HOUSE OF LORDS

European Union Committee

6th Report of Session 2009–10

The EU's Regulation on Succession

Report with Evidence

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(Q) refers to a question in oral evidence;
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SUMMARY

In October 2009 the EU Commission proposed legislation which aims to simplify the law affecting those who die having exercised their right to free movement, either by moving to another Member State to live or by buying property in a Member State other than their own. The law of succession regulates how a person's property is dealt with on their death—including the mechanism for paying taxes and other creditors, establishing who is entitled to inherit the deceased's property and how that property is to be transferred to those entitled to it. Where this involves the law of more than one Member State complications arise which can have a significant impact since the people affected are likely to be emotionally vulnerable because of bereavement.

Our inquiry into this proposal was undertaken as part of our ongoing scrutiny of the Commission's proposal. We welcome the fact that the Commission has not proposed harmonisation of the substantive law of succession. This would have been too ambitious given the complexity and cultural importance of property law and the law of succession in each Member State. We support the Commission's underlying, and more limited, objective of prescribing which state's law of succession is to apply to the whole of a deceased person's estate; but only to the extent of determining who is entitled to inherit what property. Our caution arises from the difficulty faced by the EU in legislating in this field at all, and the lack of empirical evidence of how far the complex legal position presently impairs free movement. To go further than we suggest puts at risk important interests, not least property rights, the collection of taxes and the protection of creditors.

We conclude that the test put forward by the Commission to determine which law is to govern a cross-border succession, namely the law of the place where the deceased was habitually resident at the time of death, must be further refined.

We identify, as a serious defect in the proposal, that it could result in gifts made in the UK by deceased persons during their lifetime, including gifts to charity, being claimed back by their heirs, under a process known as clawback.

We also examined the additional elements included in the Commission proposal: a single EU rule for establishing which court has the power to deal with disputes relating to succession; a single EU rule for the recognition and enforcement of decisions of courts and other public authorities concerned in dealing with succession; and the creation of a "European Certificate of Succession" which could be used throughout the EU to establish the rights of those administering a succession and the heirs, and so facilitate the transfer of the deceased's property. We draw attention to how the recognition and enforcement of documents produced by notaries in other Member States could undermine the legitimate interests of those with a claim in a succession.

As it is entitled under the EU Treaties, the UK is not taking part in the formal negotiations on this proposal and will not be bound by the legislation unless it specifically opts in after its adoption by the other Member States. With the possibility of the UK opting in at this later stage we have highlighted the major issues that we consider need to be resolved satisfactorily.

The EU's Regulation on Succession

CHAPTER 1: INTRODUCTION

1. When a person dies their property has to be accounted for, creditors and taxes paid, and the property duly passed on to those who should inherit it. This process is known as succession. The expansion of the EU, and increasing mobility within it, have led to more and more people moving from one Member State to another to work or to retire, and owning property in another Member State. The laws of the Member States governing who is entitled to what of the deceased's property and how that estate is to be administered differ fundamentally. This makes dealing with a succession with cross-border implications potentially very complex. When a person dies resident in Member State A as a national of Member State B, or owning property in both Member States A and B, it is necessary to determine whether it is the law of Member State A or B which governs the succession. Even once that has been resolved it can be difficult to ascertain just how the law of succession of one Member State applies to property located in another.

2. The complexity of cross-border succession makes it difficult and expensive for individuals affected to plan what should happen to their estate when they die and for creditors and heirs to ascertain and vindicate their rights. This situation is exacerbated by the fact that the period surrounding the death is emotionally charged.

3. The same issues arise when the cross-border element involves an EU Member State and a third country.

4. Simplification of the law applying to cross-border succession has been sought for some considerable time, but without success. At the broader international level a number of Conventions have been negotiated within the framework of the Hague Conference on Private International Law.[1] Legislative action by the EU in this area has been envisaged for almost a decade in successive programmes relating to the Area of Freedom, Security and Justice.[2]

5. Legislation by the EU can fully address the problems that arise when the cross-border elements of a succession are confined to Member States. Where those cross-border elements involve third countries EU legislation can only regulate how that succession is to be dealt with as between Member States insofar as it involves more than one Member State. A further international agreement would be necessary in order to achieve with a third country the same full degree of regulation that EU legislation can bring to Member States.

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1 As at February 2010, the Convention of 5 October 1961 on the Conflict of Laws relating to the Form of Testamentary Dispositions has been ratified by 16 Member States; the Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons has been ratified by three; and the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons has been ratified only by the Netherlands.

2 The Tampere Programme (OJ C 12, 15.1.2001, p.1), the Hague Programme (OJ C 53, 3.3.2005, p.1), and more recently paragraph 3.1.2 of the Stockholm Programme adopted by the Council and approved by the European Council at its meeting of 10–11 December 2009, available at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf

6. In March 2005 the Commission issued a Green Paper[3] seeking views on what action might be taken at the level of the European Union in relation to the law governing wills and succession. This was the subject of a report by this Committee[4] and correspondence with the Minister. We recognised the real practical benefits that could be derived from suitable European legislation. We also highlighted the difficulty in finding common workable rules in this area and set out some "red lines" which European legislation should not cross if it was to be acceptable to the UK.[5]

7. On 14 October 2009 the Commission brought forward their proposal[6] for a Regulation to simplify the rules on cross-border succession. The ordinary legislative procedure[7] applies to the proposal. It is currently under detailed negotiation in the Council. The European Parliament has yet to give it a first reading.

8. Sub-Committee E, a list of whose members is at Appendix 1, has conducted an inquiry into this proposal. The call for evidence is reproduced at Appendix 2. Those who have submitted written or oral evidence are listed at Appendix 3. We are grateful to all those who submitted evidence, particularly for their elucidation of a highly technical subject.

9. The Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice gives the UK an opt-in to the formal negotiations and adoption of this proposal. If the UK does not opt in, it will not be bound by the Regulation that is adopted. The opt-in to the formal negotiations of the proposal needed to be exercised by 22 January 2010.

10. In the course of this inquiry the Committee formed a preliminary view on whether the UK should opt in to the proposal. We took the view that the opt-in should not be exercised at that stage. In his written statement to the House on 16 December 2009[8] the Minister indicated that the Government had decided not to opt in, but intended to engage informally in the forthcoming negotiations between Member States with a view to improving the proposal. If those negotiations resulted in sufficient improvement, the UK would still have another opportunity to opt in to the Regulation after its adoption by the other Member States.

11. In deciding whether the UK should opt in, the Ministry of Justice undertook a consultation, on the basis of a paper which provided background information.[9] Those of our witnesses whose evidence was also submitted in response to this consultation are identified in Appendix 3.

12. The Commission's proposal was chosen by the Conference of Community and European Affairs Committees of Parliaments of the European Union

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[3] 7027/05, COM (2005) 65.

[4] EU Select Committee, 2nd Report (2007–2008): *Green Paper on Succession and Wills* (HL Paper 12).

[5] The red lines were: the EU measure should not in any way call into question the validity of otherwise valid *inter vivos* gifts, and it should not deal with the administration of estates, the validity and operation of testamentary trusts, matrimonial property law and interests terminating on death such as joint tenancies.

[6] 14722/09, COM (2009) 154.

[7] The ordinary legislative procedure corresponds to the pre-Lisbon co-decision procedure, under which the Council acts by qualified majority and the measure can only be adopted if the Council and the European Parliament agree.

[8] HL 16 December 2009 WS 274.

[9] http://www.justice.gov.uk/consultations/ec-succession-wills.htm

(COSAC) for a pilot exercise on the operation of the new arrangements under the Lisbon Treaty for national parliaments to raise subsidiarity issues in accordance with the Subsidiarity Protocol. The arrangements did not formally apply to this proposal since it was presented by the Commission before the coming into force of the Lisbon Treaty. As part of this pilot exercise we formed a preliminary view that the proposal complies with the principle of subsidiarity.

13. The correspondence with the Minister on the opt-in, and our response to the COSAC secretariat on subsidiarity, are at Appendix 4.

14. In this report we outline the major problems arising in cross-border successions and their impact; we consider the major issues of principle in the Commission's proposal to address these problems; and we address the specific issues of subsidiarity and the opt-in. We focus on cross-border successions within the EU, addressing, where it is relevant, the effect of the proposal on successions with a wider international dimension. In our conclusions we highlight where we consider changes to the proposal need to be made.

15. The subject matter of this proposal is highly technical and the original Commission proposal is likely to evolve in the course of the legislative procedure. This may well stretch into 2011. The Committee will consider the more detailed technical and drafting points, as they evolve in the course of that legislative procedure, as part of its ongoing scrutiny of the proposal.

16. A glossary of the terms used in this report is at Appendix 5.

17. The proposal is subject to the scrutiny reserve according to which the Government may not give their agreement to the proposal in the Council until the Committee has finished its consideration and cleared it from scrutiny. As the proposal is likely to evolve in the course of negotiations and the Government intend to continue to negotiate informally, **we have decided to retain it under scrutiny** despite the fact that the UK has not opted in to the proposal at this stage.

18. **We make this report to the House for information.**

CHAPTER 2: ISSUES ARISING IN CROSS-BORDER SUCCESSIONS

The reach of the law of succession

19. The law of succession is complex, particularly because it concerns the transfer of property rights. Property rights are complex when compared, for example, to contractual rights. Property rights frequently involve third parties and consequently states run systems for the registration of such rights in order to give them publicity. The property rights, especially those attaching to land, found in different legal systems are extraordinarily different. The property law of the UK tends to be more complex than in most other Member States. It often concerns a bundle of rights or interests in property as arises, for example, when property is held by trustees for a beneficiary with a life interest. In most other Member States there is more commonly absolute ownership of property. Land and succession rules tell an immense amount about the society in which they are found and in many ways constitute the most distinguishing feature of any given legal system. This inherent complexity makes establishing common rules across the Member States in the area of succession very difficult, and changing the law of succession might have unforeseen side effects.

20. The law of succession also interacts with other aspects of domestic law. The transfer of property on death gives rise to liability to pay tax and the collection of tax arising from the death is linked to the administration of the succession. In the UK, for example, payment of Inheritance Tax is the responsibility of the personal representatives,[10] who have to satisfy HM Revenue and Customs that it has been paid or accounted for before they are appointed to administer the succession. The administration of a succession also involves dealing with creditors, which can involve the law of insolvency if the deceased was insolvent at the time of death.

The applicable law

21. Within this context of complexity a fundamental issue is the determination of which law applies to a cross-border succession. Determination of the applicable law can make a crucial difference, not only to how the succession must be administered but even to such basic questions as what constitutes the estate of the deceased and who is entitled to get what. This is the case whether or not the deceased made a will. Box 1 compares three broad principles of the French law of succession and that of the separate UK jurisdictions[11] in order to illustrate the fundamental differences that can arise.

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[10] A personal representative is a person appointed to administer a succession. In Scotland the equivalent to personal representatives are called executors-nominative or executors-dative. In this report references to UK personal representatives include such executors.

[11] England and Wales, Scotland, and Northern Ireland have separate laws of succession.

BOX 1

The contrast of succession law in France and the UK

France:

(a) The heirs inherit their share of the property of the deceased directly on death and assume responsibility for the debts of the deceased and the tax on inheritance.

(b) The value of the estate to be taken into account is not just the property owned by the deceased at the time of death but also gifts made during his or her lifetime.

(c) A fixed proportion of the estate (of at least one half) is inherited by the child or children of the deceased, irrespective of any wishes of the testator as expressed in a will. This is known as a "forced inheritance".

