Recommendations *

Part I
General considerations

Recommendation # 1

The EU, the Member States and the notarial professional bodies should continue to support and / or organize training activities for notaries, future notaries and all those working in the notarial world in order to improve the expertise in cross-border succession matters, the application of the Regulation and the use of all tools available to notaries, including the European Notarial Network (ENN) and the European Network of Registers of Wills Association (ENRWA).

The new training activities should concentrate on furthering exchanges of experiences between notaries, in particular between notaries from neighboring Member States.

The notarial profession should reflect upon the desirability and the possibility to introduce, in close cooperation with all institutions concerned, a mandatory module on cross-border succession matters in the training of all future notaries.

These training activities should ensure that the notarial profession fully embraces the various innovations of the Succession Regulation and in particular the possibility for all citizens to choose the law applicable to their succession and the possibility to issue a European certificate of successions (ECS).

COMMENT

Notaries and the bodies representing them have undertaken substantial efforts to ensure that notaries and those working in the notarial world possess a good knowledge of the provisions of the Succession Regulation. These efforts have reached a substantial number of notaries and should be continued and further developed. The recommendation invites all those concerned to focus new training activities on exchanges of experiences between professionals. These exchanges could in particular touch on the issue of documents and information needed in order to ensure that a European Certificate of Succession is useful in other Member States.

* In these recommendations, Regulation (EU) No. 60/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (O.J., L-201/107) will be referred to as the 'Succession Regulation'.

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The last part of the recommendation touches upon the legal culture and the practice of notaries. The MAPE project has revealed that while many notaries have fully embraced the innovations of the Succession Regulation, using them to their full potential, not all notaries have done so. Changing the legal culture of a profession is a long-term process which requires education and training.

Recommendation # 2

The notarial profession should discuss with representatives of the banking and insurance industry at EU and national level mutual difficulties in cross-border succession cases. These discussions should aim to raise the awareness of members of the banking and insurance industry about the practical difficulties faced by notaries in their dealings with banks and insurance companies, in particular when gathering information in order to issue an ECS.

COMMENT

The MAPE project has shown that notaries experience substantial difficulties, in particular when issuing ECS or other national documents, in their contacts with the banking and insurance industry. Requests by notaries to obtain information necessary to issue ECS or other national documents remain unanswered or are rejected. Another difficulty faced by notaries is that banks and insurance companies may insist on obtaining an ECS, even though the Regulation leaves the choice to the parties concerned whether to request an ECS or a national document. Likewise, notaries may be faced with a refusal by a bank or insurance company to accept an ECS and a request to use only national documents. All these practical difficulties are compounded when the discussions are carried out across national borders. While the notarial world is fully aware of the constraints limiting the actions of banks and insurance companies, in particular rules on banking secrecy, carrying out open discussions on practical problems could help clarify the mutual position of all actors, for the mutual benefit of all parties involved.

These discussions could also address the problem of legitimation: the study has revealed that notaries are sometimes required by banks to demonstrate their capacity, that they have been instructed to deal with a specific succession matter or even that they are qualified notaries. This can be extremely problematic for a notary, in particular in Member States where notaries are appointed *ex lege* to deal with succession matters. Discussions should attempt to find a practical solution for these difficulties.

If these discussions reveal that there is a need for specific training of banking and insurance staff, the notariat is willing to contribute to provide information on the status of notaries and the role of notaries in the application of the Regulation.

Recommendation # 3

The CNUE, its members and all those involved in the notarial world should continue to ensure that the various tools developed to help, assist and support notaries in their cross-border work, are effectively used by the largest number of notaries and those working in the notarial world.

COMMENT

Thanks to continued support of the EU, the CNUE and its members have developed, on their own or together with partners such as the ENRWA, a number of innovative tools to support notaries involved in cross-border matters. The European Notarial Network (ENN) is an important platform offering both information and the possibility for notaries from different Member States to exchange on technical and practical questions. The European Directory of Notaries offers citizens but also notaries the possibility to find a notary speaking their language in all Member States with civil law notariat. Finally, the various information websites created and maintained by the CNUE offer verified information on the content of the law of a large number of Member States. All these tools, including the European Network of Registers of Wills and ECS's developed by the ENRWA, offer invaluable assistance to solve the difficulties faced by notaries in cross-border matters.

The MAPE project has shown that a substantial number of notaries effectively uses these tools. Still, their dissemination and effective use can be improved. The CNUE and its members should reflect on methods and avenues to promote the use of these tools even more.

Part II
General Provisions of the Succession Regulation

Recommendation # 4

The EU should consider adopting further guidance, helping practitioners determining when a succession presents the required cross-border dimension.

