

# Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future

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*ABSTRACT: Inheritance law has gained increasing importance within the European perspective. The laws that have been considered stable are now met with the requirements of modern times and are no longer sufficient. Increasing population migration and foreign property holdings as well as multinational businesses are the features of today's modern European society. Unfortunately, in the event of death and the subsequent cross-border inheritance proceedings the situation is highly complicated due to the various applicable inheritance laws. Indeed, the individualized legal systems of each European Union Member State have different rules regarding the fundamental issues of inheritance, including intestacy, the freedom to dispose of assets in the event of death, and the protection of relatives of the deceased. The lack of uniformity—or even compatibility—is a striking practical problem. Therefore, there is a need to harmonize the rules of inheritance in the individual Member States and establishing a common European inheritance law is a tempting solution. However, this discussion has not even begun. Nevertheless, EU Regulation No. 650/2012 addresses succession, the issues of applicable law for cross-border inheritance, jurisdiction, and establishes the European Certificate of Succession, which documents inheritance rights in all EU countries and serves as a useful guidepost for harmonization. The Regulation, however, causes numerous controversies in practice. This Article aims to analyze both the framework for inheritance law and the current trends in the legislation as well as highlight some of the more significant problems caused by the Regulation. In the end, the Article demonstrates that the reality of a single, uniform inheritance law for all EU countries is still far in the future.*

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## I. INTRODUCTION

Life in the European Union (“EU”) has changed. The times when Poles lived only in Poland, Germans in Germany, or the Dutchmen in the Netherlands, and only a small portion of them migrated are gone forever. Today, for example, several million Polish citizens are living in other EU countries.<sup>1</sup> There are also countries such as Luxembourg, where more than 20% of the population are foreigners.<sup>2</sup> The economic fusion of the individual EU Member States into a single economic organism seems only a matter of time. Paradoxically, United Kingdom’s exit from the EU may accelerate the process.<sup>3</sup>

Not surprisingly, this new reality has raised a number of questions related to the area of inheritance law. After all, when abroad, people often get married and settle down without changing their citizenship, they acquire property abroad, and finally, they die.<sup>4</sup> The different inheritance law

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1. See generally Mariusz Załucki, *Ku jednolitemu prawu spadkowemu w Europie. Zielona Księga Komisji Wspólnot Europejskich o Dziedziczeniu i Testamentach*, 7 PROBLEMY WSPÓŁCZESNEGO PRAWA MIĘDZYNARODOWEGO, EUROPEJSKIEGO I PORÓWNAWCZEGO 103 (2009) (presenting the statistics of nationals living abroad).

2. HEINRICH DÖRNER & PAUL LAGARDE, *ÉTUDE DE DROIT COMPARÉ SUR LES RÈGLES DE CONFLITS DE JURIDICTIONS ET DE CONFLITS DE LOIS RELATIVES AUX TESTAMENTS ET SUCCESSIONS DANS LES ETATS MEMBRES DE L’UNION EUROPÉENNE* § II (2002).

3. Usually, the main argument raised against such fusion is the British system’s differences, which, in the context of further integration, was allegedly a major barrier. Therefore, it may be assumed, the EU integration will have further stages.

4. See Matteo A. Pollaroli, *EU Regulation No. 650/2012 and Access to New Forms of Intergenerational Transfer of Wealth*, 2 RICERCHÉ GIURIDICHE 405, 408–10 (2013).

regulations in each European Union country therefore present a practical problem. Indeed, over half a million cases a year involve cross-border inheritance and represent approximately 10% of all the inheritance cases in the EU.<sup>5</sup>

Despite basically common roots, stemming mostly from Roman law,<sup>6</sup> the substantive inheritance laws in many European countries differ significantly. At least three concepts exist regarding the principles of transfer of rights and obligations of a deceased natural person to their legal successors. They are: (1) The concept of *le mort le vif saisit*; (2) the concept of *hereditas iacens*; and (3) the concept of the inheritance estate administration.<sup>7</sup> *Le mort le vif saisit* is a French phrase meaning, “the dead seizes the living.”<sup>8</sup> According to this doctrine, the heir is considered as having succeeded to the deceased from the instant of his/her death.<sup>9</sup> *Hereditas iacens* is a Latin phrase meaning “lying inheritance” or “recumbent inheritance,” which is an inheritance in abeyance, or not taken, despite the appointment of heirs.<sup>10</sup> Lastly,

the inheritance administration system is the system where the inheritance administrator plays a leading role, and the inheritance estate is transferred to [him or her] from the moment of its opening. [Under] the first two [concepts], the issue of responsibility for inheritance debts affects the personal assets of the deceased’s legal successors, while [under] the third [concept] liability for inheritance debts is not assigned to the deceased’s legal successors and concerns only the inheritance estate, and is associated with the responsibility of other persons.<sup>11</sup>

The respective regulators, focusing on these three concepts, provide for different principles of liability for inherited debts.

In [Europe and] the world one can distinguish three main models of the liability for inheritance debts: 1) the unlimited liability (the liability related to the entire property), 2) the liability limited to a particular asset (*cum viribus patrimonii*, *cum viribus hereditatis*), and

5. See Eleanor Cashin Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 132 (2013) (explaining the prevalence of cross-border succession cases); see also Council of the European Union Press Release 10865/12, Council Adopts EU-Wide Rules on Matters of Succession (June 7, 2012), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/130709.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130709.pdf).

6. R. C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 26–28 (1992).

7. Cf. Yves-Henri Leleu, LA TRANSMISSION DE LA SUCCESSION EN DROIT COMPARÉ 46 (1996).

8. MARIUSZ ZAŁUCKI, UNIFORM EUROPEAN INHERITANCE LAW: MYTH, DREAM OR REALITY OF THE FUTURE 131 (2015). See generally A.M. Bell-Macdonald, Note, *French Laws of Succession*, 2 Int'l & Comp. L.Q. 415 (1953) (describing the longstanding French laws on succession).

9. See generally Jan Gwiazdomorski, *Stanowisko prawne spadkobiercy według polskiego prawa spadkowego*, PRZEGLĄD NOTARIALNY 433 (1947) (explaining the concept of *le mort le vif saisit*).

10. ZAŁUCKI, *supra* note 8, at 132; see also ERNEST TILL, PRAWO PRYWATNE AUSTRYACKIE 11 (1904).

11. ZAŁUCKI, *supra* note 8, at 132 (footnote omitted).

3) the liability limited to a specified value (*pro viribus patrimonii, pro viribus hereditatis*).<sup>12</sup>

These differences have significant impacts. For example, if the inheritance is significantly encumbered with debts, or if it consists of only liabilities, then in one system the heir may be obliged to cover the liabilities out of their own property, and in other systems the liabilities are not the decedent's problem, and the creditors will not be satisfied.<sup>13</sup> The unlimited liability model is present in the German law, in which the heir may either accept the inheritance or reject it, and the absence of any activity on the part of the heir signifies direct acceptance of the inheritance.<sup>14</sup> This is equivalent to unlimited liability of the heir for the inherited debt.<sup>15</sup> The other model, where the heir's liability for the debt under inheritance does not apply, governs in England and Wales.<sup>16</sup> In these jurisdictions, the liability for the inherited debt is not assigned to the decedent's successors, rather it is closed within the inheritance, which has a separate identity.<sup>17</sup> This means the heirs do not acquire the inheritance as all of the rights and obligations of the deceased, and the inheritance assets are separate from the assets of the heirs.<sup>18</sup> It should also be mentioned that intermediate systems apply in some European countries (i.e. Croatia, Hungary, Czech Republic, or until recently Poland), which function to limit the liability of the heirs to the value of the inherited assets.<sup>19</sup>

These differences are only a few examples of those that exist in the inheritance systems of Europe (significant differences also exist as to assets, the benefits derived from the inheritance, the circle of entitled heirs, and the types of entitlements).<sup>20</sup> Not surprisingly, the discrepancy among the

12. *Id.* at 131 (footnote omitted).

