is the law established in articles 21(2), 22, 27, 28(b) and 30 of the Regulation.
[152] In this sense, if the private international law of that second state was included, there could be renvoi to the law of a third state. What remains to be seen is whether the Regulation would only allow such renvoi whenever it would result in the application of the law of a member state or in the application of its own law.

The Regulation creates a European Certificate of Succession ('the Certificate') that may be issued by the court with jurisdiction over the deceased's succession, that is, the court of the deceased's habitual residence.[153]

This Certificate has a standard form and includes details regarding the succession, such as the identity of the deceased, the authority empowered to administer the succession and its address, which individuals might have a claim over part of the estate, information concerning the deceased and the circumstances of his or her death, the applicable law and the reasons for determining it, the elements of fact or law giving rise to the power to administer the succession and what those powers are, who is entitled to get what, any restrictions on the rights of the heir, and finally, details of the person who applied for the Certificate.[154]

The Certificate has certain effects,[155] and it must be automatically recognized by the other member states for the purpose of administering the succession and determining entitlements to the deceased's property. The Certificate must also be given a presumption of validity in all member states, allowing interested parties to, among other things, register inherited property.[156]

So despite of the European Commission's limited approach with respect to the harmonization of succession law, the adoption of the Regulation will have a significant impact on many member states' domestic Regulation of cross-border successions, including the UK.[157]

5. The UK's decision not to opt-in to the Regulation

[153] Article 62 of the Regulation establishes the creation of the European Certificate of Succession. For a review of the legal design of the European Certificate of Succession, its characteristics, requirements and validity see Lorenzo Prats Albentosa Ley aplicable a la sucesión «mortis causa» en la Unión Europea y creación del Certificado sucesorio europeo, Diario La Ley, Nº 7929, Sección Tribuna (2012).

[154] See article 68 of the Regulation for the full list of content of the Certificate of Succession.

[155] See article 69 of the Regulation regarding the effects of the Certificate.

[156] The introduction of a European Certificate of Succession has been controversial in some of the member states. For example, the UK representatives noted that they did not support the introduction of such certificate given that it would facilitate the operation of national procedures but would also override national law and practice given its automatic recognition. This was one of the arguments the UK provided in order to justify opting-out from the Regulation. HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[157] See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014). See also CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010).

Once the Proposal of the Regulation was the UK's government considered many arguments justified their decision not to opt-in to the Regulation. In the area of European regulation of freedom, security and justice, the UK has the right to opt-in on a case by case basis.[158] The Regulation is a regulatory instrument of successions and wills that clearly fits within the area of freedom, security and justice. Before adopting its final decision, when the European Commission presented the proposal for the Regulation,[159] the UK's Ministry of Justice launched a consultation.[160] At the same time, the House of Lords EU Committee called for written evidence regarding the Commission's proposal.[161] On December 16, 2009, the UK's government decided not to opt-in to the Regulation but continue participating in its negotiations.[162]

Many reasons can explain the UK's position regarding the Regulation. The arguments provided for not opting-in to the Regulation might be structured around the following: First, as explained above, the UK's government considered that the uncertainty provided by the concept of habitual residence, key in the Regulation, could result in unforeseen and unfair outcomes. The UK's government argued that other connecting factors should also be considered and that a definition on what constituted habitual residence should have been provided as well.[163] Second, the existence of clawback provisions in the succession laws of other member states was considered to potentially impact on intervivos gifts - to institutions such as charities located in the UK -, to trusts and on property located in the UK.[164]

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[158] The Lisbon Treaty, in its Protocol [21], the " *Protocol on the Position of the United Kingdom and Ireland"* has maintained the opt-in from European legislation regarding freedom, security and justice areas lready provided under the Amsterdam Treaty for regulations adopted on the areas covered by the pillar on Justice and Home Affairs (JHA) –the former Third pillar. That means that the UK government is not automatically bound by the measures adopted under Titole IV TEC unless it opts-in to them, which might be done within three months of a proposal being presented to the Council. For additional infromation see http://www.parliament.uk/business/publications/research/briefing-papers/SN06087/uk-government-optin-decisions-in-the-area-of-freedom-security-and-justice and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206474/Final_opt-in_webpage_update.pdf (last visited July 11th 2014).