United Kingdom:

(a) The property of the deceased passes initially to personal representatives who administer the estate by collecting it in, paying creditors and taxes and then passing the balance to the heirs.

(b) The estate available for distribution to heirs comprises only property owned by the deceased at the time of death.

(c) After payment of creditors and taxes the estate is distributed in accordance with the wishes of the deceased as expressed in a will, or according to set statutory rules if there is not one. In Scotland a surviving spouse or child can choose to inherit a fixed proportion of at least one third of the moveable property[12] (divided equally if there are two or more children) in place of their entitlement under a will.

22. The legal systems of Member States all lay down tests to determine which law is to be applied to a cross-border succession. They involve establishing a connection ensuring that the law to be applied is relevant either to the property involved or the people interested in the succession. Member States use different connecting factors which can sometimes result in a conflict as to which law should be applied.

23. There are four main connecting factors currently in use: the nationality, habitual residence and domicile of the deceased, and the location of the deceased's property. For example, German courts apply the law of the nationality of the deceased to deal with a succession. French courts apply, in respect of moveable property, the law of the state where the deceased was habitually resident at the time of death. For immoveable property (essentially land) they apply the law of the place where the property is situated. The courts of the United Kingdom apply the law of England and Wales, Scotland or Northern Ireland, as the case may be, to the moveable property of those dying domiciled (as opposed to habitually resident) in these jurisdictions. Like France, immoveable property is governed by the law of the place where it is situated.

24. There is a further layer of complexity and academic debate. This is the doctrine of *renvoi*. This arises when the law of state A indicates that the law

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[12] Essentially all property other than land.

of state B should apply. The question then is whether it is simply the internal substantive domestic law of state B which should apply,[13] or also that part of the law of state B which concerns the resolution of cases which engage conflicting laws of two or more states (known as "private international law"). If the private international law of state B applies, the result could be different from that if only the substantive internal domestic law applies, because the private international law of state B could effectively send the matter back to the law of state A.[14]

25. The complexity arising from the application of different connecting factors by different legal systems is compounded by the fact that those connecting factors can themselves be uncertain. Nationality is reasonably certain, although not entirely so as some people have dual nationality, and some Member States, such as the United Kingdom, have more than one system of law. However, a national of one Member State may have been settled for many years with a family, and own most, or even all, of their property in another Member State. In such circumstances, the test of nationality may lead to the application of a law which is neither convenient nor appropriate.

26. The concepts of habitual residence and domicile are less certain than nationality but impose a more consistent connection between the succession and the law to be applied to it. They are not only different from each other but can have a different meaning depending on the jurisdiction in which they are being used. In broad terms habitual residence connotes the place, based on past experience, where an individual usually resides. Domicile is a more stringent test and takes into account, to a greater extent than the test of habitual residence, the intention of the person concerned as to his or her permanent home. The concept of domicile as it applies in England and Wales is outlined in Box 2. The distinction can become critical where a person is seconded to another Member State to work. In those circumstances the domicile is more likely to remain that of the home Member State whilst the habitual residence is more likely to be that of the Member State of secondment.

BOX 2

Domicile under the law of England and Wales

Ordinarily, a person's domicile is the place where they have their permanent home to which, if absent, they intend to return. Such absence may be long term. This is known as the domicile of choice.

Every person acquires at birth a domicile of origin which is generally the domicile of their father. This can revive if a domicile of choice is abandoned without a new one being acquired.

A dependant generally has the same domicile as the person on whom they are dependent.

27. It is, of course, possible to determine with the greatest degree of certainty the jurisdiction in which land is situated. But an estate normally comprises both land and other property, in which case another connecting factor will need to

13 In the case of succession that would be matters such as the administration of the estate and who is entitled to what property.

14 See the example found in Box 4. The Commission proposes that the doctrine of *renvoi* should not apply.

be applied to the other property, raising the prospect of one law applying to the land and another applying to that other property.

28. Box 3 illustrates how even a simple cross-border succession can give rise to results that may come as a surprise to the layman.

BOX 3

A simple cross-border succession

A British national dies domiciled in France, owning a house in France, a house in England and other assets in both countries. As the test of domicile applied by English law is more stringent that the test of habitual residence applied by French law the net effect would be the same under the law of France and the law of England and Wales. The house in France and all the moveable assets (both in France and England) would be governed by the French law of succession; the house in England by that of England and Wales.

In such circumstances the testator is likely to be advised to make separate wills under the law of each jurisdiction. The property governed by French law would be subject to the French forced inheritance rules.

29. There was general agreement among our witnesses that the complexity of cross-border successions does give rise, in practice, to difficulties. The complex and sometimes even conflicting legal rules make it more difficult and expensive to plan a succession, to administer it or resolve any dispute. A cross-border succession, even one that is not contentious, is likely to require the involvement of specialist lawyers from more than one Member State. A person may not appreciate which law is going to apply to their succession. Anyone domiciled in the UK who owns land in another Member State needs to know the law of that Member State governing the succession of that land.

30. Furthermore the complexity and uncertainty of cross-border succession make it more likely that disputes will arise in the first place dragging those concerned into expensive litigation.

31. Richard Frimston, a solicitor practising in the field, a member of the Law Society's International Committee, gave an example from his own experience how even a relatively simple cross-border succession could give rise to added expense (QQ 53 and 87). This is outlined in Box 4.

BOX 4

An example of the additional expense involved in a cross-border succession

A UK citizen died living in Germany but owning a UK building society account. Under English law he was domiciled in Germany and therefore German law applied. Although the basic rule of German law was that English law should apply, the doctrine of *renvoi* allowed the German authorities to apply German law. A conflict of applicable law was therefore avoided. The German authorities, applying German laws, issued a certificate that the UK citizen "died a British citizen under British law" and named the heir. But this certificate was not acceptable to the building society to unlock the account and expert legal services in the United Kingdom were needed to obtain authority from the English court for the account to be released, despite the fact that the German certificate contained all the necessary information.

Testator's choice of applicable law

32. One possible way of alleviating the complexity and expense concerning the law that applies to a cross-border succession is to allow a person to choose which law should be applied to his or her succession. At present this possibility is very restricted. Choice is not permitted under the law of most Member States, including all the jurisdictions of the UK. One reason to limit the choice of applicable law is to ensure an appropriate connection between the succession and the law to be applied to it, albeit that different Member States take different views as to what is the most appropriate connecting factor. For those Member States which, like France, impose a forced inheritance, there is another reason to restrict this choice. This is to prevent a testator evading the forced inheritance rules by choosing a law, such as that of England and Wales, which does not include forced inheritance.

Jurisdiction

33. Cross-border succession also gives rise to the problem of deciding which courts or other authorities should have the power to deal with the succession. In every Member State succession is subject to the oversight of a public authority. In the UK jurisdictions this is done by the court (whether or not there is any dispute over the succession). In the majority of other Member States this function is mostly carried out by a notary whose decisions are recorded in formal documents having the status of authentic instruments, with courts only becoming involved if it is necessary to resolve a dispute.

34. The question of jurisdiction is separate from the issue of the applicable law. It is possible, for example, for a UK court to deal with a disputed succession by applying French law. In cases where a court of one Member State applies the law of another to determine a dispute there is inevitably the added expense and inconvenience of establishing, normally by expert evidence, the substantive content of the law to be applied. It is also inevitably the case that courts and other authorities are more efficient and effective when applying law with which they are familiar.

35. The laws of the Member States each include tests for deciding whether their courts and authorities should assume jurisdiction, seeking the appropriate connection between the succession and their courts or authorities dealing with it. Like the connecting factors in respect of the applicable law, the connecting factors used to determine jurisdiction in the various Member States differ and can conflict, with the result that more than one Member State may have jurisdiction to deal with the matter by its own law. A party to a dispute may perceive an advantage in using the court or authority of a particular Member State and try to steer the dispute to that jurisdiction even if it is not, objectively, the most suitable.

Recognition and enforcement

36. There is yet a further issue. A decision of a court or other authority made in one Member State in the field of succession is not, in general, automatically recognised and enforced by the courts of another. The difference between recognition and enforcement is outlined in Box 5.

BOX 5

Recognition and enforcement

Enforcement of a judgment entails taking steps against a person in order to give the judgment effect, for example by the recovery of money from that person in satisfaction of a judgment.

Recognition of a judgment happens when a court of one Member State takes a judgment of another into account in reaching a decision on a matter before it. For example a defendant in a dispute in Member State A may want to resist a claim on the grounds that judgment in the same dispute has been given in Member State B in their favour. This can only succeed if the court in Member State A recognises the judgment of the court of Member State B.

37. Recognition and enforcement of decisions are easier to achieve where there is trust, on the part of the court or other authority in the Member State where the recognition or enforcement is sought, in the procedures and decisions of the courts or authorities where the decision is originally taken. Making recognition and enforcement of decisions given in other Member States easier reduces the expense involved in dealing with cross-border successions but may call for safeguards to prevent abuse.

The scale of the problems associated with cross-border successions

38. Statistics which illustrate the scale of the problem are difficult to obtain. The Commission has attempted to provide some in its impact assessment[15] although we did not find them particularly helpful. This impact assessment indicates that an estimated 29 million EU citizens are currently living outside the borders of the EU. This is about 6% of the 2006 EU population. About the same number of EU Member State inhabitants are non-nationals, of which the majority are citizens of another Member State. The Commission expects there to be an upward trend in mobility as more and more EU citizens take advantage of the internal market and the mobility it affords, although it accepts that many citizens who work or live in another state do so only temporarily and return to their state of origin. The evidence of the scale of citizens buying property in a Member State other than that of their nationality is thin.

39. The Commission's impact assessment also seeks to quantify the added cost of cross-border successions.[16] It estimates that 4.5 million people die each year in the EU and that 1 in 10 of the consequent successions involves an international dimension. It attributes an average value of €274,000 to cross-border estates, giving rise to average legal costs of 3% of the value of the estates. This results in an estimate of the costs concerned of €3.699 billion, to which it adds further costs of the same order of magnitude on account of the extra delay in dealing with international successions. As legal professionals estimate that the costs of dealing with cross-border cases are twice or three times as high as in national cases the Commission puts forward the estimate of €4 billion as the extra legal costs resulting from the international dimension of such successions. The Commission does not appear to distinguish between cross-border successions confined to the EU and those involving a third country.

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15 SEC (2009) 411.

16 On the basis of an external study commissioned by it from EPEC.

40. Jonathan Faull, Director-General, DG Justice, Freedom and Security, provided an estimate of 8 million Europeans living in a Member State other than the one in which they were born (QQ 97–98). This appears to be a conservative estimate compared with that found in the Commission's impact assessment. However he accepted that it was difficult to find precise data in this field and that the Commission had only provided its best possible estimate.

41. The Government, in their partial impact assessment published as part of the consultation document,[17] indicate that the quantification of numbers, costs and benefits has not been possible. They do, however, indicate that there are 2.2 million UK nationals living in other Member States.

42. Professor Matthews, a solicitor practising in the field and Visiting Professor of Law at King's College London, did not accept the Commission's estimate, on the basis that it assumed that a certain number of cross-border successions would cause a problem when there is no empirical evidence that this is the right number (Q 11). Although very little was known about the statistics in this area because they were not collected, it was the case that cross-border succession did give rise to greater complexity (Q 1). He specifically warned of the danger that changing the law in a general way could have the effect of pushing the costs of solving the problems of cross-border successions onto the general population whose successions do not, as in the majority of cases, involve cross-border elements. He also warned of substituting one set of complications for an existing set (Q 39, p 5).

