WELCOME OFFICE – INTEGRATION, INFORMATION, ADVICE

INHERITANCE

IN BELGIUM & THE EUROPEAN UNION
GENERAL PRINCIPLES

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NOTE TO THE READER

1. This document is merely a general source of information aimed at providing an overview of the legal principles governing inheritance matters and death duties as they might be applicable to the estate of officials and other servants of the European Communities.

   It does not set out to provide exhaustive information enabling individual situations to be settled.

2. The references to Belgian or another Member state legal provisions applicable as at the date shown on this document are given for information purposes only and do not prejudge any -likely- amendments which may be introduced in the short or medium term by the regional or federal authorities.

   The reader should bear in mind that, in Belgium as in other Member states, constitutional reforms have granted the regions autonomous regulatory powers in many areas of taxation, including in inheritance matters.

   The tax situation of officials and other servants of the Communities may, therefore, vary according to the region in which they have taken up residence.

   They should inform themselves about the rules specific to their region.

3. Figures relating to the calculations and amounts of tax applicable in Belgium or in another Member state are given purely as an indication since they may be amended at any time by the national or regional legislator or vary from one tax year to another, particularly as a result of indexing.

4. Regarding Belgian legislation, additional information, all regulatory and legislative tax instruments, national or regional, are accessible on the Federal Public Service of Justice web site [1] and the Federal Public Service of Finances web site [2].

5. The complexity of these matters is even worsened by the need in liquidating a succession to combine rules of civil law (devolution, estate administration and liquidation, family relationships, personal status, etc…) with tax law rules which are left to the entire discretion of the Member states and their regions.

6. **Disclaimer**

   The views and opinions of authors expressed herein do not necessarily state or reflect those of the European Commission or other EU institutions.

   This document is not a substitute for independent professional advice and readers should obtain any appropriate professional advice relevant to their particular circumstances and personal situation.

[1] http://www.ejustice.just.fgov.be/loi/loi.htm

[2] http://ccff02.minfin.fgov.be/KMWeb/browseCategory.do?method=browse¶ms.selectedCategoryId=4430

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I. INTRODUCTION – KEY FIGURES

“An optional EU code on inheritance could stop the heirs to multi-national estates squabbling over which of Europe’s very different national laws would take precedence. Europe’s differing national codes of inheritance and marital property are some of the oldest and most sensitive areas of law on the statute books, with each nation jealously guarding such hallowed principles as primogeniture.

Free movement is a core right of European Union citizens. About [20] million Europeans are taking advantage of this right by living outside their home countries. There are about [450,000] international successions each year in the EU, representing more than EUR [120] billion. At the moment, as owners of properties –houses and bank accounts – families are confronted with different rules on jurisdiction and applicable law in the 28 EU Member States which create a legal nightmare”. [3].

The importance of cross-border estates within the European Union is a fact:

On 1st of January 2016, the Member States of the European Union (EU) had more 510 million residents of which more than 95% were EU citizens.

There were 19.3 million persons who had been born in a different EU Member State from the one where they were resident and 16.0 million persons living in one of the EU Member States on 1 January 2016 with the citizenship of another EU Member State.

In absolute terms, the largest numbers of non-nationals living in the EU Member States on 1 January 2016 were found in Germany (8.7 million persons of which 3.8 million EU citizens), the United Kingdom (5.6 million of which 3.25 million EU citizens), Italy (5.0 million of which 1.5 million EU citizens), Spain (4.4 million of which 2 million EU citizens) and France (4.4 million of which more than 1.5 million EU citizens).

Non-nationals in these five Member States collectively represented 76 % of the total number of non-nationals living in all of the EU Member States, while the same five Member States had a 63 % share of the EU-28’s population.

In relative terms, the EU Member State with the highest share of non-nationals was Luxembourg, as non-nationals accounted for 47 % of its total population of which 39% or 230.000 persons are EU citizens.

A high proportion of non-nationals (10 % or more of the resident population) was also observed in Cyprus, Estonia, Latvia, Austria, Ireland, Belgium and Germany.

Romanian, Polish, Italian, Portuguese and British citizens were the five biggest groups of EU-citizens living in other EU Member States in 2016 [4].

Many residents of Member states own immovable properties or movable financial products in other Member states.

Confronted to these developing figures, the only statement allowed to a community law practitioner, experienced in inheritance matters, would be: “*Death opens the door to succession…how to close it?!”*

And yet, *expats* and members of their family are all exposed one day to the death of a relative with this personal drama being turned into a material and financial nightmare by the irrational complexity and disparity of national laws in inheritance matters.

This document aims to provide officials and their family with basic information and general guideline on how inheritance laws operate, including identification of the law which would be applicable to their estate and a general overview of Belgian law to the extent that it will be applicable to all or part of their assets.

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[3] Quoted by Franco Frattini, former European Commission vice-president, Commissioner for Justice, Freedom and Security in 2009

[4] http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics

II. EU OFFICIALS – TAX DOMICILE – ARTICLES 12 &13 "PPI" [5]

1. STAFF REGULATIONS AND INHERITANCE ISSUES

It has been advocated that Article 12, par. 2, of the Protocol on the Privileges and Immunities of the European Union would be applicable to "death duties" considering that it prohibits any direct or indirect taxation on salaries, wages or emoluments paid by the Union "*regardless of its nature and the manner in which it is levied*" [6] and by reference to the principles highlighted in the "Humblet" [7] and "Bourges-Maunoury" [8] cases *precluding any national tax which is imposed directly or indirectly on officials or other servants of the European Union by reason of the fact that they are in receipt of remuneration paid by the European Union.*

On these basis, one should conclude that in the case of death of an EU official or another agent, following benefits should be exempted from death duties:

- Sums paid to surviving spouse or dependent children, pursuant article 70 of Staff Regulations [9].

  The disposition states that they receive "*the deceased's full remuneration until the end of the third month after the month in which the death occurred* ".

  They benefit from the payments on the basis of a personal and direct right. The sums do not transit by the deceased estate.

- Sums paid **in capital** pursuant to article 73 of Staff Regulations [10]:

  " The benefits payable shall be as follows:
  (a) In the event of death:
  Payment to the persons listed below of a lump sum equal to five times the deceased's annual basic salary calculated by reference to the amounts of salary received during the twelve months before the accident:
  — to the deceased official's spouse and children in accordance with the law of succession governing the official's estate; the amount payable to the spouse shall not, however, be less than 25 % of the lump sum…

  As mentioned above, they benefit from the payments on the basis of a personal and direct right. The sums do not transit by the deceased estate.

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5 Protocol on the Privileges and Immunities of the European Union

6 Case C-32/67, *Van Leeuwen/City of Rotterdam*, [1968] and case C-23/68, *Klomp/Inspectie der belastingen*, [1969]

7 CJ, 16/12/1960, C-6/60, *Humblet* [1960], EU:C:1960:48

8 CJ, 5/7/2012, C-558/10, *Bourges-Maunoury* [2012], EU:C:2012:418

9 *Article 70 :*In the event of an official's death, the surviving spouse or dependent children shall receive the deceased's full remuneration until the end of the third month after the month in which the death occurred. In the event of the death of a person entitled to a pension or invalidity allowance, the above provisions shall apply in respect of the deceased's pension or allowance.

10 … 2. The benefits payable shall be as follows:
(a) In the event of death:
Payment to the persons listed below of a lump sum equal to five times the deceased's annual basic salary calculated by reference to the amounts of salary received during the twelve months before the accident:
— to the deceased official's spouse and children in accordance with the law of succession governing the official's estate; the amount payable to the spouse shall not, however, be less than 25 % of the lump sum;
— where there are no persons of the category above, to the other descendant in accordance with the law of succession governing the official's estate;
— where there are no persons of either of the two categories above, to the relatives in the ascending line in accordance with the law of succession governing the official's estate;

In that context the reference made *to in accordance with the law of succession governing the official's estate* only concerns the devolution and determination of heirs respective shares (who gets what), with a guarantee that the surviving spouse will receive at least 25% of the capital.

- Sums paid pursuant article 79 of Staff Regulations to the surviving spouse (**survivor's pension**)

  As mentioned above, they benefit from the payments on the basis of a personal and direct right. The sums do not transit by the deceased estate.

- Sums paid pursuant article 80 of Staff Regulations to the children dependent on the deceased within the meaning of Article 2 of Annex VII at the time of his death (**orphans' pension**)

  As mentioned above, they benefit from the payments on the basis of a personal and direct right. The sums do not transit by the deceased estate.

To the contrary, the following payments would not be exempted from inheritance tax:

- Arrears of remuneration or family allowances paid in accordance to articles 62 to 71 of Staff Regulations

However, in an ancient case the Court of justice held that death duties are not “national income tax” in the sense of Article 12, par. 2, of the Protocol [11].

In that case, the Dutch tax administration had capitalised the survivor’s pension paid by the Commission to the widow of an EU official and integrated the capital into the deceased estate.

2. TAX DOMICILE - OFFICIALS IN ACTIVITY - ARTICLE 13 « PPI »

Regarding the law applicable and the place of handling the liquidation of the estate, it should be kept in mind that EU officials are governed by dispositions of Protocol on the Privileges and Immunities of the European Union.

However, if the deceased person is an ‘official of the European Union in activity, article 13 of the Protocol on Privileges and Immunities applies.

Article 13 of the Protocol on Privileges and Immunities reads:

> *In the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Union, officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their State of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the State of their actual residence and in the State of domicile for tax purposes, as having maintained their domicile in the latter State provided that it is a member of the Union.*
>
> *This provision shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.*
>
> *Movable property belonging to persons referred to in the first paragraph and situated in the territory of the State where they are staying shall be exempt from death duties in that State.*

[11] Case C-7/74, *Brouerius van Bideck*, [1974]

Such property shall, for the assessment of such duty, be considered as being in the State of domicile for tax purposes, subject to the rights of third States and to the possible application of provisions of international conventions on double taxation.
…

2.1. GENERAL PRINCIPLES

Under Article 13 of the Protocol, the movable property belonging to officials and other servants, their spouses not engaged in gainful employment and their dependent children situated in the territory of the country where they are staying is exempt from death duties there.

For the purposes of that tax, they are considered to be located in the country where they have their domicile for tax purposes, subject to the rights of non-member countries and the application of any international double taxation agreements.

It means in practice that in case of death of an EU official whose tax domicile is not located in Belgium, all his movable assets are deemed to be located in the Member state of the tax domicile and not in Belgium. This includes the tangible movable assets as well (furniture, car, valuables, personal belongings, etc…) as the financial assets (bank account, investments and saving, bonds, stocks and shares, securities, life insurance policies, etc…).

These assets would not be subject to Belgian inheritance tax law. It is therefore essential to include in a will a reference to Article 13 PPI to inform the heirs about that particularity.

However, immovable property forming part of an estate is subject to the legislation of the place where it is located.

This means that, irrespective of the nationality or residence of the deceased person, any immovable property located in Belgium which he or she owned is subject to Belgian law.

2.2. OFFICIAL'S SPOUSE – DEPENDENT CHILDREN

Provided he or she is not in gainful employment, the spouse and dependent children of a deceased official may benefit from Article 13 of the Protocol.

Otherwise, common law would be applicable to the estate of a deceased spouse of an EU official.

2.3. PARTNERS

In the present version of the Protocol, the cohabiting partner (whether registered or not) of an EU official may not invoke Article 13 PPI. His or her estate would be governed by common law.

A partner cannot be treated as a "spouse" [12].

However, some registered partnerships must be considered as equivalent to marriage under Article 2.2.b) of the Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [13].

Number of Member states have simply legalized marriage between persons of the same sex [14]. Other Member states legally recognize some form of civil union [15].

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[12] EU General Court, judgment of 28 January 1999, case T-264/97, D & Kingdom of Sweden vs Council of the European Union.

[13] Belgium has recognised as equivalent to marriage registered partnerships from Danemark, Finland, Iceland, Norway, Sweden, Germany ("*lebenspartnerschaft*"), Great Britain (*civil partnership*" from Wales, Ireland, Scotland and England).

[14] The Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Iceland (2010), Portugal (2010), Denmark (2012), France and the United-Kingdom (2013), Ireland and Luxemburg (2015), Finland, Germany and Malta (2017).

3. TAX DOMICILE - OFFICIALS IN RETIREMENT – COMMON LAW

Officials in retirement are not governed by the provisions of the Protocol anymore but by common law [16].

Retired officials may not invoke Article 13 of the Protocol.

Their succession is normally opened in the place where they are living or have their domicile when they die [17].