COMMENT

The study conducted among notaries has revealed that notaries occasionally have questions as to the scope of the Regulation. 52% of the notaries who took part in the online survey indicated that in individual cases they have had doubts on whether to apply the Succession Regulation or not. This may have different causes. In some instances, the doubts were linked to the temporal scope of application of the Succession Regulation. One may expect that these difficulties have disappeared over the years. Two other questions seem to be problematic: notaries have pointed out to the cross-border nature of a succession (24%) and to the material scope of the Succession Regulation (26%). The latter issue is addressed in details in the Succession Regulation, which includes i) a general definition of its scope of application (Art. 1 para 1), and ii) a list of excluded matters (Art. 1 para 2). The Court of Justice has also provided some guidance on the application of the Regulation to certain matters[1].

The Succession Regulation does not provide much guidance on the cross-border nature of a succession. Recital 7 of the Regulation merely recalls that the Regulation applies "in the context of a succession having cross-border implications"[2]. In keeping with the tradition of other EU Regulations dealing with private international law, the Regulation does not define the necessary cross-border dimension. While this may not have raised substantial difficulties in other domains, the study has revealed that the lack of guidance on the cross-border nature of a succession may lead to difficulties in succession matters. This may be linked to the fact that succession matters by essence extend over a long period of time. When a person dies, the notary may have to take into account a will drafted decades before. Likewise when a notary is asked to help drafting a will, this will may take effect only in a distant future.

Until now, the Court of Justice has not provided much guidance on this question. In its *Oberle* ruling, the Court noted that when the estate includes assets located in several Member States and in particular in a Member State other than that of the last habitual residence of the deceased, the succession presents the required cross-border dimension[3].

The uncertainty experienced by some practitioners has led Malta to adopt a definition of the cross-border nature of successions in its Civil Code[4]. According to Article 958A of the Civil Code, 'cross-border succession' includes "a succession wherein one or more of the following may occur:

(a) the deceased held property or assets in more than one country; or

(b) the deceased was at the time of his death habitually resident in a country other than the country of which he was a national; or

(c) the deceased made a disposition of property upon death in a country other than the country of which he was a national; or

(d) the beneficiaries of the succession are habitually resident or are nationals in more than one country"

This definition may not answer all difficulties, as cross-border elements may come in different forms depending on the circumstances. Further, the cross-border nature of a succession may only appear after a certain time. Finally, it does not fall in any case to national law to determine the scope of application of an EU instrument. Nonetheless, the example of Malta could offer a basis for further reflection at EU level on additional guidance. This could take the form of a new Recital guiding practitioners more firmly, by providing a number of examples of possible cross-border elements. This Recital should make clear that the list of examples is not meant to be exhaustive.

1 / In *Mahnkof*, the CJUE has held that Article 1(1) of the Regulation should be interpreted as meaning that a provision of national law 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 the Regulation – CJUE, 1 March 2018, *Mahnkopf v. Mahnkopf*, case C-558/16, ECLI:EU:C:138.

2 / Recital 67 of the Regulation also refers to "a succession with cross-border implications".

3 / CJUE, 21 June 2018, *Vincent Pierre Oberle*, Case C-20/17, ECLI :EU :C :2018 :485, para 32. In a later ruling the Court has indicated that the Succession Regulation "refers, non-exhaustively, to other circumstances which can reveal the existence of a succession involving several Member States" : CJUE, 16 July 2020, *E.E.*, Case C-80/19, ECLI:EU:C:2020:569, para. 43.

4 / This definition was adopted in the Various Laws (Succession) (Amendment) Act, 2015 (Act No. XVI of 2015).

Recommendation # 5

Member States in which notaries act as court commissioners should reflect upon the possibility to include notaries in the list of authorities which qualify as court in the sense of Article 2(1) of Regulation 2020/1783 on taking of evidence.

COMMENT

The study has revealed that in some Member States notaries frequently experience important difficulties in getting access to information needed to deal with cross-border succession matters. The difficulty relates to information on the assets of the deceased, in particular of bank assets. It could also concern the particulars of relatives of the deceased. Another important difficulty relates to the access to the content of foreign law. It is addressed in a separate recommendation.

The Succession Regulation does not provide any mechanism or tool which could help notaries in their mission, save in relation to the issuance of a European Certificate of Succession (Art. 66 para 5).

In some Member States, where notaries act as courts, notaries can find limited assistance in the EU Regulation on taking of evidence [5]. Taking advantage of the broad definition of the concept of 'court' in Article 2 of this Regulation, some Member States have indeed indicated that notaries should be regarded as courts for the purpose of this Regulation. As of today, Hungary and Estonia have made use of this possibility[6]. Other Member States have either not provided any information on the application of Article 2(1)[7], or have indicated that only judicial authorities may be considered as courts[8].

