Legal consequences of the decision by the UK not to take part in the adoption of an EU Regulation on succession

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Abstract:

This briefing note identifies and examines the legal consequences of the decision by UK not to opt in the proposed EU 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. In particular, it analyses key concerns of the Regulation from the viewpoint of the UK. Lastly, the note assesses the impacts that a decision by UK not to take part in the adoption of the proposed Regulation could have on nationals of other EU Members States residing in UK and owning assets and property in other Member States and on UK nationals considered as habitually resident abroad or holding assets and property in other Member States.
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I. SUMMARY

To date, the UK has decided not to opt in the proposed EU 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 but intends with the objective of an eventual later opt-in to fully engage with the forthcoming negotiations on the Regulation between the Member States. From the viewpoint of the UK, key concerns of the Regulation comprise the connecting factor of habitual residence, the repercussions of the Regulation on the impact of foreign claw-back regimes and the concept of the Certificate of Succession (see under II).

If the UK does not adopt the Regulation on Succession, private international law rules of the UK regions will coexist with the Regulation. The choice of law rules of England and Wales, Northern Ireland and Scotland are rather similar compared to each other but are differ considerably from the Draft Regulation. While the former are based on a system of scission (i.e. conflict of laws rules that lead to the application of one law to some aspects of the succession, e.g. movables and of another law to other aspects of the succession, e.g. immovables), the Regulation is based on a unitary approach (application of one law to the succession as a whole). Furthermore, the Draft Regulation uses “habitual residence” as the main connecting factor, while in the UK, conflict of laws rules are based on “domicile” (see the comparison under III 2 a and 3a.)

A non opt-in of the UK would lead to less legal certainty, less predictability and higher costs for legal advice for persons planning cross-border succession with a link to the UK and other Member States as well as for those entitled to a portion of the deceased’s estate. Chapter III, especially the case studies (III 2 b “Jurisdiction” and III 3b “Applicable Law”) as well as the analysis on ”Recognition and enforcement“ (III 4 b) and on the “European Certificate of Succession” (III 5) reflect potential difficulties if the regimes of the Regulation on Succession and private international law rules of the territorial units of the UK coexist. Indeed, successions of UK citizens habitually resident in other EU Member States would nevertheless be subject to the Regulation’s rules if the courts in the State of habitual residence were seized. However, positive competence conflicts with UK courts and diverging solutions as to the determination of the lex successionis cannot be avoided where UK citizens reside in other EU Member States but also have property in the UK. Reversely, succession cases concerning EU citizens resident within the UK would not be subject to the Regulation if a UK court was seized, but might nevertheless be subject to it on grounds of residual jurisdiction, if a court or non-judicial authority of a “Regulation State” would deal with the case. Problems also arise in cases of EU citizens habitually resident within Regulation States but having assets in the UK (see also II. 1. “General Remarks” and IV “Conclusions”).

A non opt-in of the UK would therefore be likely to negatively affect cross-border successions involving UK citizens as well as cross-border successions involving citizens of other EU Member States compared to the situation of an opt-in.
II. POSITION OF THE UK

1. Decision Not to Opt In at This Stage

On 14 October 2009 the Commission published the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. After public consultation the UK government announced on 16 December 2009 its decision not to opt-in to the proposed Regulation at this stage.

2. Need for a Regulation on Succession

There seems to be rather widespread UK consensus on the usefulness of an EU Regulation on succession. At present, positive or negative conflicts of jurisdiction arise under the present multitude of regimes and conflict of laws rules in matters of succession differ from one Member State to the other. Authorities of several Member States may be competent to rule on the same succession and can declare different substantive laws applicable. Moreover, options for mobile EU citizens to clarify this situation by a professio iuris are lacking in many countries and a mix of various national rules and bilateral or regional agreements on recognition and enforcement of decisions and documents lead to a very unsatisfactory situation. The outcome of a succession can become unforeseeable to the de cujus.

Furthermore, in terms of figures, many statistics have shown the wide practical impact of an EU Regulation in this area. According to figures of the Commission, 1.8 mio citizens from other EU States live in Germany, 1 mio in France and about 860.000 in the UK. According to the same study, 20% of the Luxembourg population consists in citizens of other EU Member States and 7% of the Irish population lives abroad within the EU.
% of 4.5 million opened successions per annum within the EU are international successions, with a total patrimony of more than 120 billion Euro. Even if English legal scholars have questioned the statistics, stating that “it is a mystery where the Commission got that figure”, it is a basic fact that due to increased movement within the EU, transnational successions become more and more frequent and imply various practical problems for mobile EU citizens as well as their families. It has indeed been stated by the UK government that “Hundreds of thousands of UK citizens live and work in other EU Member States, and millions of others enjoy holidays in the EU. The diversity of rules and systems that apply to succession in different Member States can create considerable complications where a person owns property across borders. In principle therefore, efforts to simplify and clarify the rules which apply to international successions could produce huge benefits for UK citizens, and the government is strongly supportive of the project in principle. However, there are "potentially significant problems identified with the proposal that the EU Commission has published."  

3. Key Concerns of the Draft Regulation  

a. Fundamental Differences between Common Law and Civil Law Succession Regimes  

These “potentially significant problems” identified with the proposed Regulation have a first origin in differing concepts of common law and civil law jurisdictions in the area of succession and property law. The “fundamental building blocks” of both legal families are very different, from the mere question of what is included in the notion of succession (e.g. only the patrimony in the moment of death or also previous inter vivos transactions, by means of claw-back rules) to the concept of property law (from a “physical” approach in some countries to a rather “metaphysical” approach, less anchored in the notion of “dominium”), to different attitudes regarding the recognition of joint and reciprocal wills, to divergent shares of family members and opposite positions between civil law and common law jurisdictions concerning mandatory heirship rights of close family members or the question of personal representation/ compulsory administration of estates and responsibility for debts.
b. Connecting Factor “Habitual Residence”

Even if the private international law rules of the UK are based on domicile and not habitual residence, the latter concept as such is not unknown to the UK. It is used in the context of social security contributions and benefits and it has been introduced in several recent private international law instruments of the EU to which the UK adhered (e.g. the Rome I15, Rome II16 or Brussels IIbis Regulation17 as well as the Brussels I Regulation, even if the latter is, in principle, based on domicile18). However, the use of habitual residence as the main connecting factor of the proposed Regulation on Succession (Art. 4 – jurisdiction and Art. 16 – applicable law) has been criticized in the UK.

First, it has been disapproved that the notion lacks definition (unlike Art. 19 para. 1 subpara. 2 of the Rome I Regulation and Art. 23 para. 2 of the Rome II Regulation) and it was considered as insufficient that the concept might subsequently be clarified by the ECJ.19 Indeed it can be seen that the definitions of “habitual residence” in Brussels IIbis (see ECJ, C-523/0720) and in the Rome I and II Regulations vary. They are related to the relevant subject matter of the respective regulation and would therefore not be transferable to the Succession Regulation. The degree of connection that is thought appropriate may be less substantial under one regulation than under the other. The UK government noticed that a court can determine the habitual residence as a matter of fact based on all relevant factors within the context of the Brussels IIbis Regulation.21 However, in succession cases, many will not involve litigation or court judgments and moreover, the concerned person, the habitual residence of which is in question, can no longer deliver any relevant indication to render it more precise. Here, other difficulties arise.

Second, it has been criticised that the use of habitual residence as key connecting factor “could subject the estates of individuals, either on short-term secondments overseas or otherwise without a sufficiently substantial connection with a particular legal system, to that system’s law of succession if they were to die whilst resident in the country in question”22 even if they had the intention to return to another State at the end of their secondment. Contrary to the connecting factor of domicile, which

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15 See the definition in Art. 19 para. 1 subpara. 2 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).
18 See Art. 5 (2), 13 (3) and 17 (3) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).
19 See for a definition within the context of the Brussels IIbis Regulation: ECJ, 2 April 2009, C-523/07. According to the court, habitual residence corresponds to the place which reflected some degree of integration by the child in a social and family environment. The following aspects have to be taken into consideration: the duration, regularity, conditions and reasons for the stay in the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge, and the family and social relationships of the child in that State. It is then for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case. See for a critical view on the concretisation of habitual residence BOLANGER F., “L'affaire des "mineurs nordiques": La Cour determine la residence habituelle et precise le regime des mesures conservatoires”, Sem.jur. 2009, p. 33 et seq.
20 See previous note.
21 See the Minister's Letter (Lord Bach) of 17 December 2009.
22 See the Minister's Letter (Lord Bach) of 17 December 2009.
requires a substantial connection with the country of residence and helps identify the jurisdiction in relation to the place where an individual intends to settle permanently\(^{23}\), the outcomes on the basis of the connecting factor habitual residence would be inappropriate and contradict reasonable expectations of the deceased and their families. According to the UK government, the connecting factor habitual residence does not provide for a substantial degree of connection to a country.\(^{24}\)

Potential solutions for the present shortcomings could be: a) a definition requiring a substantial degree of connection (the UK government sees however a certain danger of repercussions in other areas of the law where the definition could be taken over without careful consideration of whether this is appropriate, e.g. in child custody cases) or b) the use of a non defined notion of habitual residence but in combination with e.g. a minimum period of actual residence (see e.g. Art. 3 (2) of the 1989 Hague Succession Convention\(^{25}\) and the (UK) Consultative Paper of February 1990 which has been published following the 1989 Hague Succession Convention\(^{25}\)).

c. Claw-back

A further major concern is the imposition of alien concepts of other legal systems to the UK in which an opt-in to the Regulation would result. Among these issues are the imposition of forced heirship provisions that limit the UK tradition of lifetime and testamentary freedom to dispose of assets and of claw-back rules which oblige to restore or account for lifetime gifts. In England, forced heirship rules do not exist.\(^{27}\) Surviving husbands or spouses and children can make a claim under the Inheritance (Provision for Family and Dependants) Act 1975, which may lead to a discretionary grant of maintenance. Furthermore, restrictions on the freedom to transfer property \textit{inter vivos} are rejected and the principle of unimpeachability of property transfer prevails, if it was allowed by the \textit{lex rei sitae} at the time of transfer.\(^{28}\) The introduction of the claw-back concept into the UK via the inclusion of the obligation to restore or account for gifts in the Regulation could affect the fundamental right of the deceased to alienate themselves from their property in lifetime and on death. This could create major practical difficulties, particularly for the recipients of such gifts including charities. From the UK perspective it is unacceptable that a donee, having received a gift during the lifetime of the deceased, cannot be certain that it will not be claimed back by the heirs if the donor changes his habitual residence after the gift has been made.\(^{29}\) The impact of the Regulation on this point must also be seen from the

\(^{23}\) See, on the notion of domicile, \textit{Mark v Mark} [2005] 2 FLR 1193; \textit{DICEY, MORRIS AND COLLINS}, vol. I Chapter 6 and below III 2 a bb,
\(^{24}\) See the Minister’s Letter (Lord Bach) of 17 December 2009; and \textit{infra} 2 b bb to “domicile”.
\(^{25}\) Hague Convention on the Law Applicable to Succession on Estates of Deceased Persons of 1989. Art. 3 (2): Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
\(^{26}\) Quoted in \textit{SHERRRIN & BONEHILL, The Law and Practice of intestate Succession}, 3\textsuperscript{rd} ed. 2004, p. 328 and focusing of a five years period of habitual residence.
\(^{27}\) See on this e.g. \textit{Re Groos} [1915] 1 Ch. 572.
\(^{29}\) See the Minister’s Letter (Lord Bach) of 17 December 2009.
perspective of the English legal order as a part of the trust industry\textsuperscript{30} where trusts enable the creation of different forms of interest to be transferred to following generations.\textsuperscript{31} Indeed the question whether \textit{inter vivos} trusts are subject to claw-back is not excluded from the scope of the Regulation. The claw-back rules of the \textit{lex successionis} can interfere here for originally valid lifetime trusts. The Regulation’s approach therefore gave rise to many critical reflections in the public consultation process. Furthermore, it is reckoned that the fact that the expectation to restore for gifts might lead to objections of the donees based on their fundamental right to enjoy their property.