43. Richard Frimston pointed to his own experience showing that cross-border succession arose in a significant number of cases. In general terms he considered that the Commission's proposal would make a significant impact in addressing the problems of cross-border successions, particularly the severe problems that arise when assets in a succession are governed by two sets of law or by none (QQ 47–50). He saw the proposal as providing a rough and ready solution for those he termed "ordinary folk" without very valuable estates (Q 53). The experience of Andrew Francis, a barrister practising in this field and author on the law of succession, was also that there were a number of estates containing assets outside of the UK. He welcomed the prospect of simplification of the law of cross-border succession (p 67).

44. **The law of succession involves dealing with complex property rights that vary considerably between Member States. Where there is a cross-border element in the succession, and in particular where the deceased owned property in more than one country, that law becomes even more complex with the inevitable consequence that those involved with cross-border successions are encumbered with greater expense and inconvenience.**

45. **Whilst simplification of the law on cross-border successions, if it could be achieved, would be likely to bring real practical benefits, there is a lack of evidence of the number of cross-border successions and also the extent to which the complexity and expense of dealing with the issues actually impairs mobility and the exercise of free movement rights within the EU. This suggests that the EU should be cautious in seeking to legislate in this complex area. Particular care is needed to ensure that any legislation intended to simplify the law does not have the unintended consequence in practice of replacing one type of complexity with another**.

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[17] http://www.justice.gov.uk/consultations/ec-succession-wills.htm

CHAPTER 3: THE COMMISSION'S GENERAL APPROACH

46. The area is so complicated as to bring into question whether EU legislation could succeed at all. Jonathan Faull argued that the complexity of the subject matter and the problems it causes make EU legislation necessary (Q 99). Richard Frimston thought that it could succeed (Q 52), although he suggested that any future Regulation should only deal with the applicable law (Q 83). Professor Matthews suggested dealing with the issues one at a time, starting with the applicable law question, and considered that legislation covering a limited range of matters such as the applicable law was attainable with goodwill (Q 40–41).

47. The Commission is not proposing that the substantive law of succession across the Member States should be harmonised, for example by laying down a single EU rule determining who is entitled to what property of the deceased. None of our witnesses suggested that it should. Jonathan Faull described the underlying principle behind the Commission proposal as being to ensure that one legal system was applicable to any individual cross-border succession and that a person making a will should be able to choose, within limits, the applicable law. He also indicated that the Commission was searching for legislation which would be understandable to the general public (Q 103).

48. This approach would, in principle, allow each Member State to retain its own law of succession. The proposal would replace the private international law rules of the Member States and not significantly change the substantive internal domestic rules contained in the laws of the Member States.

49. But even this limited approach would have a significant impact in practice in those cases where the law presently applied to a succession would change. For example, if that change is from a law which does not include forced inheritance to one which does, the testator's wishes as to who should be entitled to what property might not be fulfilled. There could also be significant effects on how the succession was administered.

50. The Commission proposal extends beyond providing a single rule for determining the law to be applied to a cross-border succession. It deals with jurisdiction, recognition and enforcement of judgments, and seeks to make authentic instruments produced by notaries readily recognisable and enforceable. It also seeks to introduce a European Certificate of Succession (the "ECS"), which would be a standard form, produced by a court or other public authority in a Member State, which would certify, with supporting reasons where relevant, the details of some or all of the following: the identity of the deceased, who is empowered to administer the succession, who is entitled to claim what part of the estate, and whether there is any known dispute. The Commission proposes that an ECS would be recognised and have effect throughout the EU. We deal with the ECS in Chapter 6.

51. Mr Faull nevertheless considered that the Commission had been reasonably modest and circumspect in dealing with the set of issues that arise (Q 99). He thought the proposal, if adopted, would solve some, but not all, of the problems and predicted that once everyone was used to having European law in this area some of the remaining problems might prove easier to address in due course (Q 124).

52. He appreciated the concern about EU legislation having unforeseen consequences but indicated that the Commission had spent a long time trying to foresee them (Q 109). He considered that limiting the approach to the issue of the applicable law would have made for an inadequate proposal which would have left the debate in the legislature a little devoid of content. Many other issues would arise for discussion before the Council and the European Parliament which a limited proposal would not address. He concluded "We will see in the process of legislation precisely where the scope ends up, but we thought in order to start the legislative process it was a service to the legislative institutions of the Union that we set our ambitions a little higher" (Q 102).

53. **We strongly agree with the Commission that it is not appropriate to harmonise the substantive law of succession across the Member States. We also agree that this is an area for a step by step approach to legislation. However, it would have been preferable for the first proposal in this field to have focussed on the issue of the law that should apply to a cross-border succession (the applicable law).**

CHAPTER 4: THE APPLICABLE LAW

54. The Commission's proposal envisages a single test of habitual residence to determine the applicable law to apply to a succession, subject to a testator making a valid choice of a different applicable law of his or her nationality. The same test would be applied to cross-border successions involving a third country. This would only resolve any conflict that there may be between Member States as to which law is to apply to the succession. Any conflict with the third country law could only be resolved by agreement with that third country.

55. Whilst our witnesses mostly agreed that there was benefit to be derived from simplifying the issue of the law to be applied to cross-border successions, even this presents considerable challenges.

The test for determining the applicable law

56. At present the connecting factors used in the laws of the Member States to determine the applicable law are: nationality, the place where immoveable property is situated, domicile and habitual residence. They are used both where the cross-border elements to the succession are limited to other Member States and where they extend to third countries.

57. Although it is possible to be certain of the place where immoveable property is situated, no witness suggested that this was a connecting factor which could be applied to the whole of the estate. In cross-border successions it would result in different laws being applied to determine and administer the succession of different property situated in different states but belonging to the same deceased. This is already a feature of the UK laws of succession. Oliver Parker, a senior lawyer in the Ministry of Justice, indicated that the UK system of treating moveable and immoveable property differently had been widely criticised by academic commentators and also by the judiciary in a handful of decided cases. He described it as a historical anomaly although he had not detected pressure to change it (QQ 128–129). The joint evidence of the Law Society, the Society of Trust and Estate Practitioners (STEP) and the Notaries Society of England and Wales, supported a single law applicable to the whole of a person's estate (p 81) as did the Hon. Mr Justice David Hayton, a Justice of the Caribbean Court of Justice and Fellow of King's College London (p 70). The Chancery Bar Association cited judicial criticism of the UK system[18] and considered that it was hard for people to understand (p 64). Professor Elizabeth Crawford, Professor of International Private Law at Glasgow University and her colleague, Dr Janeen Carruthers, Reader in Conflict of Laws, saw the benefit of a single law applicable to the whole estate, but considered that there needed to be sufficient certainty in the connecting factor for it to be workable.

58. **We agree with the Commission's objective of seeking a single law to apply to the whole of the estate of a deceased. However to achieve this objective it is necessary to find a suitable connecting factor between the succession and the applicable law which can be applied with reasonable certainty.**

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[18] *Re Collens deceased* [1986] Ch 505.

59. None of our witnesses pressed for nationality to be the connecting factor. It risks providing an outcome that would be inconvenient to all those concerned in the succession, as could be the case where a national of one state had settled at an early age in another and raised a family there. The Government accepted that habitual residence stood a better chance of agreement than domicile (Q 135). Andrew Francis welcomed the use of habitual residence, in principle, as the connecting factor (p 67) and Richard Frimston also considered it preferable to domicile (Q 65).

60. However the EU legislator has an open choice as to what should be the connecting factor. The proposal uses habitual residence without further definition for this purpose. Given the disadvantages of nationality and the location of property as connecting factors and the prospect of agreement around habitual residence, there is merit in using the concept of habitual residence as a starting point for finding an appropriate connecting factor.

61. The term "habitual residence" is used in other EU legislation, sometimes defined in that legislation and sometimes not. But whether or not it is defined, the European Court of Justice interprets the concept in its specific legislative context and an interpretation used in one context cannot be directly transposed to another.[19] A clear majority of our witnesses considered the term "habitual residence" needed definition. Professor Matthews pointed out that the use of the term in the proposal was different from its use in existing legislation. In existing legislation the concept is largely directed at the short term purposes personal to the person concerned by the legislation. But in succession the effects are not on the deceased but on the heirs and creditors of the estate and those effects could stretch over generations. To leave the term undefined was, in his view, a political fudge (QQ 13–14 and p 6–7).

62. The problem areas identified concerned, in particular, workers temporarily posted abroad and those retiring abroad. However, there was no clear sight among our witnesses of what the definition should be. The Hon. Mr Justice David Hayton, who led the UK Delegation to the Hague Conference preparing the Hague Succession Convention,[20] recalled the difficulty in negotiating a definition then (p 71). In the event only the Netherlands signed up to this Convention. He suggested refining the concept of habitual residence to exclude the place where a person only intends to reside for a temporary period; in which case habitual residence could revert either to the previous habitual residence or to the nationality of the person concerned (p 70).

63. Jonathan Faull agreed that the interpretation of the term depended on the context of the legislation but added that the concept would have to be applied to the factual situation in the particular case under consideration. The Commission's legal advice was that it would not be useful, even if it were possible, to provide a general definition of habitual residence because it would almost certainly be too vague (Q 101).

64. This approach would, however, mean that more individuals than would otherwise be the case would be faced with uncertainty as to how to interpret

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19 For a recent example see Case C-523/07, *A*.

20 The Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

the term "habitual residence" and would be forced into the delay and expense of litigation, ultimately in the European Court of Justice.

65. **A single factor to provide the connection between a succession and the applicable law is difficult to find. There must be a compromise between providing an appropriate connection between the succession and the law to be applied to it, and providing certainty. We believe that the concept of habitual residence should be used as the basis for the connecting factor in this proposal. However it is legally possible and necessary in practice to define the concept. Citizens should not be left to bear the expense of refining the concept through litigation. The definition should, as a minimum, address in a satisfactory way the position of employees posted to another Member State and those who retire to another Member State.**

Choice of applicable law

66. Article 17 of the proposal would introduce the possibility for individuals to stipulate in their wills that the law of their own nationality should apply to their succession when they die. This choice is not found in the laws of most Member States and does not exist in any of the laws of the UK.

67. One underlying reason for preventing or limiting a choice of applicable law is that the wider the choice the greater the chance of an inappropriate law being chosen to govern the succession. Another reason, relevant to those states whose law of succession includes forced inheritance, is that testators could, if they wished, exploit the choice in order to avoid their property passing as prescribed by the forced inheritance rules.

68. The introduction of an element of choice was generally welcomed by the witnesses, although some considered that it did not go far enough. Professor Matthews started from the position that if there was real mutual respect between Member States for each other's legal systems then it would be reasonable to allow a choice of any EU law to apply. But he conceded that was unlikely to be accepted and put forward a number of possible limiting connections: place of birth, where the testator's parents come from, and where property is owned (Q 19). The joint evidence of the Law Society, STEP, and the Notaries Society favoured extending the choice to habitual residence at the time the choice is made (p 81).

69. **We welcome the introduction of a choice of applicable law, not least because a choice is comparatively easy to ascertain. We accept that the choice must be limited to preserve an appropriate level of connection between the law chosen and the succession. Limiting a person to choosing the law of his or her own nationality is, however, too narrow. It should be possible for a person to choose the law of habitual residence at the time the choice is made. We consider that it would also be acceptable to extend the choice of available law to one with which the testator has a genuine and concrete connection and which can be ascertained with sufficient certainty.**

Administration of the succession and payment of tax

70. The law of succession has close links, and overlaps, with other areas of law, particularly property law, family law and tax. Any EU legislation determining

which law is to apply to a cross-border succession must, therefore, carefully define the scope of the applicable law.