Member States in which notaries act as court commissioners should consider granting their notaries the possibility to make use of the various mechanisms put in place by the Taking of Evidence Regulation (recast). They may limit the designation of notaries to succession matters, as Estonia and Hungary have done. Leaving aside the fact that the solution offered by Regulation 2020/1783 will not be embraced by all Member States, this mechanism will not solve all difficulties. This applies in particular to the difficulties experienced by notaries to obtain information on the bank accounts opened by the deceased. Given the existence in many Member States of confidentiality or even secrecy obligations, there is certainly no easy solution to this difficulty.

One possibility which could be explored, would be to create a mechanism inspired by Article 14 of the European Preservation Order Regulation. This provision opens the possibility for a creditor, who wishes to obtain a preservation order, to request information on the debtor's bank account(s). This is, however, reserved for situations in which the creditor has already obtained a judgment, court settlement or authentic instrument obliging the debtor to pay. While it is clear that the situation of a judgment creditor who demonstrates that there is a risk that the enforcement of his claim against the debtor could be jeopardized, differs from that of heirs and legatees who are merely seeking information on the content of the estate, it remains that Article 14 could in the future offer the basis for a mechanism ensuring more transparency in the assets of the deceased.

5 / Regulation (EU) 2020/1783 of the European Parliament and the Council of 25Novmber 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

6 / In both cases, the designation of notaries is limited to matters of succession. Hungary had already indicated, in a previous version of the Regulation, that notaries in Hungary were allowed to use the different mechanisms provided for in the EU Regulation on taking of evidence.

7 / This is the case for Belgium, the Czech Republic, Germany, Ireland, Italy, Latvia, Malta, Portugal, Romania, Spain and Croatia.

8 / This is the case for Austria, Bulgaria, Cyprus, France, Greece, Lithuania, Luxembourg, the Netherlands, Poland and Slovenia.

Part III
Rules of jurisdiction

Recommendation # 6

In order to prevent **parallel proceedings** in two (or more) Member States over the same estate regarding the same subject-matter, Member States should ensure that notaries and courts may verify whether the same question is not already dealt with by a notary or a courtin another Member State. To that end, Member States could establish a register of pending and terminated succession proceedings. The Member States could together with the EU envisage the interconnection at European level of these national registers.

COMMENT

Parallel proceedings on the same succession and estate were quite frequent among Member States before the Succession Regulation entered into force in 2015. One of the major achievements of the Regulation was to effect a concentration of proceedings in only one Member State, most often the state of the last habitual residence of the deceased.

The MAPE project has revealed, however, that parallel proceedings continue to occur, albeit not with the same frequency in all Member States. Notaries have reported that they are faced with situations where the succession they deal with is also handled by a notary (or court) in another Member State.

A typical situation is the following: a person dies in Member State A, where the deceased has his or her last habitual residence. In Member State A, a notary is appointed *ex officio* to deal with the succession, while at the same time family members of the deceased contact a notary in Member State B to help them with the parts of the succession of the deceased that is located in that Member State.

If the same succession is dealt with by two different notaries, the duplication of efforts can represent a waste of time and money for the parties involved. The duplication could also lead to contradicting documents being issued,even though the authorities in both Member States should apply the same law to the succession, as they are bound by the conflict of law provisions of the Regulation.

Availability of information on pending procedures can help practitioners avoid conflicting information in their respective documents.

Setting up new registers in each Member State to keep track of succession proceedings would require extensive study work. The content and limits of the registration obligation would need to be defined. Member States should in particular reflect on the need to limit the registration to actual proceedings opened after the deceased has passed away, in order to avoid imposing the registration of work performed by notaries assisting persons preparing their future succession. Further reflection is also needed on the information which should be registered, on the costs of operating such registers and on the guarantees needed to ensure that the registers are duly updated. All along, Member States should keep in mind the need to respect the procedural autonomy of Member States and the different legal traditions in relation to the competences of notaries. Given all these constraints, it may be worthwhile to envisage working with a pilot project involving a few Member States before working on a pan European solution. It would be desirable to involve the ENRWA in the pilot project to benefit from its expertise in cross-border interconnection of registers.

Recommendation # 7

The Succession Regulation should be revised to give the **testator** the **possibility to grant jurisdiction** to the courts of the country of its nationality for future succession proceedings when the testator choses the law of that country to govern its succession under Art. 22 of the Regulation.

COMMENT

Divergence of forum and applicable law makes it difficult for all parties and the notaries and courts involved to deal with a cross-border succession case. The Regulation strives to avoid this situation as much as possible. In some cases the divergence is unavoidable:

a) When, in the absence of a choice (Art. 22 Regulation), jurisdiction is based on Art. 10 because the deceased had his or her last habitual residence in a third country.

b) When the testator choses the law of his or her nationality which is the law of a third country.