13. *Id.*

14. See generally HERBERT BARTSCH & MALTE B. BARTSCH, DAS AKTUELLE ERBRECHT: TESTAMENT—STEUERN—ANSPRÜCHE: MIT NEUER ERBSCHAFTSTEUER UND ERBRECHTSFORM (2010) (identifying the intersection of tax and inheritance law).

15. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1942, [https://www.gesetze-im-internet.de/bgb/\\_1942.html](https://www.gesetze-im-internet.de/bgb/_1942.html) (Ger.); see DIETER LEIPOLD, ERBRECHT: GRUNDZÜGE MIT FÄLLEN UND KONTROLLFRAGEN 63 (2006).

16. See generally THEOBALD ON WILLS (John G. Ross Martyn et al. eds., 18th ed. 2016) (describing the function, admissibility, and treatment of wills throughout the United Kingdom).

17. See generally 1 WILLIAMS ON WILLS (Christopher Sherrin et al. eds., 9th ed. 2008) (expanding further on the role of wills in the United Kingdom).

18. ROGER KERRIDGE ET AL., PARRY AND KERRIDGE: THE LAW OF SUCCESSION 503–31 (13th ed. 2016).

19. See ZAKON O NASLJEĐIVANJU [THE HERITAGE ACT] arts. 130–39 (2015) (Croat.); Občanský Zákoník [Civil Code], Zákon č. 89/2012 Sb. § 1704 (Czech), *translation at* <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>; POLGÁRI TÖRVÉNYKÖNYV [PTK.] [CIVIL CODE] § 7:96, *translation at* <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F-975134979/M> (Hung.); KODEKS CYWILNY [CIVIL CODE] art. 1012 (Pol.).

20. See KODEKS CYWILNY [CIVIL CODE] art. 991 (Pol.); Mariusz Załucki, *Impact of the EU Succession Regulation on Statutory Inheritance*, 23 COMP. L. REV. 223, 224–27 (2017).

particular national inheritance laws results in uncertainty. The fact that a potential heir has specific rights to inheritance in one country, and no such rights within the system of another country—if that system applies in the respective case of inheritance—may cause serious controversies. As an example, under Polish inheritance law the spouse of a testator who has been deprived of the legal status of an heir in the last will of the testator, which means that the testator deprived the spouse of the role of a beneficiary of the inheritance assets, is entitled to *legitime*, or forced share.<sup>21</sup> In these circumstances, and in accordance with Article 991 of the Civil Code,<sup>22</sup> the spouse is entitled to half of what they would inherit should there be no last will of the testator, whereas the entitlement to inheritance would apply under the provisions of the act of law.<sup>23</sup> If in this same situation, Dutch inheritance law would apply, the testator's spouse would not have a claim to receive a forced share because Dutch law does not provide for this entitlement.<sup>24</sup> Herein lies the problem, and the solution is not easy.

In that regard, without a uniform regulation of the inheritance law in Europe, the situation is not satisfactory and these types of conflicts of law will grow. It should be noted that to a minor extent, this problem has already been perceived by various European institutions;<sup>25</sup> however, so far there is no official program of actions aimed at coping with it. Nevertheless, some actions have been undertaken, and they may be treated as the first steps towards unification of the inheritance law of the European countries. Therefore, this Article aims to analyze such actions, forecast their efficiency, and ultimately provide guidance for the future development of a uniform EU inheritance regime.

## II. THE NATIONAL REGULATIONS' DIVERGENCE PROBLEM

Inheritance law is part of the civil law system, which, in Europe is often called private law.<sup>26</sup> The characteristic feature of private law in Europe is that it is not uniform across particular countries. In the past, European private law was developed in the shadow of different historical, social, cultural, or

21. Dominik Lasok, *The Law of Succession*, in 1 POLISH CIVIL LAW 213, 251 (Dominik Lasok ed., 1973).

22. KODEKS CYWILNY [CIVIL CODE] art. 991 (Pol.); Mariusz Załucki, *Przyszłość zachowku w prawie polskim*, 21 KWARTALNIK PRAWA PRYWATNEGO 529, 535 (2012).

23. See generally PAWEŁ KSIĘŻAK, *ZACHOWEK W POLSKIM PRAWIE SPADKOWYM* (2d ed. 2012) (providing an overview of Polish inheritance law).

24. B.E. Reinhartz, *Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?*, 11 ELECTRONIC J. COMP. L. 1, 8–10 (2007).

25. For example, the need for uniform law can be seen, in particular, in European Court of Justice case law (ECJ). See, e.g., Case C-218/16, *Kubicka*, 2017 E.C.R. 755 (interpreting the EU Succession Regulation).

26. See generally Reinhard Zimmermann, *Kulturelle Prägung des Erbrechts?*, 71 JURISTENZEITUNG 321 (2016) (questioning the view that inheritance law is a matter of cultural cognition).

economic circumstances.<sup>27</sup> Despite the fact that many applied solutions in subsequent legislation are based on the ancient Roman law, the private law is not a monolith.<sup>28</sup> The Roman traditions are obviously still visible, but over time, the legislators have been moving away from the Roman template and moving towards regulations that reflect their national customs and needs.<sup>29</sup> In this sense, the differences in the specific legal regulations of European countries is not unique to inheritance law.

The national regulations' divergence problem in the area of the civil law was recognized in the European Union long ago.<sup>30</sup> Numerous attempts have been made to change the status quo and to harmonize the binding regulations of each nation. This process is referred to as the approximation, harmonization, and adaptation of laws (in the doctrine of individual countries this process has various names) and it began some time ago and is well advanced.<sup>31</sup> However, in the context of private law in the European Union, there have been talks about achieving wide-ranging harmonization since at least the 1970s, when there were demands in the European Economic Community for the adoption of a European Civil Code.<sup>32</sup>

Much of Europe's realized civil law harmonization has been driven primarily by the law of obligations (both contractual and non-contractual).<sup>33</sup> The EU's various institutions, as well as the academic field, have created such harmonization projects in this area of law.<sup>34</sup> The academic projects in particular strongly support the idea of integration and serve as a valuable source of legal solutions and legislative inspiration.<sup>35</sup> Such projects include the Principles of European Contract Law ("PECL"), the Principles of the

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27. *Id.*

28. See WALTER L.J. PINTENS, TOWARDS A IUS COMMUNE IN EUROPEAN FAMILY AND SUCCESSION LAW? A PLEA FOR MORE HARMONISATION THROUGH COMPARATIVE LAW 24-34 (2012).