[159] 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 successions and on the introduction of a European Certificate of Succession {SEC(2009) 410, {SEC(2009) 411}. This document can be found in http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2009/0154/COM_COM%282009%290154_EN.pdf (last viewed July 11, 2014).

[160] See Consultation paper CP41/09. This document might be found in http://www.biicl.org/files/4682_ec-succession-wills%5B1%5D.pdf

[161] See http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75we01.htm

[162] See http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm

[163] See http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm

[164] See http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm

English succession law does not apply to intervivos gifts. However, the Regulation might have an impact on them because such gifts might be subject to clawback provisions of other member states.[165]

Trusts, as well as assets transferred to trust are beyond the scope of the Regulation and hence not be subject to forced inheritance shares provisions of the succession systems of other member states. The Regulation expressly states it is not applicable to the creation, administration and dissolution to trusts.[166] However, this should not imply that trusts are completely excluded form the scope of the Regulation. In this sense, trust transfers as well as trusts created by will or under a statute in connection with an intestate succession seem to be subject to the scope of the Regulation, and hence to clawback provisions of succession laws governing the deceased's succession.

With respect to assets transferred to trusts, the scope of the applicable law resulting from the Regulation encompasses the obligation to restore gifts whenever necessary to determine the shares of the different beneficiaries.[167] However, trust assets are not expressly mentioned so it could be argued that such kind of gifts should not be subject to the Regulation.

In addition to the arguments provided by the UK government, cultural, procedural and substantial reasons are also relevant to understand the UK's not opting-in. From a cultural perspective, the approach to successions is very different in the UK than in the other member states. Under the English tradition, private autonomy is of crucial importance in successions so that testator's should be able to organize the transfer of their full estate as they consider.[168] Such primacy of private autonomy in the context of successions is remarkably different from the traditions of the succession laws of most member states the succession laws of which include forced inheritance and clawback provisions as one of the key elements of their succession system.

From a procedural perspective – as well as from a substantive perspective – the process by which the deceased's estate is transferred is very different between the UK – a common law system – and most European member states – civil law systems: while the English succession law provides for a court appointed estate administrator, member states

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[165] Related to this question is the issue of whether titles of assets received as gifts and registered in public Registries will be valid and shield from subsequent claims of beneficiaries of forced inheritance shares under the succession laws of other member states or will be subject to them.

[166] See Preamble [13] and article 1.2 (j) of the Regulation excluding from its scope of application the "creation, administration and dissolution of trusts."

[167] See article 23.2(i) of the Regulation.

[168] The Wills Act of 1837, in its §3 (*at http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/section/3)* provides that

> *"It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve . . . F1 upon his executor or administrator; and the power hereby given shall extend . . . F1 to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."*

that follow the Roman tradition in civil law, do not count with this figure and provide for the heirs to step in the shoes of the deceased once he or she dies.

Of minor importance but also relevant is the different notarial tradition of the different member states, almost non-existent in the UK.

All these questions, by themselves and also combined, resulted in the UK not opting-in to the Regulation. The UK's government saw benefits from the adoption of the Regulation. However, it considered that the risks it presented for the UK's succession system and for charities and trusts in the UK outweighed its benefits.[169] By adopting this decision, the UK's government considered of special importance maintaining the UK's private international law intact and gave priority to the interests of charities and trusts over potential beneficiaries of the provisions of the Regulation.

6. The intended and unintended effects of the UK's decision not to opt-in to the Regulation: Minimizing the exposure without avoiding it

The decision of the UK government not to opt-in to the Regulation involved intended, as well as unintended effects that might be classified in two major categories: the first one is one of the driving forces of the UK's government decision that is, avoiding the application of the Regulation in the UK, for citizens and residents in the UK. A second major effect, is the effect that the UK's not opting-in will have on UK's citizens with habitual residence in other member states that have adopted the Regulation.

a) The intended effects of the UK's decision: avoiding being bound by the Regulation

As explained above, many arguments were offered to justify the UK's government decision not to opt-in to the Regulation. The ultimate goal of the UK's government was maintaining as intact as possible the private international law rules in the different UK's jurisdictions and hence avoiding the application of the Regulation in the UK. Certainly, the UK's not opting-in results in the Regulation not being enforceable in the UK. Hence, from this perspective, the UK's international private law rules regarding successions will not be replaced by the provisions of the Regulation.