Giving the testator the possibility to choose the jurisdiction of the Member State of its nationality will, however, help reduce the instances where there the applicable law does not coincide with the Member State having jurisdiction.

Under the Succession Regulation, when the deceased who had chosen the law of its nationality of a Member State under Art. 22, had its last habitual residence in a different Member State, the latter will automatically have jurisdiction under Art. 4. Articles 5 (prorogation by parties) and 6 (*forum non conveniens*) of the Regulation offer limited possibilities to avoid a situation in which the law governing the succession will not be that of the Member State having jurisdiction. In all other cases the law and the forum will diverge. Granting the testator the right to designate the forum alongside the right to choose the applicable law under Art. 22 would secure the concurrence of forum and applicable law. It would also give the testator more control over the passing of its estate after death, and would increase predictability for all parties involved.

Recommendation # 8

Measures to simplify procedures for heirs and legatees should be broadened to deal with cases in which there is a divergence between the Member State having international jurisdiction under the Regulation (*e.g.* the Member State of the habitual residence of the deceased under Art. 4) and the Member State in which all or most of the heirs and most of the estate are located.

A possible solution for this type of situation would be to broaden Article 5 by allowing the parties to choose the courts of nationality of the deceased, even in the absence of a choice of law by the deceased.

COMMENT

The MAPE project has revealed that, in some situations, the Regulation grants jurisdiction to a Member State whose courts may not be best placed to deal with the succession. This could be the case where the deceased had his or her last last habitual residence in a Member State different from the one where all or most heirs and legatees reside and where the main assets of the deceased are located. In that case, it can be said that the latter Member State is as much the center of the case as the Member State in which the deceased passed away. Under the Regulation, the courts of the Member State of origin of the deceased will lack jurisdiction, save if the deceased had chosen the law of the nationality to govern the succession and all parties concerned agree to a choice of court under Article 5. Failing such a possibility to choose jurisdiction, the heirs and legatees will have to seize the courts of the Member State where the deceased last habitually resided, which may be burdensome and costly. The courts of that Member State may also struggle to deal with the case, as evidence may have to be gathered abroad. Measures to secure assets may also have to be taken abroad.

One possible solution for this situation would be to broaden Article 5, allowing the parties to choose the courts of the nationality of the deceased, even in the absence of a choice of law by the deceased. The parties to the proceedings could be granted the possibility to agree that a court or the courts of a Member State whose nationality the deceased possessed at the time of death have jurisdiction. This would allow the parties to the succession proceedings to confer jurisdiction upon a Member State which, in the specific case, might be better suited to deal with the succession than the one where the deceased had his or her last habitual residence. It can be assumed that there is a solid link between the succession and the Member State of which the deceased was a national. Party autonomy in the field of jurisdiction could be carefully and reasonably broadened, without jeopardizing the objectives of legal certainty and predictability of jurisdiction. Of course, this solution may have the disadvantage that the court chosen by the heirs will be required to apply a foreign law. This could be taken into account by the heirs before they indeed conclude an agreement conferring jurisdiction to the courts of the Member State whose nationality the deceased possessed. However, in non-contentious proceedings where the parties have amicably agreed on the jurisdiction of a court, the application of foreign law should not pose too much of a challenge for the chosen court.

Of course, if a pending procedure in one Member State is terminated because the parties have agreed on the jurisdiction of another Member State pursuant to Art. 5, national law must ensure that the parties bear the costs of the terminated proceedings. This is especially important in Member States where succession proceedings are initiated ex officio. In those Member States, it is important that the parties are obliged to notify the court or notary conducting the ex officio proceedings of the concluded agreement without undue delay.

Recommendation # 9

Measures providing more uniformity, certainty and predictability for the interpretation of the notion of "**habitual residence**" in the Art. 4 and 21 of the Regulation should be put in place. The guidance offered in **Recitals** 23 and 24 should be expanded to offer a uniform approach concerning other so-called 'hard cases', as identified in case law and in the literature. In addition to expanded Recitals, the EU should issue **guidelines** for the interpretation of the notion of "habitual residence".

COMMENT

In the empirical studies, a substantial number of participants reported difficulties with the application of the notion of habitual residence. Although this finding should be qualified as there were significant differences between Member States, this shows that so-called "hard cases" for the determination of habitual residence are not as rare as one would have anticipated. Other reasons for difficulties with the determination of the habitual residence are the lack of evidence (see recommendation # 5) Typical "hard cases" are, for instance, people working and living in two different countries, people switching residence once or twice over the year between north and south, the change of residence of elder persons with limited capacity or the habitual residence of imprisoned persons. Recitals 23 & 24 of the Regulation already give some guidelines which can be applied to some cases. These guidelines should, however, definitely be expanded to cover all "hard cases" mentioned in literature and covered by court decisions. Ideally, these guidelines could ultimately flow into a legal definition of the notion of habitual residence to be applied within the scope of this Regulation. Whether or not this is useful, will depend in large part on the future evolution of the case law of the Court of Justice of the European Union, which could clarify the concept and its meaning in different settings.

