Notaries and law in support of cross-border successions

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The following pages are both a summary of work conducted today in Lyon and a review of the previous symposiums in which we took part (Tournai, Toulouse, Bordeaux, Nice and Stuttgart). This report outlines some observations, suggestions and proposals resulting from the experience gained through these different proceedings. However, before we present them, we will make some initial remarks based on our impressions gleaned from the various events.

Firstly, the participants (notaries, magistrates, academics) are fully aware that the "Regulation is happening now". And not solely because, as we all know, the provisions relative to *professio juris* apply immediately under certain conditions (cf. Art. 83 of EU Regulation 650/2012). But above all, because everyone concerned knows that we must prepare for 17 August 2015 today, and must therefore realise the expectations it involves. In this sense, the fairly long transitional period for bringing national legislation and practices into compliance is welcomed. And the observer cannot fail to see that everyone is keen to do things right. We have thus heard that "the future is what counts for notaries", and that we must "change our habits" and "give cross-border successions standing". Admittedly, the various symposiums have above all been an opportunity to focus on what we might call "tricky issues", questions that may be difficult to solve and, as we will see below, no doubt demand clarification, including by the ultimate interpretation of the Regulation handed down by the Court of Justice of the European Union. However, it is henceforth established that notaries and judges are at the "forefront" and will have to settle numerous problems themselves. In fact, certain proposals have been outlined, concerning for example the reserved portion, the characterisation of "last habitual residence", or our understanding of the key balances underpinning the succession law, whether it is chosen or objectively designated.

This leads us to a second observation. By addressing cross-border successions, the European Union has not merely turned its attentions to a technical legal matter, but

to a question of legal policy. In this respect, we can simply recall the words of Professor Bertrand Ancel that "succession has always been a preferred test bench for international private law", a mixture of technical and political elements. The move from nationality to habitual residence, the public-policy exception, and recourse to the renvoi system fully reflect this dual dimension. We should in fact recall that – outside the European Union and to take only the example of Muslim countries – modernisation and secularisation of the legal *corpus* have always stopped at successions for which religious precepts remain fully pertinent. This is true of Morocco, Algeria and Tunisia, even though these countries have evolved in substantially different ways as regards personal status.

When all is said and done, it is clear that the Regulation on successions brings both hopes and fears. But, as Marie Curie said, "Nothing in life is to be feared, it is only to be understood". Understanding the Regulation was thus the challenge of the various cross-border symposiums held, and the discussions and debates that arose between Belgian, Italian, Spanish, German and French notarial professions, not forgetting, of course, the English solicitors. And in addition to a better understanding of this instrument – which is often revolutionary in its solutions, as the resolution of real cases has confirmed –, and beyond the obvious need to apply the Regulation while bearing in mind the fiscal issues involved in implementing bilateral double taxation treaties, these meetings have also given rise to certain remarks, proposals and suggestions which could all facilitate the effective application of the text starting in August 2015, for the benefit of both European citizens living inside and outside the Union, and citizens from non-member States living within the Union, in accordance with the principle of universality.

This summary will therefore attempt to sort through and organise these many proposals and suggestions, providing an assessment and, where applicable, a solution. Accordingly, the "addressees" vary. We will thus successively highlight suggestions addressed to the Member States (I), to notaries (II) and to the European Commission (III); it being noted, naturally, that certain suggestions may be of common interest and that, lastly, work should indeed be done together.

I – Suggestions addressed to the Member States

This is naturally a rather tricky exercise, for fear of offending certain susceptibilities. To avoid incurring any such criticism, the suggestions we make here will be directed at France, conceived as the archetypal Member State. We will merely go so far as to say, in passing, that Member State status was a topic of discussion. The situation of the United Kingdom (England, Scotland and Wales) indeed triggered questions since, unlike other texts, the successions Regulation contains no definition of Member State. It nonetheless remains that, although a member of the Union, the United Kingdom is not a member of the Regulation and therefore, will be greatly concerned by the renvoi system.

That being said, it is vital that the Member States make the various declarations required by the text as soon as possible. Unless we are mistaken, the communications required by Article 78 of the Regulation have not been made, although the deadline of 16 January has since passed. In particular, we need to identify the relevant courts and authorities to heighten their awareness of the tasks they will be required to accomplish in a few months' time.