A clear implication of this is that UK's citizens with cross-border successions will not be able to enjoy the provisions of the Regulation but also, nationals of other member states that adopted the Regulation with habitual residence in the UK will not be able to organize their succession under its provisions. So for example, nationals of other member states with habitual residence in the UK, will not be able to organize their succession under the law of their nationality as the Regulation allows, given that English law does not allow testators to choose the succession law governing their succession. Unfortunately it is difficult to assess how many individuals residing in the UK will be

[169] See http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm

affected by this decision because Eurostat data does not include data on the number of citizens 65-and-over nationals in one member state residing in the UK.[170]

However, despite of avoiding the application of this legal instrument in the UK, this does not imply that the UK succession system will not be influenced or affected by the adoption of the Regulation by the other member states. In this sense, some issues arise.

First, it remains to be seen how UK's courts will react to *mortis causa* dispositions drafted by their residents under the succession law of their nationality. Will English courts understand this as a violation of English private international law or this wll result in a redefinition of the concept of habitual residence? Further, what will be the effects English courts will give to European Certificates of Succession drafted under the succession laws of other member states affecting property located in the UK? Will the content of the European Certificate of Succession will be recognized and hence effective or it will only be effective as long as its provisions are compatible with English succession laws?

At the same time, it should be noted that the monist approach adopted by the Regulation will result in the application of succession laws of other member states to property located in the UK. In this sense, in contrast to the current situation, whenever the Regulation will enter into force a single succession law will govern the deceased's succession with cross-border implications. Consequently, this law will be applicable to all the deceased's estate and hence to property located in the UK. As a result, from the application of foreign succession law to property located in the UK it could be that such property could be subject to property rights unknown by English property law. In addition to the uncertainty created by this situation, this would require an adjustment of the land registration system in order to determine how it would deal with this property rights foreign to English property law.[171]

These are major issues that will have to be addressed once the Regulation enters into force it remains to be seen how these questions will be solved and how they be decided as well as interpreted by English courts.

b) The unintended effects of the UK's decision: the application of the Regulation to UK nationals who die while habitually residing in a member state that has adopted the Regulation.

This section focuses on the effects of the Regulation on cross-border succession for UK nationals with habitual residence in other EU member states. For this purpose, it turns to the 2013 Eurostat data on intra-EU migrants in the 65-and-over age group—the group with the highest risk of death and thus the highest likelihood of having estates subject to the succession Regulation.[172]

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[170] It should be noted that according to Eurostat, the UK does not report information regarding the number of nationals of other member states with habitual residence in the UK.

[171] See the report of the HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 23-24 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[172] See Table 1, Number of aliens 65 years or older by citizenship and country of residence, in the Annex of this paper.

Looking closely at UK citizens, in the year 2013, there were 160.308 65-and-over UK citizens that reside in member states other than the one of their nationality. As Table 1 shows, Spain was the most common country of citizenship among the non-Spanish, 65-and-over EU-citizens and the most numerous group were UK citizens. So in 2013, 107.174 British citizens 65-years-old or over resided in Spain. That represented over 66 percent of the 160.308 65-and-over UK citizens residing in the EU outside the UK.

So given that Spain seems to be the preferred destination of UK citizens of the 65-and-over age group, a comparative analysis of their substantive succession laws and the impact of the adoption of the Regulation by Spain and its not adoption by the UK, will be of great use to asses the effects of this instrument for UK citizens dying habitually resident in a member state that has adopted the Regulation such as Spain as well as their indirect effect for the UK.

1. Two different perspectives of successions: comparing Spanish and UKs succession laws

The differences between UK succession law and Spanish succession law are remarkably dramatic.[173] The UK and Spain come from different legal traditions—common law and civil law—and this results in a remarkably different way of understanding private autonomy, donations and the transfer of property, including transfers through succession.