As a solution, an additional conflict of laws rule that solves this particular problem and might reconcile the very diverging Member States positions on this issue might be considered. It would e.g. protect the donee if the claw-back of \textit{inter vivos} gifts is governed by the law that would have hypothetically been applicable to the succession at the time the gift was made. In order to ensure absolute predictability for the donee in the case of a \textit{professio iuris} by the deceased prior to the gift, the chosen law could only be applicable if the donee knew of the choice at the time the gift was made.\textsuperscript{32}

d. Other Issues

aa. Tax Neutrality of the Proposal

A further issue that has been raised as potentially critical concerns taxes. The Proposal is thought unlikely to affect tax in any significant way. However, Art. 21(2)(b) should be given further consideration, were the text of the final Regulation to be such that the UK probate process would not in some cases be engaged in the administration of property situated in the UK. This could then present a risk to the collection of inheritance tax.

bb. European Certificate of Succession

Also the European Certificate of Succession that is provided for in the Regulation is of some concern to the UK.

A certificate of inheritance in the civilian sense is unknown in English law. A functional equivalent may be the grant of probate or letters of administration because they prove that a personal representative has a title to deal with the assets, but this does not correspond to the concept of a certificate of inheritance known from the continent which is focussed on persons entitled to parts of the deceased’s estate.

Furthermore, the European certificate of inheritance intends to simplify the processes in succession cases as it shall be issued quickly.\textsuperscript{33} While this is a welcome effect, it is, however, difficult to fulfill this aim for legal orders based on a representative system,

\textsuperscript{30} Art. 1 (3) lit. i of the Regulation excludes the "constitution, functioning and dissolving of trusts" from the scope of the regulation and attempts to delimit the instrument from the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985.

\textsuperscript{31} HARRIS J. (note 46), at p. 365.

\textsuperscript{32} See on this A. DUTTA who suggests adding the following specific provision: \textit{Lifetime gifts of the deceased} – "The reclaim of lifetime gifts is governed by the law which would have governed the succession of the donor at the time of the gift by virtue of this Regulation. However, in case of a choice of law by the donor according to Art. […] the chosen law only applies if the donee knew of the choice of law at the time the gift was made." DUTTA A., "Succession and Wills in the Conflict of Laws in the Eve of Europeanisation", RabelsZ, pp. 547 et seq. at p. 583.

\textsuperscript{33} Art. 40 (1), COM (1009) 54 final, at 4.6.
as the whole procedure of administration has to be terminated before the heirs can even be identified. While this procedure can be terminated quickly in some cases, its termination can take several years if the circumstances of the case are more complex. Furthermore, property law systems and trust structures in common law countries are not tailored to such a certificate. The information that would have to be given on all persons having financial interests in relation to a succession is much more complex than the concept of the suggested certificate, which is based on civil law legal thinking.

Moreover, pursuant to Art. 36 (2) of the Proposal, the document would not be a substitute for internal procedures, so a double-tracked system would be maintained, which may complicate the actual situation. Moreover, inaccurate statements can only be challenged before the issuing authority. As the content of the certificate is presumed to be correct, it must be taken into account as a correct statement until the issuing authority has changed it, which can take time.

4. Prospects Regarding a Later UK Opt-In

The UK government intends to fully engage with the forthcoming negotiations on the Regulation between the Member States. If points of concern of the current text can be removed and further improvements be delivered in favour of citizens with links and assets to more than one Member State, the UK government would reconsider adopting the final text.

III. Consequences of a UK Decision Not to Opt-In

1. General Remarks

Within its scope of application, the proposed Regulation combines a set of rules on conflicts of jurisdiction (Chapter II), on recognition and enforcement of decisions (Chapter IV) and authentic instruments (Chapter V), with provisions on conflicts of law (Chapter III). In addition, it has created a new European Certificate of Succession (Chapter VI). Similar to Regulation (EC) 4/2009, the Proposal combines various issues in one instrument, fostering a most predictable estate planning.

The cornerstones of the regulation are simple: The rules on jurisdiction and the applicable law are construed in parallel and shall, as a principle, refer to the succession as a whole and govern its whole “life,” from its opening to the final transfer of the inheritance. This idea of applying a unique law to a succession regardless of the nature of the assets shall simplify cross-border successions. The main connecting

34 MATTHEWS P., cit., to Question 27.
35 Ibid.
36 See the Minister’s Letter (Lord Bach) of 17 December 2009.
37 Ibid.
38 See also Recitals 6 and 7 of the Proposal.
39 Art. 19 para. 1 of the Proposal.
factor for jurisdiction and the applicable law is the “habitual residence” of the deceased.

If the UK does not opt into the Regulation, this could not prevent UK citizens habitually resident in other Member States to be subject to the Regulation if a court or non-judicial authority of such Member State is seized. According to Art. 3 of the Draft Regulation, the instrument shall apply to all courts in the Member States which are seized in a matter to which the Regulation applies. The Regulation therefore intends to create a comprehensive set of rules on conflict of laws and jurisdictions which also affects nationals of “non Regulation States” habitually resident in a “Regulation State”. Courts in the Member States to which the Regulation applies would therefore have jurisdiction in succession cases of UK citizens dying habitually resident within these States. Even if UK citizens are not resident within their territories but succession property is located there, they would apply the Regulation’s jurisdictional rules if they are seized in this respect and will have residual jurisdiction if additional conditions are fulfilled (Art. 6, see in detail infra). Due to the universal character of the Regulation it would in this respect not matter whether the UK is bound by the Regulation or not. The determination of the applicable law would also be based on the Regulation.

From the perspective of UK courts, the situation would, however, be different, as they would apply their existing regional private international law regime, i.e. private international law rules of succession which lead to different national laws depending on the location of the deceased’s assets. Furthermore, this dualism of regimes might cause positive conflicts of jurisdiction, e.g. where succession property is also located in the UK. Further complications might arise in borderline cases where UK citizens are considered to be habitually resident abroad from the viewpoint of their State of residence while they are still considered to be domiciled in the UK from a UK perspective. Furthermore, as the Regulation adheres to a unitary system for court competence and lex successionis the Regulation would in terms of legal certainty e.g. be of clear benefit for UK citizens habitually resident in the UK but having immovable property abroad. In these cases, parallel court competence and a plurality of applicable laws complicate the situation while the uniform application of the Regulation would lead to jurisdiction of the courts in the UK unit in which the concerned is habitually resident and to the application of the lex fori to the succession as a whole.

Reversely, EU citizens habitually resident within the UK would not benefit from the Regulation’s rules if English courts are seized, as the Regulation only applies to courts in Member States subject to the Regulation. Instead, the successions of those EU citizens would, dependent on where within the UK they are located, be determined by private international law rules of England and Wales, Scotland and Northern Ireland. Problems arise where nationals of other EU States die habitually resident in a Member State to which the Regulation would apply but have immovable property in the UK. Here again, complications might occur regarding conflicting competences of courts and authorities in the UK and abroad. While the courts in the Member State of habitual residence of the deceased would have to apply the Regulation and to follow its unitary approach for the succession as a whole (either based on habitual residence

40 Recital 13 adds that a referral to the jurisdictional rules of national laws should be avoided.
leading to court competence of the State of habitual residence or on nationality in case of profissio iuris leading to a discretionary referral to the courts of the State of nationality), UK courts would, from their viewpoint, be competent for grants of administration and the devolution of the succession and apply the lex situs to these immovables, without recognizing a choice of the lex successionis.

The extent to which this law mix might affect the results of an international succession shall be further illustrated in concreto by the following analysis and case studies, which are grouped thematically: jurisdiction, applicable law, recognition and enforcement (decisions and authentic instruments). The note will conclude with some remarks on the European Certificate of Succession).

2. Effects on Jurisdiction 41
   a. Draft Regulation Versus Legal Situation in Case of Non-Opt-In
      aa. Principles of the Draft Regulation Regarding Jurisdiction

As a general rule, the courts of the Member State on whose territory the deceased had his habitual residence at the time of his death are competent to decide matters of succession, cf. Art. 4 of the Proposal. 42 The habitual residence of the deceased is in principle the unique decisive element, whether or not immovable property abroad is involved. 43 The notion of “court” refers to judicial as well as to non-judicial authorities which carry out judicial functions in matters of succession (e.g. notaries). 44 For the latter, however, the rules on jurisdiction shall apply only where necessary. 45

In the case of profissio iuris (the only option for such choice is the law of nationality) the rules on jurisdiction enable a potential referral by the courts in the Member State of the last habitual residence to the courts in the Member State of nationality. 46 This leads again to an - albeit not automatic 47 - parallelism between forum and lex. A choice of law cannot, however, be accompanied by a choice of court in favour of the courts of the deceased’s State of nationality. In case of a profissio iuris and at the request of one of the parties, the court seized in the Member State of habitual residence has discretion as to whether the courts in the State of nationality are a more appropriate forum 48 and may stay proceedings. 49 In its decision making process

41 This section first briefly describes the legal situation under the draft regulation in comparison to the legal situation if the UK does not adopt the Regulation (in England and Wales, Scotland and Northern Ireland), see under (a). It then illustrates the practical impact using case studies (b). These case studies confront the situation in the hypothetical of a UK opt-in with the situation of a non-UK-participation in the Regulation. The case studies are designed to answer important questions on the interplay of the Regulation with national (UK) conflict of law regimes in cross-border cases.
42 This solution has already been suggested in Art. 5 (1) of the EGPI Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters of 1993 (an unofficial English version has been published on http://www.gedip-egpil.eu/documents/gedip-documents-3pe.html).
43 See Recital 12 of the Proposal.
44 See Art. 2(b), Recital 11 of the Proposal and COM (2009) 154 final, at 4.1. (Art. 2).
45 Art. 3 of the Proposal.
46 This provision has been inspired by Art. 15 of the Brussels IIbis Regulation.
47 It has been previously considered whether there should be an automatic parallelism, and courts of the Member State of nationality should be given preferential jurisdiction if the national succession law applied, see FRIMSTON R., “Brussels IV – The Problems of Trusts and Characterisation in the Civil Law”, Private Client Business 2007, pp. 170 et seq., at p. 172.
48 It has not been specified what shall happen if the courts in the State of nationality have been directly seized.
the court first seized shall consider the interests of the de cujus, e.g. whether the deceased has left his State of nationality for only a short while, and of the legal successors, also in light of their habitual residence. Where a referral is considered appropriate, the court first seized shall set a deadline by which the courts of the State of nationality of the deceased must be seized by the parties. The court in the country of nationality shall then declare itself competent within a further deadline of eight weeks from the date on which it was seized. If these deadlines expire, the court of habitual residence shall continue exercising its jurisdiction.