29. For example, the protection of relatives of the testator has evolved significantly. See generally Mieke Puelinckx-Coene, *La Protection des Différents Membres de la Famille par le Droit Familial Patrimonial en Europe*, 12 EUR. REV. PRIV. L. 143 (2004) (covering the many different techniques and protections European countries have adopted).

30. ZALUCKI, *supra* note 8, at 24-26.

31. STEFAN LEIBLE, WEGE ZU EINEM EUROPÄISCHEN PRIVATRECHT: ANWENDUNGSPROBLEME UND ENTWICKLUNGSPERSPEKTIVEN DES GEMEINSCHAFTSPRIVATRECHTS 6-8 (2001); Bob Brouwer & Jaap Hage, *Basic Concepts of European Private Law*, 15 EUR. REV. PRIV. L. 3 (2007) (overviewing the application and development of European private law).

32. See generally Ole Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 267, 286-88 (Mauro Cappelletti ed., 1978) (presenting the idea of a European Uniform Civil Code).

33. Rafał Mańko, *The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture*, 11 Y.B. POLISH EUR. STUD. 109, 115-17 (2008).

34. Cf. Brouwer & Hage, *supra* note 31, at 4-5 (identifying a unified set of values to allow for effective harmonization); Olha O. Cherednychenko, *The Harmonisation of Contract Law in Europe by Means of the Horizontal Effect of Fundamental Rights?*, 1 ERASMUS L. REV. 37, 52-56 (2007) (arguing that harmonization of contract law in Europe should be accomplished by the legislature).

35. See Olivier Moréteau, *A Summary Reflection on the Future of Civil Codes in Europe*, in FESTSCHRIFT FÜR HELMUT KOZIOL ZUM 70. GEBURTSTAG 1139, 1144 (2010).

Existing EC Contract Law (Acquis Principles), or the Draft Common Frame of Reference (“DCFR”).<sup>36</sup>

These projects aim to build some sort of bridge between the two legal systems—civil law and common law. In particular, consumer protection laws have received significant attention.<sup>37</sup> As a result, principles regarding unfair commercial practices or concluding contracts on remote basis have been unified.<sup>38</sup> The governing bodies believe that within the European market, the legal relationships (especially the cross-border ones) require a more or less uniform approach, a common protection and guarantee system, or a universal catalogue of measures which serve to fulfill EU citizens’ claims.<sup>39</sup>

The draft Common European Sales Law (“CESL”),<sup>40</sup> which is likely to become European law, is the result of this effort.<sup>41</sup> It is important to note that while all of these projects are under the auspices of a common, single European Civil Code; to this day, such a Code has existed only in the postulational sphere.<sup>42</sup> In no way is it a foregone matter whether such a

36. See generally Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, 28 OXFORD J.L. STUD. 659 (2008) (highlighting the development of European private law through a draft European Contract Law); Martijn W. Hesselink, *The Principles of European Contract Law: Some Choices Made by the Lando Commission*, 1 GLOBAL JURIST FRONTIERS i (2001) (providing an overview of the Principles of European Contract Law); Nils Jansen & Reinhard Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the ‘Principles of the Existing EC Contract Law,’* 71 MOD. L. REV. 505 (2008) (describing the Principles of the Existing EC Contract Law as more a draft of “desirable rules”); Hans-W. Micklitz, *The Principles of European Contract Law and the Protection of the Weaker Party*, 27 J. CONSUMER POL’Y 339 (2004) (analyzing the Principles of European Contract Law as they apply to consumer protection law); Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 479 (2009) (concluding that European private law is still improving).

37. See Marco B.M. Loos, *The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization: On the Disturbance and Reconstruction of the Coherence of National Contract Law and Consumer Law Under the Influence of European Law*, 15 EUR. REV. PRIV. L. 515, 518–19 (2007).

38. This includes the following harmonization acts: see generally Directive 2011/83/EU of the European Parliament and of the Council, 2011 O.J. (L 304) 64 (“Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders.”); Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (“The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.”).

39. Vanessa Mak, *Standards in European Private Law: A Model for European Private Law Pluralism* 17–18 (Tilburg Law Sch. Legal Studies Research Paper Series, No. 015/2013, 2013), <https://ssrn.com/abstract=2302562>.

40. Larry A. DiMatteo, *Common European Sales Law: A Critique of Its Rationales, Functions, and Unanswered Questions*, 11 J. INT’L TRADE L. & POL’Y 222, 222 (2012); Karolina Norris, *Common European Sales Law: A Missed Opportunity or Better Things to Come?*, 37 BUS. L. REV. 29, 29 (2016); Ursula Pachl, *The Common European Sales Law—Have the Right Choices Been Made? A Consumer Policy Perspective*, 19 MAASTRICHT J. EUR. & COMP. L. 180, 180 (2012).

41. See Ewoud Hondius, *Towards an Optional Common European Sales Law*, 19 EUR. REV. PRIV. L. 709, 711–15 (2011).

42. See HUGH COLLINS, *THE EUROPEAN CIVIL CODE: THE WAY FORWARD* 89–90 (2008).

European Civil Code will ever be created,<sup>43</sup> and if so, what form it would take or what it would include.

So far, however, unlike consumer protection laws, European institutions have not sought to harmonize substantive inheritance law. Perhaps this is because some scholars and legislators think that inheritance law does not, in principle, fall within the competence of the European Community.<sup>44</sup> Furthermore, according to many scholars, in the primary law there were not sufficient grounds to carry out the unification of that law.<sup>45</sup>

Granted, until recently, European scholars considered international inheritance law as irrelevant since there were not many problems of cross-border character and property was rarely purchased abroad. Even in 2009, Reinhard Zimmermann, the Director of Max Planck Institute for Comparative and International Private Law, (which is one of the most important institutions dedicated to performing foundational research and promoting the transfer of knowledge in the field of comparative and international private law), called this area the “virgin territory” because it has been neglected by modern scholarship.<sup>46</sup>

Fortunately, relatively tentative voices are trying to bring about change, and the frequent argument regarding significant cultural, social, or economic differences, which allegedly prevent the harmonization of inheritance law, has been proven invalid.<sup>47</sup> A closer look at the specific national inheritance law regulations coupled with mass migration have equally contributed to the continuous blurring of the insurmountable differences. Now social assimilation is so advanced that uniform legal standards is essential.

It is also promising that despite major differences across legal systems, common features may be found<sup>48</sup>: intestate and testate succession, protection of the kin of the testator, and liability for the inherited debts.<sup>49</sup> For example, the *Comparative Succession Law* group, led by Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann sought to analyze this area of law by looking for common elements in national inheritance regulations.<sup>50</sup> In

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43. See generally Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997) (advising that a European Civil Code should not be created).

44. See Rafał Mańko, *Kompetencje Unii Europejskiej w dziedzinie prawa prywatnego w ujęciu systemowym*, 25 KWARTALNIK PRAWA PRYWATNEGO 37 (2016) (identifying the expanses and limits of European private law).

45. See, e.g., Alain-Laurent Verbeke & Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, in TOWARDS A EUROPEAN CIVIL CODE 459, 462–63 (Hartkamp et al. eds., 4th ed. 2011); Cordula Stumpf, *EG-Rechtssetzungskompetenzen im Erbrecht*, 42 EUROPARECHT 291, 291 (2007).