The impact of the Regulation on UK nationals with habitual residence in Spain may be notable and may affect a significant number of individuals. According to Eurostat, in the year 2013, out of the 160.308 UK citizens 65-and-over residing in other European Union member states, 107.174 of them—nearly 67 percent—resided in Spain.

As explained earlier, the Regulation will shift the law applicable to these people's successions (assuming they die in Spain). In the absence of the Regulation, UK law would apply, whereas the Regulation will make Spanish law applicable for those who die intestate or otherwise without having made a valid choice of law.[174]

The extent of the differences between these two succession laws is remarkable. From a procedural perspective, in Spain,[175] the estate passes to the decesead's heirs, who substitute the deceased in terms of assets and liabilities and who are responsible for paying out the forced inheritance. In contrast, in the UK,[176] the deceased's estate initially passes to a personal representative who administers it, pays the creditors, collects any debts, and pays taxes. Only once this has taken place are the remaining assets distributed

[173] See Table 3 at the annex of this article comparing the Spanish and the UK succession laws.

[174] This is what Spanish private international law provides. Article 9.8 of the Spanish Civil Code.

[175] Spanish succession law is generally regulated in articles 636 and 806 – 822 the Spanish civil code. However, given the decentralized structure of Spain, some autonomous communities such as Aragon, the Balearic Islands, Catalonia, Navarra, Galicia and the Basque Country also have their own civil law and specifically regulate succession law. The Regulation, though, does not deal with the choice of law rule in decentralized states such as Spain. Once the law governing a succession is the Spanish law, it remains to be seen how international private law rules will determine which will be the succession law finally governing a certain succession.

[176] See the report of the HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

according to the provisions of the deceased's will or according to the law if there is no will.

The approaches of both legal systems to the substantive aspects of succession are also very different. Spain is a monist succession system while the UK provides for a dual approach whereby the applicable law depends on the nature of the asset to be transferred: Movable assets are subject to the law of the country where the deceased was domiciled[177] at the time of death while immovable assets are subject to the law of the state where the they are located.[178]

Under the laws of most of the UK territories—England, Wales, and Northern Ireland—there is no forced inheritance share and hence no clawback provisions.[179] Consequently, the size of the estate available for distribution includes the assets owned by the deceased at the time of death but does not take into account gifts made by the deceased during his or her lifetime or during any period prior to death. It should be noted that Scottish law provides surviving spouses, civil partners or issue with "legal rights" that include half of the deceased's movable estate in favor of the issue, if the deceased has no surviving spouse. Likewise, if the deceased leaves a surviving spouse but no issue, the surviving spouse is entitled to half of the movable assets of the estate. But if the deceased's issue concur with the deceased's surviving spouse, then each takes one third of the deceased's movable assets of the estate.

Spanish succession law provides for a forced inheritance of two thirds of the deceased's estate in favor of the issue and descendants and the surviving spouse.[180] In cases where the deceased is survived by children—or other descendants—the forced inheritance share in their favor is two thirds of the estate, regardless of the number of children, leaving the deceased with a right to dispose of one third.[181] If the deceased leaves no issue but has ancestors, the forced inheritance share is limited to half of the estate so long as there is no surviving spouse. If there is a surviving spouse, the ancestor's

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[177] The concept of domicile in the UK is quite different to the concept of habitual residence. See DAVID HAYTON, Determination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates, DNotl, Les Successions Internationales dans l'UE. This article can be found in http://www.dnoti.de/eu_studie/08_Hayton.pdf (last visited 17 February 2014) discussing the different domiciles – of origin, of dependency or of choice – considered in England and Ireland. For the purpose of the Regulation the relevant domicile would be the domicile of choice whereby that would be the domicile the deceased had at the time of death with the intention to settle there permanently or indefinitely.

[178] Ministry of Justice, European Commission proposal on succession and wills – a public consultation, Consutlation Paper CP41/09, 21 October 2009.