As the Proposal attempts to ban scission (i.e. conflict of laws rules that lead to the application of one law to some aspects of the succession, e.g. movables and of another law to other aspects of the succession, e.g. immovables) and to create clear rules on jurisdiction, Art. 8 and 9 contain only very limited concessions from the unitary approach of Art. 4 and 5 of the Proposal. Art. 8 relates to the jurisdiction to accept or waive succession and declares the courts in the heir’s or legatee’s Member State of habitual residence competent. This shall simplify access to the competent authorities for heirs and legatees living in Member State other than that of the forum.

Art. 9 declares the Member State of the lex rei sitae competent if and insofar as the substantive law of the country in which property is located requires them to be involved to take measures relating to property transmission or to recording or transfer in the public register. The provision applies only in relation to aspects relating to the transmission of property, its recording or transfer in the public register for which the lex rei sitae requires the involvement of its courts. Even if the wording of Art. 9 is not so clear in this respect, the provision seems to confer jurisdiction to make a grant for administration, as such grant requires a compulsory involvement of English courts (a foreign grant has no effect in England) and vests the property on those charged with the administration of the estate (temporary transfer of property to a representative). Court competence based on Art. 9 of the Draft Regulation would, however, be limited to these measures only.

Art. 6 of the Draft Regulation furthermore provides for residual jurisdiction if the deceased had no habitual residence in a Member State to which the Regulation applies. Residual jurisdiction can only be based on the fact that succession property is located in a Member State and one of the following four situations can be affirmed (which have to be examined in chronological order): (1) if the deceased had his or her previous habitual residence in that State within the last five years before the court has been seized; (2) if the deceased had the nationality of that State at the time of his or her death; (3) if an heir or legatee has his habitual residence in that State; or (4) if...

49 Art. 5 (1) and (2) subpara. 1 of the Proposal. Art. 5 of the Proposal varies from Art. 15 (2) (b) and (c) of the Brussels II Regulation, in that the case cannot be referred on the court’s own motion or upon application from a court of another Member State if at least one of the parties accepts the court’s jurisdiction. Only the court seized in the State of habitual residence can act if a request has been made by at least one of the parties.

50 COM (2009) 154 final, at 4.2. (in relation to Art. 5).

51 Art. 5 (2) subpara. 2 of the Proposal.

52 See Recital 14 of the Proposal.


54 This is what the DÖRNER/ LAGARDE Study, Final Report, cit., at p. 4 seems to intend. However, the text could be clearer on this. The EGPIL has found a clearer solution in its Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters (cit. supra), see its Art. 5 (2) and (3).
the application relates solely to property situated in that State. The hypotheses listed in Art. 6 are not to be seen as alternative situations in which a competence can be justified but follow a hierarchical system. The mere location of succession property in a Member State is therefore only sufficient to establish jurisdiction as a last resort and in this case, the court’s competence is limited to the devolution of this succession property only.

The rules of jurisdiction in Art. 4, 5 and 6 are also referred to in Art. 37 (2) regarding the competence to issue a European Certificate of Succession.

**bb. Principles under National Rules on Conflict of Jurisdictions in England and Wales**

English law contains only a few rules relating to international jurisdiction in succession cases. It draws a clear distinction between administration of deceased estates and the substantive devolution of the estate.

Administration is a compulsory requirement. The English High Court has no jurisdiction to determine the succession to a deceased’s assets unless a personal representative has been properly constituted before the court.\(^{55}\) This can either be the executor of the deceased’s will, or, if there is no will or no such executor has been selected, an administrator appointed by the Court. Administration is an interim process during which the assets are identified, debts paid and the estate balance established.\(^{56}\) The representative becomes the legal owner of the deceased’s assets and administrates the affairs of the deceased. This process is comparable to the winding up of the affairs of a company prior to its liquidation. As a matter of English law,\(^{57}\) a court order, either in form of a probate of a will\(^{58}\) or a grant of administration, is therefore necessary to empower a representative to deal with the deceased’s assets,\(^{59}\) which are first vested in the representative.\(^{60}\) Only once the administration is complete, the representative transmits the remaining assets to those entitled to succeed the deceased under the *lex successionis*.

As to jurisdiction for the appointment of a representative, the grant of representation does in principle not depend on the presence of assets in England but will usually only be exercised if there is at least some property located in England.\(^{61}\) A grant has to be made in England even if the deceased died domiciled abroad. It will usually be addressed to the person that has been or is entitled abroad to be appointed to

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\(^{58}\) In the case of a testate determination of an administrator.

\(^{59}\) The courts act as long as property is also located in England, see Aldrich v. Att-Gen. [1968], p. 281, 295.

\(^{60}\) See the Non-Contentious Probate Rules 1987/2024 as amended; the Supreme Court Act 1981 as amended; the Administration of Justice Act 1985.

\(^{61}\) Dicey, Morris and Collins, 27-002 to Rule 137.
administer the estate according to the law of the State of domicile. A similar grant made by the Scottish or Northern Irish courts will however be recognised.

Once a properly constituted personal representative of the deceased appears before the English courts, they have jurisdiction to deal with the whole of the estate regardless of whether the assets consist in movables or immovables. English courts also have jurisdiction for claims made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction or for claims made in probate proceedings.

With regard to the devolution of the succession, English courts have jurisdiction to determine the succession to the property (located in England) of any person regardless of his domicile.

This jurisdiction is not exclusive, as from an English viewpoint the courts of domicile have jurisdiction to determine the succession to all of the deceased’s movables regardless of their location and English courts will follow the determination of the foreign court if the latter has been seized. It has to be noted that the connecting factor in these cases is “domicile”, not “habitual residence”, the former requiring a closer local and temporal link to the residence State.

Furthermore jurisdiction is determined by the situs of immovables, i.e. the courts of a country in which property is situated are competent to determine the succession to all property situated there. This jurisdiction is unaffected by the domicile of the deceased.

English courts, even though they have jurisdiction, can declare that they are forum non conveniens, and another court is clearly more appropriate to deal with the subject matter.

While the Regulation attempts to take the UK issues of compulsory administration into account, its unitary approach in jurisdiction matters based on habitual residence differs from English private international law rules on jurisdiction in several respects: The latter are focused on domicile, not habitual residence and allow for court competence based on situs as far as immovables are concerned. Furthermore, the only option under the Regulation where a court can declare itself forum non conveniens (in favour of the courts of the Member State of the deceased’s nationality) is the case of professio iuris (Art. 5).

**cc. Principles under National Rules on Conflict of Jurisdictions in Scotland and Northern Ireland**

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63 In practice the High Court; county courts do not administer estates even if they would have jurisdiction according to the County Courts Act 1984.
64 DICEY, MORRIS AND COLLINS, Rule 137.
65 Acquisition of domicile depends on the intention to reside permanently or indefinitely in a country, see also recently Mark v Mark [2005] 2 FLR 1193. Domicile therefore has a subjective connotation. Consequently, the acquisition of a domicile of choice may be prevented if it is foreseen and reasonably anticipated that the concerned intends to move back, e.g. after the end of employment. An existing domicile is presumed to continue unless it the acquisition of a new domicile is proven. E.g. a person intending to reside in a country for a period of 10 years would not acquire a domicile there, even if this person has his home there for this time-period. See also DICEY, MORRIS AND COLLINS, vol. I Chapter 6.
66 DICEY, MORRIS AND COLLINS, cit., Rule 31(2).
Differences between the English system and the regimes of other regions within the UK lie primarily in substantive succession law. While the succession laws in England and Wales and Northern Ireland are widely similar, succession law in Scotland is based on civilian tradition and differs from the common law based rules in the other territorial units, in particular as to the extent to which a person is free to direct the distribution of his estate without challenge from members of his family.\textsuperscript{67} However, all UK jurisdictions cleave to similar conflict rules in the law of succession, which rest largely on the common law, as the following few remarks on Scottish law demonstrate.

As regards matters of administration under Scottish law, i.e. grants of probate in testate cases or letters of administration in intestate cases, Scottish law requires a grant of "confirmation" before a person is entitled to take administrative acts in the deceased's estate.\textsuperscript{68} Confirmation is title to assets in Scotland, England and Northern Ireland. In case of foreign grant of probate or letters of administration confirmation must (and will) be granted additionally in Scotland. The most important grounds for jurisdiction of Scottish courts regarding the substantive devolution of the estate are domicile (combination of "residence" and "intention" to settle)\textsuperscript{69} as well as movables and immovables situated in Scotland.\textsuperscript{70}

\textbf{b. Case Studies – Comparison Opt-In and Non-Opt-In}

The following case studies take different factual situations into account and show how the opt-in or non-opt-in of the UK would impact on the outcome of succession cases. Following the EP specifications on aim and content of the briefing note, the chosen structure shall highlight the situation of nationals of other EU Member States habitually resident in the UK and owning assets abroad on the one hand, and of UK nationals habitually resident abroad or holding assets and property in other Member State on the other hand. It will also take cases into account in which nationals of other EU Member States own assets solely in the UK and the situation of other EU nationals habitually resident in other EU States but owning immovable property in the UK.