46. Zimmermann, *supra* note 36, at 504.

47. Cf. COLLINS, *supra* note 42, at 45–46.

48. See PINTENS, *supra* note 28.

49. Cf. ZAŁUCKI, *supra* note 8, at 145–48.

50. With a long-term program to explore selected topics in the law of succession from historical and comparative perspective. See generally 1 COMPARATIVE SUCCESSION LAW:



addition, *The Perspectives of the Europeanization of the Law of Succession*<sup>51</sup> was supported by the European Commission, Directorate—General Justice, Freedom and Security.<sup>52</sup>

Although never officially admitted, and in a somewhat accidental way, EU institutions have become interested in inheritance-law harmonization. However, instead of change coming directly from particularized efforts, many of the changes have become mere coincidences of the changing societal needs.

In turn, at the EU Community level the announcement to begin work on a European instrument in matters of the inheritance appeared in the so-called Vienna Action Plan of 1998.<sup>53</sup> Under the Plan's directives, in 2002, the German Notaries' Institute in Würzburg announced efforts to harmonize the international inheritance law. This project was announced in Brussels in 2004.<sup>54</sup> At the same time, The Hague Programme of the European Council from 2004 called on the Commission of the European Communities to present a Green Paper that explored the whole issue of international inheritance law.<sup>55</sup> The initiative by the Commission was especially notable because, at the time, the dominant view concerning harmonization of inheritance law was that it lacked legal grounds.<sup>56</sup> Nevertheless, the Commission recognized the need to simplify cross-border inheritance and to create a Community instrument to deal with documents and extrajudicial acts. In 2005, the Commission issued the Green Paper on Succession and Wills ("Green Paper").<sup>57</sup>

### III. FIRST ATTEMPTS TO NEUTRALIZE DIVERGENCES IN THE AREA OF INHERITANCE LAW

By the beginning of the 21st century, the perspectives on uniform inheritance law had changed. The prior difficulties and hurdles proved to be insignificant in the face of further European integration. The Green Paper

TESTAMENTARY FORMALITIES (Kenneth G.C. Reid et al. eds., 2011) (comparing inheritance laws in hopes of updating the outdated laws).

51. The research project has many different goals. See *Civil Justice Project "The Perspectives of Europeanization Law of Succession,"* TURIBA UNIV., <http://www.turiba.lv/en/bizness-zinatne/research/projects/civil-justice-project/313> (last visited Apr. 12, 2018).

52. ZALUCKI, *supra* note 8, at 17.

53. Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security, and Justice, ¶ 41(c), 1999 O.J. (C 19) 1, 10.

54. Richard Frimston, *Brussels IV? Conflicts of the Laws of Succession in the European Union: Perspectives for Harmonisation*, 6 PRIVATE CLIENT BUS. 351, 351 (2004).

55. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 O.J. (C 53) 1, 13.

56. Even the European Parliament said that the harmonization of the Member States' substantive law on succession falls outside the scope of the Community. Cf. Resolution with Recommendations to the Commission on Succession and Wills, EUR. PARL. DOC. 2148(INI) (2005).

57. *Green Paper: Succession and Wills*, at 1, COM (2005) 65 final (Mar. 1, 2005).

become a tool that resulted in further endeavors to pursue uniformity of EU inheritance laws.

A. *THE GREEN PAPER ON SUCCESSION AND WILLS*

The Green Paper opened the discussion on the rules of succession *ab intestate*, or testamentary inheritance, and aimed to tackle institutional harmonization. It was also a response to the Programme from the summit of the European Council in The Hague in 2004.<sup>58</sup> The Green Paper (signed in The Hague) referred primarily to the regulations of two Conventions<sup>59</sup>: (1) The Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (concluded on October 5, 1961);<sup>60</sup> and (2) The Convention of 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (concluded on August 1, 1989)<sup>61</sup> and largely contained considerations on the scope of the statute on inheritance law, the choice of the relevant law, the rules on jurisdiction, and the recognition and the enforcement of decisions in matters of inheritance.<sup>62</sup>

The observations “were related primarily to the issue of the so-called cross-border inheritance, . . . [or a] legal situation where there is a conflict of several overlapping systems of substantive law, necessary to be resolved by the given legislation.”<sup>63</sup> In addition, the Commission formulated 39 questions to the people potentially interested in these issues, and primarily related to the relevant law and the jurisdiction of courts in probate matters, the ways to certify the qualifications of heirs or administrators of the estate or the register of wills.<sup>64</sup> However, at the time of the Green Paper’s release, the total harmonization of substantive inheritance law in the Member States could not be taken into account, and therefore, it was necessary to act only in reference to the conflict of rules. Indeed, the Commission asserted that, at the community level, there could be no progress in the field of the inheritance

58. *Id.* at 3.

59. *Id.*

60. *See generally* Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, 510 U.N.T.S. 175. The Convention is the culmination of the work of the eighth and the ninth sessions of The Hague conference. *Id.*

61. *See generally* Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, 28 I.L.M. 150. The Convention is the culmination of the work of the sixteenth session of The Hague Conference. *Id.*

62. *See generally Green Paper: Succession and Wills, supra* note 57 (addressing the findings and recommendations of recent European legislation on succession and wills).

63. *See* ZAŁUCKI, *supra* note 8, at 24–27.

64. The issues in the Paper have been discussed in many countries. *See generally* Jadwiga Pazdan, *Ku jednolitemu międzynarodowemu prawu spadkowemu*, 15 REJENT 9, 9–21 (2005) (discussing the feasibility of international inheritance law); Philip D. Bremner, Bridging the Gap Between Civil and Common Law: An Analysis of the Proposed EU Succession Regulation (Sept. 20, 2010) (unpublished Masters Thesis, University of Aberdeen), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2632147](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632147) (concluding that there is work to be done in establishing uniform international inheritance law).

law without prior consideration of the relevant law. Therefore, it did not exclude the possibility of total harmonization, but it believed that it was first necessary to unify the rules of conflicts of law.<sup>65</sup>

The Green Paper did not provide for ready-made solutions. Rather it only attempted to identify, in a complex way, the problems associated with inheritance and the legal status of inheritance estates left on the territory of the European Union.<sup>66</sup> Given the function of the Green Paper, the document did not contain any proposals for specific regulations, and only indicated areas for reflection on the future shape inheritance law in the European Union.<sup>67</sup> In the end, the Commission's focus on resolving conflicts of law would become the core aspect of the resulting legislative initiative in Europe.<sup>68</sup>

After the Green Paper, the next steps were to proceed to the preparation and implementation of a single European normative act regulating the issue of the inheritance in instances of conflicts of law.<sup>69</sup> This act was intended to harmonize the national regulations. Of course, people expressed concerns over whether this task was feasible at all given the fundamental differences in each Member State's approach to certain issues.<sup>70</sup> Some critics even claimed that

the concept of works on one comprehensive normative act must be dismissed at the outset as posing a very serious risk of stretching the works in time, without a prospect of any specific solutions within a reasonable time. It remains questionable, moreover, whether inheritance law requires any unification in the EU and it can be assumed that some objections to this idea will be formulated. Therefore, it seems reasonable to postulate that works on the European instrument should proceed according to the system of "small steps". The priority should be given to works on solutions to specific problems that turn out to be the most troublesome for the practice. Among the issues, the

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65. Jonathan Harris, *The Proposed EU Regulation on Succession and Wills: Prospects and Challenges*, 22 TR. L. INT'L 181, 181 (2008).