Part IV
Applicable Law / Choice of Law

Recommendation # 10

The EU should issue guidelines that prompt a narrow interpretation of the escape clause in Art. 21 (2) of the Regulation. The narrow interpretation should be also part of measures of information and training in connection with the Regulation.

COMMENT

The empirical studies have revealed that in some Member States, the escape clause of Art. 21 (2) of the Regulation is often used to avoid the application of the law of the habitual residence of Art. 21 (1) of the Regulation.

A too frequent use of this clause is problematic for two reasons. The main and most important reason is the danger it poses to a uniform application of the Regulation in the Member States. A uniform interpretation of Art. 21 Succession Regulation would be seriously threatened if the escape clause would be given a broader understanding in some Member States.

The second reason is that the application of the escape clause will necessarily have an impact on the understanding of the central notion of habitual residence. The general rule, the application of the law of the last habitual residence of the deceased, embraces a very broad concept of habitual residence as the center of all life interests of the deceased (assets, social contacts, family, belongings, activity) which makes it very difficult to think of any evidently closer connection to another state.

To avoid too broad an application of the escape clause, different measures may be put in place. In first instance, extended efforts of information and training on the Regulation (see recommendation # 1) should stress the need for a narrow interpretation of the escape clause. The EU should also reflect on the possibility to issue interpretation guidelines, which stress that the escape clause should be reserved for truly exceptional situations.

Recommendation # 11

The EU legislator should revise and broaden the **testator's right of choice of the applicable law** and add a possibility to choose the law of the *habitual residence* of the testator (at the time of the choice). This additional choice should be taken into account in the provisions of the Regulation on choice of court (see recommendation # 7), which should be expanded accordingly.

COMMENT

The empirical studies undertaken in the course of the MAPE project has revealed a broad demand for an extension of the right of the testator to choose the law applicable to its succession. Such an extension has been widely advocated across all Member States.

The extension of the *professio iuris* to allow the testator to submit its succession to the law of its habitual residence at the time of choice has several advantages. It extends the self-determination of the testator over its estate. It contributes to an enhanced predictability of the legal consequences upon the death of the testator which benefits all persons concerned. Whereas the habitual residence under the general rule of Art. 21 (1) Regulation can change over the lifetime of the testator and can come as a surprise in the light of testamentary disposition drawn up some time ago, the choice by the testator of the law of its habitual residence in the form of a testamentary disposition will not be impacted by where the testator decides to live after having made the choice. This choice will therefore meet the requirement of predictability and legal certainty. In order to avoid doubts about the validity of the choice of law at a later stage, it would be advisable that a testator making use of this possibility also indicates the elements which demonstrate that its habitual residence is established in the State whose law is chosen.

The right to submit one's succession to the law governing the matrimonial property or partnership relations, could constitute another alternative. While this would help streamline the division of assets which must take place once a spouse or partner passes away, this solution would, however, require further study. Not all Member States are indeed party to the Regulations 2016/1103 [9] and 2016/1104[10]. The law governing matrimonial property relations or partnership relations could therefore differ depending on the Member State concerned. Further, even in those Member States bound by Regulations 2016/1103 and 2016/1104, the law governing matrimonial property relations or partnership relations may change over time, in particular if spouses or partners move to another country where they reside for a long time.

The rules of jurisdiction should be expanded accordingly to ensure that whenever a choice is made by a testator for the law of its habitual residence, a choice of court may be made accordingly. As explained in the comments to recommendation # 7, it is of great importance to ensure the convergence of forum and law wherever possible in the Regulation. Therefore, every choice of law which is made possible in addition to the existing rights of the testator, should be accompanied by a possibility to grant jurisdiction to the courts of the respective country to ensure the convergence of the forum and law. This convergence can be brought about in different ways: by choice of forum by the testator (Recommendation # 7), by party prorogation after death (Art. 5 Regulation) or by the court of Art. 4 Regulation upon motion of a party under Art. 6 Regulation. Art. 7 and 8 of the Regulation would have to be applied accordingly.

Recommendation # 12

Art. 35 Regulation [public policy exception] should be supplemented by EU guidelines on its interpretation with respect to rules of national law granting a **mandatory share to close relatives** of the deceased testator. The guidelines should clarify that Art. 35 Regulation may not be used to protect the reserved mandatory shares of close relatives except in cases of demonstrated financial need and dependence on the deceased.