\textbf{aa. Nationals of Other EU Member States\textsuperscript{71} Habitually Resident in the UK}

\textbf{1) Owning Assets and Property in the UK}

\textit{Example: A, a French national, dies habitually resident in England owning assets and a villa in London; he has chosen French law as lex successionis and expressed this choice in form of a will, but without determining his succession.}

\textbf{Jurisdiction if the Regulation was adopted by the UK}

\begin{footnotesize}
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\begin{itemize}
\item \textsuperscript{67} See also K.J. HOOD, Conflict of Laws within the UK, Oxford 2007, 4.63.
\item \textsuperscript{68} SCOBIE E., Currie on Confirmation, 8th ed. 1995, para. 14-33.
\item \textsuperscript{69} See e.g. White v. Tennant, 31 W.Va. 790, 8 S.E. 596 (1888); residence of a few hours' duration evidenced by the deposit of belongings in a new home abroad was considered to be sufficient to acquire domicile abroad, even if the concerned person returned in the same night to the State he previously resided and died there.
\item \textsuperscript{70} See also CRAWFORD, E.B./ CARRUTHERS, J., cit., 7-04.
\item \textsuperscript{71} Other EU Member States are intended to be those to which the Regulation would apply.
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\end{footnotesize}
Pursuant to Art. 4 of the Draft Regulation, English courts, as courts of the Member State of habitual residence, are competent to rule on the succession as a whole. As under English law, a clear separation is to be made between administration of deceased estates and the substantive devolution of the estate, the question of administration has to be solved first. As a matter of English law, a court appointment (probate of a will or letter of administration) is necessary to empower an administrator to deal with the deceased’s assets which are firstly vested in the administrator. Here, the English courts would be competent for matters of administration and the devolution of the succession, both based on Art. 4 of the Draft Regulation.

According to Art. 5 of the Draft Regulation, the English courts may, upon request and in case of professio iuris in favor of the law of the deceased’s nationality, refer the case to the courts in the Member State of nationality, if they consider them to be better placed to rule on the succession. This will not be the case here (property solely situated within the UK).

For matters of administration, Art. 21(2)(a) has to be taken into account, but this provision only points to the application of substantive rules of the lex rei sitae (here English law) relating to administration and does not affect court competence. The English courts of domicile and situs have, in this case, jurisdiction for all matters, based on Art. 4.

**Jurisdiction if the Regulation was not adopted by the UK**

The English (High) Court is competent to make a grant of representation in respect of the property. It also has jurisdiction to determine the succession to the property after a representative of the estate has been properly constituted before the court.

**Example 1:** (variant of the example under (1)): A, a French national, dies habitually resident in England owning assets in London and a villa in France; he has chosen French law as lex successionis and expressed this choice in form of a will, but without determining his succession.

**Jurisdiction if the Regulation was adopted by the UK**

As has been seen under (1), English courts, as courts of the Member State of habitual residence, are competent to rule on the succession as a whole (Art. 4 of the Draft Regulation). According to Art. 5 of the Draft Regulation, the English courts may upon request and in case of professio iuris in favor of the law of the deceased’s nationality refer the case to the courts in the Member State of nationality, if they consider them to be better placed to rule on the succession, which could be the case here (immovables situated in the State of nationality). In case of a referral to French courts, foreign jurisdiction refers to the succession as a whole, not only to the immovables located in France.

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72 See DICEY, MORRIS AND COLLINS, cit, Rule 129.
73 DICEY, MORRIS AND COLLINS, cit., Rule 137.
The English courts are also competent for matters of administration (see under (1)).

**Jurisdiction if the Regulation was not adopted by the UK**

As the deceased left assets in England, the English (High) Court is competent to make a grant of representation in respect of the property. It also has jurisdiction to determine the succession to A’s property after a representative of the estate has been properly constituted before the court. However, from the English viewpoint, jurisdiction of French courts to determine the succession to the immovable property situated in France would be accepted, regardless of whether the deceased died domiciled in England. There is no rule providing for a discretionary referral by the English court to a court in the Member State of nationality in case of *professio iuris*. The English courts could only decline jurisdiction on grounds of the *forum non conveniens* doctrine as established under English law.

French courts, if seized, would apply the Regulation and would, from their viewpoint, have jurisdiction based on Art. 6 lit. b, regarding the succession as a whole.

*Example 2: E, a Dutch national, dies intestate domiciled in Cornwall where she has been living for six years. Before that, she has spent several years in Germany. Her immovable property is situated in England, the Netherlands and Germany.*

**Jurisdiction if the Regulation was adopted by the UK**

According to Art. 4 of the Draft Regulation English courts are competent. They decide upon administration and the devolution of the succession in relation to all property of the deceased. Courts in the Netherlands and Germany would not be competent except for measures under Art. 9.

**Jurisdiction if the Regulation was not adopted by the UK**

English courts as courts of domicile would be competent. But from the English viewpoint, it would be accepted if German and Dutch courts determine the succession to the property located in the respective countries based on the fact that the immovables of the deceased are located within their territories.

From the viewpoint of German and Dutch courts, the situation would be more difficult: These courts would have to apply the Regulation (Art. 3) if seized. However, as E is not habitually resident in a “Member State of the Regulation”, they could only be competent on the basis of the residual jurisdiction rules in Art. 6.

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74 *DICEY, MORRIS AND COLLINS, cit., Rule 129.*
75 *DICEY, MORRIS AND COLLINS, cit., Rule 137.*
76 *DICEY, MORRIS AND COLLINS, cit., Rule 139.*
German courts would not be competent according to Art. 6 lit a of the Draft Regulation, as the deceased’s residence in Germany had come to an end more than five years before the court was seized. However, competence could be based on Art. 6 lit d (but then limited to that property only).

As to Dutch courts, they would be competent on the basis that succession property is located there and the deceased had the Dutch nationality at the time of death, see Art. 6 lit. b of the Draft Regulation. The competence of Dutch courts would, however, not be limited to the immovables situated in the Netherlands but extend to the succession as a whole.

Also here, a competence conflict arises.

**bb. Nationals of Other EU Member States Habitually Resident in Other EU Member States but Owning Property in the UK**

*Example: C, Lithuanian citizen, has moved to Luxembourg in 2008 where he has been living since and where he dies intestate. He had worked in Glasgow before, where he owns a house.*

**Jurisdiction if the Regulation was adopted by the UK**

Pursuant to Art. 4 of the Draft Regulation, the Luxembourg courts have jurisdiction to decide upon the succession as a whole, i.e. also in respect of the immovables in Glasgow. However, as regards the house in Scotland, Art. 9 allows the competent Scottish court to make a grant of confirmation, as Scottish law requires the involvements of Scottish courts in order to obtain a title to property located in Scotland.

**Jurisdiction if the Regulation was not adopted by the UK**

From the viewpoint of Scottish private international law rules, Scottish courts would be competent to grant confirmation and to determine the succession, but the Luxembourg courts would have jurisdiction in relation to all movables of the deceased as he died domiciled there. The Luxembourg court would however not be considered competent to determine the succession in the immovables located in Scotland.

From the viewpoint of the Luxembourg courts, the Regulation would apply and confer jurisdiction to them for the succession as a whole. Art. 9 would not enter into account in favour of the Scottish courts, as the UK would then not be a “Member State” of the Regulation.

Here, a competence conflict becomes evident.

**cc. Nationals of the UK Habitually Resident in Other Member States**

(1) **Owning Assets and Property in Other Member States**
Legal consequences of the Decision by the UK Not to Take Part in the Adoption of an EU Regulation on Succession

Example: A, a UK national dies intestate habitually resident in France where he lived in a rented farmhouse after having retired. He also owns immovables in Greece and Spain. His only heir lives in England.

**Jurisdiction if the Regulation was adopted by the UK**

Pursuant to Art. 4 of the Regulation, French courts would be competent to determine the succession in its entirety, also with respect to the immovables in Greece and Spain. Art. 9 would enter into account, but only concerning measures that have to be undertaken by a local court according to Greek or Spanish substantive law of property (transmission or registration issues).

**Jurisdiction if the Regulation was not adopted by the UK**

From the viewpoint of courts in the UK, they would in principle have no competence to rule on the succession as A is neither domiciled in the UK nor has he property there.

From the viewpoint of French courts, they would apply the Regulation (Art. 3) and have to base jurisdiction on Art. 4 for all moveables and immovables, as A is habitually resident in France. From the viewpoint of Greek or Spanish courts they would not be competent to decide on A’s succession but only, if required by their national laws, to take measures under Art.9.

(2) **Owning Assets and Property in the UK and in Other Member States**

Example 1: L, an unmarried UK citizen born in London, has worked in several Member States, but has always returned to England, where his house is and where he has his bank account, family and friends. He spent the last years basically moving between London, Rome, Vienna and Berlin spending several consecutive months in each foreign city, but always returning to London in between. Lastly, he has been working in Rome for several months where he dies in a flat that he had rented for a year, without the intention to settle there.

**Jurisdiction if the Regulation was adopted by the UK**

Art. 4 of the Regulation is based on habitual residence, as it “frequently coincides with the deceased’s property”. In this case, however, L might be considered to be habitually resident in Rome, even if his immovables and other interests are located in England and he moved frequently around for working reasons, as he was installed in Rome in a rented flat for the duration of a year. If so, Italian courts would be competent to rule on the succession as a whole. However, Art. 9 allows the English courts to make a grant of administration as L has a house in England. Yet, the English courts would not be competent to decide upon the devolution of the succession concerning the immovable property in England, as the Italian courts are competent to rule on all elements of the succession irrespective of whether adversarial or non-adversarial proceedings are involved.

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or where property is located and which type of property (movables or immovables) is involved.

**Jurisdiction if the Regulation was not adopted by the UK**

According to English private international law rules, English courts would be competent. L has property in England and he would still be considered domiciled in England. For the purpose of an English private international law rule, the question where a person is domiciled is determined according to English law. Under English law, “domicile” diverges from the notion of permanent home but the elements required for the acquisition of domicile go beyond. Acquisition of domicile depends on the intention to settle in a country, i.e. to reside there permanently or indefinitely. The concept therefore has a subjective connotation. The acquisition of a domicile of choice may be prevented if it is foreseen and reasonably anticipated that e.g. after the end of employment the concerned intends to move back. An existing domicile is presumed to continue unless the acquisition of a new domicile is proven. No person can at the same time for the same purposes have more than one domicile. It is therefore likely that in this case, L would be considered to be domiciled in England. From an English perspective, L would therefore not have sufficient substantial connection with Italy to be considered domiciled there and jurisdiction of Italian courts as regards L’s movables in Italy (based on domicile) could not be established. From the English viewpoint, Italian courts would not have jurisdiction.

The Italian courts, applying the Regulation, would however consider themselves as competent to rule on the succession as a whole (provided that “habitual residence” of L would be affirmed).

Here again, a competence conflict arises.