71. In our report on the Commission's Green Paper[21] we expressed the opinion that it was necessary to limit the scope of application of any EU legislation to "succession issues" by excluding matters such as the administration of estates and questions relating to the validity and operation of testamentary trusts, matrimonial property law, and interests terminating on death such as joint tenancies.

72. The scope of the proposal as a whole is set out in Article 1 of the proposal and the scope of the provisions relating to applicable law in Article 19. These provisions in combination do exclude from the scope of the law to be applied to cross-border successions some of the matters we previously raised, but the proposal nevertheless includes within its scope most aspects of the administration of a succession, albeit limited in a way which would fit in with the UK's procedures. Thus, Article 21 permits a Member State in which property is located to subject the administration of the succession to the appointment of personal representatives. So for example, if a succession was governed by French law, any dealing in the assets in the UK would require the appointment of personal representatives, as is now the case. This would assist in ensuring the proper distribution of the estate. However, eligibility to be a personal representative would be determined by French law as would their powers. This could mean that a person would have to be accepted as a personal representative even if they would not be qualified to act in that capacity under the relevant UK law.

73. The law concerning what tax is payable and how it is collected does not follow the law otherwise applicable to the succession; and the tax legislation of the UK differs from that of many other Member States. In the UK payment of Inheritance Tax is the responsibility of the personal representatives who have to satisfy HM Revenue and Customs that it has been paid or accounted for before they are appointed to administer the succession. Many other Member States do not have personal representatives fulfilling this role and tax is the responsibility of the heirs, who inherit property directly.

74. Revenue and customs matters are specifically excluded from the scope of the proposal by Article 1. Article 21 permits a Member State to subject to prior payment of tax the final transfer of property located in that State to those inheriting it. This does not appear to achieve its objective of protecting the collection of tax, because in the UK tax is collected or otherwise accounted for before the formal appointment of the personal representatives. For his part, Jonathan Faull claimed that the proposal was absolutely neutral in tax matters (Q 116). That may be the intention of the proposal but it has not been achieved as far as the collection of tax is concerned.

75. Inclusion of the administration of estates within the scope of the proposal would require consequential changes to domestic law. For example, in England and Wales the personal representatives who administer a succession are not at present obliged to administer foreign assets. Were the proposal to be adopted and apply to the United Kingdom they would have to do so. This is likely to be a practical benefit, but the present protection afforded to

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[21] EU Select Committee, 2nd Report (2007–2008): *Green Paper on Succession and Wills* (HL Paper 12).

personal representatives against being sued personally in respect of their distribution of the estate provided they have previously advertised their intentions in the London Gazette would become inappropriate. People residing outside the UK with an interest in the succession are even less likely to consult or have access to the London Gazette than those presently residing in the UK.[22]

76. **Limiting the scope of the proposal to determining the law applicable to the issue of who is entitled to what asset in any particular succession would result in simpler legislation that would require fewer consequential changes to the domestic law of Member States. It would be consistent with the cautious approach we advocate. It would also permit the continuation of important UK procedures for administering successions which ensure the protection of the interests of creditors, beneficiaries and HM Revenue and Customs.**

Property rights and registration of land

77. Article 1(3)(j) of the proposal excludes from the matters that are covered by the proposal "the nature of rights *in rem* relating to property and publicising these rights".[23] The Commission explains in its Explanatory Memorandum to the proposal that this provision is intended to prevent the introduction into a Member State of a right in relation to real property (essentially land) which is not found in its law.[24] It uses the example of a usufruct, which is the right of a person to use and derive profit or benefit from property that belongs to another; for example a farmer may give a right of usufruct to a neighbour, thus enabling that neighbour to sow and reap the harvest of that land. This right does not exist as part of the substantive domestic law of England and Wales but does in other Member States, for example France. The reference in the proposal to publicising these rights includes the system of land registration in the United Kingdom.

78. Professor Matthews did not agree that the Commission's objective had been fully achieved. He interpreted this provision as simply saying that the domestic law of England and Wales, for example, did not need to introduce usufruct as a property right. However, if the law of France were to apply to the succession of land located in England, then one consequence would be that a usufruct imposed under French law could, in fact, attach to that land. However there would be no requirement in the proposal to change the UK domestic Land Registry rules to show that ownership of the property was subject to the usufruct (Q 36). If those rules were not changed the result would be that the usufruct would be effective but not publicised in the Land Register. This could cause difficulties if the land is then sold to a third party. At present the issue does not arise because UK law applies to the succession of land situated in the UK.

79. Another issue affecting the registration of land arises in relation to clawback, and is discussed later in this chapter.

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22 Evidence of Richard Frimston (Q 56).

23 A right *in rem* is a right which relates to property which can be asserted against anyone who infringes it, in comparison with a right *in personam* such a right under a contract which can only be asserted against a specific person.

24 14722/09, COM (2009) 154, paragraph 4.1.

80. The Institute of Chartered Accountants of England and Wales (ICAEW) cited the example of French law, under which minors can inherit and hold land, whereas under English law minors are unable to hold land in their own right.[25] Provision would have to be made for those cases where French law applied to a succession and under that law a minor inherited land in England (p 75).

81. The position as far as property other than land is concerned is different. Professor Matthews provided an example of a valuable painting located in England belonging to a person who died domiciled in France. As matters stand, under the law of England and Wales the law applying to the succession of the painting is French. If that painting was given in the will to A subject to a usufruct in favour of B in order to allow B to hang the painting in his house for the rest of his life, any dispute between A and B coming before an English court would be resolved by the court applying French law and allowing B to take possession of the painting for the rest of his life. Professor Matthews did not interpret the proposal as seeking to change this (Q 36).

82. **We support the principle that substantive property rights should be interfered with as little as possible by the proposal. We do not consider that the proposal meets this requirement. As it stands the proposal would have the effect of making land in the UK subject to novel property rights as a result of applying the law of another Member State to a succession which includes that land. This would be the expected consequence of applying a single law to the succession of the whole of an estate, including land. A further consequence would be that the system of land registration would need adjustment to cater for this possibility.**

Special succession regimes

83. In addition to the exceptions relating to the administration of successions already mentioned in this chapter, the proposal includes, in Article 22, other exceptions in respect of "special succession regimes". The effect of this Article would be that the law of the Member State in which certain immoveable property, enterprises or other special categories of property are located can be applied irrespective of the law which would otherwise be applied, provided that these properties are subject, in domestic law, to a special regime "on account of their economic, family or social purpose" which applies irrespective of the law governing succession. The Commission's Explanatory Memorandum to the proposal[26] cites the special regimes applicable in some Member States in respect of family farms as an example of a special succession regime. The intention appears to be to preserve aspects of succession which Member States regard as culturally important.

84. These exceptions were characterised by Professor Matthews as special pleading (Q 34). He pointed out that they would result in a different law being applied to the succession of certain land from that which would otherwise be applied under the proposal, thus undermining the underlying objective of providing a single law applicable to the whole of an estate (p 6). Richard Frimston also considered these exceptions to be loosely worded and would have preferred Article 22 to be omitted, but accepted that exceptions might be needed in order to achieve agreement on the proposal (QQ 69, 70).

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[25] Minors are unable to hold a "legal estate" in land, i.e. freehold or leasehold, in their own right but can do so as beneficiaries of trusts.

[26] 14722/09, COM (2009) 154, paragraph 4.3.

85. **The exceptions for special succession regimes found in the proposal detract from the proposal's objective of simplifying the handling of cross-border successions and should, ideally, be removed. Whilst we accept that some exceptions may be necessary to achieve agreement to the proposal, they should be kept to the absolute minimum and the present drafting improved to ensure that this is the case.**

Clawback

86. This is the single most contentious issue in the proposal for the UK. Clawback arises when a person benefiting from a forced inheritance is able to make a claim for that inheritance from the lifetime gifts made by the deceased. Clawback is intended to stop the possibility of individuals evading the forced inheritance rules by giving away their property during their lifetime. In the law of England and Wales and that of Northern Ireland there is no forced inheritance and therefore no clawback. Nor will the courts entertain a claim for clawback even if they are applying a law which includes it. In Scotland there is forced inheritance in respect of moveable property, but the evidence to us was that clawback either did not exist in the UK or was only very limited.[27] Under Article 19(2)(j) of the proposal, clawback claims would specifically be within the scope of the applicable law and therefore would operate in the UK when the law being applied to a succession provides for clawback.

87. The rules of clawback vary considerably between Member States whose law includes it, as demonstrated by a study commissioned from Professor Paisley, Professor of Commercial Property Law at the University of Aberdeen, by the Ministry of Justice and published as part of its consultation document.[28] These differences in the operation of clawback would exacerbate the difficulty in coping with clawback. They include the following:

- The period of time before death in which a gift is made before it may be taken into account.
- The time within which a claim for clawback may be made.
- Whether clawback can be claimed only against the person receiving the gift or against anyone else to whom the property has been passed or sold.
- Whether a claim can be made for the return of the property itself or for monetary recompense.

88. An example of how clawback would operate in an extreme case was given by Professor Matthews (Q 33) and is outlined in Box 6.

BOX 6

An extreme example of clawback

A British national domiciled in, and entirely connected with, England gives away a significant proportion of his property. Forty years later he dies, having moved to France, having become domiciled, bought property, married and raised a family there.

The forced inheritance claims and clawback will apply to the gifts made when he was domiciled in England as far as French law is concerned. They are liable to be returned to the estate to meet these claims.

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27 Evidence of Professor Matthews (p 4) and Professor Crawford and Dr Carruthers (p 65).

28 http://www.justice.gov.uk/consultations/docs/ec-succession-wills.pdf

89. A variety of unwelcome consequences if clawback were to operate in the UK have been raised. These are summarised in Box 7.

BOX 7

The adverse effects of clawback in the UK

- Those receiving gifts, including charitable gifts and gifts made on marriage, would be uncertain whether the property would be subject to clawback. This would either inhibit the use of the gift or force them to seek forms of protection such as insurance.
- Anyone whose property might possibly have been acquired from a donee and subject to clawback, whether or not they were aware of this fact, may feel the need to take out protection against a clawback claim.
- It would be difficult to fix a price for assets subject to clawback.
- Trusts and the use of insurance or pension policies to effect estate planning would be undermined, even transfers to offshore trustees if the property remains in the UK.
- Increasing legal costs would be incurred in advising on property rights and the transfer of property.
- The various UK registers of property title would be undermined because they would not provide a guarantee as to the ownership of the property.

90. A particular problem could arise with registered land, bearing in mind that clawback can, in some circumstances, be exercised against specific property transferred from the original donee to a third party. There would be two possible responses to the possibility of clawback. Either the potential effect of clawback could be excluded from the Land Registry's guarantee of title, in which case those acquiring property were likely to want to seek insurance against a clawback claim which might well be difficult and expensive to obtain. Alternatively the guarantee could remain and the Land Registry budget would bear the increased costs of indemnifying those whose title to property becomes undermined by a successful claim for clawback. This would inevitably push up the fees which underpin the guarantee.[29]

91. Richard Frimston suggested that limited clawback may have a benign effect. There would be a greater onus on a donee, such as a charity, to ask responsible questions when receiving a large gift (Q 81).