[179] It should be noted that the Inheritance (Provision for Family and Dependants) Act of 1975 allows a court to make provisions for the maintenance to spouses, domestic partners or descendants from a deceased's estate whenever reasonable provisions have not been made for them in a succession instruments such as a will. In any case, such provisions are not automatic entitlements and hence are not equivalent to a mandatory inheritance share as understood in most European member states and consequently do not represent a potential constraint on the testator's freedom to dispose of his or her property. See SARAH ALBURY et al., Rapporteurs, Royaume-Uni: EU study on the international law of succession, 702. This document is available at http://ec.europa.eu/civiljustice/publications/docs/report_conflits_uk.pdf (last visited 17 February 2014)

[180] It should be noted that Spain is a plurilegislative state so that the applicable succession law will result from the application of the Spanish conflict of law rules. However, the analysis of the applicable succession law resulting from the Spanish conflict of law rules is beyond the scope of this paper. So the references on the Spanish succession law will be based on the provisions of the Spanish Civil Code.

[181] Article 808 of the Spanish Civil Code.

forced inheritance share is limited to one third of the estate.[182] It should be noted that the forced inheritance share provided for the surviving spouse is in the form of a usufruct of a share of the deceased's estate, which can depend on which of the deceased's relatives concur with the surviving spouse. When the deceased leaves issue and a surviving spouse, the surviving spouse is entitled to the usufruct of one third of the deceased's estate.[183] When there are ancestors but no surviving issue, the spouse gets usufruct of half of the estate,[184] and when there are neither ancestors nor issue, the spouse gets usufruct of two thirds of the estate.

As in many other legal systems, in order to calculate the amount of the entitlement of the forced inheritance share of the beneficiaries, it is necessary to create a fictional estate. Under Spanish inheritance law, this fictional estate includes the estate owned by the deceased at the time of death but also all the lifetime gifts made by him or her.[185] However, the treatment of each depends on the element being taken into account and there does not seem to be a temporal frame within which gifts should be considered when calculating the fictional estate.[186] So, for example, gifts made to a beneficiary of the forced inheritance share are counted in order to calculate the fictional estate with respect to which the other beneficiaries of forced inheritance shares should be entitled, but they are deducted from the forced inheritance share to which the beneficiary who received the gift is entitled. At the same time, gifts made to individuals not beneficiaries of forced inheritance are attributed to the share the testator could have disposed of in his or her will (i.e., the share not subject to forced inheritance). Finally, whenever gifts exceed the share the testator could have disposed of, they are reduced to stay within the limits of the forced inheritance shares.

Once clawback provisions are applied, the specific amounts to which beneficiaries of the inheritance shares are entitled depend on whether they have received less than they were entitled to—in which case, they may request a completion of their entitlement—or more than they were entitled to—in which case, excessive donations may be reduced.[187]

The Spanish civil code does not include a specific statute of limitations for claiming that a gift should be treated as a clawback to the estate, but the general statute of limitations for adverse possession—6 years for movables[188] and 30 years for immovables[189]—arguably applies to this situation.

2. The effects – intended or not - of the adoption of the Regulation by Spain for UK citizens with habitual residence there.

As explained earlier, the direct consequence of the UK's not opting-in decision is that the UK's international private law rules regarding successions will not be replaced by the provisions of the Regulation. But with respect to UK nationals with habitual residence in

[182] Article 809 of the Spanish Civil Code.
[183] Article 834 of the Spanish Civil Code.
[184] Article 837 of the Spanish Civil Code.
[185] Article 818 of the Spanish Civil Code.
[186] Article 819 of the Spanish Civil Code.
[187] See articles 819 and 820 of the Spanish Civil Code.
[188] Article 1962 of the Spanish Civil Code.
[189] Article 1963 of the Spanish Civil Code.

any member state that (like Spain) adopts the Regulation, the succession laws of those member states will govern their succession unless they choose the law of their nationality in a valid disposition of property upon death.[190] Thus, absent such a disposition, British citizens habitually resident in Spain will now have their successions governed by Spanish law instead of British law.