**Example 2:** A, a UK national owning a villa in London, dies intestate habitually resident in France where he lived in his farmhouse after having retired. His only heir lives in England.

**Jurisdiction if the Regulation was adopted by the UK**

In principle, French courts would be competent to rule on the succession as a whole, (Art. 4 of the Draft Regulation), but Art. 9 of the Draft Regulation has to be taken into account conferring competence to the English courts for matters of administration. As A did not make a professio iuris in favour of his law of nationality (for UK nationals of his regional law of “domicile”, i.e. (supposedly) A’s last domicile within the UK (London)) no referral to English courts would be possible.

**Jurisdiction if the Regulation was not adopted by the UK**

Even if A was considered to be “domiciled” in France, the English court would be competent concerning the administration of A’s estate in the UK as well as the

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78 See Re Annesley [1926] Ch 692.
79 See recently Mark v Mark [2005] 2 FLR 1193.
80 See Recital 32. The Regulation does not specify this issue any further.
devolution of the succession as A has property in England. In cases in which the deceased died domiciled abroad, the grant of administration will usually be made to the person that has been or is entitled to be appointed to administer the estate under the law of domicile. If a foreign grant has already been made, it has no effect in England. Such representative appointed under the law of the country of domicile of the deceased must either obtain an English grant or somebody else must hold an English grant. In case of a foreign grant of administration, it has, however, been shown that the appointed administrator can exceptionally be disqualified. For example, the English court could make a grant of administration to A’s heir, even if the French court has previously appointed another representative to administer the estate (and even if the representative appointed by the French court opposes), if the representative would be disqualified under English law, or if there would be another special reason against the recognition of the appointment.

If a deceased has property in England and after a representative has been duly appointed, the English (High) Court has jurisdiction irrespective of the deceased’s domicile to determine any question with regard to the succession, in particular to determine the persons entitled to succeed to the property. If French courts as courts of domicile and situs determine the succession to A’s movables, regardless of where they are situated and A’s immovables in France, such determination would be followed in England.

From the viewpoint of French courts, which would have to apply the Regulation if seized, they would however be competent to rule on the succession as a whole, including the immovables in England (Art. 4 of the Regulation).

The result would therefore be more complex as if the Regulation was adopted by the UK.

**dd. Nationals of the UK Habitually Resident in the UK but Owning Property in Other EU Member States**

Example: E, a UK national, dies intestate domiciled in Kent where she has been living for six years. Before, she has spent several years in Poland. Her immovable property is situated in England, the Netherlands and Poland. Her heir lives in the Netherlands.

**Jurisdiction if the Regulation was adopted by the UK**

According to Art. 4 of the Draft Regulation, English courts as courts of habitual residence are competent to decide upon administration and the devolution of the succession in relation to all property of the deceased. Courts in the Netherlands and Poland would not be competent except for measures under Art. 9.

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81 BRIGGS, A., cit., at p. 237.
83 *Lewis v. Balshaw* (1935) 54, C.L.R. 188.
84 *Doglioni v. Crispin* (1866) L.R.1 H.L.301; *Re Trufort* (1887) 36 Ch. D. 600; *Re Ross* [1930] 1 Ch. 377; DICEY, MORRIS AND COLLINS, cit., Rule 137.
85 DICEY, MORRIS AND COLLINS, cit., Rule 138.
Jurisdiction if the Regulation was not adopted by the UK

English courts as courts of domicile and *situs* would be competent to determine any question with regard to E’s succession. From the English viewpoint, it would however be accepted if Dutch and Polish courts determine the succession to the immovable property located in the respective countries.86

From the viewpoint of Dutch and Polish courts, applying the Regulation (Art. 3), the scope of their competence would be different. As E is not habitually resident in a “Member State of the Regulation”, they would be competent on the basis of the residual jurisdiction rules in Art. 6 which are based on the location of succession property plus additional conditions. As the deceased’s residence in Poland had come to an end more than five years ago, Art. 6 lit a of the Draft Regulation would not apply. Competence could only be based on Art. 6 lit d (and would then be limited to that property only). Dutch courts would be competent on the basis of Art. 6(c), as the deceased’s heir has her habitual residence in the Netherlands. The competence of Dutch courts would, however, not be limited to the immovables situated in the Netherlands but cover the succession as a whole.

Also here, a competence conflict arises between Dutch and English courts, as they would claim jurisdiction for the succession as a whole.

3. Effects on the Applicable Law 87

a. Draft Regulation Versus Legal Situation in Case of Non-Opt-In

aa. Principles of the Draft Regulation Regarding the Applicable Law

According to Art. 16, the law of the State in which the deceased had his habitual residence at the time of his death shall be applicable to the succession as a whole. *Renvoi* is excluded.88 The parallelism between the determination of the applicable law and of jurisdiction shall enable the court to regularly apply the *lex fori*.89 The strict use of habitual residence as a connecting factor for the law applicable to the succession as a whole without providing any other alternative objective connecting factor cures the variation in national conflict of laws provisions.90 The choice of a single legal regime concerning movables and immovables shall lead to unity of the devolution and

86 DICEY, MORRIS AND COLLINS, cit., Rule 139.
87 The same structure as under “2. Jurisdiction” has been chosen for section “3. Applicable Law”. Where appropriate, the same cases as described above under “2. Jurisdiction” will also be dealt with under this heading. Additional reference will be made to cases of wills, joint wills and agreements as to succession as well as to *inter vivos* gift and claw-back (see art. 19 (2) (j) of the Draft Regulation). The latter are of particular concern to the UK. Furthermore, potential difficulties arising in relation to the connection factor habitual residence will be highlighted (equally a key concern for the UK).
88 The term “referral” used in Art. 26 is misleading, even in English. Art. 20 of the Regulation 593/2008 (“Rome I”) and Art. 24 of the Regulation 864/2007 (“Rome II”) use rightly the term “renvoi.” The provision notably targets States to which the Regulation does not apply. For the EU Member States subject to the Regulation, the provision is declaratory, as they all apply the same rules.
89 This approach has also been suggested in the DÖRNER/ LAGARDE Study, Final Report (note 8), at p. 4. National conflict of laws provisions range from the application of the law of nationality (e.g. Germany, Greece, Italy, Austria, Poland, Portugal, Slovakia, Spain, the Czech Republic and Hungary) to the law of domicile (England) or habitual residence (France) at death, to systems of scission (domicile or habitual residence for movables and *lex rei sitae* for immovables, e.g. in France, Belgium, Luxemburg, England, Ireland) and to systems which either allow or do not allow for a choice of law (e.g. *no professio iuris* in France, Spain, Portugal, England (except for the question of interpretation of wills), Ireland, Sweden, Greece and Austria).
transmission of the succession and abandon the frequent recourse to systems of scission.

The Regulation alternatively allows in Art. 17(1) a limited choice of the law of the deceased's nationality as applicable to the succession in its entirety, thereby implanting the disputed professio iuris in succession matters on the European level. The Draft Regulation clarifies that for those States in which the legal system is based on the notion of "domicile," the latter shall be used as equivalent to nationality. This clarification is targeted at the United Kingdom. A choice of law has to be made expressly and must be included in a declaration in the form of a disposition of property upon death. A tacit choice included in a will that points towards a certain law but does not expressly refer to it as the law chosen will not be admitted. Any modification or revocation must meet the "conditions for the modification or revocation of a disposition of property upon death." In parallel to its Art. 8, the Proposal provides additional alternative connecting factors for the validity of an acceptance or waiver of succession or legacy, or for a declaration made to limit liability for subsequent formalities for an acceptance or waiver of succession or legacy in cases of property located abroad: it refers to the law of the State in which the heir or legatee has its place of habitual residence.

Furthermore, the law of the State in which property is located remains applicable where, for purposes of an acceptance or waiver of a succession or legacy, the law requires formalities that go beyond those provided for by the otherwise applicable law.

In addition and also in parallel to Art. 9, the lex successionis shall be no obstacle to the application of the law of a Member State in which property is located, where the latter subjects the administration and liquidation of the succession to the local appointment of an administrator, see Art. 21(2)(a). However, the lex successionis shall govern the determination of the persons qualifying for such appointment.

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92 Some EU states like Estonia or Bulgaria (Art. 25 of the Estonian Private International Law Act and Art. 89 (3) of the Bulgarian Private International Law Code) already follow a more liberal approach. Art. 5 (1) of the Hague Convention of 1989 provides more alternatives (A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.). The idea behind the limited choice in Art. 17 of the Proposal is the protection of legitimate expectations of heirs and legatees, as the law of nationality is more predictable for them (see Recital 18 of the Proposal).
93 See Recital 32 of the Proposal.
94 See also Art. 5 (2) of the Hague Convention of 1989.
95 Art. 17 para. 4 of the Proposal.
96 Art. 20 of the Proposal.
97 The English version speaks of "State;" the German version uses the word "Mitgliedstaat".
98 Art. 21 para. 1 of the Proposal.
99 Art. 21 para. 2(a) of the Proposal.
The law of a Member State in which property is located shall furthermore be taken into account where it mandates that inheritance taxes be paid before the final transfer of the inheritance.\textsuperscript{100}

Art. 18 concerns agreements as to succession, either of one person (para. 1), or of several persons (para. 2). Agreements within the meaning of Art. 18 are those which confer, modify or withdraw rights to the future succession, regardless of whether or not they are supported by consideration.\textsuperscript{101} It seems to be intended that joint wills are included even if they are not directly mentioned in the text.\textsuperscript{102}

According to Art. 18 (1), an agreement is governed by the law that would hypothetically have been applicable if the \textit{de cujus} would have died on the day on which the agreement was concluded. In the event that the agreement would be invalid under that law, it shall be deemed valid if it would have been valid under the law applicable at the time of death. Whether the testator changes his or her habitual residence after the establishment of such agreement, does not lead to invalidity and the agreement can be subjected to the law applicable at death if ever it would be void under the law applicable when it was drafted.

Agreements concerning the succession of multiple persons in Art. 18 (2) are only valid in substantive terms if the law that would have applied to the succession of one of the parties according to Art. 16 would have considered it valid if the person had died on the day the agreement was concluded. If only one of laws would uphold the agreement that law shall apply. If the contract is valid according to the law applicable to the succession of several parties, the law with which the agreement has the closest links shall be applied.

Art. 18 favours the validity of such agreements by accepting alternative connecting factors and shall especially enable surviving spouses to benefit from joint property.\textsuperscript{103}

Art. 18 para. 3 also allows a \textit{professio iuris} within the limits of Art. 17 (choice of the law of nationality of the involved or one of the involved persons).

The law applicable to matters of formal validity of dispositions of property upon death is not dealt with in the Draft Regulation, see Art. 19(2)(k). Substantive validity of (normal) wills is subject to the general rules of the Regulation.