92. In England and Wales there are some circumstances where gifts can be undone. That most frequently raised, and the closest to clawback as found in this proposal, is the Inheritance (Provision for Family and Dependants) Act 1975 which provides a mechanism for family or dependants of a deceased to obtain reasonable financial provision from the estate. Under this Act, a court can set aside a gift if made within 6 years of death and made with the intention of defeating a claim under the Act. Other examples raised include legislation to protect creditors of the insolvent, and adjustment of property in divorce proceedings. These are all, however, of relatively limited impact, and practitioners know how to advise their clients. Richard Frimston was of the opinion that people in the UK were used to clawback in all sorts of ways

[29] Evidence of Oliver Parker (Q 155).

(Q 81). Professor Roger Kerridge, Professor of Law at Bristol University, suggested that in most continental jurisdictions the effect of clawback was much the same as the anti-avoidance provisions which exist under the English Family Provision legislation (p 79).

93. Additionally, some gifts (although not those to charities) can give rise to Inheritance Tax if made up to seven years before the death of the donor.

94. Lord Bach, Parliamentary Under Secretary of State at the Ministry of Justice, indicated that many of the respondents to the Ministry of Justice consultation cited clawback as a reason for the UK not to opt in (Q 139). This was also the strong flavour of the evidence presented to us. However, he also indicated that many Member States would be reluctant to see clawback removed from the proposal (Q 127). Given that clawback forms part of the law of the majority of Member States and given that processes having a similar effect can arise in the UK, we considered whether clawback presents a particular problem to the UK. We believe it does. As a number of our witnesses pointed out, there is in the UK a legal culture of freedom for individuals to dispose of their property as they wish; and there is a strong UK cultural heritage of providing social support through gifts to charity. To this may be added the important role played by trusts in the UK. Trusts are not part of the law of many other Member States and trustees frequently acquire property through gifts; for example trusts set up to provide for a disabled person or protecting the interests of a child could be vulnerable to clawback.[30] Professor Matthews attributed clawback as the main reason he considered that the proposal would have detrimental effects on the City (Q 9). Lord Bach expanded on this by indicating that clawback would have a chilling effect on the functioning of trusts within the City (Q 151).

95. Jonathan Faull appreciated that clawback was a difficult and sensitive issue and one which would play a large part in any UK decision to opt in. He indicated that the Commission, having consulted with British lawyers, officials and others, had crafted this aspect of the proposal to meet the support of most Member States (Q 106).

96. It is undoubtedly the case that the impact of clawback could be alleviated by permitting testators to choose a law to apply to the whole of their estates which did not include clawback, such as that of England and Wales. The proposal as it stands only allows a choice of testator's nationality at the time of death. This mechanism would therefore not be available to anyone who did not have the nationality of a state whose law excluded clawback. This option was regarded as inadequate by Professor Matthews on a number of further grounds: it depended on the person concerned realising that a change in their habitual residence to a State with clawback laws had occurred, making a formal choice in a valid will which was not thereafter revoked, and not changing nationality. Furthermore he considered that the broad exceptions to the applicable law contained in the proposal also undermined this choice (Q 33, p 5). Lord Bach pointed out that only a minority of those dying made wills (Q 139).

97. It would, of course, be possible to amend the proposal so as to exclude or limit clawback. Richard Frimston suggested that Member States with limited clawback may also be reluctant to see clawback extended. He cited the case

[30] Joint evidence of the Law Society, STEP and the Notaries Society (p 81).

of Austria whose law only takes into account gifts made two years before the deceased's death (Q 61). The joint evidence of the Law Society, STEP and the Notaries Society suggested some possible ways of achieving this: limiting clawback to gifts made after the choice of an applicable law, and limiting it to gifts made with six years of the deceased's death (p 82). Professor Kerridge considered the significant question to be whether clawback applied only to the original donee or also to anyone who acquires the property from the original donee (p 79). There are more possible ways to limit clawback and a combination can be used.

98. **We consider that the impact of the clawback in the proposal as it stands would be detrimental to UK interests. The Government should consult with accountants, lawyers, charities and others who would be likely to be affected by it.**

CHAPTER 5: JURISDICTION, RECOGNITION AND ENFORCEMENT

99. The Commission proposal envisages the single basic rule that the court of the Member State in which the deceased was habitually resident at the time of death should have jurisdiction to deal with a succession.

100. The same test would be applied to cross-border successions involving a third country where the deceased was habitually resident in a Member State. But this could only resolve any conflict of jurisdiction there might be between Member States. Any conflict with a third country could only be resolved by agreement with that country.

101. Specific provision is also made in the proposal to resolve any conflict of jurisdiction between Member States where the deceased was not habitually resident in the EU at the time of death. This is termed "residual jurisdiction" in the proposal.

102. The Commission proposal also envisages establishing consistent rules to simplify the recognition and enforcement of decisions given by the courts of the Member States and also of authentic instruments produced by notaries. This would not apply to decisions or authentic instruments from third countries.

Jurisdiction

103. The laws of the individual Member States can give rise to different answers to the question of which court is to deal with a cross-border succession, and the possibility that more than one could, by its own law, have jurisdiction to do so. This gives rise to the further possibility that there may be a race by those contemplating litigation to start proceedings in the jurisdiction they perceive will give them an advantage. For example, delay in reaching a decision may favour one party, with a resultant rush by that party to start proceedings in a jurisdiction which is slow to process litigation.

104. The resolution of the question of which court has jurisdiction is different from the question of which law should apply to the succession. It may be the case, for example, that all the litigants in a succession dispute live in a Member State other than that of the applicable law, making it more convenient for the court of their Member State to resolve their dispute. There is, however, a strong link between the jurisdiction and the applicable law in that it is cheaper and more convenient for the court dealing with succession to apply its national law.

105. For Richard Frimston, including in the proposal provisions dealing with jurisdiction was one of the matters making the proposal difficult in practice because it was so novel (Q 65). None of our other witnesses questioned the underlying benefit in principle of EU legislation providing a single rule for determining which court should have jurisdiction. However there were questions as to how the proposal seeks to achieve this. The Commission proposes that jurisdiction should be determined by the habitual residence of the deceased at the time of death, mirroring the basic rule of determining the applicable law. This choice raises the same issues of certainty as arise from using this connecting factor to determine the applicable law. It raises the spectre, in a case where it is uncertain where the habitual residence of the deceased was, of a race to start proceedings. As the proposal stands the first

court to which the matter is brought would have the sole right to deal with the case unless and until it decides that it did not have jurisdiction, irrespective of the objective merits of the various claims for habitual residence.

106. However jurisdiction would not follow applicable law where a person chooses to apply the law of his nationality. In this case jurisdiction remains with the court of the Member State of habitual residence, but that court would have a discretion to invite the parties concerned to use the court of the nationality of the deceased which would also be the court of the applicable law.

107. Professor Matthews, Richard Frimston, the Chancery Bar Association and the joint evidence of the Law Society, STEP and the Notaries Society favoured jurisdiction following the applicable law (QQ 37, 51, pp 61, 83). This approach would avoid the added cost and inconvenience arising from the need to provide expert evidence of the content of the law applicable to the case and the need for the court to apply a law with which it was not familiar.

108. This is a particularly important question for the UK where succession can involve complicated issues of trust law with which the courts of most other Member States are not familiar and which can often require an assessment of oral evidence, after cross-examination, to be resolved. The legal traditions of most other Member States favour written evidence including notarial acts. They tend to relegate oral evidence to a lower level and do not employ the technique of cross-examination to test the veracity of witnesses.[31]

109. Jonathan Faull indicated that the Commission had chosen the approach found in its proposal because it envisaged that most Member States would not be persuaded to make the link between the applicable law and jurisdiction mandatory. Instead it had chosen flexibility (Q 110).

110. **We consider that the connecting factor to determine jurisdiction should be the same as that used to determine the applicable law, including in cases where a testator has chosen the applicable law.**

111. Different considerations apply where the cross-border element of the succession involves third countries. The proposal would apply the rule applicable to Member States if the deceased died habitually resident in the EU. If, on the other hand, the deceased died habitually resident in a third country, there would be a hierarchy of connecting factors to determine which Member State has residual jurisdiction. The hierarchy is: the previous habitual residence in a Member State of the deceased, the nationality of the deceased, the habitual residence of those inheriting (irrespective of the size or proportion of the inheritance), and the location of the property which is the subject of the proceedings. These clearly provide the potential for more than one Member State to have residual jurisdiction. Where this happens the first court to which any dispute is brought would have sole jurisdiction until it decided otherwise.

112. In their Explanatory Memorandum[32] the Government identified a need to tighten the categories for attributing residual jurisdiction. For example the rules set out in the proposal could lead to the court of a Member State of an heir who only benefits from a very small inheritance having jurisdiction.

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[31] Evidence of Professor Matthews (p 9).

[32] http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered%20EMs%2009/14001-15000/14722-09.pdf

113. Jonathan Faull characterised the circumstances in which residual jurisdiction would arise as “circumscribed” and thought the hierarchy sufficiently clear. He accepted that the test of this would be the extent to which they would invite or facilitate forum shopping by potential litigants (Q 112). Professor Matthews saw nothing wrong in having a hierarchy of factors to determine residual jurisdiction, but accepted that it was for negotiation precisely what it ought to be (Q 37). Richard Frimston described the proposal for residual jurisdiction as “fairly sensible” (Q 83).

114. **We believe that if the proposal is to deal with jurisdiction it should include provision for residual jurisdiction. The proposal is however capable of being tightened up to ensure that the circumstances in which more than one residual jurisdiction arises are more limited and the connection between the succession and any residual jurisdiction is stronger.**

Recognition and enforcement of court decisions and authentic instruments

115. The potential benefits to be derived from the simplification of the rules resolving conflicts of applicable law and jurisdiction can be enhanced by making the decisions taken in one Member State recognisable and enforceable in another. A person benefiting from a decision in one Member State would not incur added expense and delay in going through a process in another Member State in order to have that decision given effect. The question arises whether such recognition or enforcement should be subject to safeguards to protect the public policy of the Member State in which recognition or enforcement is sought. This might happen, for example, if the original decision were made without an interested party having what was considered to be a sufficient opportunity to contest it.

116. The Commission proposes that decisions made in one Member State, whether made by courts or by notaries in the form of authentic instruments, should be recognised and enforced in other Member States in accordance with rules based on those currently in place in respect of civil and commercial matters.[33]

117. Recognition of a decision of a court in another Member State would not require any special procedure, but the court in which recognition is requested might refuse on limited grounds: that recognition was “manifestly contrary” to public policy, the defendant had insufficient opportunity to arrange the defence, and the decision was irreconcilable with an existing decision in a dispute between the same parties. The procedure for enforcement, following the rules for civil and commercial matters, would involve obtaining a declaration of enforceability in the court of the Member State of enforcement according to a single simplified procedure. If contested, a declaration of enforceability could only be refused on the grounds on which recognition could be refused.

118. In contrast, an authentic instrument would have to be recognised unless it was “contrary” to the public policy of the Member State in which recognition was sought. The procedure for enforcement of an authentic instrument

[33] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

would follow that of a court decision save that the only ground for refusal would be that enforcement was contrary to the public policy of the Member State in which enforcement was sought.

119. The recognition and enforcement of court decisions was regarded by Richard Frimston as an objective worthy of pursuing, but one which could raise tricky issues. He cited the example of Malta, which does not have a law of divorce. He asked whether that meant that a Maltese court would not recognise a divorce obtained elsewhere, with a consequential effect on succession issues which were dependent on whether the marriage was regarded as continuing to exist up to the time of the death (Q 86). Other witnesses did not raise objections to the provision for recognition and enforcement of judgments.