III . TAX SITUATION OF RETIRED EU OFFICIALS

1. TAXATION OF RETIREMENT PENSION

1.1. ARTICLE 12 (EX-13) PPI

According to Article 12 (ex-13) of the Protocol on the Privileges and Immunities of the European Union, annexed to the Treaty on the European Union, signed in Lisbon on 13 December 2007 and entered into force on 1st December 2009:

> *"Officials and other servants of the Union shall be liable to a tax, for the benefit of the Union, on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by a European law. That law shall be adopted after consultation of the institutions concerned.*
> *Officials and other servants of the Union shall be exempt from national taxes on salaries, wages and emoluments paid by the Union".*

The purpose of Article 12 is to avoid double taxation as EU officials and other agents pay their income tax to the Union. The provision applies also to retirement pensions.

In that respect, the Court of justice has ruled that:

(a) Article [12] of the Protocol is not confined to national taxation based directly on the salaries, wages and emoluments paid by the Communities to their officials and other servants: the exemption also extends to all indirect national taxes (see *Humblet*, Case 6/60 [1960] ECR 1125, Case 260/86 *Commission v Belgium* [1988] ECR 955, ground of judgment No 10, and *Tither*, Case C-333/88 [1990] ECR I-1133, ground of judgment No 12).

(b) Article [12] of the Protocol restricts the tax sovereignty of the Member States in that it precludes any national tax, regardless of its nature and the manner in which it is levied, which is imposed directly or indirectly on officials or other servants of the Communities by reason of the fact that they are in receipt of remuneration paid by the Communities, even if the tax in question is not calculated by reference to the amount of that remuneration (see *Commission v Belgium* in above-mentioned case, ground of judgment No 10; *Tither* in above-mentioned case, ground of judgment No 12, and *Kristoffersen*, Case C-263/91 [1993] ECR I-2755, ground of judgment No 14).

(c) For the application of the conditions under which tax advantages are granted, there must be no discrimination between persons entitled under officials or other servants of the Communities and other taxpayers (see *Brouerius van Nidek*, Case 7/74 [1974] ECR 757, ground of judgment No 14).

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15 the Czech Republic (2006), Hungary (2009), Austria (2010), Croatia (2014), Cyprus and Greece (2015), Estonia, Slovenia and Italy (2016).

16 See developments below

17 The "habitual residence" under the Regulation n° 650/2012 (see below).

1.2. FORMER EU OFFICIAL LIVING IN A THIRD COUNTRY

The PPI is not applicable in third countries, not Members of the Union.

In addition and so far, the European Union has not concluded any bilateral agreement on the prevention of double taxation with any third country. Therefore pensions of retired EU officials established in third countries are exposed to double taxation.

One exception however. An Agreement has been signed on 26 October 2004 with Switzerland according to which the Confederation shall not tax retirement pensions of former EU officials established in its territory. The term pension covers invalidity, retirement or survivor's pension, family allowances and termination-of-service allowances.

However, the Confederation can take the pension into account for assessing the tax rate and the amount of tax payable on income from other sources (*reserve of progressivity* clause).

1.3. THE « FRENCH CASE » - JUDGMENT OF THE COURT OF JUSTICE OF 5/7/2012 – CONFIRMATION OF "HUMBLET" CASE-LAW

In 2007, the French tax administration in Chartres decided to take into account the pensions exempt from national income tax of two retired officials in order to assess the ceiling of the French wealth tax , in violation of the Protocol and the "Humblet" case-law [18].

To make the story short, considering the amount of the pensions leaded to an increase of the wealth tax.

The tribunal of First Instance of Chartres approved the administration in a judgment of 10 October 2007. The decision was overruled by the Court of Appeal of Versailles on 27 November 2007. A later judgment by the French Cour de cassation on 19 January 2010 rejected the appeal (*pourvoi en cassation*) by the French Ministry of Finances [19]. At that stage one could have expected the case to be closed and the *Humblet* case-law being definitely reinstated by the highest national French jurisdiction. But the same tax administration of Chartres persisted and a new case ended up once again before the local Tribunal of first instance which referred the case to the Court of justice in November 2010 [20].

The Court of justice confirmed its "*Humblet*" case-law in a judgment of 5/7/2012 [21] in following terms:

> *"The second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities, initially annexed to the Treaty establishing a single Council and a single Commission of the European Communities, and subsequently, under the Amsterdam Treaty, to the EC Treaty must be interpreted as meaning that it precludes national legislation such as that at issue in the main proceedings which takes account of the income, including the pensions and allowances on termination of service, paid by the European Union to its officials and other staff, or to its former officials and former staff, in calculating the cap on a tax such as the wealth tax".*

The Court added in paragraph 30 of the judgment:

> *"In the interest of legal certainty, it must be held that, given that the income paid by the Union and subject to the Union's own tax cannot be taxed either directly or indirectly by a Member State and given that it is withdrawn from the tax sovereignty of the Member States, a person in receipt of such income is also exempt from any obligation to declare the amount of such income to the authorities of a Member State".*

On basis of that very clear statement by the Court, an EU official or retired official has no obligation to reveal the amount of the remuneration or pension that he receives from the Union when it comes to assess his tax liabilities.

[18] Judgment of 16 December 1960, *Humblet*, C-6/60, Rec. p. 1125
[19] A copy of the judgment is available on request at HR-B1-CONSEILS-JUR@ec.europa.eu
[20] Reference for a preliminary ruling, case C-558/10
[21] C-558/10, *Bourges-Maunoury*,

2. DETERMINATION OF THE TAX DOMICILE AFTER RETIREMENT

The tax situation of a retired EU official is not governed anymore by Article 13 (ex-14) of the PPI, but by common law.

Under common law, the tax domicile of a person (which means the place where the person is taxable on all her/his income worldwide) is normally the place where that person has the center of her/his interest, in most cases where that person has her/his permanent residence.

It is in any case a matter of fact.

2.1. NORMAL RESIDENCE UNDER EUROPEAN LAW

Under EU law, a definition of the concept of "*normal residence*" or « *permanent residence* » can be found in various community law instruments:

- **Directive 83/183/EEC of 28 March 1983** on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals [22] as amended by Council Directive 89/604/EEC of 23 November 1989. [23]

Article 6 of the directive reads: "*For the purposes of this Directive, "normal residence" means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.*

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence."

- The **Court of justice** has ruled that the criteria to assess normal residence refer to personal links as well as professional links to a specific location, in addition to the duration and that therefore, all these criteria have to be considered in combination (see judgments of 23 April 1991, Ryborg, C-297/89, point 19, and of 17 July 2001, Louloudakis, C-262/99, point 51).

- The **Court** has interpreted Article 6 of the directive in a judgement issued on **26 April 2007** [24] :

"Normal residence must be regarded as the place where a person has established his permanent centre of interests (see, by analogy, Ryborg, paragraph 19, and Louloudakis, paragraph 51).

The criterion of permanence refers to the condition that the person must be habitually resident in the place concerned for at least 185 days in each calendar year.

All of the relevant facts must be taken into consideration in determining normal residence as the permanent centre of interests of the person concerned (see Ryborg, paragraph 20), namely, in particular, the actual presence of the person concerned and of the members of his family, the availability of accommodation, the place where the children actually attend school, the place where business is conducted, the place where property interests are situated, that of administrative links to public services and social services, inasmuch as those factors express the intention of that person to confer a certain stability on the place of connection, by reason of the continuity arising from a way of life and the development of normal social and occupational relationships (Louloudakis, paragraph 55)".

[22] OJ 1983 L 105, p. 64
[23] OJ 1989 L 348, p. 28
[24] in case C-392/05, *Georgios Alevizos v Ipourgos Ikonomikon*, [2007]

- **Directive 2006/126/EC of 20 December 2006** [25] on driving licences (Recast) of which Article 12 reads:

"Normal residence
For the purpose of this Directive, 'normal residence' means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living".

- In a judgment of **5 December 2012**, the **Civil Service Tribunal** has made an interesting analysis of the subjective and objective criteria which lead to identify the "habitual residence" of a person. [26]. The Tribunal takes the opportuinity to remind that:

"*the registration in a municipal population register normally reveals the wish and the intention to fix the stable and permanent center of residence and interest at that place (order of 26/9/2007, F-129/06, Salvador Roldan/Commission, par. 52; judgment of 20/11/2007, Kyriazis/Commission, F-120/05, par. 53)*"

2.2. BILATERAL AGREEMENTS

In determining the tax domicile of a person, a vast majority of bilateral conventions on the prevention of double taxation also refer to the objective criteria of 183/185 days of residence (= half of the year + 1/3 days) in the territory of one of the signatories in order to fix the tax domicile of that person.

However under the bilateral conventions also, in default of any conclusive criterion, for instance because a person resides in several countries over a year without privileging any, the tax domicile shall be fixed in the country of the person's nationality.

2.3. PARTICULARITIES OF NATIONAL LAWS OR INDIVIDUAL SITUATIONS

Some Member states generate their own rules in fixing the tax domicile or the effects thereof.

- By registering with a municipality in Belgium, a person will become a "resident of the kingdom" and be presumed to be taxable in Belgium *unless otherwise proven:*

> "Sont assujettis à l'impôt des personnes physiques les **habitants** du Royaume, c'est-à-dire les personnes physiques qui ont établi en Belgique leur **domicile** ou **siège de leur fortune"**... "Sauf preuve du contraire, sont présumés avoir établi en Belgique leur domicile ou siège de leur fortune, les personnes inscrites au **registre national des personnes physiques (art. 2 du Code des impôts)"**.

- The Netherlands keep the grip on their tax payers for 10 years after they have departed from the country! Even though a Dutch citizen and tax payer has moved his residence to another country and has become taxable in that country, the Dutch authorities will still consider him as a tax payer liable for tax on all his income worldwide for 10 years…

- Rare are countries where the tax domicile is not fixed by reference to the residence but by reference to the nationality. The best-known example is the USA. All American citizens, even "*resident aliens*" holding a "*green card*", remain taxable in the USA, even though they live abroad.

As already mentioned, the reference to nationality is also used in bilateral conventions preventing double taxation as ultimate criterion.

- In some cases, the tax domicile may be placed in a Member state or a third country other than the country of the normal and effective residence by way of a **legal fiction**:

    - Article 13 (ex-14) of the PPI for EU officials
    - The Vienna Convention for diplomats

[25] OJ L 403 of 30/12/2009, p. 18
[26] Case F-6/12, *Bourtembourg v. European Commission, EU:F:2012:175*

3. TAXATION OF OTHER INCOME

3.1. EARNED INCOME

Earned income is income which is derived directly or indirectly from all types of gainful activity and is made up of the "gains, profits resulting from a former professional activity, remuneration and pensions received by the taxpayer.

Taxable income is any consideration resulting from pursuing an occupation.

3.2. CAPITAL AND WEALTH

In addition of income, some Member states also tax assets and wealth of a person (which includes capital, the net value of immovable and movable assets).

3.3. IMMOVABLE PROPERTY – PROPERTY TAX

The general principle is that tax payable on income from real estate should be declared and paid in the country where the property is located.

3.4. DIVIDENDS AND INTEREST

Such income comprises yields on movable assets, i.e. dividends and earnings from stocks and shares, interest on investments and savings accounts, income from life annuities, etc.

3.4.1. DIVIDENDS

Dividends are very often taxed at the source through a withholding tax levied by the paying agent. The tax does not as such provide full discharge and does not exonerate the beneficiary from declaring the income to the Member state of the tax domicile. When it concerns individual tax payers, the Court of justice does not consider that double taxation constitutes a violation of the free movement of capital.

- In a case related to Belgian tax burden on dividends from shareholdings in companies established in another Member State and the absence of possibility in the State of residence to set off income tax levied at source in another Member State, the Court has ruled on **14 November 2006** that [27]:

> *"Article 56(1) of EC Treaty does not preclude legislation of a Member State which, in the context of tax on income, makes dividends from shares in companies established in the territory of that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State.*
>
> *Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice. The purpose of the France-Belgium Convention is essentially to apportion fiscal sovereignty between the French Republic and the Kingdom of Belgium in those situations… However, that convention is not at issue in the preliminary reference at hand"* [28].