In cases of estates without claimants, the application of the \textit{lex successionis} shall be no obstacle to the right of a Member State or body appointed in accordance with the law of the Member State in question to seize the succession property located on its territory (Art. 24 of the Proposal).

\textbf{bb. Principles under National Conflict of laws rules regarding the Applicable Law in England and Wales}

\textsuperscript{100} Art. 21 para. 2(b) of the Proposal.
\textsuperscript{101} Art. 2(c) of the Proposal.
\textsuperscript{102} COM (2009) 154 final, at 4.3, in relation to Art. 18 ("agreements as to succession and joint wills"). For definitions see Art. 2(c) and (d). There is some uncertainty here about the inclusion of joint wills into Art. 18 of the Draft Regulation (see also below, IV E).
\textsuperscript{103} See also Arts. 8 through 12 of the Hague Convention of 1989.
The UK has entered into various bilateral treaties but none of these govern the rules relating to the conflict of laws in relation to succession. The national conflicts of laws rules are formed by statutes, jurisprudence and the work of scholars. Statutes in this area are largely derived from international conventions (e.g. the Wills Act 1963). Many common law rules still form the basis of the English conflict of laws system.

Under conflict of laws rules in England and Wales, the question of the applicable law to the succession only becomes relevant when the estate of the deceased has been fully administered. Administration (which does not comprise the distribution of the estate to the beneficiaries) is governed by the lex fori, i.e. the law of the legal system that has provided authority to the representative to collect in the assets of the estate.

English private international law rules determining the law applicable to the entitlement on intestacy draw on the distinction between movable and immovable property. The applicable law to a succession to the movables of an intestate is, except in cases of bona vacantia, determined by the connecting factor of domicile at the time of death. Intestate succession to immovables is, on the contrary, governed by the lex rei sitae. The lex rei sitae also governs whether something is to be classed as a movable or immovable object. This scission system has faced some criticism by English legal scholars. It is seen as an outdated and unnecessarily complicated concept as it can lead to situations in which e.g. surviving spouses have double or no rights. The unique application of the law of domicile to the succession as a whole would therefore be favoured, but for the time being, the scission system survives.

In cases of testate succession the situation is similar: The material validity of a will concerning movables is governed by the law of domicile of the testator at his death. Testate succession in immovables is subject to the lex rei sitae. The lex successionis determines all matters pertaining to the validity and enforceability of the provisions of a will (e.g. claims for legal rights, bequests for charitable purposes, invalidity of gifts, rules of forfeiture, etc., but e.g. not the validity of a trust).


No special rules exist for the validity of testamentary dispositions executed in one document by more than one person. Joint wills are possible but inconvenient in practice with respect to the application for a grant.

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104 For the distinction between movable and immovable property see e.g. Re Berchthold [1923] 1 Ch. 192; Re Cutliff’s Will Trust [1940] 1 Ch. 565.
105 Mobilia sequuntur personam, see Cheshire and North’s, private International Law, 13th ed., Ch. 9 and State of Spain v. Treasury Solicitor [1954] P. 223 at 245 (Maldonado).
106 Duncan v. Lawson (1889) 41 Ch.D. 394 at 397; “immovable property […] forms part of the actual territory controlled by the law of th place and by international comity and for manifest convenience is deemed to be, for the purposes of descent and inheritance, regulated by the lex loci.”, Lord Porter in Rea v. Rea [1902] 1 I.R. 451 at 461 quoting Lord Selborne in Freke v. Lord Carbery (1873) L.R. 16 Eq. 461. See also Re Collens [1986] All E.R. 611 at 613, 614; Re Osoba [1978] 1 W.L.R. 791; Re Hayward [1997] 1 All E.R. 32.
108 See DICEY, MORRIS AND COLLINS, Rule 145 and 27-043 ff. See also Re Groos [1915] 1 Ch. 572.
A choice of the applicable law to the succession is not permitted under English law. The only aspect where party autonomy in English conflict of laws rules on succession is accepted concerns the interpretation of wills.\textsuperscript{109}

The \textit{lex successionis} also determines the existence and extent of rights of spouses and the next-of-kin.

In case where there is no one to succeed the deceased, a State will assume title to the ownerless property within its territory as \textit{bona vacantia}. The question which State is entited to do so is governed by the \textit{lex rei sitae}.

\textbf{cc. Principles under National Conflict of laws rules regarding the Applicable Law in Scotland and Northern Ireland}

The succession regimes in England and Wales and Northern Ireland are widely similar, as well as the conflict of laws regimes.

In Scotland, the civilian approach to succession law differs from the common law based rules in other regions of the UK. These divergences have their origin in very different systems of property. Regimes of family law also differ and contrary to Scottish law, English law has an elaborate trust concept.\textsuperscript{110} Also, a surviving spouse, civil partner or cohabitant may be entitled under English law to a share in the family home under the law of implied trusts and proprietary estoppel (discretionary provisions) rather than as a matter of legal title as it is the case in Scottish law. The concerned might also not at all have a right to the family home under the English law rules of intestate succession.\textsuperscript{111} With respect to the conflict of laws, rules are, however, similar to English law.

The question of the applicable law to the succession is equally a question subsequent to issues of administration of the estate, which are governed by the \textit{lex fori}.\textsuperscript{112} Classification between matters of administration and of distribution of estates is equally governed by the \textit{lex fori}.

While the Succession (Scotland) Act 1964 has removed differences between substantive rules on the succession to immovables and movables, remnants of the distinction permeate Scottish conflict of laws rules\textsuperscript{113}, though it has been seen, also in Scotland, that scission is not beneficial.\textsuperscript{114} Analogous to English law, in the Scottish regime the law of ultimate domicile governs intestate succession in movables while the \textit{lex rei sitae} governs succession in immovables. The conflict of law regime is similar in cases of testate succession. Essential validity as regards movables, is subjected to the \textit{lex domicilii} at the time of death, and, as regards immovables, to the...

\textsuperscript{109} \textsc{Dicey, Morris and Collins, cit., Rule 147.}

\textsuperscript{110} For an analysis of the nature of trusts in Scots law see K. G. C. Reid, 'Patrimony not Equity: the trust in Scotland' 2 European Review of Private Law 427.


As regards legal rights, they are governed by the lex domicilii at death as regards movables and the lex rei sitae for immovable property. Prior rights in movable property arise if the deceased died domiciled in Scotland; prior rights in immovable property arise, if it is situated in Scotland.

In the case of an estate without claimants, the question whether a foreign government can acquire the deceased’s property depends on whether or not that State has from the viewpoint of the forum under the law of the deceased’s domicile the right to succeed as last heir.

b. Case Studies – Comparison Opt-In and Non-Opt-In

aa. Nationals of Other EU Member States Habitually Resident in the UK

(1) Owning Assets and Property in the UK

Example 1: A, a French national, dies habitually resident in England owning assets and a villa in London; he has chosen French law as lex successionis and expressed this choice in form of a will, but without determining his succession.

Applicable law if the Regulation was adopted by the UK

As a preliminary matter, the question of the applicable law to matters of administration has to be solved: As to the choice of the administrator, Art. 21(2)(a) of the Draft Regulation, has to be taken into account, according to which the lex successionis shall be no obstacle to the application of the law of the Member State in which property is located where it subjects administration of the succession to the appointment of an administrator (here English law). The lex successionis shall, however, govern the determination of the potential administrators.

As regards the devolution of the succession, A is considered to be “habitually resident” in London and Art. 16 of the Draft Regulation would, in principle, subject his succession to English law. However, Art. 17(1) of the Draft Regulation permits to choose the law of the State whose nationality the deceased possesses as the law to govern the succession as a whole. The choice has to be made expressly and is to be included in a declaration in the form of a disposition of property upon death (Art. 17 (2) of the Draft Regulation). A disposition as to the estate does not need to be made. Here, French law would apply.

Applicable law if the Regulation was not adopted by the UK

As a rule, intestate succession (here, A did not make a will but only a professio iuris) in movables is governed by the law of the deceased’s domicile at the time

of his death.\textsuperscript{117} Intestate succession in immovables is governed by the \textit{lex rei sitae}.\textsuperscript{118} If A was to be considered “domiciled” in England, English law would apply to his movables.\textsuperscript{119} English law as \textit{lex rei sitae} would also apply to his immovables. As English law does not provide for a \textit{professio iuris} in matters of succession, A’s choice of the law of his nationality would be void.

In this case, a non adoption of the Draft Regulation by the UK would make a decisive difference for the result of the case.

\textbf{(2) Owning Assets and Property in the UK and Other Member State}

Example: B, a German citizen habitually resident in the UK, owns assets in Germany (flat), the UK (movables) and in Greece (villa). He dies in England. He has made a joint will with his French wife before moving to the UK, in which the spouses mutually appointed themselves as heirs. At the time the will was made, B was habitually resident in Germany and his wife lived in France. The will was drawn up in Germany.

\textbf{Applicable law if the Regulation was adopted by the UK}

B has made a joint will with his wife. Provided that Art. 18 of the Regulation applies to joint wills,\textsuperscript{120} as Art. 2 (d) of the Draft Regulation and the explanatory memorandum to Art. 18 seem to intend,\textsuperscript{121} the applicable law to substantive validity would derive from Art. 18 (2) of the Regulation. Substantive validity is subject to the law that would, pursuant to Art. 16, apply to the succession of one of the involved persons in the hypothetical event of death on the day the agreement was concluded. Here, German law and French law become relevant. German substantive law upholds the material validity of a joint will of spouses, made in one document, see Art. 2265 \textit{et seq.} BGB. The French \textit{Code Civil} does not recognize this type of will, but according to the French \textit{Cour de Cassation} it is accepted in France, if the country in which it was drawn up recognises it. In this case, the applicable law would be German law.