120. On the other hand there was widespread concern at the recognition and enforcement of decisions taken by notaries in the form of authentic instruments. Professor Matthews explained that the functions of notaries are to record and give publicity to transactions. Those transactions are generally concluded in the context of an agreement by the relevant parties, rather than a dispute. Given the absence of litigation, transactions before a notary tended not have the same procedural safeguards built into them as do decisions of courts. In particular a notary might not have been made aware of the existence of a dispute affecting the succession to a particular property and might not have given all interested parties a chance to state their case. Professor Matthews therefore advocated that authentic instruments should have the status of high quality evidence rather than be recognised and enforceable (Q 38, p 11).

121. Lord Bach and Oliver Parker raised a serious concern about the recognition and enforcement of authentic instruments which had been apparent from the early discussions of the proposal in the Council Working Group. It arises from the fact that the proposal would provide rules for resolving conflicts of jurisdiction between courts but would not apply the same rules to determine who should be able to produce an authentic instrument. This discriminates against court-based systems in favour of systems which use notaries. The specific example used to illustrate this concern is outlined in Box 8 (Q 162).

BOX 8

An effect of the proposal for recognition and enforcement of an authentic instrument

A contested succession is being litigated in London according to the jurisdiction provisions of the proposal. A disgruntled party could nevertheless seek an authentic instrument from a notary in another Member State and that notary could properly issue one as the jurisdiction rules only apply to courts. The notary might not even be made aware of the contested proceedings in London. The likelihood is that the authentic instrument could be obtained before any judgment was delivered by the London court.

Recognition and enforcement of the authentic instrument is automatic unless it can be proved to be in breach of public policy in the enforcing state, which is likely to be difficult to achieve in the majority of cases. The effect would be to pre-empt or undermine the London judgment.

122. Jonathan Faull suggested that the Commission had not gone too far in providing for the mutual recognition and enforcement of authentic

instruments because of the important role that notaries played and the safeguards provided (Q 118). He pointed out that notaries were firmly established as an indispensable part of the system in the Member States where they took a prominent role in overseeing successions (Q 122).

123. **We consider that the mutual recognition and enforcement of court decisions is likely to be sufficiently non-controversial to be acceptable in principle. However we do not consider that there is sufficient mutual trust at present to justify making authentic instruments recognisable and enforceable. We consider that authentic instruments should be given the status of evidence rather than being recognisable and enforceable.**

CHAPTER 6: THE EUROPEAN CERTIFICATE OF SUCCESSION

124. The proposal would create a European Certificate of Succession. This would be a certificate in standard form produced by a court in a Member State having jurisdiction in accordance with the general rules on jurisdiction set out in the proposal. The Chancery Bar Association highlighted that the definition of a "court" in Article 2 was wide enough to enable notaries authorised by the internal law of their Member State to issue an ECS (p 61).

125. The certificate would set out specific information relating to a succession including: the grounds for the issuing court to assume competence to do so, information concerning the deceased and the 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 and any restrictions on the rights of the heir, and details of the applicant for the certificate.

126. Article 42 of the proposal sets out the effects of an ECS. This is outlined in Box 9. These would last for three months after which a renewed copy would be required.

BOX 9

The effect of an ECS under the proposal

- An ECS would be recognised automatically for the purposes of the administration of the succession and determining who is entitled to get what of the deceased's property.
- The content of an ECS would be presumed accurate in all Member States throughout its period of validity.
- Any person who passed property in accordance with an ECS would be released from their obligations under the succession unless they knew the contents of the ECS were not accurate.
- Those who acquired succession property in accordance with an ECS would be considered to have properly acquired it unless they knew that the contents of the ECS were not accurate.
- The ECS would be a valid document for allowing inherited property to be registered.

127. Two initial points can be made. First, an ECS would be more readily recognised in other Member States than a court decision, even if it was issued by a notary. Secondly, an ECS could only be rectified by the issuing authority.

128. Richard Frimston considered that an ECS could assist UK personal representatives to administer a succession involving property in a Member State which does not use personal representatives for this purpose (Q 87). It is not clear, however, how an ECS would be issued in the UK. The Notaries Society, in a separate submission, called for clarification, and pointed to the suitability of notaries to undertake this task in view of their existing special involvement in international law (p 85).

129. Professor Matthews gave evidence of the drawbacks of an ECS for a UK succession. At a practical level it would not be suitable to deal with the greater complexities that could arise in a UK succession than in most other Member States whose property law tended to be simpler, and where there were more often a limited number of heirs who normally acquire absolute ownership of the property they have inherited. He suggested that none but

the simplest English succession could be summarised in the way contemplated by the proposal (Q 27, pp 11–12).

130. With regard to how an ECS could be used in the UK, it is not clear whether an ECS could be used to secure the transfer of property in the UK to the heir without obtaining a grant of representation in accordance with ordinary UK procedures. Richard Frimston interpreted the proposal as meaning that an ECS could be used to obtain a grant, but not to secure the release of property without one (QQ 87–89). Jonathan Faull indicated that he was consulting Commission lawyers as to this interpretation (Q 119). This is an important question because in the UK the internal procedures ensure the payment of tax. This is not the case with an ECS.

131. The fact that, under the proposal, an ECS would have to be recognised in all Member States, would be presumed accurate and could only be rectified by the court which issued it has important consequences. It means that an inaccurate statement in an ECS issued in another Member State could be hard to correct, and in the meantime it would be necessary to proceed on the basis of the ECS until it was altered. An inaccurate statement in an ECS as to the nationality or habitual residence of the deceased would mean that effect could not be given to a choice made by a testator of the applicable law to be applied to a succession until the issuing court had been persuaded to rectify or cancel it. These problems would be exacerbated by the fact that an incorrect ECS would provide absolute protection to a third party acquiring property on the back of an ECS in the absence of knowledge of the inaccuracy.[34] This would presumably be the case even if it were subsequently rectified.

132. Professor Matthews accepted that an ECS could be useful if its effect was to provide evidence of the matters stated in it but was not conclusive (QQ 24–27). Richard Frimston cited the example given in Box 4 as an occasion when an ECS would have enabled an English grant of probate to be obtained without difficulty (Q 87). The joint evidence of the Law Society, STEP and the Notaries Society recognised the need for the ECS to be able to accommodate the different laws of different Member States, but supported an ECS provided it were subject to local procedures in the Member State of recognition. It would not be acceptable for an ECS to be used, for example, to secure the release of money from a UK bank account without securing a grant of representation or paying taxes (p 83).

133. Jonathan Faull emphasised that an ECS would reflect a genuine understanding of the situation by the court issuing it and could be changed if that proved incorrect. He regarded it as sensible for any error to be corrected at source (QQ 120–121).

134. The Government evidence was that they were still considering the provisions on the ECS, as they appeared particularly obscurely drafted. It was important that the ECS should not by-pass the existing system in the UK for administering succession and collection of tax (Q 163).

135. **We do not support an ECS which overrides national law and practice as a consequence of being automatically recognised in every Member State and treated as conclusive of the matters stated in it. We can, however, see advantages in an ECS which facilitates the operation of national procedures by providing non-conclusive evidence of the salient aspects of a succession.**

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[34] Evidence of Professor Matthews (Q 27, p 12).

CHAPTER 7: SUBSIDIARITY AND OPT-IN

Subsidiarity

136. The proposal was made before the Treaty of Lisbon came into force. Its legal basis is stated to be Article 61(c) and the second indent of Article 67(5) of the Treaty establishing the European Community. These provisions allowed the Community to legislate in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market. The equivalent powers are now found in Article 81 of the Treaty on the Functioning of the European Union which clearly encompasses the subject matter of this proposal. This is not an area where the European Union has exclusive competence so the principle of subsidiarity applies.

137. Under this principle the European Union should act only insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. Whilst this is a legal principle and it is possible to challenge the validity of an EU measure on the grounds that it does not comply with the principle of subsidiarity, in practice the determination whether a measure complies includes a significant political assessment based on the evidence as a whole.

138. Recital (6) of the proposal is the key statement of the objective of the proposal:

> "The smooth functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties asserting their rights in the context of international succession. In the European area of justice, citizens must be able to organize their succession in advance. The rights of heirs and/or legatees, other persons linked to the deceased and creditors of the succession must be effectively guaranteed."

139. In reviewing our preliminary decision on subsidiarity (see paragraph 12) we first considered whether the objectives justify legislative action at all and then considered whether that legislative action should be taken at EU level.

140. The evidence provided to us, and discussed in Chapter 2, confirms that there are indeed difficulties associated with successions that involve a cross-border dimension. Although the scale of those difficulties has not been fully established, there is likely to be an increase in the number people affected by cross-border succession who would benefit from simplification of the law in this area.

141. To achieve simplification would require action at EU level because it entails creating rules which are the same in every Member State, for example establishing a single connecting factor for determining the law to be applied to a cross-border succession. Therefore the objective cannot be achieved by the Member States acting separately. This conclusion is reinforced by the longstanding failure of broader international initiatives to achieve simplification.[35] This conclusion remains valid despite our concerns that the complexity of the subject matter is such that an over-ambitious proposal runs

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[35] See paragraph 4.

the risk of replacing one complexity with another or creating new and unforeseen difficulties. These concerns point to the need for care in framing EU legislation; they do not point to the possibility of the Member States, acting individually, being able to achieve the objective which the proposal seeks.

142. None of our witnesses considered that the proposal raised subsidiarity concerns.

143. **We therefore confirm our preliminary view that the proposal complies with the principle of subsidiarity.**

The UK opt-in

144. The Lord Chancellor and Secretary of State for Justice announced on 16 December 2009 that the UK would not opt in to the formal negotiations on the Commission's proposal.[36] This followed a consultation exercise,[37] the invitation to which highlighted two key concerns with the proposal: over clawback and the lack of clarity of the habitual residence test. These concerns were widely shared by the respondents to the consultation. The Government concluded that the potential benefits of the proposal were outweighed by the risks. However the Government indicated that they would engage fully in the forthcoming negotiations with the aim of removing the points of concern. This approach would give the possibility of opting in to the final Regulation if the points of concern had been successfully negotiated out.

145. We in turn formed a preliminary view that the UK should not opt in to formal negotiations.[38] Whilst there were concrete benefits to be gained from EU legislation in this field, the risk of introducing clawback to the UK was unacceptable. There were also other factors. We pointed to the significant incentive for other Member States to adopt a measure to which the UK could opt in, which would have the effect of reducing the disadvantage of conducting negotiations with the UK on the proposal informally rather than formally. Finally we drew attention to the possibility, raised by Mr Justice Hayton (p 72), that the UK could, whilst not opting in to EU legislation, nevertheless gain some of the benefits of that law, and avoid the disadvantages of it, by suitably amending its own domestic law. For example, if the provisions of the EU legislation for determining the law to apply to the whole of a deceased's property were acceptable it would be possible to amend UK legislation to align it with the EU legislation in this respect, whilst still excluding or limiting the operation of clawback in the UK.

146. If the UK does not, ultimately, opt in, and its domestic laws remain unchanged, its citizens living and owning property in other Member States would continue to be faced, with the added expense and inconvenience presented by the issues identified in Chapter 2. There would be conflict between the laws of all the jurisdictions of the UK and the EU Regulation as to which law should apply to cross-border successions and which court should have jurisdiction to resolve disputes. UK citizens would not have the benefit of simplified rules for recognition and enforcement of court decisions,

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[36] HL 16 December 2009 WS 274.