The result is that the differences between British and Spanish succession law will become increasingly consequential. As explained above, these include differences in: (1) monist versus dualist approaches, (2) forced inheritance, and (3) clawback. Under UK succession law, the private autonomy of the deceased is an absolute priority that is considered to be protected by not having forced inheritance and the application of the succession law of the deceased's last habitual residence will have a remarkable impact on property entitlements and succession rights derived from forced inheritance shares and clawback provisions of *inter vivos* gifts.[191] Further it is often argued[192] that clawback provisions introduce uncertainty in entitlements, especially of *inter vivos* gifts as well as of creditors. As explained above, this was one of the major concerns of the UK government.[193]

However, the UK's position does not reach to protect the interests of UK citizens residing in member states that adopted the Regulation given that article 20 of the Regulation establishes its universal application, regardless of whether or not it is the law of a particular member state.[194] So that means that UK nationals with habitual residence in a member state that applies the Regulation such as Spain for example, will be subject to the provisions of the Regulation and hence will have Spanish succession law governing their succession unless they have chosen the law of their nationality in a validly drafted disposition of property upon death.[195] Consequently, the expectations of some number of European residents as to the outcome of a given successions (and their material benefits from them) will be defeated because of the Regulations' choice of law rules, and these people may turn to the courts to seek relief.

Succession laws have a very important cultural component. Irrespective of their knowledge of legal issues generally, people tend to be aware of the succession laws in place in their countries of nationality. This awareness is formed through cultural

[190] See Article 22.2 of the Regulation and paragraph 39 of the Preamble of the Regulation. This is a very contentious and difficult issue that will have to be resolved through the interpretation of the provisions of the Regulation by courts. It is not clear whether a validly drafted disposition of property upon death choosing UK succession to be applied to the deceased's succession will have to include forced inheritance or will be able to provide a distribution of the full estate given that the chosen law, UK succession law, does not provide for forced inheritance. The solution of such questions remains to be seen.

[191] The validity and effects of gifts are covered by Regulation No 593/2008. See Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I, OJ L 177, 4.7.2008, p. 6).

[192] See the UK opinion regarding the Regulation in the European Commission proposal on succession and wills – A public consultation, Consultation Paper CP41/09, Published on 21 October 2009.

[193] See the report prepared by the HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014).

[194] The member states that have not ratified the Regulation are the UK, Ireland and Denmark.

[195] See Article 22.2 of the Regulation and paragraph 39 of the Preamble of the Regulation.

traditions, family discussions, or broader social networks and information flows,[196] and it provides the foundation for individual expectations as to the material outcomes of the successions or future successions of the estates of friends and family members.

Whether these individual expectations are fulfilled strongly depends on the law applied to the successions in question. As explained above, succession laws across EU member states vary substantially. To some extent, expectations may be protected, despite the variation, through the use of valid dispositions of property upon death—recognized and enforceable in all EU jurisdictions—since most European succession laws aim to protect testators' wishes expressed in validly drafted *mortis causa* dispositions. But when such dispositions have not been left or do not include choice of law clauses, default succession laws become the rule under which estates are distributed, and the Regulation tends to shift the choice of default laws away from what most family and friends in the deceased's country of nationality are likely to expect.[197]

The possibility of unfulfilled expectations becomes particularly problematic in the context of the forced inheritance and clawback provisions in many European succession laws.[198] These are examples of mandatory succession provisions that may create a sense of entitlement among potential beneficiaries, generally children, spouses, ancestors, and, in some cases, the sisters and brothers of the deceased.[199] The Regulation's shift of applicable law from countries of nationality to countries of habitual residence will mean that unexpected forced inheritance rules or clawback provisions now become applicable. This may lead to unpleasant surprises for many individuals who assumed they would be beneficiaries of given successions or to pleasant surprises for those who did not expect it. When the change in law leads to an increase in an individual's entitlements compared to the expected amount, this is unlikely to trigger complaints, but individuals are likely to

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[196] There is consensus in considering succession law as especially sensitive and culturally embedded area of the law. See HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 6th Report of Session 2009-10, 'The EU's Regulation on Succession', House of Lords Report with Evidence 75 (2010), available at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (last visited 17 February 2014). PAUL MATTHEWS, The Problem of Clawback and the EU draft Regulation on Succession, *mimeo working paper* and CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010).

[197] It should be noted that drafting a will is a necessary but might not be a sufficient condition to avoid the application of the Regulation. In order to have the testator's choice of laws rule applicable to his succession it will be necessary that the disposition of property upon death is validly drafted in the jurisdiction in which it is drafted and that that jurisdiction allows for a choice of law or that such will complies with the different succession laws – including forced inheritance shares - that eventually might be applicable to the testator's succession. For an explanation with examples of the alternatives of a testator when wanting to choose the applicable law to his succession see CHRISTIAN HERTEL, Drafting Testamentary Dispositions, joint wills and agreements as to succession in a cross-border situation. A comparison of cross-border successions according to the law up to now and the new Commission proposal by way of practical cases. *Workshop material of the conference Cross-border successions – A New proposal: Contents and Way forward* (ERA, Trier, 2010).

[198] Most European member states include mandatory inheritance share provisions, with the exception of England and Ireland.

[199] ANATOL DUTTA, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, *Rabels Zeitschrift fuer auslaendisches und Internationales Privatrecht*, 73 (2009): 3, 560. See also PAUL TERNER, Perspectives of a European Law of Succession, *Maastricht J. Eur. & Comp. L.,* 24 (2007): 149 noting that the law of succession is embedded more deeply in cultures and history than other areas of the law.

complain loudly when the change in law leads to decreases in entitlements. In these cases, individuals may well challenge the Regulation's implementation, arguing in favor of the application of the law of the deceaseds' nationality.[200] And such challenges may take the form of litigation before the courts.[201]

When this occurs, it is hard to say whether the Regulation's goal of simplifying cross-border successions and reducing their transaction costs will have been met. It is possible, instead, that any reductions achieved will be offset or overtaken by increases in litigation costs and increase uncertainty. This could be especially true in the case of donees of gifts made by the deceased during his or her lifetime or during a certain period of their lifetime. Beneficiaries are likely to pursue litigation when they do not receive the assets they expect or whenever they want to maintain the assets they unexpectedly received as a result of the choice of law rule imposed by the Regulation.

7. Conclusions

The free movement of individuals within the European Union results in ever more frequent situations of nationals of one member state residing in another, owning property in a third and eventually even dying in a fourth. The law of succession involves complex property rights, entitlements, and cultural understanding of property transfers that vary considerably between member states and are beyond the Regulation's scope but nonetheless within its zone of impact through its choice of law provisions. This situation, which is especially complex from the legal perspective, drove the European Commission to adopt legislative measures in order to harmonize legal rules based on the belief that such action would simplify the resolutions of such cases. This is the framework of the Regulation 650/2012 on cross-border succession.

Based on the uncertainty generated by the lack of definition of the concept of habitual residence and the existence of forced inheritance and clawback provisions in succession laws of most European member states, the UK's government decided not to opt-in to the Regulation.

Although it might be too early to fully assess the Regulation's effects, this paper presented and discussed the different effects – intended and unintended – of the UK's not opting-in for the UK and its citizens, for nationals of other member states with habitual residence in the UK as well as for UK's citizens residing in European member states that adopted the Regulation.

The UK's government has managed to preserve intact its system of conflict of laws in succession matters. However, the growing importance of intra-european migration and the adoption of the Regulation by the other member states will have a remarkable impact for nationals of other member states with habitual residence in the UK, for UK citizens with habitual residence in member states that adopted the Regulation as well as for property located in the UK and in member states where the Regulation will be in force.

[200] The effect of reacting to losses, in this case, receiving fewer assets than expected, is often referred to in economics as the endowment effect.

[201] See CHRISTOPHER CURRAN, *The Endoment Effect in Bibliography of Law and Economics*, Volume I, Boudewijn Bouckaert and Gerrit De Geest eds., 819-835, Edward Elgar (2000).

From this perspective, this paper argues that the decision of the UK's government managed to minimize – but not eliminate - the impact of the Regulation.