Matters of formal validity are not dealt with in the Regulation, see Art. 19(2)(k). The applicable law would then result from national private international law rules which are, in this case, for all implicated countries based on the rules of the Hague Convention of 1961 (Art. 1 and 4 of the Convention), which allows for a variety of connecting factors.\textsuperscript{122}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{117} BRIGGS, A., cit., p. 83.
  \item \textsuperscript{118} \textit{Balfour v. Scott} (1793) 6 Bro PC 550; DICEY, MORRIS AND COLLINS, cit., Rule 141; BRIGGS A., cit., p. 83; This double tracked system in determining the applicable law has been criticized and the law of domicile has been favored as applicable law to the succession as a whole, see DICEY, MORRIS AND COLLINS, cit., at 27-016 w.f.r.; see for Scotland: CRAWFORD E./ CARRUTHERS J.M., cit., 18-04; Scottish Law Commission Report No. 124.
  \item \textsuperscript{119} English Administration of Estates Act 1925, as amended.
  \item \textsuperscript{120} Defined by the Draft Regulation (Art. 2 lit d) as "wills drawn up by two or more persons in the same instrument for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition."
  \item \textsuperscript{121} There is some uncertainty as to joint wills and there role within Art. 18 of the Proposal. While joint wills are dealt with in Art. 2 (d) of the Draft Regulation and mentioned in the explanatory memorandum (COM (2009)154 final, under 4.3. in relation to Art. 18) as being governed by Art. 18 of the Draft Regulation, the text of this provision does not refer to joint wills, but to agreements as to succession only.
  \item \textsuperscript{122} Article 1 of the Hague Convention of 1961: A testamentary disposition shall be valid as regards form if its form complies with the internal law: a) of the place where the testator made it, or
\end{itemize}
\end{footnotesize}
Applicable law if the Regulation was not adopted by the UK

Under English law the material validity of a will of movables is governed by the law of the testator’s domicile at the time of his death while the material validity of a will of immovables is governed by the law of the lex rei sitae. There are no specific conflict rules for joint wills. Accordingly, the testate succession after B in movables would be governed by English law, as the conflict rules refer to “domicile at the time of death”, while the testate succession in immovables would be governed by German and Greek law. This would be different from the Regulation’s approach.

As to matters of form, there would be no substantial difference to the situation under the Regulation. Pursuant to the Wills Act 1963,\(^\text{123}\) based on the Hague Convention of 1961.

(3) Cases of Inter Vivos Gifts

Example: A, a German widower, dies domiciled in England. He owns several houses in London. He has made a will in the UK, in which he has chosen German law to govern his succession and in which he transfers his property to his three children. Three years prior to his death, A has transferred the property of one of his houses to his son F.

Applicable law if the Regulation was adopted by the UK

According to Art. 17 (1) of the Draft Regulation, A had the option to choose German law to govern his succession under the formalities of Art. 17 (2) and (3). According to Art. 19(2)(j) the applicable law also governs any obligation to restore or account for gifts and their relevance when determining the shares of heirs. Here, German law would govern the question of claw-back, resulting out of the prior property transfer to Fr. The claw-back rules in 2325 et seq. BGB would apply concerning the succession into A’s property, including the immovable property located in London.

Applicable law if the Regulation was not adopted by the UK

According to English conflict of laws rules a professio iuris is not possible. A was domiciled in England and had property there. English courts would therefore be competent to decide on his succession and apply English substantive law to his movables and immovables, all situated within the UK. As regards the gift to one

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b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
e) so far as immovables are concerned, of the place where they are situated.

\(^\text{123}\) See also DICEY, MORRIS AND COLLINS, cit., Rule 143.
of his sons, the principle of unimpeachability of property transfer would prevail and no claw-back rules would apply.124

(4) Cases of Uncertainty Regarding the Connection Factor Habitual Residence

Example: M, a German citizen, works in England. She is married to S, equally German, who works in Paris. Their child J stays in Paris with the father, M commutes every week, working 4 days in London, staying 3 days in Paris, where she works from home. After one year of job experience for both, the family intends to return to Germany, where both grandparents live and they have lived before. The couple owns a family villa outside Berlin. Both intend to leave for Germany within the next month, when M dies in a car accident in England.

Applicable law if the Regulation was adopted by the UK

Art. 4 and 16 require the determination of M’s habitual residence. The Regulation gives no criteria for its determination, except the mention that it coincides with the deceased’s “center of interest”.125 In the case of M the determination of her habitual residence is complicated. It might be argued that her “center of interest” is in France with her husband and child living there. It could, however, also be argued that she spends more time in England, where she works. It would be difficult to argue for Germany though, as neither she nor her partner and child have been resident there at the time of her death. If France would be considered the place of habitual residence, French courts would be competent with respect to the succession as a whole and French law would apply.

Applicable law if the Regulation was not adopted by the UK

If M and her family have moved from Germany abroad and concretely intend to move back after a year of professional experience abroad, there are some indications that they might still be considered domiciled in Germany from the English viewpoint: they own a villa to which they wish to move back and their families live there.126 German law would then apply to movables (domicile) and to immovables (situs).

However, from the viewpoint of German and all other “Regulation State” courts, which would apply the Regulation, either English or (more probable) French courts would be competent, as M was not habitually resident in Germany at the time of her death. Furthermore, English or (most probably) French law would apply as the law of M’s State of habitual residence. Under the Regulation, German law could only apply in case of a professio iuris.

bb. Nationals of Other EU Member States Resident in Other EU Member States but Owning Assets in the UK

Example: C, a Lithuanian citizen, has moved to Luxembourg in 2008 where he has been living since and where he dies intestate. He had worked in Glasgow before, where he owns a house.

**Applicable law if the Regulation was adopted by the UK**

According to Art. 16 of the Draft Regulation, the law of Luxembourg as C’s State of habitual residence applies to his succession, including the house in Glasgow, as he did not choose Lithuanian law as his law of nationality to govern it.

**Applicable law if the Regulation was not adopted by the UK**

According to Scottish conflict of laws rules, Scottish law would apply to the succession of immovable property situated in Scotland. From the Scottish viewpoint, the law of Luxembourg would only govern the succession into C’s movables.

cc. nationals of the UK Resident in Other Member States

(1) Owning Assets and Property in Other Member States

Example: A, UK national, dies intestate habitually resident in France where he lived in his farmhouse after having retired. He also owns immovables in Greece and Spain. His only heir lives in England.

**Applicable law if the Regulation was adopted by the UK**

According to Art. 16 of the Regulation, French law applies to A’s succession as he is habitually resident in France. French law governs the whole succession including the immovables in Greece and Spain. As French courts are competent in this case, they would therefore apply the *lex fori*.

**Applicable law if the Regulation was not adopted by the UK**

English law would subject A’s movables to French law and the immovables to Greek and Spanish law respectively. From the UK perspective, this case would however not lead to the jurisdiction of the UK as A died domiciled abroad and has no assets in the UK. As jurisdiction lies, also from the English view, with the French court (applying the Regulation), French law would apply to the succession as a whole.

(2) Owning Assets and Property in the UK and in Other Member States

Example: L, an unmarried UK citizen born in London, has worked in several Member States, but has always returned to England, where his house is and where he has his bank account, family and friends. He spent the last years basically moving between London, Rome, Vienna and Berlin spending several consecutive months in each foreign city, but always returning to London in between. Lastly, he has been working in Rome for several months where he dies in a flat that he had rented for a year, without the intention to settle there.
Applicable law if the Regulation was adopted by the UK

In this case, the habitual residence of L is difficult to determine. As has been mentioned above under 2 b. cc. (2), the habitual residence of L might be considered to be Rome. If so, Italian law applies to the succession as a whole, with the exception of Art. 21(2)(a) as regards the applicable law to administration issues concerning the assets in London.

Applicable law if the Regulation was not adopted by the UK

If the Regulation was not adopted by the UK, and pursuant to the arguments under 2 b. cc. (2) concerning L’s domicile (London is likely to still be considered as his domicile and English courts would be competent for the grant of administration and the devolution of the succession) English law as law of domicile and situs of the immovables would apply for questions of administration as well as the devolution of the succession.

From the viewpoint of an Italian court, Italian law as the law of habitual residence would apply.

dd. Nationals of the UK Resident in the UK but Owning Assets in Other EU Member States

Example: E, a UK national, dies intestate domiciled in Cornwall. Her immovable property is situated in England, the Netherlands and Germany.

Applicable law if the Regulation was adopted by the UK

Pursuant to Art., 16 of the Draft Regulation, English law applies to this case (English courts would also have jurisdiction).

Applicable law if the Regulation was not adopted by the UK

In case of non UK opt-in, English courts would apply English conflict of laws rules. According to those, intestate succession into movables is subject to the lex domicilii, intestate succession to immovables to the lex rei sitae. Although this separation has been criticized, it is still applied. The lex successionis would therefore be English law for all movables and immovables in England; Dutch law for the immovable property situated in the Netherlands; German law for the immovable property situated in Germany. This case shows that the Regulation would in terms of legal certainty indeed be of clear benefit for UK citizens habitually resident in the UK but having immovable property abroad.

4. Effects on Recognition and Enforcement

a. Draft Regulation Versus Legal Situation in Case of Non-Opt-In

aa. Principles of the Draft Regulation Regarding Recognition and Enforcement

The Draft Regulation contains rules on recognition and enforcement in its Art. 29 et seq. It enables recognition without review of the substance or of the applicable law.
Its provisions are widely structured in parallel with the Brussels I and IIbis Regulations. \[127\] Art. 29 corresponds to art. 33 Brussels I Regulation and the grounds of non-recognition in Art. 30 are, except for Art. 30(a), largely identical with Art. 34 of the Brussels I rules as well as Art. 22 of the Brussels IIbis rules. Only Art. 30(a) has been adapted: The subparagraph “it understood that the public policy criterion may not be applied to the rules of jurisdiction” has been added to clarify that the jurisdiction of the court seized to render the decision it is not a criterion for non-recognition. \[128\]

The provision on authentic instruments in Art. 35 is modeled according to Art. 57 of the Brussels I Regulation. In contrast, Art. 34 on recognition of authentic instruments is a new provision and has no corresponding rule in Brussels I. These provisions shall ensure the free movement of authentic instruments by giving them the same evidentiary effect with regard to their content and facts as to national instruments. They are presumed to be authentic. However, the presumption can be rebutted. \[129\] Art. 2 lit h of the Proposal defines authentic instruments in the same way as Art. 4 (3) (a) of Regulation 805/2004: \[130\] they are to be understood as instruments formally drawn up or registered as authentic instruments, the authenticity of which relates to the signing and content of the instrument and has been established by a public authority or other authority empowered by the Member State of origin for that purpose.

**bb. Principles under National Conflict of Laws Rules on Recognition and Enforcement in England and Wales**

The Brussels I Regulation excludes succession and wills. \[131\] The United Kingdom is party to several bilateral conventions with EU States \[132\] which are general in scope, and in theory some judgments rendered in the area of wills and succession could fall within their provisions. It is, however unclear, whether these conventions have ever been used for the purpose of directly enforcing judgments in matters of succession in the United Kingdom. Otherwise, English national rules on recognition and enforcement of foreign judgments are relevant (i.e. the Foreign Judgments Act 1933 and the Administration of Justice Act 1920, the latter limited to Commonwealth jurisdictions).