66. Frimston, *supra* note 54.

67. Marie-Christine de Lambertey-Autrard, *Quel Droit Européen en Droit Patrimonial de la Famille? Le Livre Vert sur les Successions et les Testaments*, 129 INFORMATIONS SOCIALES 84, 84-85 (2006).

68. Paul Terner, *Perspectives of a European Law of Succession*, 14 MAASTRICHT J. EUR. & COMP. L. 147, 171 (2007).

69. Cf. Naiví Chikoc Barreda, *Reflexiones Sobre los Regímenes Especiales en Derecho Internacional Privado Sucesorio Según el Reglamento Europeo 650/2012 de 4 de Julio de 2012*, 6 CUADERNOS DE DERECHO TRANSNACIONAL 121, 122-23 (2014); Jennifer Bost, *Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions*, 27 EMORY INT'L L. REV. 1145, 1149-53 (2013).

70. See generally M. ESPERANÇA GINEBRA MOLINS & JAUME TARABAL BOSCH, *EL REGLAMENTO (UE) 650/2012: SU IMPACTO EN LAS SUCESIONES TRANSFRONTERIZAS* (2016) (highlighting the millions of Europeans that will be positively impacted by the Council Regulation).

most oppressive seem to be the ones of the applicable national jurisdiction in matters of inheritance and the procedure for the determination of inheritance. The next appropriate step seems to be unifying the conflict of laws rules of material nature (indicating the law relevant to the assessment of the effects of the inheritance opening), for the purpose of avoiding positive and negative conflicts concerning the jurisdiction.<sup>71</sup>

Despite these concerns, the work on unifying inheritance law in the European Union continued and led to the adoption of an EU act of law which governs the issues of the international inheritance law. On July 4, 2012, the European Parliament and the Council of the European Union adopted Regulation (EU) No 650/2012 “on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and” created the European Certificate of Succession.<sup>72</sup> This act of law is called the “EU Succession Regulation” or “Brussels IV.”<sup>73</sup>

#### B. EU SUCCESSION REGULATION

The EU Succession Regulation (“Regulation”) is the next level of integration within the European Union and is the first clear manifestation of institutional harmonization of inheritance law in the European Union (“EU”). The EU legislature intended for the Regulation to eliminate the existing legal barriers to the free movement of persons that result from the individual Member States’ different inheritance regulations. The rules aimed to resolve jurisdictional disputes in inheritance matters with a cross-border element and to provide grounds for the recognition and enforcement of judgments issued by one Member State by the competent authorities of another Member State.<sup>74</sup> In addition, the Regulation provides for “the creation of [the] European Certificate of Succession,” an institution which is meant to allow a rapid examination of international inheritance cases and to facilitate persons residing in the EU Member States claiming their property rights acquired on the grounds of a single title under the inheritance law.<sup>75</sup> However, this instrument does not introduce any harmonization of the national standards on substantive inheritance law. The Regulation was

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71. ZAŁUCKI, *supra* note 8, at 26 (quoting Wojciech Machała, *Zielona Księga. Prawo Spadkowe i Testamenty*, WIADOMOŚCI OŚRODKA BADAŃ ADWOKATURY 21 (2006)) (footnote omitted).

72. Council Regulation 650/2012, 2012 O.J. (L 201) 107, 107.

73. See Max Atallah, *The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)*, 5 BALTIC J. EUR. STUD. 130, 130 (2015); Frimston, *supra* note 54.

74. See Council Regulation 650/2012, ¶¶ 5–6, 2012 O.J. (L 201) 107.

75. Christian Hertel, *European Certificate of Succession—Content, Issue and Effects*, 15 ERA F. 393, 393–95, 393 n.1 (2014); see Richard Crône, *Le Certificat Successoral Européen*, in DROIT EUROPÉEN DES SUCCESSIONS INTERNATIONALES: LE RÈGLEMENT DU 4 JUILLET 2012, 169, 171 (2013).

published in the Official Journal of the European Union on July 27, 2012, and entered into force on August 16, 2012, with the reservation that it would be applicable in relation to the succession of the deceased, beginning on August 17, 2015.<sup>76</sup>

### 1. Article 4 of the Regulation

Article 4 of the Regulation established a general principle for the Member States' jurisdiction in matters of succession. According to this provision, the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.<sup>77</sup> Jurisdiction is thus determined by the habitual residence of the deceased at the time of his death.<sup>78</sup> "This principle is undoubtedly the backbone of the system of succession established by the Regulation . . ." <sup>79</sup> The term "habitual residence" refers to the place where the testator had his center of life and thus it becomes the primary connector with the EU international law of succession.<sup>80</sup> It is an expression of the relationship between a particular decedent, a State, and the laws of that State.

Recall that prior to the Regulation, jurisdiction, and applicable law were inconsistently determined.<sup>81</sup> For example, in determining applicable law, not only one connector (usually the nationality), but two connectors were used, due to the submission of the estate inheritance (or other specified categories of goods, such as businesses) to the law of their location place. That determination of applicable law led to the collision divisibility of the estate (also known as a collision fragmentation of the estate) in which the succession is divided into separate assets subject to inheritance by different substantive laws requiring courts in different countries often ruled. This is in contrast to the so-called collision uniformity of succession, also known as a uniformity of the succession status, where the applicable succession law is indicated with a

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76. Council Regulation 650/2012, art. 83, 2012 O.J. (L 201) 133. *But see* Caroline Davidsson, *The Consequences of England's Decision Not to Opt into the Proposed EU Regulation on Succession and Wills 1* (Autumn 2010) (unpublished Master Thesis, Lund University), <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1979828&fileId=1982118> ("[A] non opt in by England would lead to legal uncertainty, less predictability and higher costs for legal advice for citizens planning cross-border successions with a connection to England and other Member States as well as for those entitled to a share of the deceased's estate.").

77. ANDREA BONOMI & PATRICK WAUTELET, *LE DROIT EUROPÉEN DES SUCCESSIONS: COMMENTAIRE DU RÉGLEMENT N<sup>o</sup>. 650/2012 DU 4 JUILLET 2012*, at 29–31 (2d ed. 2016).

78. Atallah, *supra* note 73, at 131–32.

79. Mariusz Załucki, *New Revolutionary European Regulation on Succession Matters. Key Issues and Doubts*, 3 *REV. DERECHO CIV.* 165, 168–69 (2016).

80. Giovanna Debernardi, *Le Règlement Européen Sur Les Successions Et Nouvelles Perspectives Pour Les Systèmes Juridiques Nationaux* 53 (May 31, 2017) (unpublished Doctoral Thesis, Università Degli Studi di Torino & Université Côte D'Azur), <https://tel.archives-ouvertes.fr/tel-01564138/document>.