[27] Articles 63 and 65 TFEU

[28] C-513/04, *Mark Kerckhaert, Bernadette Morres v Belgische Staat*

- The **Court of justice** has confirmed its views in a judgment of **16 July 2009** [29] in following terms:

> "*In so far as Community law, in its current state and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community, Article 56 EC does not preclude a bilateral tax convention, such as that at issue in the main proceedings, under which dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not provide that the Member State in which the shareholder resides is unconditionally obliged to prevent the resulting juridical double taxation".*

- Unfortunately for the European tax payer, the Court of justice has maintained its line of reasoning in a judgment of **4 February 2016** [30] :

> « *…… les dividendes distribués par une société établie dans un État membre à un actionnaire résidant dans un autre État membre sont susceptibles de faire l'objet d'une double imposition juridique lorsque les deux États membres choisissent d'exercer leur compétence fiscale et de soumettre lesdits dividendes à l'imposition dans le chef de l'actionnaire (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C‑436/08 et C‑437/08, EU:C:2011:61, point 168 et jurisprudence citée).*
>
> *« …les désavantages pouvant découler de l'exercice parallèle des compétences fiscales des différents États membres, dans la mesure où un tel exercice n'est pas discriminatoire, ne constituent pas des restrictions interdites par le traité (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C‑436/08 et C‑437/08, EU:C:2011:61, point 169 et jurisprudence citée).*
>
> *« … il y a lieu de relever que conformément à la jurisprudence de la Cour, dès lors que le droit de l'Union, dans son état actuel, ne prescrit pas de critères généraux pour la répartition des compétences entre les États membres s'agissant de l'élimination de la double imposition à l'intérieur de l'Union européenne, la circonstance que tant l'État membre de la source des dividendes que l'État de résidence de l'actionnaire sont susceptibles d'imposer lesdits dividendes n'implique pas que l'État membre de résidence soit tenu, en vertu du droit de l'Union, de prévenir les désavantages qui pourraient découler de l'exercice de la compétence ainsi répartie par les deux États membres* (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C‑436/08 et C‑437/08, EU:C:2011:61, point 170 et jurisprudence citée) ».

And to conclude :

> *" Articles 49 TFEU, 63 TFEU and 65 TFEU must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which, when a resident of that Member State, a shareholder in a company established in another Member State, receives from that company dividends taxed in both States, that double taxation is not remedied by the grant in the shareholder's State of residence of a tax credit at least equal to the amount of tax paid in the State of the source of those dividends.».*

Member states maintaining deliberately double taxation on the same income, one can wonder about the effectiveness of the « *free movement of persons and capital* » and the ideal of « *mobility* » advocated all the time but not materialised for the citizens.

3.4.2. INTEREST

Taxation of interest has been harmonized by the Members states so that there is no more room for double taxation. The **directive 2003/48/EC of 3 June 2003** on taxation of savings income in the form of interest payments, which came into force on 1st July 2005, was based on two principles: (1) taxation of interest payments in the Member state where the beneficiary has is permanent residence and (2) an automatic exchange of information between Member states

[29] C-128/08, *Jacques Damseaux vs Belgian State*,

[30] C-194/15, *Baudinet e.a. c. Agenzia delle Entrate – Direzione Provinciale I di Torino*, not yet available in English version, EU:C:2016:81

The automatic exchange of information is applied by the 28 Member states, which means that a financial institution paying interest to a non-resident beneficiary will provide to the competent authorities of the beneficiary's tax domicile the following information: identity of the beneficiary, account number, information related to the interest payment. Member states exchange information on a regular basis.

The Directive (EU) 2015/2060 of 10 November 2015 has repealed the Directive 2003/48/CE[31], with effect on 1st January 2016, which has been integrated into the Directive 2014/107/EU of 9 December 2014, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, in force since 1st January 2016.

The new Directive provides for an automatic and mandatory exchange of information in a much larger scope than the directive 2011/16//EU in line with the worldwide standard (CRS) published by the Council of the OECD in July 2014 in order to ensure a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of information in the internal market.

The scope of the Directive has been extended et covers now a variety of financial products and income such as:

- Financial accounts (current accounts, deposits, equity, debt interest, cash value insurance, annuity contract, etc…)
- Account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity - Contract, the Cash Value or surrender value) as of the end of the relevant calendar year
- Total gross financial income (interest, dividends, bonds, etc…)
- Total gross proceeds from the sale or redemption of financial assets paid or credited
- Depository account: the total gross amount of interest paid or credited to the account

Etc…

4 TAX ALERTS – EU "BIG BROTHER"

4.1. DIRECTIVE 2010/24/EU OF 16.3.2010 (OJ L84 of 31.3.2010) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures,

The directive provides for a mutual assistance procedure whereby the requested authority may supply the applicant authority with the information which the latter needs in order to recover claims arising in the applicant Member State and notify to the debtor all documents relating to such claims emanating from the applicant Member State.

Compared to previous similar instruments, Article 2 extends the scope of the Directive to:

(a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union;

…

2. The scope of this Directive shall include:

(a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

(b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties;

(c) interest and costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph.

The directive came into force on 1/1/2012

[31] Which means also the Directive 2014/48/UE of 24 March 2014, modifying the Directive 2003/48/EC has never been transposed

4.2. DIRECTIVE 2011/16/EU OF 15.2.2011 (OJ L64 of 11.3.2011) on administrative Cooperation in the field of taxation and repealing Directive 77/799/EEC,

The Directive completes the **Directive 2010/24/EU** and reinforces the mechanisms of exchange of information between Member states. It is in force since 1/1/2014.

Article 2 of the Directive extends its scope to "*all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities*".

Article 8 of the Directive establishes a mandatory automatic exchange of information between Member states.

> "*The competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2014 that is available concerning residents in that other Member State, on the following specific categories of income and capital as they are to be understood under the national legislation of the Member State which communicates the information:*
>
> *(a) income from employment;*
> *(b) director's fees;*
> *(c) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures;*
> *(d) pensions;*
> *(e) ownership of and income from immovable property.*

It has also been modified and « integrated » into the **Directive 2014/107/EU of 9 December 2014**, amending the Directive 2011/16/EU, **that came in force on 1st January 2016.**

4.3. REGULATION(EU) 2015/847 OF 20 MAY 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006

The aim of the Regulation is to ensure the full traceability of transfers of funds throughout the payment chain. It reinforces the prudential obligations of financial institutions including collecting information on payer, payee and origin of the funds as soon as a transfer will amount …1.000 €.

It came into force on 26 June 2017.

Forewarned can be forearmed…

4.4. RECENT CASE-LAW IN RELATION TO THE EXCHANGE OF INFORMATION

- In a case related to the extent and limits of the right for a public administration to exchange personal data with another public administration without informing the persons whose data was being exchanged and processed, the **Court of justice ruled on 1st October 2015** that:

> *Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing."* [32].

[32] Case C- 201/14, *Smaranda Bara e.a. v Președintele Casei Naționale de Asigurări de Sănătate, Casa Naţională de Asigurări de Sănătate, Agenţia Naţională de Administrare Fiscală (ANAF)*, ECLI:EU:C:2015:638

- In another case, the issue was to know whether the German legislation requiring credit institutions to notify the tax authorities of deceased customers' assets for purposes related to the collection of inheritance tax could be extended and applied to branches established in another Member State (Austria) in which banking secrecy prohibits, in principle, the disclosure of such information. The **Court of Justice ruled on 14 April 2016** that:

> *« Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.»* [33] .

IV. INHERITANCE & SUCCESSIONS – INFLUENCE OF EUROPEAN LAW

Most of the time successions issues combine inseparably the application of civil law, first, then the application of tax law.

1. UNTIL 17/08/2015: FULL AUTONOMY OF MEMBER STATES [OR REGIONS] – CIVIL AND TAX LAWS

Until recently there were no community rules in these matters to resolve potential conflicts of the laws and the law applicable to estates was left to the entire discretion of the Member states.

Laws on inheritance differ across the Union in terms of "the definition of heirs", the "determination of their share of the estate" as well as the tax rates applicable.

Rules on which national law should apply in cross-border succession cases also vary: some member states followed the principle that the law should be determined by the nationality of the deceased, while others applied the law of the country where the deceased lived.

Only with regard to the formalities relating to wills, the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions applies to all members states except Italy and Portugal. (Italy, however, has similar rules in its national law).

There is no European Register of Wills.

A uniform system of central national registers of wills in Europe (e.g. if all member states would ratify the Treaty of Basel of 16th May, 1972) would help in international successions to find existing wills more easily.

In addition, the matter is extremely volatile as Member states amend their inheritance law very often.

In addition, also, some Member states have given up some of their competences and attributions to their Regions, e.g. Belgium and Spain.

In 1989, The Hague Conference on Private International Law agreed a convention on rules determining the law that should apply to succession. Only two EU members – Luxembourg and the Netherlands – have signed the convention and only the Netherlands has ratified it. The convention has never entered into force…

[33] Case C- 522/14, *Sparkasse Allgäu v Finanzamt Kempten*, ECLI:EU:C:2016:253

Judgments and other decisions issued in one Member state were not recognized and enforced in another Member state as Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels Ibis”) [34] does not apply to rights in property arising out of a matrimonial relationship, wills and succession.

Both Regulation (CE) n° 593/2008 of 17 June 2008 on the law applicable to contractual obligations (“Rome I”) [35] and Regulation (CE) n° 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”) [36] expressly exclude wills and successions from their scope. Yet, there was a clear need for the adoption of harmonized European rules (for further information, see the Commission 2005 Green Paper on Succession and wills, COM/2005/0065 final [37] ; also the European Parliament 2006 Draft report on succession and wills) [38].

2. LAW APPLICABLE TO A SUCCESSION – REGULATION (EU) N°650/2012 OF 4 JULY 2012 IN FORCE SINCE 17/08/2015

2.1. PRINCIPLES

On 14 October 2009, the Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Inheritance [39]. It includes a set of rules that Member states would use to determine which national law should apply in successions with cross-border implications. It creates also a European inheritance certificate, which people could use to prove ownership of inherited property.

The Regulation materialized on 4/7/2012 [40]. It came into force on 17 August 2015. It does not harmonize civil laws on successions in the Union, but only coordinate some aspects of civil law.

The Regulation should contribute solving some of the issues as it tends to unify and simplify the civil aspects of a succession:

1) the application of a single national law to the entire estate of a deceased person (movable and immovable assets)

2) even though the law applicable is not the national law of a Member state

3) in principle, it shall be the law of the country of the last habitual residence although the regulation does not provide any definition of the ‘habitual residence”.

4) except if the deceased has expressed the will for his estate to be governed by his national law (whether the law of a Member state or not)

5) the creation of a European Certificate of Succession… of 34 pages [41]

6) the determination of the competent jurisdictions and the guarantee of automatic recognition of decisions, organized on the same pattern as Regulation(EC) 44/2001.

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[34] OJ L 351 of 30.12.2012, p. 1

[35] OJ L 177 of 4.7.2008, p. 6

[36] OL L 199 of 31.7.2007, p. 40

[37] Not published in the Official Journal but to be found at http://europa.eu/scadplus/leg/en/lvb/l16017.htm

[38] http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/614/614735/614735en.pdf; http://www.europarl.europa.eu/oeil/file.jsp?id=5262052

[39] Com(2009)154 final

[40] OJ L 201 of 27/7/2012, P. 107

[41] **Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014** establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 359 of 16.12.2014, p. 30

However, the Regulation **does not apply to**:

- **revenue matters (tax matters)** or to administrative matters of a public-law nature. It will remain an exclusive "*competence of national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries".*

  "It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes" *(recital 10).*
- **the status of natural persons**, as well as **family relationships** and **relationships deemed by the law applicable to such relationships to have comparable effects**;
- the legal capacity of natural persons,
- questions relating to the disappearance, absence or presumed death of a natural person;
- questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;
- maintenance obligations other than those arising by reason of death;
- **the formal validity of dispositions of property upon death made orally**;

etc…

But no revolution should be expected as Commissioner Barrot said "*there will be no change of substance and that the aim would be limited "to try to avoid conflicts and confusion as to which law applies". The regulation shall not solve all problems. It does not harmonize either the law of succession or the property law of Member States. Nor does it affect the way in which inheritances are taxed by Member States.*

Consequently, international successions will continue to give rise to inconsistencies between national tax systems and they may lead to double taxation or discrimination.

In addition, Denmark, the United Kingdom and Ireland do not participate in the adoption of the regulation.

2.2. THE COURT OF JUSTICE – INTERPRETATION AND ENFORCEMENT OF THE REGULATION

The Regulation will undoubtedly give rise to important case law on both its interpretation and application.

1. **Judgment of 12 October 2017**, *Aleksandra Kubicka vs. Przemysława Bac, acting in her capacity as notary*, C-218/16 [42]

Ms Kubicka, a Polish national resident in Frankfurt an der Oder (Germany), is married to a German national. Two children, who are still minors, were born from that marriage. The spouses are joint owners, each with a 50% share of their family home. In order to make her will, Ms Kubicka approached a notary practising in Słubice (Poland).

The Polish Civil Code has two forms of legacy. On the one hand the "leg by vindication" by which the testator may decide, by notarial will, that a designated person acquires the object of a legacy at the time of the opening of the succession. The object of such a legacy may consist, in particular, of a share of ownership in an immovable property, which constitutes a transferable property right.

On the other hand, the "legacy by damnation", in which the testator may choose any lawful testamentary form, including the holographic will. For this type of legacy, the heir has an obligation to transfer the right in the property to the legatee, who may also enforce execution of the legacy by the heir.

Ms Kubicka wishes to include in her will a legacy 'by vindication', which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance, whereby her husband and children would inherit it in equal shares.

[42] EU:C:2017:755

She expressly ruled out recourse to an ordinary legacy (legacy ‘by damnation’), since such a legacy would entail difficulties in relation to the representation of her minor children, who will inherit, as well as additional costs.

The notary’s assistant refused to draw up a will containing the legacy ‘by vindication’ on the ground that creation of a will containing such a legacy is contrary to German legislation and case-law relating to rights in rem and land registration, which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 and that, as a result, such an act is unlawful.

The Court did not follow that reasoning and held that:

“Article 1(2)(k) and (l) and Article 31 of 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 must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy ‘by vindication’, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground 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”.

2. **Judgment of 1 March 2018**, *Doris Margret Lisette Mahnkopf*, C-558/16 [43]

On the one hand, the German civil Code provides that ‘If the property regime is ended by the death of a spouse, the equalisation of the accrued gains shall be effected by increasing the surviving spouse’s share of the estate on intestacy by one quarter of the estate.

On the other hand, that Civil Code provides that the surviving spouse of the deceased as an heir on intestacy shall be entitled to one quarter of the estate as against relatives of the first degree (e.g. children).

Mr Mahnkopf died on 29 August 2015. At the time of his death he was married to Mrs Mahnkopf. Both spouses, who had German nationality, were habitually resident in Berlin. The deceased had made no disposition of property upon death and his sole heirs were his wife and their only son.

The spouses were subject to the statutory property regime of community of accrued gains and had not entered into a marriage contract. In addition to assets possessed by the deceased in Germany, the estate also includes a half share in the co-ownership of a property in Sweden.

At the request of Mrs Mahnkopf, the probate court with jurisdiction in respect of Mr Mahnkopf’s estate, issued a national certificate of inheritance according to which the surviving spouse and the descendant each inherited one half of the deceased’s assets pursuant to the intestacy succession laid down by German law. The share of the estate allocated to the spouse results from the application of the German Civil Code, under which the surviving spouse’s share on intestacy, which is one quarter, is increased by an additional quarter when the spouses were subject to the matrimonial property regime of community of accrued gains.

Mrs Mahnkopf also applied to a notary for the issue to her, pursuant to Regulation No 650/2012, of a European Certificate of Succession designating her and her son as coheirs, in respect of half of the estate each in accordance with the national rule of intestacy succession. She wished to use that certificate for the purpose of registration of their right of ownership of the property in Sweden.

The notary submitted Mrs Mahnkopf’s application to the local Court that rejected the application for a European Certificate of Succession, on the ground that the share allocated to the deceased’s spouse was based, as regards one quarter of the deceased’s estate, on a regime governing succession and, as regards another quarter of his estate, on the matrimonial property regime, which does not fall within the scope of Regulation No 650/2012.

[43] EU:C:2018:138

Here again, the Court did not follow this reasoning and held that:

> *"Article 1(1) of 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 must be interpreted as meaning that 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 that regulation".*

3. INHERITANCE TAX - MEMBERS STATES TOLERATE MULTIPLE TAXATIONS OF A SINGLE ESTATE

3.1. There are only few bilateral agreements between Member states preventing double taxation in inheritance matters. For example, even though a deceased person would have had a main residence and tax domicile in another Member state, a '*déclaration de mutation par décès'* must be made and inheritance tax paid in Belgium in respect of immovable properties situated in the kingdom.

At the same time, those immovable properties would be declared and taxed under the national law applicable to the deceased estate. The estate might then be also taxed by the Member state of the residence of the heir(s).

This raises the threat of double, triple or multiple taxations…

To date, Belgium has only concluded two such bilateral agreements on inheritance tax, one with Sweden (1956) and the other with France (1959).

However, some Member states even in absence of bilateral convention preventing double taxation apply a "self-restrain" policy and accept not to tax twice part of the deceased estate which have been already subject to death duties in another Member state [44].

3.2. In addition, the Court of justice does not question the Member states right to exercise their exclusive competence in matters linked to successions and inheritance, especially at the taxation level.

In a case involving the "long arm" Dutch law [45], the Court of justice ruled on **23 February 2006** that:

> *"Article 56 of [EC Treaty] does not preclude legislation of a Member State by which the estate of a national of that Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that State, while enjoying relief in respect of inheritance taxes levied by other States*" [46].

In another case, related to German law not allowing inheritance tax in respect of capital claims, paid by the heir in one Member State, to be credited against inheritance tax payable in another Member State where the owner of the assets was resident at the time of death, the Court has ruled on **12 February 2009** that:

> "*Articles 56 EC and 58 EC "do not preclude legislation of a Member State which – as regards the assessment of inheritance tax payable by an heir who is resident in that Member State in respect of capital claims against a financial institution in another Member State – does not provide for inheritance tax paid in that other Member State to be credited against inheritance tax payable in the first Member State where the person whose estate is being administered was, at the time of death, resident in the first Member State"* [47].

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[44] e.g. The Netherlands apply a self-retrain policy

[45] See Tax liabilities, chapter 4.3., b) below

[46] C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v Inspecteur van de belastingdienst/ Particulieren/Ondernemingen buitenland te Heerlen,* [The Netherlands],

[47] C-67/08, *Margarete Block v Finanzamt Kaufbeuren*, [Germany]

The Court of Justice confirmed its position in a more recent judgment of **30 June 2016** [48] considering ruling that:

> *"Articles 63(1) TFEU and 65 TFEU do not preclude legislation of a Member State, such as that at issue in the main proceedings, which provides for a reduction in inheritance tax in the case of inheritance by persons within a particular tax class where the estate includes assets that had already been acquired, by way of inheritance, by persons within that tax class during the 10 years prior to the acquisition, on condition that inheritance tax was levied in that Member State in respect of that earlier acquisition".*

In the current state of EU law, Member States are not obliged to allow any reduction in the inheritance tax levied on a deceased person's estate even though the same assets have already been subject to inheritance tax in another Member state.

4. COMMISSION COMMUNICATION [49] AND RECOMMENDATION OF 15/12/2011

Within the EU all citizens are able to cross borders freely to live, work study or retire, and to purchase property and invest in other EU Member States. However, the Single Market Act [50] and the "EU Citizenship Report" [51], have identified many legal and practical obstacles that deter people from actually exercising these rights across borders within the EU, as well as actions that need to be taken in a whole range of areas so that EU citizens' rights are fully effective.

Taxation is one of these areas.

The European Commission's Communication of 20 December 2010 on "*Removing cross-border tax obstacles for EU citizens*" [52] examined the most pressing tax problems that citizens face when active across borders within the EU and outlined solutions to these problems.

Inheritances received across borders are one of these problem areas identified. The problems consist mainly of double taxation and discriminatory tax treatment.

The snapshot of citizens' and businesses' concerns in the Internal Market published in August 2011 confirmed that inheritance taxes feature among the 20 top problems faced by citizens and businesses when active across borders.

The Communication of 15/12/2011 reveals also that increasing numbers of EU citizens are moving from one country to another within the European Union during their lifetimes to live, study, work and retire; the number of EU-28 citizens that reside in a Member State other than their State of origin reached approximately 19.3 million in 2016 [53], an increase of more than 10 million compared to 2005.

Studies also show that cross-border real estate ownership in the EU increased by up to 50% between 2002 and 2010 and that there is also a massive growing trend in cross-border portfolio investment.

Given these statistics, it is likely that more assets may be inherited across borders in the future and therefore that more inheritance tax issues will arise.

In the European Union the total revenue from inheritance and estate taxes, including purely domestic cases and cross border cases, amounts to less than 0.5% of total tax revenue.

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48 C-123/15, *Max-Heinz Feilen v Finanzamt Fulda,* EU:C:2016:496, [Germany]

49 COM(2011) 864 final "Tackling cross-border inheritance tax obstacles within the EU"

50 COM(2010) 206

51 COM(2010) 603

52 COM(2010) 769

53 http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics

As the cross-border cases count for only a fraction of the total number of inheritance cases, the revenues associated with cross-border cases amounts to far less.

The first conclusion is that at a national level the magnitude of double taxation following from cross-border inheritance cases is limited. Inheritance taxes do not contribute significantly to Member states overall budget.

Furthermore, there is a tendency towards lower effective inheritance tax rates [54].

However, their dissuasive effect should convince citizens, wealthy or not, to move to [often sunnier] places which are more attractive and respectful of their heir's legitimate patrimonial interest…

5. REPORT OF EXPERT GROUP - 2015 [55] [56]

No effective answer has been given by Member states to the 2011 Recommendation.

Inheritance tax is still charged with reference to a large number of criteria, including residence, deemed residence, domicile and location of property. Individuals who have moved their residence within the EU, whether permanently or temporarily, are affected. So too, are those who have purchased property or invested across borders within the EU.

Increasing numbers of people are now realising that multiple taxation may arise simply because their children have moved within the EU to seek employment or further their education. When the children inherit from their families, the state of the deceased, the children's state of residence or citizenship and the state where property is situated may all claim tax.

This is clearly an obstacle to free movement of citizens and capital.

The European Commission has kept drawing attention to the problem of double taxation, in the context of small businesses, as long ago as 1994 [57].

But now ordinary people are also affected as the 2011 recommendation regarding relief for double taxation of inheritances has highlighted [58].

The expert group proposes a simple solution: 'one succession – one tax'.

The experts recommend a solution which identifies one taxing system with one succession. This follows a comparable approach taken in relation to social security [59]. The means of identifying the tax system may be based on habitual residence, which is a concept previously used in EU law.

This approach will not infringe Member States' or regions' power to determine the nature of the tax system they impose. It will, however, remove from individuals the burden of double or multiple taxation and the spectre of expropriation.

So far likewise the Commission, the experts seem to preach in the wilderness as Members states prefer looking at their own interests and regard citizens free movement as a wishful thinking.

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[54] STUDY ON INHERITANCE TAXES IN EU MEMBER STATES AND POSSIBLE MECHANISMS TO RESOLVE PROBLEMS OF DOUBLE INHERITANCE TAXATION IN THE EU, by Copenhagen Economics

[55] http://bookshop.europa.eu/en/ways-to-tackle-cross-border-tax-obstacles-facing-individuals-within-the-eu-pbKP0115918/

[56] http://bookshop.europa.eu/en/ways-to-tackle-inheritance-cross-border-tax-obstacles-facing-individuals-within-the-eu-pbKP0415905/?CatalogCategoryID=dnkKABstlNQAAAEjLpEY4e5L

[57] Communication from the Commission on the Transfer of Businesses: Actions in Favour of small and medium-sized enterprises (SMEs) (OJ C 204/1 23.7.1994).

[58] Commission Recommendation regarding relief for double taxation of inheritances (2011/856/EU: OJ L366/81 20.12.11).

[59] The 'unicity of social security regime' principle for workers under Regulation n° 883/2004

6. FIRST AID AGAINST DISCRIMINATIONS: THE COURT OF JUSTICE

The Court of Justice continues to address inconsistencies between inheritance tax and the fundamental freedoms when they reveal discriminations.

However, there are many problems that the Court cannot solve because they arise by virtue of the existence of two or more inheritance tax systems rather than a single discriminatory system.

A recent but steady case-law of the Court of justice has started condemning any treatments discriminatory against or detrimental to citizens:

1. In a first case involving Dutch law, the Court ruled on **11 December 2003** that

   Community law precludes national legislation (Dutch) concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.

   The Court of Justice affirms the prohibition of discrimination on the basis of the Member State of residence [60]. Subsequent judgments will adopt the same line.

2. In a judgment of **18 January 2007** [61], the Court of justice has condemned the Swedish legislation which provided that in case of a sale of a real estate property, the vendor could be exonerated from capital gain tax if the proceeds of the sale were to be reinvested… in Sweden:

   … by adopting and maintaining in force tax provisions, such as those in Chapter 47 of the law on income tax (1999:1229) (inkomstskattelagen (1999:1229)), which make entitlement to deferral of taxation on capital gains arising from the sale of a private residential property or of a right to reside in a private cooperative property conditional on the newly acquired residence also being on Swedish territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and under Articles 28 and 31 of the EEA Agreement;

3. Condemning discriminatory Portuguese law, the Court ruled on **11 October 2007** that

   "Article 56 EC precludes national legislation which subjects capital gains resulting from the transfer of immovable property situated in a Member State, in this case Portugal, where that transfer is made by a resident of another Member State, to a tax burden greater than that which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated [62]**.**

4. Condemning discriminatory Belgian regional rules, the Court held **25 October 2007** that

   "in the absence of valid justification, Article 43 EC precludes inheritance tax legislation of a Member State which excludes from the exemption from that tax available for family undertakings those undertakings which employ in the three years preceding the date of death of the deceased at least five workers in another Member State, whereas it grants such an exemption where the workers are employed in a region of the first Member State" [63].

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[60] C-364/01, *The heirs of H. Barbier and Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*,

[61] C-104/06, *Commission vs Sweden*

[62] C-443/06, *Erika Waltraud Ilse Hollmann v Fazenda Pública, Ministério Público*,

[63] C-464/05, *Maria Geurts,Dennis Vogten v Administratie van de BTW, registratie en domeinen, Belgische Staat*,

5. Condemning German law, the Court held on **18 January 2008** that,

Article 56(1) and 58 of the EC Treaty preclude legislation of a Member State which, for the purposes of calculating the tax on an inheritance consisting of assets situated in that State and agricultural land and forestry situated in another Member State,

– *provides that account be taken of the fair market value of the assets in that other Member State, whereas a special valuation procedure exists for identical domestic assets, the results of which amount on average to only 10% of that fair market value, and*

– *reserves application of a tax-free amount to domestic agricultural land and forestry in relation to those assets and takes account of their remaining value in the amount of only 60% thereof* [64] *.*

It follows that the fact that the grant of tax advantages in relation to inheritance tax is made subject to the condition that the asset acquired by inheritance be situated in the national territory constitutes a restriction on the free movement of capital prohibited, in principle, by Article 73b(1) of the Treaty.

6. Condemning Dutch law refusing the deduction of certain debts from the value of an estate for the sole reason that the deceased was not residing, at the time of death, in The Netherlands the Court held on **11 September 2008** [65] that :

"Articles 56 and 58 of the Treaty preclude national rules concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in a Member State, which, for the assessment of those duties, makes no provision for the deductibility of overendowment debts resulting from a testamentary parental partition inter vivos where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was residing, at the time of death, in the first-mentioned Member State, in which the immovable property included in the estate is situated, in so far as such rules apply a progressive rate of taxation and in so far as the combination of

(i) the failure to take into account such debts and

(ii) that progressive rate

could result in a greater tax burden for heirs who are not in a position to rely on such deductibility. The answer set out above is not affected by the fact that the rules of the Member State in which the person whose estate is being administered was residing at the time of death provide unilaterally for the possibility that a tax credit may be granted in respect of inheritance duties payable in another Member State on immovable property situated in that other State.

As regards inheritances, the case-law has confirmed that the measures prohibited by Article 56(1) EC as being restrictions on the movement of capital include those the effect of which is to reduce the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets (van Hilten-van der Heijden, paragraph 44, and Jäger, paragraph 31).

"In those circumstances, it is sufficient to note that the Member State in which the immovable property is situated cannot, in order to justify a restriction on the free movement of capital arising from its rules, rely on the existence of a possibility, beyond its control, of a tax credit being granted by another Member State – such as the Member State in which the person whose estate is being administered was residing at the time of death – which could, wholly or partly, offset the loss incurred by that person's heirs as a result of the fact that, for the purposes of assessing transfer duties, no account is taken in the Member State in which that property is situated of overendowment debts resulting from a testamentary parental partition inter vivos (see, to that effect, Eckelkamp and Others, paragraph 68).

[64] C-256/06, *Theodor Jäger v Finanzamt Kusel-Landstuhl*, C-256/06,

[65] C-43/07, *D.M.M.A. Arens-Sikken v Staatssecretaris van Financiën,*

A Member State cannot rely on the existence of a tax advantage granted unilaterally by another Member State – in the present case, the Member State in which the person concerned was residing at the time of his death – in order to escape its obligations under the Treaty and, in particular, under the Treaty provisions relating to the free movement of capital (see, to that effect, Case C-379/05 Amurta [2007] ECR I-0000, paragraph 78)".

7. The Court of justice condemned Belgian law concerning the assessment of death duties on immovable property which did not allow for mortgage-related charges to be deducted from the value of that property on the ground that, at the time of death, the deceased owning the property was not residing in Belgium [66].

The Court held on **11 September 2008** that the combined provisions of Articles 56 EC and 58 EC

"Preclude national legislation concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated [67].

In that regard, it must be borne in mind, first of all, that the Court has, in its case-law on the free movement of capital and inheritance duties, held that a citizen cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided for by the rules in force in a Member State other than his State of residence (Barbier, paragraph 71).

Next, as has been noted in paragraph 13 of the present judgment, there is no agreement between the Kingdom of Belgium and the Federal Republic of Germany for the prevention of double taxation of succession duties.

The Member State in which the immovable property included in the estate is situated cannot, in order to justify a restriction on the free movement of capital arising from its legislation, rely on the existence of a possibility, beyond its control, of a tax credit being granted by another Member State – such as the Member State in which the person whose estate is being administered was residing at the time of death – which could, wholly or partly, offset the loss incurred by that person's heirs as a result of the fact that, in the Member State in which the property inherited is situated, debts secured on that property are not deductible for the purposes of assessing transfer duties (see, to that effect, Arens-Sikken, paragraph 65).

A Member State cannot rely on the existence of a tax advantage granted unilaterally by another Member State – in the present case, the Member State in which the person concerned was residing at the time of her death – in order to escape its obligations under the Treaty and, in particular, under the Treaty provisions relating to the free movement of capital (see, to that effect, Case C-379/05 Amurta [2007] ECR I-0000, paragraph 78).

Finally, it is apparent from the case-file submitted to the Court that, in relation to the assessment of transfer duties, the national legislation at issue in the main proceedings simply excludes altogether the deduction of debts secured on immovable property left as inheritance where the person concerned was not, at the time of death, residing in that Member State, in which the property included in the estate is situated, without the treatment of those debts and, in particular, the absence of a tax credit in another Member State, such as the Member State in which the deceased was residing, being taken into consideration".

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[66] Transfer of property *mortis causa* or « *Mutation à cause de mort* », see below Inheritance in Belgium, paragraph 2

[67] C-11/07, *Hans Eckelkamp, e.a. v Belgische Staat*,

8. Spanish law has been also condemned by a judgment of **6 October 2009** [68] for maintaining a discriminatory legislation between residents and non-residents in relation to capital gain tax on real estate property transactions. The Court held that:

"…by treating differently, until 31 December 2006, capital gains realised in Spain according to whether they were made by residents or by non-residents, the Kingdom of Spain failed to fulfil its obligations under Article 56 EC and Article 40 of the Agreement on the European Economic Area of 2 May 1992";

9. German law has been condemned (once again) in a judgment of **22 April 2010** [69], tax relief granted on donations of real estate properties being significatively less if the donator and the donees were living outside Germany. The Court held that:

"Article 56 EC in conjunction with Article 58 EC must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that, for the calculation of gift tax, the allowance to be set against the taxable value in the case of a gift of immovable property in that State is smaller where the donor and the donee were resident in another Member State on the date of the gift than the allowance which would have applied if at least one of them had been resident in the former Member State on that date".

10. On **20 January 2011**, the Court of justice condemned Greek law for a double discrimination based on nationality and residence. The Court held that [70]:

- *"by granting exemption from the tax on the transfer of immovable property, under Article 1(1) and (3), first subparagraph, of Law 1078/1980, solely to persons permanently resident in Greece, whilst non-residents who intend to settle in Greece in the future are not granted exemption from the tax, and*

– *by granting, on certain conditions, exemption from the tax solely to Greek nationals or persons of Greek origin on the purchase of a first residence in Greece,*

the Hellenic Republic has failed to fulfil its obligations under Articles 12 EC, 18 EC, 39 EC and 43 EC and under Articles 4, 28 and 31 of the Agreement on the European Economic Area of 2 May 1992".

11. In relation to discriminatory treatment of gifts to institutions of general interest, the Court condemned German law once again in a judgment of **27 January 2009** [71], ruling that:

1. ""Where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods.

2. Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit".

12. Belgian legislation has been condemned once more by a judgment of **10 February 2011** [72], this time in the field of gifts in favour of non-profit associations and institutions. Belgian law refuses to grant

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68 C-562/07, *Commission vs Spain*,
69 C-510/08, *Mattner v Finanzamt Velbert,*
70 C-155/09, *Commission vs Greece*,
71 C-318/07, *Hein Persche v Finanzamt Lüdenscheid,*
72 C-25/10, *Missionwerk Werner Heukelbach eV vs Belgium State*,

exemption or reduction from inheritance tax when beneficiaries have their operational centre in another Member state than the Member state where the deceased had his habitual residence. Considering that such practices constitute an obstacle to the free movement of capital, the Court held that:

"Article 63 TFEU precludes legislation of a Member State which reserves application of succession duties at the reduced rate to non-profit-making bodies which have their centre of operations in that Member State or in the Member State in which, at the time of death, the deceased actually resided or had his place of work, or in which he had previously actually resided or had his place of work".

13. In the same line, the Court of justice has condemned Austrian legislation refusing the tax deductibility of gifts to research and teaching institutions on ground that the deductibility is limited to gifts to institutions established in national territory. In a judgment of **26 June 2011** [73], the Court held that:

"by authorising the deduction from tax of gifts to research and teaching institutions exclusively where those institutions are established in Austria, the Republic of Austria has failed to fulfil its obligations under Article 56 EC and Article 40 of the Agreement on the European Economic Area of 2 May 1992";

14. On **31 March 2011**, the Court of justice condemned German legislation which created discrimination in direct tax matters [74]. A mother had transferred immovable properties to her two sons by means of anticipated succession *inter vivos*. The rights of usufruct which their mother had enjoyed over the properties were transformed into an annuity under the terms of which the two brothers each had to pay their mother a monthly sum of EUR 1 000. At the same time, the brothers received in Germany income from the letting of the properties. Under German law the annuities paid to their mother are deductible from the rental income except that the German tax authorities refused the deduction to one of the brothers because he was not living in Germany but in Belgium.

The Court held that:

"*Article 63 TFEU must be interpreted as precluding legislation of a Member State which, while allowing a resident taxpayer to deduct the annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income derived from that property, does not grant such a deduction to a non-resident taxpayer, in so far as the undertaking to pay those annuities results from the transfer of that property".*

15. The Court of justice has again condemned German legislation in a recent case in inheritance matter. Under German law the surviving spouse enjoys a 500.000 € threshold on his part inherited in the succession. Mr and Mrs Welte were residing in Switzerland but owned a property in Germany. After the dead of her husband Mrs Welte inherited her late husband share in the property. She was denied the 500.00 € tax exemption on ground that she was a non-resident [who could only claim a 20.000 € tax exemption].

In a judgment of **17 October 2013** [75], the Court of justice held that:

"Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of inheritance of immovable property in that State, in a case where, as in the main proceedings, the deceased and the heir had a permanent residence in a third country, such as the Swiss Confederation, at the time of the death, the tax-free allowance is less than the allowance which would have been applied if at least one of them had been resident in that Member State at that time".

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[73] C-10/10, *Commission vs Republic of Austria*,

[74] C-450/09, *Schröder vs Finanzamt Hameln*,

[75] Case C-181/12, *Yvon Welte v. Finanzamt Velbert*

16. On **3 September 2014** [76], the Court of Justice has condemned Spain legislation for maintaining a discrimination in inheritance matters. The autonomous community of Madrid has suppressed inheritance tax in its region. However, the regional legislation has maintained inheritance tax upon those living outside Spain. As expected, the Court held that :

« by applying different tax treatment to donations and successions between beneficiaries and donees resident in Spain and those not resident in Spain, between bequeathers resident in Spain and those not resident in Spain, and between donations and similar transfers of immovable property situated within and outside of Spain, the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992 ».

17. On **4 September 2014** [77], the Court of Justice has condemned Germany whose legislation provided, in the area of inheritance tax, a higher tax exemption for residents than for non-residents, the Court finding that:

« By enacting and maintaining in force legislation whereby, in the application of inheritance and gift tax in respect of immovable property situated in Germany, a lower allowance is granted only if the deceased person, on the date of his death, or the donor, on the date on which he makes the donation, and the beneficiary, on the date of the chargeable event, resided in another Member State, whereas a considerably higher abatement is granted if at least one of the two parties resided in Germany on those dates, the Federal Republic of Germany has failed to fulfil its obligations under Article 63 TFEU"

18. On **11 September 2014** [78] , the Court of Justice has condemned Belgium law for maintaining a discrimination in relation to immovable income. Belgium is probably the only country where a rent is not considered as taxable income. Rental income is not taxable and the rent does not have to be declared. .

Real properties located in Belgium are taxable on the rental value (*revenu cadastral*) fixed in… 1975! To the contrary, in relation to immovable properties held in other countries, the tax payer must declare the present rental value or the actual gross rental income (where in the same situation rental income from Belgian source do not have to be declared) creating a discriminatory treatment towards properties held abroad.

As expected also, the Court of Justice held that:

"Article 63 TFEU must be interpreted as precluding legislation of a Member State, …, in so far as it is liable to lead, when a progressivity clause contained in a convention for the prevention of double taxation is applied, to a higher rate of tax on income merely because the method for determining income from immovable property results in income deriving from immovable property that is not rented out situated in another Member State being assessed at a Member State. It is for the referring court to ascertain whether that is in fact the effect of the legislation at issue in the dispute in the main proceedings ».

19. On **18 December 2014**, the Court of Justice has condemned the Netherlands for maintaining a discrimination in relation to gifts tax by refusing the tax exemption in respect of property situated in the territory of another Member State.

The Court of Justice held that:

« Article 63 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which an exemption from gift tax relating to certain properties that are protected on account of their forming part of the national cultural and historical heritage is limited to those properties situated in the territory of that Member State, provided that

[76] Case C-127/12, *Commission v. Spanish Kingdom*
[77] Case C-211/13, *Commission v. Germany*
[78] Case C-489/13, *Ronny Verest, Gaby Gerards v. Belgische Staat,*

that exemption is not excluded in the case of properties that may form part of the cultural and historical heritage of that Member State despite being located in the territory of another State.». [79]

20. On **24 February 2015** [80], the Court of Justice has condemned Germany law once again in relation to the of payments made to a parent in the context of an anticipated succession, excluding non-resident taxpayers from the benefit of a tax relief.

The factual circumstances are similar to the Schröder case (see point 14 above), except that in this case annuities are paid in consideration of a gift of movable assets (shares in a family business).

The Court of Justice held that:

"*Article 63 TFEU must be interpreted as precluding legislation of a Member State which does not permit a non-resident taxpayer who has received in that Member State commercial income generated by shares in a business which were transferred to him by a relative in the course of a gift by way of anticipated succession to deduct from that income the annuities which he has paid to that relative in consideration for that gift, whereas that legislation allows a resident taxpayer to make such a deduction".*

21. On **16 July 2015** [81], the Court of Justice has condemned France for maintaining a discrimination in relation to gifts made in favour of public bodies or bodies of public interest, a tax exemption being refused if the gift was made in favour of a beneficiary located in another Member state unless a bilateral agreement existed between France and the other Member state.

The Court of Justice held that:

« by exempting from droits de mutation à titre gratuit (duty payable on transfers for which no consideration is given) gifts and legacies to public bodies or to charitable bodies only where such bodies are established in France or in another Member State or in another State which is party to the Agreement on the European Economic Area of 2 May 1992, which has concluded a bilateral agreement with it, the French Republic has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area,».

22. On **17 September 2015** [82], the Court of justice has condemned Austrian law for maintaining a discrimination in relation interim taxation of capital gains and income from the disposal of holdings by a national foundation.

The right to deduct from the taxable amount gifts was refused to non-resident beneficiaries exempt from tax in the Member State of the foundation under a double taxation convention.

The Court of Justice held that:

« Article 56 EC must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings under which, as regards interim tax which is charged on capital gains and income from the disposal of holdings of a resident private foundation, that foundation has the right to deduct from its taxable amount only gifts made in the course of a given assessment period that have been the subject of a tax levied within that period on the beneficiaries of those gifts in the Member State in which the foundation is taxed, whereas such a deduction is excluded by that national tax legislation where the beneficiaries reside in another Member State and are exempt, on the basis of a double taxation convention, from a tax that is otherwise charged on gifts in the Member State in which the foundation is taxed".

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[79] Case. C-133/13, *Staatssecretaris van Financiën c. Q*

[80] Case. C-559/13, *Grünewald c. Finanzamt Dortmund-Unna*

[81] Case. C-485/14, *Commission c. France*

[82] Case. C-589/13, *Familienprivatstifung Eisenstadt c. Finanzsenat Aubenstelle Wien*

23. On **8 June 2016** [83], the Court has condemned German law in relation to the gift of immovable property situated within national territory, German law providing for a higher tax-free allowance for residents than for non-residents.

The Court of Justice held that:

"Articles 63 and 65 TFEU must be interpreted as precluding rules of national law that provide, in respect of gifts between non-residents, in the absence of a specific request by the beneficiary, for recourse to a method of calculation of taxation by application of a lower tax-free allowance. Those articles also preclude, in any event, rules of national law which provide, at the request of such a beneficiary, for recourse to a method of calculation of taxation by application of a higher tax-free allowance which applies to gifts in respect of which at least one party is a resident, the exercise of that option by the non-resident beneficiary involving the aggregation, for the purpose of the calculation of tax due on the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and the 10 years following that gift".

24. On **21 December 2016** [84]**,** the Court has condemned Portugal for a double discrimination in relation of (1) the taxation of natural persons on capital gains resulting from a share exchange, from a transfer of all the assets used in the exercise of a business or professional activity and (2) the difference in treatment between natural persons who exchange shares and maintain their residence in the national territory and those who make such an exchange and transfer their residence to the territory of another Member State of the European Union or the European Economic Area.

The Court of Justice held that:

"1. …, by adopting and maintaining in force Article 10(9)(a) of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Code on income tax of natural persons), according to which, for a taxable person who loses his status as a resident in Portugal, for taxation purposes for the year of such loss of residence status, the amount which, under Article 10(8) of that code, was not taxed when the shares were exchanged is to be reckoned as a capital gain, the Portuguese Republic has failed to fulfil its obligations under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the Agreement on the European Economic Area of 2 May 1992;

2. …, by adopting and maintaining in force Article 38(1)(a) of the same code, which reserves entitlement to the tax deferral provided for by that provision to natural persons who transfer all the assets used in the exercise of a business or professional activity to a company which has its head office or effective management in Portugal, the Portuguese Republic has failed to fulfil its obligations under Article 49 TFEU and Article 31 of the Agreement on the European Economic Area";

25. On **4 May 2017** [85], the Court has condemned Greece in relation to duties payable on gifts and legacies to public bodies or to charitable bodies as bodies located in another Member state are excluded from reduced rate and reduced rate being only granted for bodies in MS which has concluded a bilateral agreement with Greece.

The Court of Justice held that:

« En adoptant et en maintenant en vigueur une législation qui prévoit un taux préférentiel des droits de succession pour les legs effectués en faveur d'organismes sans but lucratif qui sont établis dans d'autres États membres de l'Union européenne ou de l'Espace économique européen sous réserve de réciprocité, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 63 TFUE et de l'article 40 de l'accord sur l'Espace économique européen, du 2 mai 1992 [86] ».

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83 C‑479/14, *Sabine Hünnebeck v Finanzamt Krefeld*

84 C-503/14, *European Commission v Portuguese Republic*

85 C-98/16, *European Commission v Hellenic Republic*

86 Text and operative part not available yet in English

V. CROSS-BORDER ESTATES – PRIVATE INTERNATIONAL LAW - TESTS

Cross-border successions cannot be resolved without considering at least the following issues:

(1) the law(s) applicable to the estate,
(2) the content of the estate (movable and immovable assets)
(3) the persons qualifying to inherit
(4) the extent and/or limitation of their rights
(5) the tax liabilities

1. THE LAW APPLICABLE TO THE ESTATES

Since 17/08/2015, the single law applicable as a whole to the entire estate (immovable et movable assets) will be:

- by default, the law of the state in which the deceased had his habitual residence at the time of his death [except if the deceased was manifestly more closely connected to another State]

- or, by choice, the law of the State whose nationality he possessed at the time **(1) at the time of the choice or (2) at the time of death (Art. 22)**

The determined law will be applicable whether it is the law of a Member state (principle of universal application).

2. THE CONTENT OF THE ESTATE – MOVABLE – IMMOVABLE

The law applicable under the regulation n° 650/2012 will determine the content of the estate.

In general, the assets will be divided into following categories:

A) MOVABLE

Movable assets, as opposed to immovable assets, include e.g. valuables, furniture, art collections, vehicles, savings, equities, securities, company shares, funds on a bank account, tax refunds and cash, household effects, life insurance capital, etc...

B) IMMOVABLE

Everyone apprehends the concept of real estate property (a house or a piece of land) but it is not of common knowledge that some Members states extend the definition to airplanes, yachts or ship vessels. But here also, the situation varies from one to another Member states.

While most of them levy inheritance tax on all real estate properties owned worldwide by the deceased person, e.g. Luxembourg does not tax immovable properties located abroad and owned by a Luxembourg resident at the time of his death.

C) OTHERS

Some national legislations reintegrate sometimes assets into the deceased estate by a fiction of the law, e.g. in Belgium donations made by the deceased less than 3 years [87] before his death and which have not been subject to registration duties.

As quoted above, Spain, Germany, the United Kingdom, the Netherlands and Belgium reintegrate life insurance policies subscribed in favour of third parties into the deceased estate.

[87] 1 year in Luxembourg, 7 years in the UK, etc…

It will not be the case in France where, e.g. life insurance made in favour of the surviving spouse will not be reintegrated into the deceased estate and will be exempted from inheritance tax [88].

This patchwork of examples shows the complexity of these matters.

3. THE PERSONS QUALIFYING TO INHERIT

The law applicable under the regulation n° 650/2012 will determine who comes in line to inherit from a deceased person (heirs, legatees and donees).

Mandatory provisions of some Member states institute *privileged heirs* (e.g. surviving spouse, partner or children) who cannot be totally disinherited and are guaranteed by law part of the legacy, limiting the freedom to dispose or devolve by will.

4. THE TAX LIABILITIES [NOT WITHIN THE SCOPE OF REGULATION 650/2012]

4.1. DIRECT INHERITANCE TAX PAYERS

Safe few exceptions, in most Member states inheritance tax payers are heirs, legatees and donees (recipients of a donation), each beneficiary being taxed on the share received.
But in the United Kingdom, for example, death duties are calculated on the value of the entire estate with the consequence that each heir or legatee is liable for the inheritance tax in total.

However, the deceased may by will(s) shared out the tax weight amongst heirs and legatees.

The Netherlands also present a unique -and not attractive- particularity. When two spouses inherit from the same person, their shares are added together and taxed as a whole.

On the other end, in Portugal, Sweden, Luxembourg, most of the new Member states, some Spanish autonomous regions[89], heirs and legatees have nothing to fear as, inheritance taxes have been abolished.

To illustrate the volatility of the matter and how legislations can change quickly, let us only remember that Italy abolished death duties in 2001 but reinstated them in 2008 [90].

4.2. INDIRECT LIABILITIES

In most Member states third parties are under specific obligations in connection to the relationship that they entertained with the deceased.

1. In Belgium, banks will not release the accounts of a deceased unless they have received an *akte van bekendheid/acte de notoriété* or more often, a *notarial* declaration of devolution, drafted by a notary in which the latter states the identity of the deceased, the devolution and the identity of the heirs and their shares.

2. Moreover, upon death of a Belgian resident, banks and financial institutions have several other obligations:

- Information: tax authorities must be informed about the existence of bank accounts, effects, bank safes (articles 96-101 Inheritance Tax Code)

[88] Article L132.12 of French Insurance Code.
[89] Madrid, Castillo, Aragon, Basque región, Majorca, Cataluña (2014), etc…
[90] Still reasonable ones in direct line: 1.000.000 € threshold, then 4%

- Temporary blocking of funds: upon death, bank safes must be sealed. Before opening such bank safe, the tax authorities must be informed by registered mail four days in advance in order to give them the opportunity to be present at such opening.
  An inventory of the content of the safe must then be made.

- Refusing to release the funds or effects if they belong, even partially, to heirs or beneficiaries domiciled abroad (article 95 Inheritance Tax Code), as long as such heir or beneficiary has not delivered guaranty for payment of inheritance taxes (article 94 Inheritance Tax Code) and unless a certificate of the tax authorities is delivered.

3. Insurance companies established in Belgium are under a legal obligation to notify the tax authorities of any insurance contract regarding tangible movable assets, concluded by the deceased and/or his spouse (article 103/1 Inheritance Tax Code).

In addition, in Belgium, attempt to use life insurance policies to exclude or deprive *privileged heirs* (e.g. children) from their rights would fail.

Belgian Constitutional Court has ruled that the capital paid to the beneficiary of such a life insurance could not reduce the rights devolved to privileged heirs by law (the part of the legacy devolved to them by law) [91].

Germany and the United Kingdom also reintegrate life insurance policies subscribed in favour of third parties into the deceased estate.

4.3. TAX POWER

Some Member states impose inheritance tax only on assets located on their territory even though the deceased is a national or a resident of that Member state [92].

However, most of Member states will apply inheritance tax to the deceased worldwide assets.

A) SUCCESSION OPENED IN A COUNTRY OF THE LAST DOMICILE OF THE DECEASED

Most Member states will apply their domestic legislation to the world wide estate left by a person who at the time of his/her death had in that Member state his/her habitual residence or tax domicile.

The definition of the habitual residence if left to the *lex fori*, the national law applicable [93].

To assess the tax domicile, some Member states refer to the nationality of the deceased.

In addition, some Member states, using "*long arm statutes*", impose also inheritance tax liabilities to heirs, legatees or donees depending on their residence [94].

Germany imposes estates received by German residents from deceased persons domiciled in another country at the time of their death.

Contrary to these principles, Spain does not take into account the last residence of the deceased but the residence of heirs, legatees or donees.

Therefore, the estate will only be taxed if the latter have their residence in Spain.

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[91] Ruling of 26 June 2008, n° 96/2008, about « *KBC Life Invest Plan* » (Branch 23 type)

[92] Monaco, Canton of Geneva

[93] e.g. In Germany: 6 months of continuous stay

[94] e.g. France, The Netherlands and Germany.

b) Succession opened in a country different than the country of last domicile

Member states, in general, impose inheritance tax on assets located on their territory but owned by a person who at the time her/her death had his/her habitual residence and tax domicile in another Member state, e.g. real estate properties, stocks and equities issued by resident companies, public bonds, ….

But where most Member states only levy inheritance tax on particular assets (e.g. real estate properties), the United Kingdom levies inheritance tax on all assets located on its territory and owned by a person whom at the time of her death had her residence in another country.

Trying to avoid assets relocation, The Netherlands also keep imposing inheritance tax on world wide estates of Dutch nationals who have been established in another country for less than 10 years at the time of their death.

As already quoted, Spain levies inheritance tax on estates received by Spanish residents (heirs or legatees) even though the assets are located in another country and the residence of the deceased person was located in another country.

In Spain, the residence of the deceased person is irrelevant as only the residence of the beneficiaries is taken into account.

c) Conflict of laws - double taxation or no taxation

The present chaotic situation leads to situations sometimes detrimental, sometimes beneficial to the beneficiaries of the deceased estate:

- A real estate property located in France and owned by a resident of The Netherlands. It will be taxed in France (location) and in The Netherlands (residence of the deceased).

  And if the heir resides in Germany, the same property will be taxed again…

- A Dutch national dies in Belgium where he resides. But his estate could be taxed also in The Netherlands if, having kept his Dutch citizenship, he only moved to Belgium less than 10 years before the date of his death.

- A Spanish resident dies leaving heirs, all residing in Belgium. The deceased estate includes real estate properties in Spain and in Belgium, equities and bank accounts located in Belgium.

  Spain will only tax the real estate property located on its territory, as heirs do not reside in Spain, and Belgium will only tax the property located in Belgium, as the deceased did not reside in Belgium.
  No inheritance tax will be paid on movable assets left by the deceased.

- In the same circumstances as above if the deceased is a Belgian resident, the entire estate will be taxed in Belgium (residence of the deceased) and in Spain (residence of the heirs) …

To avoid or mitigate double taxation, some Member states have

(1) Taken unilateral measures in their domestic legislation, e.g. Belgian law allows a tax credit to compensate inheritance tax paid abroad on a real estate property [95].

(2) Or concluded bilateral agreements preventing double taxation.

    But some Member states are more active than others on that ground.

    France has concluded 9 agreements while Belgium only 2!

[95] See also Spain, the United Kingdom and France

4.4. INHERITANCE TAX RATES – TAX RELIEVES

In this matter more than any other not only do Member states enjoy total freedom but, because of frequent changes, it requires constant monitoring to experts to keep the information up to date.

Member states not only regularly modify their inheritance tax rates but also bring frequent modifications to a large variety of tax relieves [96], making some of them much more attractive than others.

In addition, Member States continue to modify, sometimes fundamentally, the inheritance tax system, sometimes by eliminating or substantially reducing it - for example in Italy in 2001 and 2008, in Portugal in 2004, in Sweden in 2005, in Belgium in 2007 (Flemish region) and in 2014 (Brussels region), in France in 2007, Valencia in 2017, Cataluña in 2013 and 2014, Andalusia in 2018, etc ....

VI. INHERITANCE IN BELGIUM

Inheritance taxes are levied on the occasion of the death of a person, on the value of all or part of the goods making up the estate of the deceased person.

In Belgium, anybody who inherits from a deceased person pays a tax (inheritance tax) on the share of the dead person's estate which he or she receives.

1. GENERALITIES

As already said, Belgium is one of the Member states which devolved inheritance matters to the Regions [97], as well as regarding the definition of "residence", the basis (composition of taxable estate) as regarding the tax rates and tax relieves.

In Belgium, the law distinguishes, in the case of individuals, between the *'droit de succession'*, which applies to inhabitants of Belgium, and the *'droit de mutation par décès'*, which applies to those not living in Belgium.

Although for income tax purposes, an official and his or her spouse are regarded as subject to separate taxation,[98] they are still regarded as married for the purposes of inheritance tax.

The inheritance tax code contains no provision similar to Article 126, § 1, 4° CIR/92.

In Belgium, inheritance taxes are regional matters [99].

- The Flemish Region [100], then the Brussels Region [101] have made use of their powers to alter the tax rates.
- In Flanders, people who have been living together for at least one year are now treated in the same way as married couples [102].

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96 e.g. threshold brought to 563.000 € in Germany, to 325.000 € in the UK, to 159.325 € for children and handicapped legatees in France, since 1 January 2011…

97 Referred to as "territorial units" in Regulation n°650/2012

98 Using the terminology introduced by the Belgian Law of 10 August 2001 (Article 28, replacing Article 141 CIR/92).

99 Art. 3(4) of the special Law of 16 January 1989 concerning the financing of Belgium's Communities and Regions.

100 Decree of 20 December 1996 (Belgian Official Gazette of 31/12/1996), as last amended by the Decree of 21 December 2001 (Belgian Official Gazette of 29/12/2001).

101 Ordonnance of 6 March 2008 (Belgian Official Gazette of 1/4/2008.

102 Decree of 1 December 2000 (Belgian Official Gazette of 11/1/2001), applicable from 1/1/2001.

- In the Flemish Region, since 1 January 2007, there are no more inheritance duties to be paid by the surviving spouse or cohabitants on the family dwelling located in Flanders [103].

- The Flemish Region offers another particularity: death duties are applied separately on the value of immovable and the value of movable assets.

  Death duties are not applied on the aggregate value of immovable and movable assets.

In Brussels, the inheritance tax rate applicable on the family dwelling has been reduced on the first slices up to 250.000 € [2% to 12% instead of 3% to 18%].

The Brussels Region by an **Order of 30 January 2014** has copied the Flanders Region and exempted surviving spouse and partner [only registered partner "cohabitant légal"] from inheritance tax on his share inherited in the family house (main residence of the household] [104].

Wallonia has also exercised its powers, but, like Brussels, regards as surviving spouses only cohabitants who make a declaration of cohabitation under Article 1476 of the Civil code [registered partnership] [105].

2. 'DROIT DE SUCCESSION' AND 'DROIT DE MUTATION PAR DECES'

'Droit de succession': the tax due by an heir on the whole of the share of a dead person's assets which he or she receives, less any debts of the deceased and the funeral expenses.

This tax is payable by any person who inherits goods or assets from a person who lived in Belgium.

'Droit de mutation par décès': the tax due by an heir on the gross amount which he or she receives from a real estate property located in Belgium left by a deceased person who did not live in Belgium.

The Belgian tax authorities used to deny the beneficiary the right to deduct debts (e.g. a mortgage loan) or losses from the gross value.

The Court of justice has ruled that it was contrary to European law [106].

Following the judgment, it took almost 2 years for the Brussels Region to adapt its legislation [107] which now reads:

> ***Article 1***
>
> *Il est établi :*
> *1° un droit de succession sur la valeur, déduction faite du passif visé à l'article 27, alinéa 1er, de tout ce qui est recueilli dans la succession d'un habitant du royaume ;*
>
> *2°* ***un droit de mutation par décès sur la valeur, déduction faite du passif visé à l'article 27, alinéa 2, si le défunt est un habitant de l'Espace économique européen, des biens immeubles situés en Belgique recueillis dans la succession d'un non-habitant du royaume****.*
>
> *Est réputé habitant du royaume celui qui, au moment de son décès, y a établi son domicile ou le siège de sa fortune.*
> *Est réputé habitant de l'Espace économique européen, celui qui, au moment de son décès, a établi dans cet espace son domicile ou le siège de sa fortune.*

103 Decree of 7 July 2006 (Belgian Official Gazette of 20/9/2006), applicable from 1/1/2007.
104 Published in the Official Gazette on 6/3/2014 and in force retroactively since 1/1/2014.
105 Decree of 14 November 2001 (Belgian Official Gazette of 29/11/2001), applicable from the date of publication.
106 See CJEC, judgment of 11 September 2008, note 24, p. 9 above
107 Decree of 26/8/2010 modifying the Inheritance Tax Code, Belgium Official Gazette 3/9/2010, p. 56433

Article 60

Les réductions visées à (article 59, 2° et 3°, ne sont applicables qu'aux personnes morales belges et aux personnes morales analogues créées conformément et assujetties à la législation d'un autre Etat membre de l'Espace économique européen et ayant leur siège statutaire, leur direction générale ou leur établissement principal dans l'Espace économique européen.

3. MOVABLE AND IMMOVABLE PROPERTY

Immovable property: means land and buildings and the objects incorporated therein.

Movable property: means goods which can be transported from one place to another and non-material assets, such as debts.

The*'droit de succession'* is due on all the movable and immovable property left by the deceased person. The *'droit de mutation par décès'* is due only on any immovable property left by the deceased person in Belgium.

4. CONFLICTS OF LAWS IN INHERITANCE MATTERS

The Belgian conflict rule is a "*disjunctive*" rule, not leading to unity of succession. The lex *successionis* governing intestate succession, before 17 August 2012, differed according to the character of the hereditary assets. The law of the "last residence" of the deceased governed succession on movable property anywhere in the world. The law of the place of physical location, the *lex rei sitae*, governed succession to immovable property.

The concept of domicile was determined according to the lex fori (see article 102 Civil Code, article 2 and 3 of Tax Code). It was automatically the place of one's principal establishment at the time of death. A choice of law was not possible in Belgium (Articles 77 and following of the Belgian Private International Law code).

However, since 17/08/2015 these provisions of Belgian law are obsolete and not applicable anymore as the regulation n° 650/2012 prevails.

5. DEVOLUTION UNDER BELGIAN LAW

One has to keep in mind that estate devolution under Belgian law depends on the matrimonial regime. To decide which law determines the matrimonial property regime of an individual's property, a distinction must be made:

a) If both spouses have the same nationality, the applicable law will be the common national law of the spouses.

b) If both spouses do not have the same nationality, Belgian law determines the applicable law by reference to the first stable matrimonial residence of the spouses.

The conflict rules for matrimonial property and for succession law are not coordinated and very often lead to the application of different material laws.

In this regard, it should also be kept in mind that matrimonial property law comes first.
In the case of death, the marital property system must first be settled.

In the case of community property, one half of the community (subject to any contractual modification) goes to the surviving spouse by virtue of marital property law, and has nothing to do with succession law.

The other half of the community property passes under the law of succession.

In the case of separation of property, all property of the deceased belongs to his estate, including his share in co-owned property.

5.1. SURVIVING SPOUSE'S RIGHTS

According to article 745bis § 1 BCC the intestate inheritance rights of the surviving spouse vary according to what other heirs are present. Three situations may be discerned.

- The first situation occurs when the deceased leaves descendants, adopted children or their descendants.

  The children do not necessarily have to be born of the marriage of the deceased with the surviving spouse. In this case, the surviving spouse will receive the usufruct (life interest) in the entire estate (article 745 bis§1, first indent BCC), while the bare ownership will be divided equally between the descendants, eventually with application of representation.

- Secondly, if the deceased leaves no descendants but other inheritors, the surviving spouse receives full ownership of the deceased's share in the community (if any) and the usufruct of the deceased's own personal assets (article 745 bis §1, second indent BCC).

  Thus, the surviving spouse receives full ownership of the entire community, half of which is obtained by virtue of marital property law (see above), and the other half by virtue of inheritance law. This rule clearly favours spouses married under a community property regime.

  If a house was community property, the surviving spouse will be full owner for the entirety; if a house was joint property in a regime of separation of assets, the surviving spouse will be full owner of his own half share, and only have a right of usufruct in the other half belonging to the inheritance, in which he will have to tolerate the rights of the deceased's blood relatives.

- Thirdly, if the deceased leaves no other inheritors, the surviving spouse receives full ownership of the entire estate (article 745bis §1, third indent BCC).

5.2. COHABITANT – REGISTERED PARTNER'S RIGHTS

The only measures that have been adopted for cohabitants or registered partners do not concern devolution but applicable inheritance taxes.

However, the law of 28 March 2007 amended Article 745octies of the Belgian Civil code which now reads as follows:

> *"Quels que soient les héritiers avec lesquels il vient à la succession, le cohabitant légal survivant recueille l'usufruit de l'immeuble affecté durant la vie commune à la résidence commune de la famille ainsi que des meubles qui le garnissent".*

Since 2007, a right of usufruct is recognised to the registered partner on the common residence.

Except in the Flemish Region, no measures were taken concerning succession law in favour of non-registered partners.

In Brussels and the Walloon Region, cohabitants or not registered partners are thus considered as third persons.

Therefore, they cannot inherit intestate nor do they have a protected heirship.

They can only inherit based on a will and at the highest tax rate.

The law of 31 July 2017, however, extends the rights of legal cohabitants [registered partners], especially when they are recipients of donations, gifts or legacies.

They may be exempted from the obligation to return them to the estate and therefore from inheritance tax.

5.3. PRIVILEGED HEIRS UNDER BELGIAN LAW

The freedom of a person to dispose of his assets by will is limited in most continental legal systems through the traditional mechanism of forced heirship or reserved portion.

It is a share of the estate, of which these heirs may not be deprived and therefore protects them against disinheritance by the deceased.

The protected heir has a property right towards hereditary assets. He has an absolute right to receive his share "en nature", in hereditary assets, and unburdened.

Forced heirs are children and ascendants, because of their close blood relationship with the deceased.

In Belgium, in addition to blood relatives, since 1981, it includes the surviving spouse.

5.4. KEEPING OR REGISTERING WILLS

The existence of the holograph will may be registered in the central register of wills (*register central des testaments*).

The notary may also draw up a notarial act of deposition of the will, which certifies the date of the will. At the same time, the testator may witness his writing and his signature. In that case existence of the will must be registered in the central register of wills, unless the testator has explicitly dismissed the notary to do this.

The existence of the public and international will must also be registered in the central register of wills.

The Central Register of Wills is kept in Brussels by the Royal Federation of Belgian Notaries.
The Federation arranges for the registration of a will in other countries and it answers all questions relating to the existence of and the place where a will is kept.

In Belgium, a will is <u>valid</u> provided that it was drawn up in accordance with the law of the place where that was done, the nationality of the testator, his or her domicile or normal residence or the place where the immovable property was located.

In Belgium, there are <u>three types of will</u>, all of which are equally valid on the date of death:

- *The holograph (manuscript) will*: a will written, dated and signed by the testator alone in his or her own hand. It may be entrusted to a notary for conservation and publication;

- *The authentic will*: a will drawn up by a notary;
- *The international will* under the Washington Convention of 26 October 1973.

  This is written by the testator or at his or her request and in the language of his or her choice. It may be typewritten.

  The testator must declare in the presence of two witnesses that the document is his or her will and that he or she knows its contents.

  The testator then signs the will or recognises his or her signature. The witnesses and the notary also sign.

  The notary attaches a certificate stating that all the formalities have been completed. This minute is placed in a sealed envelope with the will.

  The certificate must be in three copies: the record is attached to the will, one copy is given to the testator and another kept by the notary.

6. BELGIAN LAW OF 31/07/2017 – REFORM OF THE CIVIL LAW

On 31 July 2017 [108], the Belgian legislator voted a reform of the civil law applicable to successions. The law brings some innovations to the rules, particularly about the hereditary reserve (forced heirship).

The legislator maintains the principle of the hereditary reserve. The reserve is a part of the succession that the law reserves for the benefit of certain heirs, called the "forced heirs" who cannot be deprived of their share by gifts made by the deceased on their part of the estate.

In practice, Belgian law does not recognize the possibility of disinheriting a descendant. As a result, the gifts that would have been made by the deceased and that would have the effect of depriving the forced heirs of the share that the law protects to their benefit can be reduced.

The reserve can be considered from a quantitative and qualitative point of view.
The new rules apply to successions opened after the law comes into force on September 1, 2018.

6.1. QUANTITATIVE REDUCTION OF HEREDITARY RESERVE

The reserve is the portion of the legacy which a person cannot dispose of free of charge to the detriment of the forced heirs. The surplus, called the "available quota", is left to the free disposal of the person. The global reserve is reduced to the maximum of half of the estate left by the deceased regardless of the number of children. It could be up to three quarters before.

The new law therefore increases the available quota.

6.2. SUPPRESSION OF ASCENDANTS HEREDITARY RESERVE

The new law removes the old reserve of ascendants (¼ for the maternal line, ¼ for the paternal line). This abolition of the reserve is compensated by the extension of the maintenance obligation to them in charge of the deceased legacy. When the parents are in need at the time of death, their reserve takes the form of a capital, or a monthly life annuity fixed taking into account the life tables. The amounts granted may not exceed one quarter of the estate.

6.3. SURVIVING SPOUSE HEREDITARY RESERVE

The surviving spouse's reserve is maintained. It always corresponds to the usufruct on half of the succession: the family dwelling is in any case included as well as the furniture which garnishes it, even if the value of this usufruct exceeds half of the value of the usufruct of all the estate.

From now on, the usufruct of the surviving spouse will be received as a priority over the available quota and the least possible on the reserve of the descendants, whereas previously it was imputed proportionally on the available quota and on the reserve of the descendants.

6.4. QUALITATIVE AMENDMENT OF THE RESERVE- RESERVE IN KIND REPLACED BY RESERVE IN VALUE

Previously, the heirs' reserve was expressed in kind. Any forced heir had a right “in rem” [109] on each of the assets comprising the estate. The reservation in kind entailed a great deal of difficulties and legal uncertainty, since the forced heirs could request the material/real return in the succession of the property subject to a gift, when their reserve was unlawfully reduced.

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[108] M.B. 01/09/2017
[109] meaning on the property itself

From now on the reserve will be expressed in value.

The forced heirs can now claim only the value of the donated goods which reduce their reserve, and not the goods donated themselves.

In addition, the valuation of donations for the purpose of reduction is no longer based on the value of the property on the day of death but on the basis of the intrinsic value of the property donated on the day of the donation, indexed until the day of the donator's death.

6.5. SOFTENING THE PROHIBITION OF PACT ON FUTURE SUCCESSIONS

The current ban on inheritance pacts [110] is clarified and relaxed. On the one hand, its scope is described in the law, so that a certain number of controversial cases are solved. On the other hand, legally authorized inheritance pacts are extended.

One important innovation is the introduction of a global estate pact between parents and their children.

The Global Estates Pact provides parents with the opportunity to settle, before death, and with their children, the allocation and sharing of their estate.

This reform offers parents peace of mind, creates the possibility of reaching a personalized settlement of the family situation and avoids conflicts between children after the death of parents.

6.6. CHILDREN OF RECOMPOSED FAMILIES IN THE BRUSSELS REGION

A Decree of 12/12/2016 of the Brussels Region [111] has modified the Code of successions in Brussels.

Since January 1, 2017, for the application of the inheritance tax tariff, are now included to descendants in direct line:

1. The partner's child ["cohabitant legal" meaning registered partner only]
2. The deceased legal cohabitant's child if the partnership still existed at the time of death
3. A person who does not descend from the deceased and who, at the time of the death, cohabited for at least one year without interruption with the deceased and received the care that the children normally receive from their parents
4. Adopted children (simple adoption) when

   (1) where the adopted child is a child of the adopter's spouse;
   ...
   (3) where the adopted child has, for three uninterrupted years, received from the adopter or the adopter and his spouse together or from the adopter and his cohabitant together, the care that the children receive normally from their parents;

Cohabitation with the deceased is presumed, unless otherwise proven, when the person in question is entered in the population or foreigners' register at the same address as the deceased.

At the devolution level, the law of July 31, 2017 does not grant these children any part of the hereditary reserve (forced heirship).

However, they may be allocated a share of the estate through the available quota which now amounts to half of the estate.

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[110] An "successoral pact" under Belgian law is an agreement between a person and the heirs concluded prior the person's death and organising its legacy

[111] M.B. 29/12/2016, Ordonnance portant la deuxième partie de la réforme fiscale

7. TAX RATES – BASIS - REMINDER

In Belgium, the tax rate depends on:

1. The relationship to the deceased

2. The share received by each beneficiary

3. The region (Wallonia, Flanders or Brussels)

Valuation of the estate (movable and immovable assets): the declaration to be made to the tax authorities listing all assets worldwide should include their value estimated, at the date of the death, either by the heirs themselves, either by an expert chosen by them or by an expert chosen by joint agreement between the administration and the heirs (in that case – the so-called prior expertise procedure – the valuation may not be challenged by the administration at a later stage).

8. WHAT TO DO IN PRACTICE IN CASE OF DEATH OF A RELATIVE?

Normally, death automatically results, immediately and without formality, in the transfer of ownership of an asset from the deceased person to the heirs.

In Belgium, no certificate certifying or attesting the transfer of ownership is issued to the heirs by either the notary or an administrative body.

The only documents drawn up in the event of a death are:

- *The notarial act* drawn up by a notary or justice of the peace which simply sets out how the inheritance has been disposed of, including the identity of the heirs and the share received by each.

- *The statement of inheritance or transfer as a result of death* a document under private seal signed by the heirs or legatees and sent to the tax administration within five months of death.

  It provides the basis for calculating the inheritance tax or transfer tax payable by the heirs.

- *An inventory of assets in the inheritance* may be drawn up in the following cases:

  - At the request of the heirs,

  - As part of a procedure of acceptance subject to inventory,

  - Following the imposition of seals by a justice of the peace to protect the interests of any party.

VII. SOURCES OF INFORMATION

As part of its 2015-2017 Training Programme “Europe for Notaries – Notaries for Europe”, the Council of the Notariats of the European Union (CNUE) has published eight educational videos for practitioners dealing with particular aspects of Regulation (EU) 650/2012 on international successions.

Produced with the European Commission’s support, these videos deal with the following topics:
- Specific bequests
- Matrimonial property regimes and inheritance
- The European Certificate of Succession
- Public policy and recognition of judgments
- The choice of applicable law
- Third countries
- Habitual residence
- The validity of wills

This playlist contains eight educational videos on Regulation (EU) 650/2012 made in the framework of the 2015-2017 Training Programme. They can be viewed in English and French at the following link:

https://www.youtube.com/playlist?list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN

Tout regarder – Play all
https://www.youtube.com/watch?v=vq-SCiK1gs0&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN
https://www.youtube.com/playlist?list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN

1) The specific bequests - Les legs particuliers

https://www.youtube.com/watch?v=vq-SCiK1gs0&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=1

2) Matrimonial property regimes and inheritance - Régimes matrimoniaux et succession

https://www.youtube.com/watch?v=s9wNKeFFqIw&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=2

3) The European Certificate of Succession - Le Certificat européen de succession

https://www.youtube.com/watch?v=-0-xxkSLo44&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=3

4) Public policy and recognition of judgements - Ordre public et reconnaissance des jugements

https://www.youtube.com/watch?v=L-m2Ek9G1JE&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=4

5) The Choice of applicable Law - Le choix de la loi applicable
https://www.youtube.com/watch?v=fvrbHI4-qG0&index=5&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN

6) Third countries - Les pays tiers
https://www.youtube.com/watch?v=EnSYrZDzMZU&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=6
7) The habitual residence - La résidence habituelle
https://www.youtube.com/watch?v=LtYFx4xsopg&index=7&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN

8) The validity of wills - La validité des testaments
https://www.youtube.com/watch?v=iyeA40z-29Q&list=PLG3DR7pUin5DvvLSBFPH5I2_Pnnm7J2aN&index=8

SUBJECT MATTER	LINK(S)
Your Europe	http://europa.eu/youreurope/citizens/index_en.htm
Retiring abroad	http://europa.eu/youreurope/citizens/work/retire-abroad/index_en.htm
Monitoring Member states inheritance laws	http://successions-europe.eu/?lang=fr
Finding a notary in the EU	http://www.annuaire-des-notaires.eu/
Successions in the EU	https://e-justice.europa.eu/content_succession-166-fr.do
National rules on inheritance vary considerably between Member States (as to, for example, who inherits, what the portions and reserved shares are, how wide the testamentary freedom is, how the estate is to be administered, how wide the heirs' liability of debts is, etc.). In cross-border inheritance cases, it is necessary to determine which court has jurisdiction to deal with the case and which law applies to the case.	https://e-justice.europa.eu/content_succession-166-en.do?init=true
National rules on registration of wills vary considerably. In some Member States, the person that makes a will (the "testator") must register it. In other Member States, registration is recommended or concerns only certain types of wills. In a few Member States, registers of wills do not exist. Registering and searching for wills - Information sheets	http://www.arert.eu/Information-sheets.html?lang=en
The European Network of Registers of Wills Association	http://www.arert.eu/spip.php?lang=en&page=plan
RW : Making it easier to find wills in Europe It is sometimes impossible for heirs or those having to administer a succession to find a will, especially when it may have been drawn up abroad. In order to make it easier to find a will in Europe, the Notaries of Europe created the European Network of Registers of Wills (ENRW). Operational since 2002 through the secure interconnection of the various national registers, the ENRW makes it possible to carry out an EU-wide search for the will of a person who has died. More information on	www.arert.eu