The key issue is recognition as otherwise there can be no question of enforcement. In principle a judgment will be recognised if it is final and conclusive and rendered by a

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127 See also Recital 25.
128 However, the English version of Art. 30 must be corrected in (a) and (b), as half of the first sentence of (a) belongs to (b).
129 See also Recital 26 of the Proposal.
130 Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims. The notion remained undefined in the Brussels I Regulation (Art. 57). Its predecessor, the Brussels Convention, did not contain a definition, as its original Member States have been part of the notariat latin, where similar forms of authentic instruments were in use. A definition became necessary after the adhesion of Scandinavian Member States, the UK, Ireland and Spain. The ECJ specified the notion in C-260/97, Unibank v. Christensen, 17 June 1999, ECR 1999 I-3715.
131 Art. 1(2)(a) Brussels I Regulation.
132 Convention with Belgium (scheduled to SR&O 1936 No 1169); with Germany (scheduled to SI 1961 No 1199); with Austria (scheduled to SI 1962 No 1339); with Italy (scheduled to SI 1973 No 1894).
court which had international jurisdiction under English conflicts rules and as long that there is no defence to its recognition.  

As to issues of jurisdiction, two situations have to be distinguished: Judgments in personam may be enforced in England if the judgment is for a debt or definite sum of money, final and conclusive, and the foreign court had jurisdiction according to the English conflicts rules. Judgments in rem are recognised if the underlying subject matter was property (movable or immovable) situated in the foreign country. The English courts consider that foreign courts have no jurisdiction to adjudicate on the title to, or right to possession of, any immovable property situated outside their territory. 

Defences to recognition are limited. The merits of the judgment cannot be reviewed (i.e. it cannot be challenged how the foreign court dealt with the matter, or which law it applied), but the following (general) grounds of non recognition might be relevant in succession cases depending on the circumstances of the case and the nature of the proceedings: Disregard of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; the defender did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear; fraud; want of natural or substantial justice; enforcement of the judgment would be contrary to public policy; enforcement would be contrary to a prior English judgment.

As to aspects of procedure, foreign judgments are not automatically recognized but require registration according to the Foreign Judgments Act 1933 (or in some cases even a fresh action being brought in England).

c. Principles under National Conflict of Laws Rules on Recognition and Enforcement in Scotland and Northern Ireland

The principles of recognition and enforcement in the law of Scotland and Northern Ireland are similar. For example, for Scotland: Judgments in rem “stand unaided contra mundum” while judgments in personam require either further court procedure or a registration in the recognizing State (Foreign Judgments Act 1933 and Administration of Justice Act 1920). In cases of judgments in rem, the main cases for which recognition can be refused are the grounds of lacking jurisdiction of the foreign court (i.e. no presence of the property within the jurisdiction) or of fraud. For other grounds of non recognition see the Foreign Judgments Act 1933 referred to above (bb.) which also applies to Scotland and Northern Ireland.

b. Comparison Opt-In and Non-Opt-In

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133 A. BRIGGS, cit., p. 136.
134 DICEY, MORRIS AND COLLINS, Rule 35, but see also Rule 36.
135 DICEY, MORRIS AND COLLINS, Rule 40.
136 DICEY, MORRIS AND COLLINS, Rule 114.
137 DICEY, MORRIS AND COLLINS, Rule 41.
138 DICEY, MORRIS AND COLLINS, Rule 44.
139 See the Foreign Judgments Act 1933, esp. sec. 4
140 CRAWFORD, E.B./ CARRUTHERS, J.M., cit., 9-01.
aa. Judgments

The procedure of recognition under the Draft Regulation has been unified and simplified according to the model of the Brussels I Regulation. As regards the rules on enforceability, Art. 33 of the Draft Regulation even directly refers to the Brussels I Regulation which applies in the UK. This concept shall lead to a Europe-wide uniform system of recognition of judgments of other Member States of the Succession Regulation, based on mutual trust and reciprocity. The underlying thought is that if agreement is reached between the Member States on jurisdiction, it can be proceeded to relatively simple enforcement methods. The idea of mutual trust would consequently not apply with respect to the UK if it decided not to opt into the Regulation, as the UK would then refuse to adhere to the jurisdictional system established by the Regulation. The Regulation only refers to judgments of courts in Regulation States and the recognition of which is sought in other Regulation States (see also Art. 1(2) of the Draft Regulation). This is unfortunate, as the parallel regime for recognition under the Brussels I Regulation is already applied between the UK and other Member States. Nevertheless, from the formal viewpoint, the UK would not benefit of the mutual trust regime in relation to other EU Member States in succession cases and reversely. This would lead to more formalities for judgments of other Member States recognition of which is sought in the UK (e.g. requirements of registration of judgments etc. not foreseen by the Regulation) and it could lead to situations where a foreign judgment in succession matters might not be recognized because the criteria for a refusal of recognition are not identical (especially as regards the question of international jurisdiction of foreign courts, which is no longer controlled under the Draft Regulation but is a test criterion for recognition of foreign judgments under English rules outside the scope of the Brussels I/ Lugano regime in civil and commercial matters).

A non UK opt-in would therefore complicate the legal framework applicable in cross-border succession cases linked with the UK and with “Regulation States”. This result is deplorable in light of predictability and legal certainty.

bb. Authentic Instruments

As to the recognition of authentic instruments, it is difficult to say what the impact of a non UK opt-in would be in concreto. It is unclear how this system of mutual recognition of authentic instruments would work in practice, as the provision is rather unusual for common law jurisdictions. They have no notarial tradition comparable to the continent and, as a result, follow a different concept of authentic instruments than the States adhering to the habits of the notariat latin. The extension of mutual trust to notarial acts could from the UK perspective rather endanger procedures for personal representatives and does not fit with common law deeds produced during the administration of estates. Nevertheless, it can be stated that a non opt-in of the UK might, depending on the circumstances of the case, deprive EU citizens from a

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142 Member States that are part of the notariat latin use similar forms of authentic instruments. The concepts are different in Scandinavian Member States, the UK, Ireland and Spain. See also note 85.
143 HARRIS J. (note 138), at p. 226.
simplification of formal burdens during the administration and devolution of a cross border succession.

5. Consequences as to the Creation of a European Certificate of Succession

A non UK participation in the Draft Regulation would also deprive those individuals entitled to a portion of the estate of the deceased of the option to easily receive and circulate, pursuant to unified parameters, a certificate that intends to simplify and accelerate processes in succession cases.\(^{144}\) Chapter VI on the European Certificate of Succession follows the unified rules on jurisdiction described above, see Art. 37(2) of the Draft Regulation. Content and effects of the certificate are unified for all Member States and might therefore be of substantial benefit. It is, for instance, unlikely that a land registry or any other public registry dealing with land in the UK would alter the register on the basis of a foreign certificate of inheritance; it would instead be necessary to apply for an English grant to deal with the succession of legal interests in registered land. A European Certificate of Succession might, under Art. 42(5) of the Draft Regulation, simplify the situation. It is, however, another question whether Chapter VI is to date fully worked out.

From a UK perspective, the practical implementation of a European Certificate of Succession is subject to obstacles for legal systems, which are not familiar with the concept of a certificate of inheritance and which are based on a system of compulsory administration, such as English law. The aim of issuing such certificate quickly seems difficult to fulfill, as the whole procedure of administration has to be terminated before the heirs can even be identified. While administration can in some cases be rapidly accomplished, it might well take several years, depending on the complexity of the case. Furthermore, property law systems and trust structures in common law countries seem not to be tailored to such a certificate. The information to be given on all persons having financial interests in relation to a succession is much more complex than the concept of the European Certificate, which is rather based on civil law legal thinking.\(^{145}\) Art. 41 on the content of such certificate, albeit already providing for a range of information, reflects this. While it would oblige the UK to give effect to European Certificates of Succession issued abroad and contribute to simplified proceedings if the UK opted into the Succession Regulation, it cannot be assessed to date to what extent other problems might arise under this new concept, rather unknown to the UK.

IV. CONCLUSIONS

The comparison between the regimes of the Draft Regulation and the conflict of laws rules applicable in the regions of the United Kingdom shows that there are considerable differences between the system the Regulation establishes and the national private international law rules on succession. Differences notably concern the core issues of jurisdiction and applicable law. Case studies illustrate that a non opt-in

\(^{144}\) Art. 40 (1), COM (1009)!54 final, at 4.6.

\(^{145}\) MATTHEWS P. (note 5), to Question 27.
of the UK would lead to diverse complications. Depending on the court seized (court of a Member State which adheres to the Regulation or UK court), the way how a cross-border succession is dealt with would in many case be considerably different if the UK chose to adopt the Regulation, versus a situation where it does not opt into it.

From the perspective of UK citizens, several of the hypothetical case scenarios have shown that the Regulation would, in terms of legal certainty, be of clear benefit. An example is the case of UK citizens habitually resident in the UK but having immovable property abroad. Indeed, the present national regimes can lead to split court competence and to a plurality of applicable laws to one succession while the Regulation would simply confer jurisdiction to the courts of the UK unit of habitual residence and declare the \textit{lex fori} as applicable to the succession as a whole. The concerned person has to face one legal order only, instead of several.

Not applying the Regulation, e.g. because of the imprecise connecting factor “habitual residence”, would not prevent UK citizens from being affected by the Regulation and the criticised uncertainty of its connecting factor. Those UK citizens which reside abroad in a “Regulation State” would be subject to the concept of “habitual residence”, as the courts have to apply the Regulation to all residents within their territory. Furthermore, UK citizens residing abroad but having property in the UK could, under the Regulation, have their assets subject to the succession law of their State of habitual residence even if they intended to return to the UK or consider it as their real home, and despite the fact that the UK would still consider them to be domiciled in the UK. Competence conflicts would inevitably arise and different connecting factors in the Regulation and in conflict of laws rules of the UK regions would endanger legal certainty.

From the perspective of nationals of “Regulation States” residing in the UK or having assets there, a non UK opt-in would equally lead to disadvantages, if a UK court would be seized. The scission system in force in the diverse territorial units of the UK leads to less legal certainty and higher costs for legal advice for those EU citizens which have immovable property the UK and abroad. If a deceased in addition owned immovables in more than one region of the UK, the fact that separate territorial UK units have their own legal regimes leads to an even more complicated situation. For example, in the case where a person dies domiciled in England owning immovable property in Scotland and in other EU Member States, e.g. Italy and Spain, the succession to the movable property would be governed by English law, the succession to the immovable property by Scottish, Italian and Spanish law, while, pursuant to the Regulation, English law alone would apply to this case in its entirety.

Also as regards the regimes on recognition and enforcement of judgments and on authentic instruments and the introduction of a European Certificate of Succession, a non UK opt-in would lead to the maintenance of separate regimes which complicate the situation in light of predictability and legal certainty.

It can therefore be stated that a non UK opt-in would neither be of benefit for cross border successions involving UK citizens nor for those involving citizens of other EU Member States.
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS

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- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents