The merits or otherwise of the selection of 'the last Habitual Residence of the Deceased' as the principal connecting factor in the EU Succession Regulation – No. 650/2012

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In this article, **Notary Dr Carmel Gafá** and Dr **Daniele Gafá** evaluate the effectiveness of the 'last habitual residence of the deceased' criterion at homogenising conflict of law rules within the EU. The rest of the article can be found in Id-Dritt XXX.

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1. Introduction

> *Around twelve point three million (12,300,000) Europeans live in another European Union country and there are around four hundred and fifty thousand (450,000) international successions each year, valued at more than one hundred and twenty billion euros (€120,000,000,000). Currently different rules on jurisdiction and applicable law in the twenty-seven (27) European Union Member States are creating legal headaches for already grieving families… Today's endorsement by the Council of new European Union rules will bring legal certainty to the thousands of families confronted with international successions. – European Union Justice Commissioner and Commission Vice President, Viviane Reding*[1]

Being a by-product of globalisation, particularly within the ambit of a modern European Union which has nowadays fully embraced the notion of freedom of movement, the issue of cross-border succession within the European Union may no longer be disregarded as a frivolous matter. The sheer monetary value of this phenomenon alone necessitates legislative attention, albeit the issue per se falling outside the European Union's legislative competence. Intriguingly, the approach taken by the European Union in addressing the issue was similar to that adopted in other spheres of law wherein the European Union lacks the necessary competence to legislate. Rather than focusing on the virtually unattainable (not to mention, not necessarily desirable) task of homogenising substantive succession laws throughout the Union, EU legislators directed their attention rather to the unification (or the so-called 'europeanisation') of conflict of law rules in matters of succession.[2]

To this effect, on the fourth (4th) of July of the year two thousand and twelve (2012), the European Union took a giant's step forward by adopting Regulation (EU) Number 650/2012 on jurisdiction, 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; more commonly known and hereinafter referred to as the 'Succession Regulation'. Binding on all twenty-eight European Union Member States bar three (namely Denmark, The Republic of Ireland and the United Kingdom), the Succession Regulation became applicable on the seventeenth (17th) of August of the year two thousand and fifteen (2015), effectively governing the '***succession of persons who die on or after'*** this cut-off date.[3]

[1] 'European Commission plans to ease legal burden for cross-border successions to become law' European Commission (7 June 2012) <http://europa.eu/rapid/press-release_IP-12- 576_en.htm>.

[2] A. Verbeke, Y.H. Leleu, 'Harmonisation of the Law of Succession in Europe' (2011) 472; K. Joamets, T. Kerikmäe, (2013), 'The New Developments in the EU family law—Green Paper "Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records". Its Applicability in Marriage on the Example of Estonia' 39.

[3] Regulation (EU) No 650/2012 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, article 83(1). (emphasis

From the very outset, even upon prima facie inspection, it becomes immediately evident that the Succession Regulation envisages an exhaustive, far-reaching and holistic upheaval of a previously unaddressed issue under European Union law. Its scope, in fact, was not limited to the conventional private international law elements of jurisdiction, choice of applicable law and recognition and enforcement of foreign judgements which have customarily manifested themselves in similar European Union legislative instruments. On the contrary, the Succession Regulation goes a step further than the traditional approach by addressing concerns which are specifically characteristic to succession disputes in particular. The conception of a European Certificate of Succession for instance demonstrates but one of a series of practical measures intended to eradicate existing administrative barriers.

2. Interpreting the term 'Last Habitual Residence of the Deceased'

The notion of habitual residence is no newcomer to the field of private international law. First introduced in the year nineteen fifty-five (1955) by The Hague Conference on Private International Law, the connecting factor was subsequently incorporated into European Union legislation, firstly with regard to social security and labour law and later on in the sphere of judicial cooperation in civil matters. Perhaps lamentably so however, neither The Hague Conference nor the aforementioned European Union Regulations which preceded the Succession Regulation laid down any precise definition or guidelines whatsoever as to the correct interpretation of the concept of 'habitual residence'. This common thread is one which also persists to some extent in the Succession Regulation which similarly shies away from concisely defining the enigmatic notion. Some scholars have suggested that legislators' persistence at leaving the connecting factor undefined might perhaps stem from the reasoning that as a factual criterion, a designation of habitual residence necessarily requires a close inspection of the contextual circumstances surrounding each situation. Contrary to connecting factors such as 'domicile' or 'nationality', 'habitual residence' is not a legal conception capable of being generically, accurately and succinctly defined, but rather, it is a factual one which necessitates a case-by-case approach.

Jurisprudence of the Court of Justice of the European Union does offer some guidance in this respect, albeit in relation to the 'Council Regulation (EC) No 2201/2003 of the 27th of November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility' in particular, hereinafter referred to as the Brussels II Bis Regulation. In its response to the landmark preliminary reference brought by Finnish Courts (*Korkein hallinto-oikeus*) in ***Case C-523/07 A***[4], the

added).
[4] Judgement of the Court of Justice of 2 April 2009. A. C-523/07.

Court of Justice of the European Union reiterated that the connecting factors contemplated under European Union Regulations are to be given autonomous interpretations. Adhering to the same line of argumentation, this time in response to the preliminary reference brought by German Courts, in ***Case C-29/76***[5], the Court of Justice of the European Union confirmed that such connecting factors are to be understood in the light of the objectives and spirit of the European Union legislative instrument in question, in a manner entirely distinct from any municipal Member State law definitions.

With regard to the definition itself, the Court held that mere physical presence in a particular State in and of itself does not suffice for the determination of habitual residence, but rather, an analysis of all factual circumstances specific to each case must be taken into account. In so doing, the Court of Justice of the European Union went on to lay down a vast array of criteria which should be considered in establishing the habitual residence of a child, for instance:

> *the degree of integration in social and family environment, duration, regularity, conditions and reasons for stay in the territory of a Member State, child's nationality, place and conditions of school attendance, linguistic knowledge, family and social relationships.*[6]

Though the Court's interpretation of the notion is specifically restricted in application to the Brussels II Bis Regulation, it does serve as a guideline in the absence of any further legislative clarification.

Inspired by the findings of the Court of Justice of the European Union, by means of Recital twenty-three (23), the ground-breaking Succession Regulation became the first European Union legislative instrument to expressly, albeit not concisely, lay down a series of factual criteria to be taken into account in designating the final habitual residence of the deceased:

> *... the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.*[7]

[5] Judgement of the Court of Justice of 14 October 1976. LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol. Case 29/76.
[6] Rohova, I., Drlickova, K., 'Habitual residence as a single connecting factor under the succession regulation' [2015] SCIJLP 371.
[7] Regulation (EU) No 650/2012 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

Expounding upon the criteria stipulated in the preceding recital, Recital twenty-four (24) of the Succession Regulation goes on to explain that:

> *In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.*[8]

From the multitude of factors that courts are to consider in determining the last habitual residence of the deceased, a common thread may be drawn from the Succession Regulation's consistent emphasis on the term 'factual circumstances'. The *raison d'être* behind this approach is presumably to ensure that the notion is as easily discernible as possible; a desirable characteristic for connecting factors which shall be analysed further on.

in matters of succession and on the creation of a European Certificate of Succession, Recital 23.
[8] Ibid, Recital 24.


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