81. See ZAŁUCKI, *supra* note 8, at 21–26.

single connector.<sup>82</sup> In these cases, the succession estate as a whole can be inherited under one substantive law.<sup>83</sup>

In fact, from the very beginning of the Regulation the EU legislator opted for collision uniformity of the succession.<sup>84</sup> This idea was met with the widespread acceptance.<sup>85</sup> As a result, the Regulation promulgates provisions based on the connector of the habitual residence of the deceased. The justification for the use of this connector, both for jurisdiction, as well as for substantive law, was included in Recital 27 of the Regulation. Recital 27 states that “[t]he rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law.”<sup>86</sup> This solution eliminates the need to examine and interpret foreign legal regulations.<sup>87</sup>

Most importantly, Article 4 of the new EU normative act effectively creates a situation where the court of a Member State, in principle, will apply its domestic law to the succession case.<sup>88</sup> Overall, the Regulation’s jurisdictional rules intend to allow a relatively broad jurisdiction in succession matters, and to facilitate conducting a succession case in a convenient place, especially for the heirs of the decedent.

## 2. Article 21 and 22 of the EU Succession Regulation

From the viewpoint of some European national legal systems, the Regulation’s mechanisms of determining the law applicable to the succession are a breakthrough solution.<sup>89</sup> Pursuant to Paragraph 23, the law applicable to the succession as a whole shall be the law of the Member State in which the deceased had his habitual residence at the time of death.<sup>90</sup> The connector of substantive law is therefore the same as in jurisdiction. The Regulation, however, does not limit connectors to only the connector of habitual residence. The connector can also be the testator’s choice of law. According to Article 22, every testator “may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of

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82. Cf. Council Regulation 650/2012, ¶¶ 1–83, 2012 O.J. (L 201) 107, 107–16.

83. See *id.* at 118 art. 4 (discussing the jurisdiction to be applied in matters of succession).

84. Frimston, *supra* note 54, at 351–53.

85. See generally Jürgen Basedow et al., MAX PLANCK INST. FOR COMPARATIVE & INT’L PRIVATE LAW, *Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*, 74 RABEL J. COMP. & INT’L PRIV. L. 522 (2010) (elaborating on the creation of a European Certificate of Succession).

86. Council Regulation 650/2012, ¶ 27, 2012 O.J. (L 201) 110.

87. See generally Paul Lagarde, *Les Principes de Base du Nouveau Règlement Européen Sur Les Successions*, in 101 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 691 (2012) (explaining the idea of uniformity of applicable law and jurisdiction in succession cases).

88. See Council Regulation 650/2012, art. 4, 2012 O.J. (L 201) 118.

89. As I have already explained in different paper. See Zalucki, *supra* note 79, at 170.

90. Council Regulation 650/2012, ¶ 23, 2012 O.J. (L 201) 109.

making the choice or at the time of death.”<sup>91</sup> The testator’s choice of law right is, moreover, a very interesting instrument, and Article 22 is one of the most important articles in the Regulation.<sup>92</sup>

Besides testators who will have more than one nationality and therefore a wider choice, the testator’s choice of applicable law is limited. This is because in the past, Member States did not use the choice of law applicable to the succession in their respective regulations concerning conflicts of laws.<sup>93</sup> However, there were some regulations, like in Poland, where the choice of law approach was a bit more comprehensive.<sup>94</sup> In the Recital 38 to the Regulation, the EU legislator rationalizes choice of law limitations by grounding it in the overarching intention “to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.”<sup>95</sup> But, “[t]hese restrictions do not seem to be justified.”<sup>96</sup>

In practice, the Regulation’s choice of law clause may help to prevent the chaos that would ensue if the law of the habitual residence of the decedent differed significantly from the national law of the testator. This will depend, however, on the intention of the testator, who either will make the choice of his national law, or will leave the law applicable to his succession to the provisions of Regulation, and thereby rely on the connector of the place of habitual residence.

If, however, the testator relies on the connector, Article 20 of the Regulation specifies that the law of the testator’s place of resident shall apply regardless of whether or not that law is the law of the Member State overseeing the succession case.<sup>97</sup> Therefore, if a Member State court will have jurisdiction over the succession (*forum*), which is established pursuant to Article 4 of the Regulation, and the case will fall within the scope of the Regulation application,<sup>98</sup> then this act, as a general regulation of the EU collision law in matters of succession will be the grounds to indicate the applicable substantive law (*ius*). In essence, the Regulation grants a prescription to apply the substantive inheritance law specified by the Regulation for the whole of

91. *Id.* art. 22(1), 2012 O.J. (L 201) 120.

92. As can be best judged, there is a tendency to extend the party autonomy in the area of succession law. *See, e.g.*, Erik Jayme, *Party Autonomy in International Family and Succession Law: New Tendencies*, 11 Y.B. PRIV. INT’L L. 1, 1–3 (2009).

93. *See* Magdalena Pfeiffer, *Choice of Law in International Family and Succession Law*, 2 LAW. Q. 291, 295–97 (2012).

94. *See supra* note 19 and accompanying text.

95. *Cf.* Council Regulation 650/2012, ¶ 38, 2012 O.J. 111.

96. *Cf.* Załucki, *supra* note 79, at 173.

97. Council Regulation 650/2012, art. 20, 2012 O.J. 120.

98. *See id.* at 116 art. 1(1) (“This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.”).

the succession.<sup>99</sup> This means that the EU legislator has introduced the principle of a uniform succession status, which prevents fragmentation of the succession status due to the application of the Member States' conflict rules.

Yet, this uniform succession status also creates problems for immovable property or property rights whose nature differs under the different European legal systems. It is true that the Regulation foresees the concept of adapting property rights in Member States where the property right being invoked is not known to that Member State's law. In such case, the Regulation provides that this right is subject to adaptation to the closest equivalent property right under the law of that State, taking into account the objectives and interests served by the specific property right and the effects attached to it.<sup>100</sup> In practice, however, this will not be so obvious or simple.<sup>101</sup>

### 3. The European Certificate of Succession

The advent of the European Certificate of Succession ("ECS") has also proven to be an extremely important component of the European inheritance law system. The new solution was highly desired because the previous practice of documenting rights to inheritance was extremely varied.<sup>102</sup> For example, in the case of distributed inheritance that is located in the territory of more than one country, an heir attempting to demonstrate his powers often had to initiate several succession proceedings before the authorities of different countries.<sup>103</sup> This was obviously unsatisfactory and oftentimes led to questionable and conflicting decisions in different countries. Identification of the heirs, legatees, executors of wills or administrators of estates, especially in the cross-border context, also proved difficult prior to the ECS. Indeed, succession rights issued in accordance with the provisions of an individual Member States only invokes effects in that Member State and does not automatically extend to other European Union

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99. See generally Tena Ratković, *Private International Law Aspects of Succession—The Croatian Experience*, 13 ANALI PRAVNOG FAKULTETA UNIVERZITETA U ZENICI 8 (2014) (comparing the jurisdictional results sought in the Council Regulation to the law of Croatia); Isabel Rodríguez-Uría Suárez, *La Ley Aplicable a las Sucesiones Mortis Causa en el Reglamento (UE) 650/2012*, 2 INDRET 1 (2013) (discussing the applicable law to successions based on the EU Council Regulation); Felix M. Wilke, *Das Internationale Erbrecht Nach der Neuen EU-Erbrechtsverordnung*, 58 RECHT DER INTERNATIONALEN WIRTSCHAFT 601 (2012) (describing international succession law).

100. Celia Martínez-Escribano, *Consequences of the European Succession Regulation in European Property Law*, 3 EUR. REV. PRIV. L. 553, 565–69 (2017).

101. Cf. Załucki, *supra* note 79, at 172–74.

102. See generally Jens Kleinschmidt, *Optionales Erbrecht: Das Europäische Nachlasszeugnis als Heraysforderung an das Kollisionsrecht*, 77 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 723 (2013) (identifying challenges in the harmonization efforts of the Council Regulation).

103. See generally Mirosława Pytlewska-Smółka, *Europejskie poświadczenie spadkowe*, 67 NOWY PRZEGLĄD NOTARIALNY 21 (2016) (discussing European succession impacts).



countries.<sup>104</sup> Not surprisingly, the “identification of heirs and other entities entitled on a transnational scale” through the use of a single document was an important goal of the Regulation from the outset.<sup>105</sup>

The ECS was created pursuant to Article 62 of the Regulation.<sup>106</sup> The certificate allows documentation of

- (a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate; (b) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate; [and] (c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.<sup>107</sup>

Furthermore, under Article 69 the ECS does not require a special procedure in order to take effect in any of the Member States.<sup>108</sup> The ECS is presumed to accurately demonstrate the elements established under the law applicable to the succession or under any other law applicable to specific elements of succession.<sup>109</sup> The person mentioned in the ECS as the heir, legatee, executor of the will, or administrator of the estate is presumed to have the status mentioned in the certificate and/or to hold the rights or the powers stated in the certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.<sup>110</sup>

The adoption of the of the EU Succession Regulation was a significant challenge. The links between inheritance cases and national laws applied in the Regulation, and particularly the reference to the habitual place of residence of the testator is a specific *novum*, which breaches the previous tradition of some of the European countries.<sup>111</sup> Despite the Regulation’s efforts to unify the principles of international inheritance law throughout the EU, it raises significant issues in practice. One problem stems from trying adjust the national legal systems to meet the requirements of the Regulation, especially since some of the Regulation’s components have not been regulated in an exhaustive manner. In addition, the Regulation is a legal act to comprehensively regulate the issues of the international inheritance law of

104. See MARCIN MARGOŃSKI, CHARAKTER PRAWNY EUROPEJSKIEGO POŚWIADCZENIA SPADKOWEGO: ANALIZA PRAWNOPORÓWNAWCZA AKTU POŚWIADCZENIA DZIEDZICZENIA I EUROPEJSKIEGO POŚWIADCZENIA SPADKOWEGO 36–37 (2015).

105. Załucki, *supra* note 79, at 175.

106. Council Regulation 650/2012, art. 62, 2012 O.J. (L 201) 107, 128.

107. *Id.* art. 63(2), 2012 O.J. (L 201) 128.

108. *Id.* art. 69, 2012 O.J. (L 201) 130.

109. Elise Goossens, *A Model for the Use of the European Certificate of Succession for Property Registration*, 3 EUR. REV. PRIV. L. 523, 535 (2017).

110. Jerzy Pisuliński, *Europejskie poświadczenie spadkowe*, in ROZPRAWY CYWILISTYCZNE: KSIĘGA PAMIĄTKOWA DEDYKOWANA PROFESOROWI EDWARDOWI DROZDOWI 619 (2013) (detailing the ECS).

111. See, e.g., *supra* notes 93–96 and accompanying text.

the European Union.<sup>112</sup> Indeed, in accordance with Recital 9, the Regulation applies to “all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.”<sup>113</sup> Yet, not all of the instruments provided for in the Regulation may be applied without specific adjustment of the Member State’s national laws. This means that although the Regulation remains at odds with some national laws, it has been binding upon succession cases since August 17, 2015.<sup>114</sup>

At the same time, the Regulation is still in its earliest stages of incorporation. The national courts have struggled—and expressed some doubts—in response to the Regulation in practice. And while there has not been much discussion to address or even identify the Regulation’s problems, time will tell the inherent difficulties that must be addressed. Nevertheless, the next Part seeks to look into the future and examine the difficult or even impossible to resolve issues that the Regulation creates.

#### IV. NEW OBSTACLES TO NEUTRALIZE

##### A. COEXISTENCE OF ECS AND NATIONAL CERTIFICATES

Recall that one of the largest practical problems in this area of law prior to the adoption of the Regulation was the documentation of entitlement to inheritance. The previous legal regime required the heir of dissipated inheritance (i.e. one that was located in the territory of more than one country) to instigate several cases of inheritance before the authorities of various countries in order to prove their entitlement.<sup>115</sup> As it may be imagined—and was proven in practice—this was not satisfactory. The response was supposed to be the European Certificate of Succession.<sup>116</sup> However, there are some doubts that the Regulation achieved this goal. For example, one of the major problems stems from the competent Member State issuing a document confirming the acquisition of the entitlement to inheritance in a previously binding form. This problem existed before the Regulation and the Regulation has left it unaddressed. The Certificate does not replace the internal documents used by the Member States for similar purposes. There is also another problem: if a Member State has already issued the European Certificate of Succession, is the issuance of a national instrument documenting the acquisition of inheritance (in the same or another country) groundless or does the Regulation allow for such document to be issued? While the existence of two documents, if permitted, does not

112. See Council Regulation 650/2012, ¶¶ 56–57, 2012 O.J. (L 201) 113.

113. *Id.* ¶ 9, 2012 O.J. (L 201) 108.

114. See *id.* at 133 art. 83(1).

115. Basedow et al., *supra* note 85, at 605–06.

116. Pytlewska-Smólka, *supra* note 103 (providing an overview of the ECS).

present a serious problem, a problem does appear if the documents are of different content, which is quite possible in practice. Again, the Regulation allows this problem to go unsolved. There is, of course, a possibility to instigate a procedure aimed at waiving either the European Certificate of Succession or the national document confirming inheritance entitlement found in Article 71.2 of the Regulation,<sup>117</sup> but the consequence of such procedure is not yet clear. The interrelation between the national documents and the European Certificate of Succession is uncertain and must eventually be resolved by a verdict of the European Court of Justice. The verdict is expected this year, in the case C-20/17 Vincent Pierre Oberle.<sup>118</sup> However, even now, before it is issued, it can be predicted that it will not solve all the doubts.

B. *LEGATUM PER VINDICATIONEM*

Another problem with the Regulation provisions application, and one which has already been referred to the European Court of Justice, is whether one of the provisions (legacy by vindication—*legatum per vindicationem*) of material effect in one country, is effective in a situation when it refers to property located in another country whose laws do not provide for such legacies to have direct material effect (i.e. where the death of the legator does not result in an automatic transfer of the object of the legacy to the legatee).<sup>119</sup> This was exactly the issue in case C-218/16, and the Polish court filed a request to the European Court of Justice for preliminary ruling. On May 17, 2017, the Advocate General of the European Court of Justice<sup>120</sup> recommended that the Court provide a preliminary ruling in accordance with which a Member State is not allowed to refuse the acceptance of the material effects of the legacy by vindication (*legatum per vindicationem*) of the inheritance law if the regulation applies to the ownership title to a property located in a Member State whose legislation does not provide for a direct material effect.<sup>121</sup> Underlying this opinion was the view that the Regulation was meant to effectively respond to the need for clarity in collision of legal and judicial standards of inheritance law.<sup>122</sup> This harkens directly to the aim outlined in the Regulation's recital that: "In the European area of justice, citizens must be able to organise their succession in advance, [and] [t]he proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in

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117. Cf. Council Regulation 650/2012, art. 71(2), 2012 O.J. 131.

118. See Case C-20/17, Oberle, 2017 O.J. (C 112) 19, 19.

119. See Case C-218/16, Kubicka, 2016 O.J. (C 335) 30, 30.

120. In the procedure before the Court, the role of the advocate is to prepare an opinion with regard to hearing the case which has been filed, but the opinion is not binding.

121. See generally Case C-218/16, Kubicka, 2017 E.C.R. 755 (ruling on *legatum per vindicationem*).

122. *Id.*

asserting their rights in the context of a succession having cross-border implications.”<sup>123</sup>

The European Court of Justice shared this view in its October 12, 2017 judgment. It stated that Article 1(2)(k) and (l) and Article 31 of Regulation must be interpreted as precluding a Member State’s refusal to recognize the material effects of a legacy “by vindication,” as provided for by the law governing the succession that is chosen by the testator in accordance with Article 22(1), when that refusal is based on the grounds that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.<sup>124</sup> However, this judgment will likely cause further practical difficulties that will no doubt be the subject of further decisions by the European Court of Justice.

### C. THE SCOPE OF THE REGULATION

Yet another problem arising in the practical application of the Regulation provisions may be seen in another case, which has already been reported to the Court. This case refers to precisely determining the scope of the Regulation within the Member State’s legal regime.<sup>125</sup> There was a doubt whether the application of the national law in accordance with the provisions of the succession Regulation means, among other things, application of such provisions of the national law, which regulate the ownership after the death of one of the spouses by increasing the share of the estate of intestacy of the other spouse.<sup>126</sup> *Mahnkopf v. Mahnkopf*<sup>127</sup> involves a German law, which provides for a unique, privileged status of a spouse whose marriage ended as a result of the death of the other spouse.<sup>128</sup> This is a matrimonial property regime entitled *Zugewinnngemeinschaft*, which means separate estates with adjustment of accrued gains, and consists of the duty to adjust the accrued gains of both of the spouses after the marriage ends.<sup>129</sup> In accordance with this law, in case of a death of a spouse, the accrued gains are adjusted such that the statutory share in the inheritance for the surviving spouse is increased by one-fourth. A doubt has arisen in that regard, whether the EU succession Regulation provisions must also be applied to the national law provisions, such as the aforesaid BGB regime. A consequence of applying the German

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123. Council Regulation 650/2012, ¶ 7, 2012 O.J. (L 201) 107.

124. Case C-218/16, *Kubicka*, 2017 E.C.R. 755.

125. See generally Case C-558/16, *Mahnkopf v. Mahnkopf*, ECLI:EU:C:2017:965 (ruling on the ECS compared to German law).

126. *Id.*

127. *Id.*

128. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1371, [https://www.gesetze-im-internet.de/bgb/\\_1371.html](https://www.gesetze-im-internet.de/bgb/_1371.html) (Ger.).

129. DIRK OLZEN & DIRK LOOSCHELDERS, *ERBRECHT* 50–51 (5th ed. 2005); Puelinckx-Coene, *supra* note 29, at 148.

law in this case would be, for example, the duty to increase the share in the inheritance of the deceased spouse of the testator, even if the succession does not apply to German citizens, but the governing law applicable to inheritance would be the German law. This result might encourage people to identify German law governing, since it would lead to greater rights to inheritance. Therefore, the verdict of the European Court of Justice in this case is especially important for the further application of the succession Regulation. According to the ECJ, a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of EU succession Regulation.<sup>130</sup> Does this clarify the doubts that exist in this area? It can be expected that the ECJ's view will raise further questions in the near future.

*D. DISINHERITANCE AND PROTECTION OF THE PEOPLE CLOSE TO THE DECEASED*

Serious doubts related to the application of the Regulation provisions are also seen in other areas, including the institution of disinheritance of an heir.<sup>131</sup> The main problem in this situation is that disinheritance is not homogeneously understood by all European legal systems.<sup>132</sup> Not all systems provide for such an institution, and those which do apply different principles to the formal requirements and consequences of disinheritance.<sup>133</sup> In addition, the rules applying to the protection of the closest kin of the testator are different, the catalogue of the protected persons are different, and the principles and the allowed reasons for contesting the last will of the deceased are different. Therefore, depriving the heir of the entitlement to benefit from the inheritance in any way will not always be effective. Only unification of that area would enable the use of such institution in practice. By that time, the application of the institution will raise some doubts. Also, in that regard, applications for preliminary ruling must be expected, or requests for clarification of issues which cannot be clarified. Similarly, difficulties may appear as to the priority of the heirs' entitlement to inheritance, or the testator's attempt to extend (using the right of choice indicated in the Regulation) the scope of their freedom in disposing of their property in case of death at the cost of the entitlement of their kin. In particular, this situation occurs when the system of one country provides for limitations in disposing of a part of the inheritance assets, while another country's system will not provide for such limitations. Most importantly, this is only one-step-removed *forum shopping* and searching for the most convenient jurisdiction to handle

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130. Case C-558/16, *Mahnkopf v. Mahnkopf*, ECLI:EU:C:2018:138.

131. Mariusz Załucki, *Disinheritance Against the EU Regulation on Succession (No. 650/2012): Polish Law Perspective*, 4 *EUR. J. ECON., L. & POL.* 16, 17 (2017).

132. *Id.*

133. *Id.*

the case, and acceptance of this practice, may result in many risky verdicts. Again, because the Regulation resulted solely in the unification of the principles of the international inheritance law of the EU, instead of the substantive inheritance law of the particular EU countries, problems like these will remain.

## V. CONCLUSION

In the end, inheritance law harmonization is an endeavor from which contemporary Europe cannot retreat. Past experience shows, however, that achieving such an objective is not simple and requires many years of observing the need and pinpointing the problems which require attention. Despite the fact that the difficulties in applying the inheritance law in the European Union has already been recognized, EU institutions will not be hasty to provide necessary clarification and solutions. This is an unwanted situation since a uniform inheritance law is needed in Europe now. The only solution at the present stage is doctrinal harmonization, which would require comparative research, watching the trends of legislation development and drawing conclusions as to the expected shape of law in the future. This type of approach would quickly result in spontaneous harmonization: a phenomenon of legislative changes among the Member States since the legislators watch specific trends (doctrinal and those originating from other countries) and in response adjust their own laws to the contemporary requirements. After spontaneous harmonization, it is only one step more to achieve institutional harmonization at the EU level. Therefore, in order to fulfill the assumed objective—the harmonization of substantive inheritance law in the European Union in this half of the century—research of the common principles which may become basis for the future European regulation must be carried already today. Only the determination of all common values at the foundation of each specific standard solution may facilitate a closer look and a possible attempt to design new, uniform regulations. Nevertheless, Europe's uniform inheritance law is still in its earliest stage, and all evidence indicates that this phase will last much longer than it should.