COMMENT

The empirical studies undertaken in the course of this project revealed a great divergence of opinion on the question of whether Art. 35 of the Regulation may be invoked to refuse to apply the foreign law governing a succession under the Regulation, when that law does not provide a mandatory share for close relatives of the deceased or provides for such shares which are substantially narrower than those of the law of the forum. This divergence of opinion can also be observed in court practice of the Member States and in scholarship. It is therefore important that the interpretation of the Regulation be clarified on this issue.

The public policy clause of Art. 35 Regulation can only be invoked exceptionally in cases of serious violations of fundamental principles of justice (as, for instance, human rights) from the point of EU law and the law of the forum. A simple divergence relating to the size of the mandatory share obviously does not qualify as such a serious violation.

9 / Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (*OJ*, L-183, 8 July 2016).

10 / Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (*OJ*, L-183, 8 July 2016).

Even the decision of a foreign succession law to grant mandatory shares or other financial provision *only* to those close relatives financially dependent on the deceased and consequently in financial need upon its death is still in line with the fundamental principles of justice and should not be considered a violation of Art. 35 Regulation.

EU guidelines should therefore clarify that a simple divergent outcome on the size of mandatory shares is not sufficient to invoke the public policy exception in defense of a solution under foreign law. Art. 35 Regulation may only be invoked in cases where the foreign succession law denies any mandatory share or other financial provision out of the estate to close relatives who are in financial need as a consequence of the death of the deceased because they were financially dependent on him or her. As always, the decision to use the public policy exception should only be taken after a careful assessment of all specific circumstances of the case. On the basis of such assessment, the authorities of a Member State may perfectly decide not to use the public policy exception even if close relatives financially dependent on the deceased are deprived of support.

The recommended clarification and careful interpretation of Art. 35 Regulation on the issue of mandatory shares will contribute to the freedom of the testator to dispose over its assets upon death. Mandatory shares are only invoked where the testator – in the exercise of its freedom to dispose – appointed a particular heir and the will (sometimes grossly) diminishes the part the heirs will take out of the estate. If the testator makes use of its limited right of choice under Art. 22 Regulation, and choses the law of its nationality, with the aim of reducing the mandatory shares in favor the testamentary heir, it makes use of its legitimate right of disposition over its assets upon death. This right should be respected and only corrected in cases of serious injustice, as described above. In addition a careful use of Art. 35 Regulation will contribute to the predictability of the legal consequences of testamentary dispositions in the EU. The heirs do not need to fear that the testament will be changed or corrected in a succession proceeding in an unpredictable manner on the basis of Art. 35 Regulation which is not uniformly applied in the Member States.

If the applicable foreign law of succession directly or indirectly discriminates against persons on the basis of their gender, religion, sexual orientation or the like, this will, of course always be a reason to invoke Art. 35 Regulation and leave the respective foreign legal rules unapplied.

Recommendation # 13

The EU should invest in more comprehensive commonly accessible data bases and information networks on foreign legal systems for notaries and courts which have to apply foreign legal rules (even beyond EU Member States), as it is unavoidable that a Member State is required to apply foreign law under the Regulation.

COMMENT

The empirical studies undertaken in the course of the MAPE project revealed frequent problems with the application of foreign law by notaries. Important information on foreign legal systems is currently made available through different means : online platforms (such as the e-Justice portal, *Succession in Europe* website and the additional information provided by the *Union internationale du notariat*), information networks (such as the ENN) and through national notarial institutes, which often shoulder a great deal of the information efforts.

The sources available do not, however, cover all legal systems, nor do they provide detailed information on all legal systems. In addition, while notarial institutes offer excellent advice on foreign law, such institutes exist only in certain Member States.

Therefore, the EU and the CNUE should devise a strategic approach to enhance the possibilities for notaries in all Member States to have easy access to reliable information on the foreign applicable law. A first step should be to map all existing initiatives in order to identify possible gaps. A second step should consist in finding a way to expand existing platforms to include more detailed information on the succession law of Member States, as well as of selected third countries whose law has been found to apply frequently under the Regulation. The selection of the relevant third countries should be done in close cooperation with the national Chambers and take into account the information already made available in the specialized literature on foreign legal systems. A final step could be to encourage Member States to establish a notarial institute, if this has not yet been done. In addition, the existing cooperation between national notarial institutes should be evaluated and, if needed, improved.

Part V
European Certificate of Succession

Recommendation # 14

The EU should reflect on the possibility to streamline the information which must be included in a European Certificate of Succession, to ensure that the process of issuing an ECS is as smooth as possible.

COMMENT

The Regulation includes detailed rules on the issuance of a European Certificate of Succession. Article 65 indicates which information should be submitted by a person applying for a European Certificate of Succession. Article 66 outlines the various steps the issuing authority needs to undertake before issuing the ECS.

The MAPE Project has revealed that many practitioners consider the process leading to the issuance of an ECS cumbersome. This may be due to a large extent to the fact that practitioners have had to adapt to a new instrument, while they already had a long experience with their own national certificate. The nature and extent of the information required is also linked to the far reaching, pan-European effects of the ECS.

It remains that the experience acquired over the last years could be used to revisit the various Forms and consider whether they may be streamlined. This could also be the opportunity to consider amending, if needed, the Forms (and in particular Form IV – Annex IV and Form V – Annex III). Another issue which should be taken into consideration in this respect is the possibility for the issuing authority to add comments to the ECS where appropriate. Finally, the EU should also review the various language versions of the Forms to correct mistakes and ensure uniformity. All these developments could be addressed in parallel with the current initiatives undertaken by the EU Commission to further digitalize the judicial cooperation in civil and commercial matters[11].

11 / See the Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, 1 December 2021 COM(2021) 759 final.

Recommendation # 15

The EU should reflect on the desirability to require that Member States create a public register where all ECS would be registered. The notarial profession should strongly encourage Member States to interconnect their registers through the ENRWA platform.

COMMENT

The European Certificate of Succession is an important instrument which facilitates the life of EU citizens. It also helps professionals dealing with cross-border successions.

The Succession Regulation left it to Member States to decide whether and how to provide for registration of ECS, in order to ensure that they are easily accessible. Only some Member States have decided to create a central register where ECS may be recorded. This situation makes it more difficult for notaries to verify whether an ECS has been issued in relation to a particular estate. This may lead to additional costs, for example when immovable property owned by the deceased is later sold on. The difficulty is compounded by the fact that existing registers may not be interconnected. At present, only three Member States (France, Luxembourg and the Netherlands) have interconnected their ECS registers.

In addition, the lack of uniform approach to the publicity enjoyed by the ECS has led to a dearth of data about the actual use of the ECS. The MAPE Project has revealed that such data only exists in some Member States. This makes it more difficult to assess whether the ECS has been effectively adopted by practitioners. Having a register in each Member State would improve the collection of data, such as the number of ECS issued per year.

The EU should go one step further and consider imposing on Member States the obligation to create an online registration system for ECS. Such a register would enable any notary to verify that the ECS has been issued by a competent authority. The exact details of such an obligation, and in particular the data which should be registered and made accessible, need to be further reflected upon. It would be for Member States to decide how such register is built and operated at national level.

Given the obvious benefits for citizens and professionals of being able to access data in registers kept in other Member States, the notarial profession should, once Member States have indeed created a register for their ECS, strongly encourage Member States to interconnect those registers through the ENRWA-platform.

The EU should consider expanding the national registers to include information on rectification, modification and withdrawal of a certificate (Art. 71) and on suspension of the effects of a certificate (Art. 73). Additionally, Member

States could envisage offering third parties such as banks and insurance companies limited access to some of the information included in their registers.The interconnection of national registers of ECS's would constitute a natural addition to the interconnection of national registers of succession proceedings mentioned in Recommendation # 6.

Recommendation # 16

The EU should adopt additional measures to alleviate the burden of translating an ECS when it circulates among Member States.

COMMENT

The MAPE Project has revealed that in many instances, the use in other Member States of a European Certificate of Succession requires some sort of translation : it could be that the receiving authority requires a full fledge translation of the whole ECS, or that it requires a translation of some of the information included in the ECS. While translation may be needed in order to ensure that the actual content of the ECS is clearly understood, and therefore in the interest of all parties concerned and of legal certainty, it brings in additional costs, which can be excessive in relation to the amount at stake. The need to have the ECS or part of it translated, may also bring in additional delays. The Regulation is silent on the issue of the translation of the ECS.

The *eJustice* portal makes it possible to issue an ECS in any of the official languages of the EU[12]. This should reduce the number of instances in which a translation is required. However, the benefits of this solution are limited because in some Member States (*e.g.* Poland), issuing authorities can only issue an ECS in the local, official language.

Another possible solution is to adapt the *eJustice* portal to allow the issuance of a dynamic ECS in two languages version. Again, this may be difficult to accept in some Member States where issuing authorities are bound by strict language requirements.

A last possibility is to align the Succession Regulation with the solution adopted in Regulation 2019/1111 : under Article 91 para 2 of this Regulation, the translation may only concern "the translatable content of the free text fields". This is the practice already today in some Member States. Adapting the Regulation in this sense will make it clear that requiring a full fledge translation of an ECS is no longer possible, while preserving the possibility while preserving the possibility for practitioners in Member States to require proper translation of the actual context of the text fields, in order to ensure proper understanding of the content of the ECS.

12 / Practitioners have indicated that they are satisfied that the *eJustice Portal* also offers access to a Word version of the forms (https://e-justice.europa.eu/166/EN/succession), which makes the translation easier.

Recommendation # 17

The EU should modify the Regulation to provide for a longer period of validity of certified copies of a European Certificate of Succession.

COMMENT

Article 70 para 1 of the Regulation provides that the authority which has issued a European Certificate of Succession may also issue certified copies. According to Art. 70 para 3, a certified copy shall be valid "for a limited period of six months". The MAPE Project has revealed that a large majority of practitioners experience this limitation as too stringent. Situations have been reported where discussions with third parties such as banks extended over a long period of time, requiring the party concerned to apply for an extension of the period of validity of the certified copy. In some instances, attempts to use the ECS to access land registers in another Member State have also taken longer than 6 months, forcing the holder of the ECS to request an extension. As the Court of Justice has stated, this "would lead to longer delays and higher costs[13]". There is a general feeling that it is desirable to extend the validity period. This translates in the rather high number of instances in which an issuing authority has been sought to extend the validity of a certified copy.

Several solutions could be contemplated to meet this goal. A first possible solution would be to extend the validity period and bring it to 9 or 12 months. This longer validity period would still make it possible "to ensure that the content of the certified copy of the European Certificate of Succession corresponds to the reality of the succession"[14]. It does not seem necessary, nor has it been advocated that certified copies should be valid indefinitely[15]. The extended validity period could be determined taking into account national practices in particular relating to the tax obligations imposed in case of death.

13 / CJUE, 1 July 2021, *UE, HC v. Vorarlberger Landes- und Hypothekenbank AG*, Case C-301/20, ECLI:EU:C:2021:528, para. 27.

14 / CJUE, 1 July 2021, *UE, HC v. Vorarlberger Landes- und Hypothekenbank AG*, Case C-301/20, ECLI:EU:C:2021:528, para. 24.

15 / Comp. Art. 4 of the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022)695 final), on the validity of a copy of the European Certificate of Parenthood.

Another solution would be to allow the issuing authority to decide at the outset that the period of validity of a certified copy is longer than 6 months. Article 70 para 3 makes it already possible for the issuing authority to provide for a longer period of validity, but limits this possibility to "exceptional, duly justified cases". This restriction could be lifted to allow the issuing authority in all cases to provide for a longer period of validity taking into account the special circumstances of the situation.

Recommendation # 18

The EU should invite the Member States to expand the information already available on the *eJustice* Portal in relation to the documents and/or information required for the purposes of registration of immovable property in the land registry of Member States. The information made available should be detailed enough to allow issuing authorities to verify whether the ECS on its own will effectively allow the registration of immovable property and, if this is not the case, what additional information and/or document is required in addition to the ECS to ensure that the heirs or legatees may effectively register their rights.

COMMENT

According to Article 69 para 5 of the Regulation, a European Certificate of Succession "shall constitute a valid document for the recording of succession property in the relevant registers of a Member State, without prejudice to points (k) and (l) of Article 1(2)". No other provision of the Regulation has raised more controversy than this one. From the outset it was clear that the reservation for points (k) and (l) of Article 1(2) would limit the possibility to use an ECS to record succession property in other Member States.

The MAPE Project has revealed that a sizeable majority of notaries and professionals report difficulties in registering the status of heirs and legatees in relation to real estate on the basis of an ECS issued in another Member State.

The main reason why heirs and legatees are facing difficulties when using an ECS issued in another Member State is that the Member State where the register is established may require additional information and/or additional document. When the information and/or document required relates to the status of the heirs or legatees, it may be asked whether such additional requirement is compatible with the Regulation.

In most cases, however, the additional information required does not relate to "the status and/or the rights of each heir or [...] each legatee" (Art. 63 § 2 (a) of the Regulation), but to other issues, such as the precise identification of the real estate concerned, the existence or not of encumbrances such as a servitude or an easement or the estimated value of the immovable. The information could also relate to a specific method of identifying the heirs or legatees (*e.g.* through a national number), the exact share attributed to each heir or more in general to the identification of the assets of the deceased. Member States may require this type of information as part of their power to regulate access to their land registers, in so far as it does not duplicate information already included in the ECS.

The MAPE Project has made clear that notaries have been quite creative in devising solutions to bridge the gaps between the information included in an ECS and the requirements of the Member State where the immovable is located.

However, not all difficulties have been solved. The recommendation aims therefore to further facilitate the work of notaries in assisting their clients by providing a one-stop-place where all relevant information is made available on documents, formalities and other requirements for the registration of rights *in rem* on immovable in land registers. This information should ideally distinguish between what is already covered by the ECS and the additional information and/or document required.

The recommendation should be seen in light of the obligation undertaken by the Member States in Article 77 of the Regulation, to provide "fact sheets listing all the documents and/or information usually required for the purposes of registration of immovable property located on their territory". The information currently available on the *eJustice* Portal does not live up to that standard. It should be complemented so that notaries can usefully advise their clients.