[37] http://www.justice.gov.uk/consultations/ec-succession-wills.htm

[38] Letter at Appendix 4.

nor the possible advantages from an ECS which would be recognised in other Member States. Their position would, however, be better than it is at present. This is because the rules concerning cross-border succession of 24 or more individual Member States[39] would have been replaced by one EU Regulation, officially published in English, and therefore more readily available and transparent than the individual laws of the Member States.

147. Furthermore, there would still remain the possibility of amending the UK domestic laws to align with the EU Regulation to the extent that it is considered beneficial to do so, whilst avoiding importing those elements we have identified as detrimental.

148. **The decision whether the UK should opt in to the Regulation once it has been adopted is different from the decision whether or not to opt in to negotiations. The latter involves an assessment of the prospects of negotiation whilst the former requires a straight balance of the advantages and disadvantages of that Regulation, as a whole, in the form in which it is adopted. However the balancing exercise should take into account the extent to which it is possible and practical to attract some, at least, of the benefits of simplifying the law in the field of cross-border succession by amending domestic law in line with EU law. The issues that need to be resolved are:**

- **The refinement of the concept of habitual residence as the connecting factor for determining the applicable law to apply to a cross-border succession and the jurisdiction of the courts (see paragraphs 65 and 110).**
- **The extent of testator choice of applicable law (see paragraph 69).**
- **The protection of creditors, beneficiaries and HM Revenue and Customs (see paragraph 76).**
- **The restriction of special succession regimes (see paragraph 85).**
- **Clawback (see paragraph 98).**
- **The recognition and enforcement of authentic instruments (see paragraph 123).**
- **The automatic recognition of a European Certificate of Succession (see paragraph 135).**

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[39] Ireland, like the UK, is able to choose whether or not to opt in. Like the UK it has not opted in to the formal negotiations. Denmark does not participate and does not have the power to opt in.

CHAPTER 8: SUMMARY OF CONCLUSIONS

The objective of simplifying cross-border succession

149. The law of succession involves dealing with complex property rights that vary considerably between Member States. Where there is a cross-border element in the succession, and in particular where the deceased owned property in more than one country, that law becomes even more complex with the inevitable consequence that those involved with cross-border successions are encumbered with greater expense and inconvenience (see paragraph 44).

150. Whilst simplification of the law on cross-border successions, if it could be achieved, would be likely to bring real practical benefits, there is a lack of evidence of the number of cross-border successions and also the extent to which the complexity and expense of dealing with the issues actually impairs mobility and the exercise of free movement rights within the EU. This suggests that the EU should be cautious in seeking to legislate in this complex area. Particular care is needed to ensure that any legislation intended to simplify the law does not have the unintended consequence in practice of replacing one type of complexity with another (see paragraph 45).

151. We strongly agree with the Commission that it is not appropriate to harmonise the substantive law of succession across the Member States. We also agree that this is an area for a step by step approach to legislation. However it would have been preferable for the first proposal in this field to have focussed on the issue of the law that should apply to a cross-border succession (the applicable law) (see paragraph 53).

The applicable law

152. We agree with the Commission's objective of seeking a single law to apply to the whole of the estate of a deceased. But to achieve this objective it is necessary to find a suitable connecting factor between the succession and the applicable law which can be applied with reasonable certainty (see paragraph 58).

153. A single factor to provide the connection between a succession and the applicable law is difficult to find. There must be a compromise between providing an appropriate connection between the succession and the law to be applied to it, and providing certainty. We believe that the concept of habitual residence should be used as the basis for the connecting factor in this proposal. However it is legally possible and necessary in practice to define the concept. Citizens should not be left to bear the expense of refining the concept through litigation. The definition should, as a minimum, address in a satisfactory way the position of employees posted to another Member State and those who retire to another Member State (see paragraph 65.

154. We welcome the introduction of a choice of applicable law, not least because a choice is comparatively easy to ascertain. We accept that the choice must be limited to preserve an appropriate level of connection between the law chosen and the succession. Limiting a person to choosing the law of his or her own nationality is, however, too narrow. It should be possible for a person to choose the law of habitual residence at the time the choice is made. We consider that it would also be acceptable to extend the choice of available law to one with which the testator has a genuine and concrete connection and which can be ascertained with sufficient certainty (see paragraph 69).

155. Limiting the scope of the proposal to determining the law applicable to the issue of who is entitled to what asset in any particular succession would result in simpler legislation that would require fewer consequential changes to the domestic law of Member States. It would be consistent with the cautious approach we advocate. It would also permit the continuation of important UK procedures for administering successions which ensure the protection of the interests of creditors, beneficiaries and HM Revenue and Customs (see paragraph 76).

156. We support the principle that substantive property rights should be interfered with as little as possible by the proposal. We do not consider that the proposal meets this requirement. As it stands the proposal would have the effect of making land in the UK subject to novel property rights as a result of applying the law of another Member State to a succession which includes that land. This would be the expected consequence of applying a single law to the succession of the whole of an estate, including land. A further consequence would be that the system of land registration would need adjustment to cater for this possibility (see paragraph 82).

157. The exceptions for special succession regimes found in the proposal detract from the proposal's objective of simplifying the handling of cross-border successions and should, ideally, be removed. Whilst we accept that some exceptions may be necessary to achieve agreement to the proposal, they should be kept to the absolute minimum and the present drafting improved to ensure that this is the case (see paragraph 85).

158. We consider that the impact of the clawback in the proposal as it stands would be detrimental to UK interests. The Government should consult with accountants, lawyers, charities and others who would be likely to be affected by it (see paragraph 98).

Jurisdiction, recognition and enforcement

159. We consider that the connecting factor to determine jurisdiction should be the same as that used to determine the applicable law, including in cases where a testator has chosen the applicable law (see paragraph 110).

160. We believe that if the proposal is to deal with jurisdiction it should include provision for residual jurisdiction. The proposal is however capable of being tightened up to ensure that the circumstances in which more than one residual jurisdiction arises are more limited and the connection between the succession and any residual jurisdiction is stronger (see paragraph 114).

161. We consider that the mutual recognition and enforcement of court decisions is likely to be sufficiently non-controversial to accept in principle. However we do not consider that there is sufficient mutual trust at present to justify making authentic instruments recognisable and enforceable. We consider that authentic instruments should be given the status of evidence rather than being recognisable and enforceable (see paragraph 123).

European Certificates of Succession

162. We do not support an ECS which overrides national law and practice as a consequence of being automatically recognised in every Member State and treated as conclusive of the matters stated in it. We can, however, see advantages in an ECS which facilitates the operation of national procedures

by providing non-conclusive evidence of the salient aspects of a succession (see paragraph 135).

Subsidiarity and Opt-in

163. We confirm our preliminary view that the proposal complies with the principle of subsidiarity (see paragraph 143).

164. The decision whether the UK should opt in to the Regulation once it has been adopted is different from the decision whether or not to opt in to negotiations. The latter involves an assessment of the prospects of negotiation whilst the former requires a straight balance of the advantages and disadvantages of that Regulation, as a whole, in the form in which it is adopted. However the balancing exercise should take into account the extent to which it is possible and practical to attract some, at least, of the benefits of simplifying the law in the field of cross-border succession by amending domestic law in line with EU law. The issues that need to be resolved are:

- The refinement of the concept of habitual residence as the connecting factor for determining the applicable law to apply to a cross-border succession and the jurisdiction of the courts.
- The extent of testator choice of applicable law.
- The protection of creditors, beneficiaries and the collection of tax.
- The restriction of special succession regimes.
- Clawback.
- The recognition and enforcement of authentic instruments.
- The automatic recognition of a European Certificate of Succession (see paragraph 148).

APPENDIX 1: EU SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee who conducted this inquiry were:

Lord Blackwell
Lord Bowness (Chairman)
Lord Burnett
Lord Kerr of Kinlochard
Lord Maclennan of Rogart
Lord Norton of Louth*
Baroness O'Cathain
Lord Renton of Mount Harry†
Lord Rosser
Lord Rowlands††
The Earl of Sandwich†
Lord Tomlinson**
Lord Wedderburn of Charlton**
Lord Wright of Richmond

* Member until 12 November 2009

** Member until 18 January 2009

† Member since 24 November 2009

†† Member since 19 January 2010

Declarations of Interests

Lord Blackwell
No relevant interests

Lord Bowness (Chairman)
Regular remunerated employment:
Streeter Marshall Solicitors (31 March 2009)
Notary Public (fees)

Lord Burnett
No relevant interests

Lord Kerr of Kinlochard
No relevant interests

Lord Maclennan of Rogart
Property in USA

Lord Norton of Louth
No relevant interests

Baroness O'Cathain
No relevant interests

Lord Renton of Mount Harry
No relevant interests

Lord Rosser
No relevant interests

Lord Rowlands
No relevant interests

The Earl of Sandwich
No relevant interests
Lord Tomlinson
Property in Spain and Belgium
Lord Wedderburn of Charlton
No relevant interests
Lord Wright of Richmond
No relevant interests

A full list of registered interests of Members of the House of Lords can be found at http://pubs1.tso.parliament.uk/pa/ld/ldreg/reg01.htm

APPENDIX 2: CALL FOR EVIDENCE

EU Sub-Committee E (Law and Institutions) is conducting an inquiry as part of its scrutiny of the European Commission's 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.[40]

It has previously published a short report as part of its scrutiny of the Commission's Green Paper on Succession and Wills.[41]

In its Explanatory Memorandum accompanying its proposal the Commission highlights the significance of cross-border successions within the European Union. It considers that the present divergent laws and the number of different authorities involved in these successions prevent the full exercise of private property law. Its objective is legislation to enable people living in the European Union to organise their succession in advance, and to guarantee the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession.

The Regulation would—

- establish rules determining which Member State's court or national authority should deal with a succession, the basic rule being that it should be that of the Member State where the deceased was habitually resident at the time of death;
- establish which state's law should be applied to specific aspects of the succession;
- require mutual recognition and enforcement of judgments in this area; and also of "authentic instruments," which are documents formally drawn up and registered in a Member State; and
- provide for the recognition of a European Certificate of Inheritance ("ECI") which has been issued in accordance with the proposal.

The proposal is subject to the UK opt-in under Protocol (No.4) on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

Particular questions raised by the Commission's proposed Regulation to which we invite your response are as follows:

Subsidiarity and proportionality

- What is the extent of cross-border successions involving other Member States and what problems arise?
- What issues need to be addressed by legislation?
- Is it necessary that legislation be in the form of a directly applicable Regulation?

[40] COM (2009) 154.

[41] European Union Committee, 2nd Report (2007–08): *Green paper on Succession and Wills* (HL 12).

Jurisdiction

- What should be the connecting factor(s) determining the Member State whose national authorities or courts have jurisdiction to deal with a succession?
- Does the Commission's proposed connecting factor of habitual residence require defining, and if so how?
- Should there be rules conferring residual jurisdiction on the courts and authorities of one or more Member State when the habitual residence of the deceased was not a Member State, and if so what?
- Should there be an exceptional jurisdiction for a Member State in respect of the transfer of property situated there which requires the involvement of its courts or public registration?
- What should be the rules to prevent actions on the same or related issues proceeding in different Member States?

Applicable law

- What areas of succession should the applicable law rules cover? In particular should they affect (and if so how):
  - (a) payment of the debts of the deceased and for the collection of taxes,
  - (b) the clawback of gifts made during the lifetime of the deceased,
  - (c) testamentary trusts and interests terminating on death such as joint tenancies,
  - (d) the validity, interpretation, rectification and revocation of wills,
  - (e) special succession regimes with economic, family or social objectives in the law of the Member State where the property is located?
- What should be the test(s) for determining the applicable law?
- How far should there be freedom for a testator to choose the law applicable to the succession of his or her estate?
- Should a public policy exception to the applicable law rules be available if the applicable law is that of another Member State?

Mutual recognition and enforcement of judgments and authentic instruments

- What should be the scope and procedure for mutual recognition and enforcement of judgments?
- On what grounds should it be possible for a court to refuse to recognise or enforce a judgment of the court of another Member State?
- Should documents which have been formally drawn up or registered as authentic instruments in one Member State be recognised and enforceable in another Member State?

European Certificate of Inheritance ("ECI")

- Could an ECI be of practical benefit, and what would be needed to achieve this, particularly in terms of:

(a) the persons to whom it should be available,

(b) the matters capable of certification,

(c) its probative effect,

(d) whether it is optional or mandatory?

- Should an ECI be complemented by a European Register of Wills? If so what form should it take?

We would also welcome your views on any other aspect of the Commission's proposal.

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence only, those marked ** gave both oral and written evidence. The written evidence of those marked † was also provided to the Ministry of Justice in response to its consultation on the proposal.

*	Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice
†	The Chancery Bar Association
	Professor Elizabeth Crawford and Dr Janeen Carruthers, University of Glasgow
*	Jonathan Faull, Director-General, Freedom Security and Justice, European Commission
†	Andrew Francis, Serle Court, Lincoln's Inn
*	Richard Frimston, Law Society and the Society of Trust and Estate Practitioners, Russell-Cooke LLP
†	The Honourable Mr Justice Hayton, Judge of the Caribbean Court of Justice
†	The Institute of Chartered Accountants in England and Wales
†	Professor Roger Kerridge, University of Bristol
†	The Law Society of England and Wales and the Society of Trust and Estate Practitioners and the Notaries Society of England and Wales—Joint submission
	The Notaries Society of England and Wales
**	Professor Paul Matthews, King's College London, Withers LLP

APPENDIX 4: CORRESPONDENCE WITH THE GOVERNMENT AND RESPONSE TO COSAC

Letter of 12 November 2009 from the Chairman to Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E (Law and Institutions) at its meeting of 11 November. The Committee had already launched an inquiry into the proposal and published a call for evidence on 23 October.

This proposal is, as you are aware, subject to the United Kingdom opt-in and accordingly subject to the commitments made by Baroness Ashton in June last year. They include a commitment to set out in the Explanatory Memorandum, to the extent possible, an indication of the Government's view as to whether or not it would opt in. In this case the Explanatory Memorandum provides no substantive discussion on this issue. Whilst we appreciate that the proposal is also subject to Government consultation and this precludes any firm statement of the Government position it would nevertheless be of assistance to us to know the Government view as to the significant considerations governing a decision to opt in and the approach you were minded to take; and we consider that this is information which could have been provided in the Explanatory Memorandum. We should therefore be grateful if you would provide us with further information on the exercise of the opt-in. It would be useful to have this information in time for our next meeting on 25 November.

Letter of 17 November 2009 from Lord Bach to the Chairman

I am writing in response to your letter of 12 November in which you ask what considerations the Government will be taking into account, and the approach it is minded to take, on whether to opt-in or not to the proposed Regulation on succession matters.

The Government supports, in principle, simplifying cross-border inheritance issues. We recognise that with over 2 million UK citizens living in other EU countries, the possibility of their estates being governed by a single law has considerable merit. Those considerations weigh significantly towards opting in.

As the Explanatory Memorandum made clear, however, we have identified some significant concerns, particularly in relation to the issue of clawback and the absence of an adequate connecting factor. These were set out in our initial Explanatory Memorandum. Our initial analysis of the Regulation concluded that these issues were significant enough to weigh heavily towards a decision not to opt-in to this proposal. These issues will certainly be addressed during negotiations, but we estimate that it is far from certain that a satisfactory compromise can be agreed. In the context of a qualified majority voting regime, and having regard to the impact this provision might have on our legal system if it remains unamended, the Government's preliminary view is that opting-in might carry a significant risk.

As you acknowledge in your letter, we are still in the early stages of consulting on this proposal and await the collective evidence to inform our decision. It is hoped that the issues we have identified, and the concern resulting from them, will be tested in the consultation exercise which could reveal other unforeseen benefits and risks. The results of the consultation exercise, which ends on 2 December, coupled with a considered view as to the negotiability of solutions, will inform the Government's

decision on whether to opt-in to the Regulation or not. In accordance with Baroness Ashton's undertaking, the Government will also take into account the Committee's opinion if it can be expressed within the first 8 weeks of the 3-month opt-in period. The Government must make its decision by 22 January 2010.

I hope this helps explain the general position of the Government in respect of this dossier at this point in time. I would of course be interested in hearing your own views on this matter. I know your own inquiry is underway and I look forward to meeting the Committee as part of that on 16 December.

Letter of 17 December 2009 to Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for giving evidence to Sub-Committee E (Law and Institutions). The Committee has considered whether the UK should opt in to the Commission's proposal in the light of your Explanatory Memorandum, your useful letter of 17 November, the consultation exercise carried out by your department and the evidence we have received in the course of our ongoing inquiry. The evidence we have heard points to there being concrete benefit to be gained from European legislation simplifying the handling of cross-border successions. However, we have formed the view that the UK should not opt in to the proposal for the reasons set out below.

Our preliminary view is that it would be unacceptable to run the risk of the claw back provisions found in the law of other Member States jeopardising lifetime gifts which would otherwise be valid under UK law. We also consider that there are other valid concerns which make the proposal undesirable as it stands; including the lack of definition in the proposal for the concept of habitual residence, giving jurisdiction to the Member State of habitual residence of the deceased even if he or she had chosen a different applicable law, and the broad nature of the special succession regimes which derogate from the basic principle of a single applicable law applying to a succession.

Our present belief is that the prospects of negotiating changes to the proposal are not sufficiently certain to counterbalance these concerns. Indeed it is questionable whether they would, in any event, be significantly improved by opting in, given that there is a significant incentive for other Member States to include the UK in the framework of any adopted Regulation because a significant number of cross-border successions involve a UK dimension.

We noted with interest the suggestion made by Mr Justice Hayton in his response to the consultation that the UK could remain out of the Regulation but seek to benefit from it to the extent desirable by suitably adjusting its domestic legislation.

We should be grateful to be informed of the outcome of your consultation.

Response to the COSAC Subsidiarity Check

Procedure

Which parliamentary committees were involved in the subsidiarity check and how?

The Sub-Committee on Law and Institutions (Sub-Committee E) of the House of Lords European Union Committee.

Was the plenary involved?

No.

At which level the final decision was taken and who signed it?

The decision was taken by the Sub-Committee. This Response was approved by the Chairman of the European Union Committee who has signed it.

Which administrative services of your parliament were involved and how?

The Committee Office of the House of Lords provided administrative support and legal advice for the Sub-Committee.

In the case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

There was consultation between officials advising the respective Committees.

Did your government provide any information on the compliance of the proposal with the principle of subsidiarity?

The Government provided an Explanatory Memorandum on the proposal which included comments on compliance with the principle and expanded on these comments in response to a specific request.

Did you consult your regional parliaments with legislative powers?

Yes. The European and External Relations Committee of the Scottish Parliament were unable to consider the matter within the timetable set. The Welsh Assembly responded that they were content to leave the response to the Lords as succession is not currently a devolved matter. The Northern Irish Assembly considered the proposal but had no comment to make.

Did you consult any non-government organisations, interest groups, external experts or other stakeholders?

Yes, evidence was taken from two experts (Professor Matthews and Richard Frimston) as part of a more general inquiry undertaken by Sub-Committee E in the course of its scrutiny of the Commission's proposal.

What was the chronology of events?

14 October: publication of the Commission's proposal

2 November: receipt of the Government's Explanatory Memorandum

3 November: contact made with the regional assemblies for Scotland, Wales and Northern Ireland

25 November: evidence heard from Professor Paul Matthews as part of the Committee's inquiry into the proposal

2 December: evidence heard from Mr Richard Frimston as part of the Committee's inquiry into the proposal

9 December: approval of this Response by Sub-Committee E

10 December: approval of this Response by the Chairman of the European Union Committee

Did you cooperate with other national parliaments in the process?

No.

Did you publicise your findings?

Updates on progress will be available on the website of the European Union Committee and via IPEX.

Findings

Did you find any breach of the principle of subsidiarity?

The Committee concluded that the draft Framework Decision complies with the principle of subsidiarity.

Did you adopt a reasoned opinion on the proposal?

No.

Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The justification given under the heading "Subsidiarity" in the Commission's explanatory memorandum is limited to:

- asserting that the objectives of the proposal can only be met by way of common rules which must be identical;
- indicating that activity within the Hague Conference on Private International Law has not provided a solution to date; and
- indicating in general terms only that consultations and studies have illustrated the amplitude of the problems.

The recitals include only limited reasoning in respect of subsidiarity.

Of greatest assistance was the Impact Assessment (and its summary) which did seek to identify and quantify the underlying impediments to free movement in this area.

Did you encounter any specific difficulties during this subsidiarity check?

The Committee is undertaking a formal inquiry into the Commission proposal. In order to meet the deadline for this response, the normal 6 week period for written evidence to be submitted for that inquiry was shortened. Also it was necessary to form a view before the completion of all the sessions of oral evidence to the inquiry.

APPENDIX 5: GLOSSARY

Applicable law	The law that governs a particular question.
Authentic instrument	A document formally drawn up (usually by a notary) or registered in a Member State, which is in public form and which can be the basis for the enforcement of the right or obligation it certifies.
Beneficiary	A person or organisation entitled to a benefit under a will, a trust, or the rules that govern the property of those who have not made a will.
Clawback	A claim made by a person benefiting from a forced inheritance for that inheritance to be met from the lifetime gifts made by the deceased.
Cross-border succession	A succession which involves a cross-border element, usually because the deceased owned property in more than one state or died whilst living in a state other than that of his or her nationality.
Enforcement	Giving effect to a decision of a court or other authority by taking steps against a person who owes an obligation or who has failed to observe the right of another.
Estate	The property of a deceased person taken into account for the purposes of their succession.
Forced inheritance	The share of an estate legally required to pass to close relatives of the deceased, irrespective of the terms of any will.
Grant of representation	The formal document that authorises the personal representatives to administer a succession.
Heir	A person who is entitled to inherit property of a deceased person.
Immoveable property	Property not liable to be moved, essentially land and everything permanently attached to it.
In rem	A right is *in rem* when it relates to property and can be asserted against anyone who infringes it.
Jurisdiction	A place having a distinct system of law *or* the power of a court to deal with a particular case.
Moveable Property	Property other than immoveable property.
Personal representative	A person appointed to administer a succession.
Private international law	That part of the law of a state which concerns the resolution of conflicts between the laws of two or more states.
Real property	Immoveable property, essentially land and everything permanently attached to it.

Renvoi	The doctrine of law which arises when the law of state A indicates that the law of state B should apply. *Renvoi* arises if the law of state B to be applied includes its rules of private international law.
Residual jurisdiction	The power of a court of a Member State to deal with the succession of a person who died whilst habitually resident in a third country.
Special succession regime	A special legal regime which applies, irrespective of the law governing succession, to certain immoveable property, enterprises or other special categories of property located in a Member State, and which has a specific economic, family or social purpose.
Succession	How a person's property is dealt with on their death, including who is entitled to inherit the deceased's property.
Testator	A person who has made a will to govern his or her succession.
Trustee	A person who formally owns property but does so on behalf of another.
Usufruct	The right of a person to use and derive profit or benefit from property that belongs to another.