Furthermore, it would be worthwhile for the Member States to engage in a sort of audit of their current succession rules to ensure that their domestic provisions are compatible with the Regulation. Of course, we all know that the Regulation is not concerned with domestic successions law and only addresses rules of conflict. But it does contain some substantive rules and, above all, through the *professio juris*, it offers a choice and therefore a possible competition between domestic laws. For instance, will a German national living in France opt for his national law or prefer to die intestate so that French law applies? There are many "tactical" parameters but the substance of succession law (German and French) is decisive. It would simply be sufficient, for example, to include mandatory provisions protecting certain categories of heirs. At a time when France intends to reform its law of obligations in order – if we go by the reasoning of the law – to further assert its presence in European cooperation, such an initiative is required in successions law too.

Along the same lines, taxation of cross-border successions requires careful examination. Admittedly, the Regulation's entry into force will be a non-event on this point. The various cases addressed at the seminars have clearly shown that the Regulation, quite logically, has absolutely no effect on this point. However, we cannot rule out the possibility of seeing a "multiplication" of cross-border situations which have hitherto gone relatively unnoticed. It is especially clear that

certain estate planning provisions with fiscal consequences made with regard for current civil rules could indeed be called into question when the Regulation takes effect.

This last observation leads us to point out, ultimately, that while notaries – as we will see – have sought to get into battle order right now, for obvious reasons, the States must do the same. This raises the question of the human and material resources that the introduction of the Regulation demands. Courts and administrative services must be prepared and informed of the transition on 17 August 2015. This will no doubt involve training and specialisation, i.e. a whole series of obligations which – it's a hackneyed but essential consideration, particularly in times of budget squeeze – have a cost. As we have said, the successions Regulation is at the heart of European citizens' concerns. This Regulation could, along with others, help people better understand the benefits of building Europe. The Member States must therefore truly contribute to turning this key factor of a citizen's Europe into reality…

II – Suggestions addressed to notaries

At the various meetings, we have frequently heard that notaries – irrespective of the status they will have in the system introduced by the Regulation – will be in the vanguard of its implementation. They cannot therefore play waiting games and simply hope that the judges – and above all the Court of Justice – will answer the questions that will arise. This is perfectly illustrated by the questions surrounding the characterisation of the deceased's last habitual residence. The difficulties are obvious. And although it begins to outline an answer, the checklist provided by the Regulation's whereas clauses 23 and 24 will not be sufficient, if only because of the relativity introduced by recital 24. This brings fears of an overly systematic recourse to national understandings, running counter to the need for uniform interpretation.

Indeed, when the time comes, the Court of Justice will have to work towards this uniform interpretation, as this is clearly stated in its mission expressly dictated by the TEU. But it has to be said that its recent practices in interpreting other regulations already in force (Brussels I, Brussels IIA, etc.) do not really show that it readily goes about the task, often leaving it to the national judge to qualify or characterise based on a set of rather vague leads. We will not therefore be satisfied

with "makeshift" nationalist interpretations of "habitual residence", and neither will we accept widespread use of the exception permitted by Article 21 § 2 of the Regulation, a temptation clearly voiced by some in a, once again, instinctive nationalist reaction. It is vital that we avoid seeing a French, German or Spanish implementation of the Regulation, like we currently have a French European company, a German European company or a Spanish European company even if, in this particular case, the situation can be explained or even justified by the regulation's structure. Uniform application, i.e. European application of the Regulation, will not only condition achievement of the expected results, but will above all demand development of uniform practices, i.e. European notarial practices under the Regulation.

It is widely acknowledged that notarial practice in the Member States is, *mutatis mutandis*, a source of law. The same perspective is required in the European legal system. This implies sharing best notarial practices between professionals in the Member States. And seminars like those we have held are a powerful driver. It also calls for the organisation of professional networks – whether formal or informal – to support the Regulation on cross-border successions. Naturally, this kind of network raises numerous questions in terms of deontology and responsibility. There lie areas to be explored and developed. And we must not forget that, above and beyond the drafting of formal documents, notaries must advise, particularly with the prospect of resorting to the choice of law. This splendid estate planning tool is also a major challenge. It raises many questions relating both to the determination and proof of a person's nationality, particularly in the case of plural nationality – a sensitive issue in which the teachings of the European legal system are difficult to understand – and to access to knowledge of foreign law content. In this respect, getting to grips with the future ECS is but one aspect among others.

The notarial profession thus faces numerous challenges and it must find the necessary resources to be able to offer the legal certainty that clients may rightfully expect. This thus provides insight into the future challenges of the profession and, consequently, of the effectiveness of the Regulation. The main tasks that the regulation requires can therefore be defined and expressed as the commandments below:

1 – You shall audit succession arrangements made prior to 17 August 2015

2 – You shall independently qualify the concepts that the Regulation contains
3 – You shall address any cases of plural nationality
4 – You shall carefully characterise the "last habitual residence"
5 – You shall verify the content of foreign law
6 – You shall provide evidence of the advice you give
7 – You shall make wise use of the public-policy exception
8 – You shall carefully draft the ECS
9 – You shall handle all fiscal impacts
10 – You shall call on your cross-border professional networks

III – Suggestions addressed to the European Commission

Last but not least, the various symposiums brought to light certain expectations at European level. As guardian of the application of European treaties and secondary legislation, the Commission is in the front line. Even though it is not the only decision-maker, the final adoption of regulations relating to matrimonial and property regimes is vital given the extent to which they will tie in closely with the successions Regulation.

First of all, it is clear that this kind of programme must be followed up. Training is an absolute necessity and is, in fact, one of the core stipulations of the TFEU and various communications found in the actions plans that punctuate the construction of civil and commercial judicial cooperation. Training legal professionals is a key requirement given that they are the main players in the European legal and judicial area. The cross-border initiative must thus be pursued, to bring together notaries from Members States who will be required to work together in future. We cannot trust one another if we do not know one another! And "cross-border" does not necessarily mean neighbouring. From a French perspective, the marked presence of Dutch, Polish and Portuguese citizens in the country and, conversely, the many French people residing in Luxembourg and numerous central and eastern European countries both demand that the experience be continued with these Member States.

But, above all, we must now focus on another dimension. The Regulation is universal in that the law of a non-EU country may be designated as the applicable

law. And if we take France which, like certain other Member States, has many residents from the southern shores of the Mediterranean, it is highly likely – if only out of a sense of identity and community – that the Member States' authorities will have to assume choices of national law that will result in settling successions under Algerian, Moroccan or Tunisian law. This has been a recurring issue in the professionals' speeches who have thus voiced concerns and a lack of understanding. It is vital to address this topic in which the lack of knowledge of foreign law is even more patent than in matters concerning the laws and systems of another Member State. We shall merely recall here that the public-policy exception emerges as a solution to many situations, without even addressing the concrete difficulties of settling the succession. The European Commission wanted this universality and cannot now dissociate itself from the issue.

Furthermore, the seminars have highlighted some difficulties understanding certain Articles of the Regulation. This is the case of the exception clause already mentioned, but also of Article 83-4 relative to the transitional provisions on dispositions of property upon death. In the absence of any explanatory report and due to the fragmented nature of the preparatory works, it is suggested that– like the "Brussels IIA regulation" – practitioners be provided with a manual to help them implement the text. Similarly, attention has been drawn to Article 77 of the Regulation entitled "Information made available to the public". While such a provision is obviously welcomed, it has been suggested that a similar article organise the provision of information for professionals.

As we have already pointed out, here lies the question of access to knowledge of the foreign law that could govern a succession. Naturally, as we have already said, professionals are partly responsible for concretely implementing this requirement. And the European judicial network obviously has its share of responsibility. But this will undoubtedly be a major challenge for the European Union in the years to come, if only because of the preponderance that numerous regulations bestow on autonomy of will. This could indeed remain a dead letter unless the question of access to the law and its content is seriously addressed. The organisation of a European certificate of law, like what already exists in practice, should be examined. Attention should also be turned to clarifying the role of judges and their cooperation, particularly through international requests issued, for example, under the regulation on the taking of evidence in civil matters. It is high time to review this question as its resolution conditions the full effect of a major section of the Regulation. Because, as the seminars confirmed, it is not exactly true to say that

"the 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" (whereas clause 27). And the challenge remains of "[allowing] citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, […] to know in advance which law will apply to their succession" (whereas clause 37) and thus "to organise their succession in advance by choosing the law applicable to their succession" (whereas clause 38).

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In conclusion to these observations and suggestions which all seek to enable the Regulation to meet with the expected success, one last remark must be made.

The author of this report took part in developing the proposed Regulation within the PRM-III/IV group. He can but be satisfied to see that the Regulation finally adopted is very clearly welcomed by the notaries and lawyers who attended the various seminars. They are all fully aware that they will have to change their ways and they are ready to do so. Probably because they all insist on one point: the text is absolutely not disconnected from reality, as their everyday practices are becoming increasingly international. In this sense, the ECS is a key instrument which can rise to our expectations and which must be understood as soon as possible. It is also no doubt because the Regulation is largely based on practical experience which has also inspired its solutions.

It is therefore time to put it into practice. But it must be supported through continued training, so that citizens within and outside the EU receive the service they expect.

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