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Behind the European Succession Regulation: Differences in the Substantive Law of Succession of Member States**

I Introduction: Regulation of the European Union in the Field of International Private Law

The Treaty of Amsterdam,[1] which entered into force on 1 May 1999, amended the statutes of the European Union in a way that international private law and the international procedural law of the Member States may be unified by regulations in the fields listed in Art. 81 of the Treaty on the Functioning of the European Union (TEU). The results achieved by now in this field – despite their weak points – must be considered as logical steps in the process of the unification.[2] The unification of rules on jurisdiction, recognition and enforcement, as well as those of on conflict-of-laws is a significantly easier task than the harmonisation of the substantive rules. Concerning the latter, important and hopeful first steps have been made, for example the directives[3] formed in the field of consumer protection or the model rules[4] of the PECL, but we cannot talk about a breakthrough even in the field of the seemingly simplest

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1 HL C 340, 1997.11.10.

2 To this significant process see in the Hungarian legal literature: Császár Mátyás, 'Az EU nemzetközi magánjogi forrásainak hatása a nemzetközi magánjog általános részére' (2013) 60 (11) Magyar Jog 669–679; Vékás Lajos, 'Európai uniós és tagállami nemzetközi magánjog' (2017) 64 (10) Magyar Jog 589–601; Concerning codificational and technical problematics, see: Somssich Réka, 'Az uniós tagállamok szabályozástechnikai megoldásai a nemzeti jog, valamint az uniós jog viszonyának rendezésére a nemzetközi magánjog területén' in Berke Barna, Nemessányi Zoltán (eds), *Az új nemzetközi magánjogi törvény alapjai* (HVG-ORAC 2016, Budapest) 44–59.

3 As such, we can mention the directives targeting the unification of the central institutions in contract law: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

4 *Principles of European Contract Law*, Parts I and II, edited by Ole Lando and Hugh Beale; Part III, edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (The Hague, London, New York, 2000, 2003).

contract law harmonisation.[5] Conversely, the creation of regulations in the field of international private law brought spectacular results within the short period of one and a half decades. No less than ten regulations have been created, which form the common law of the European Union over a broad area by answering questions on international jurisdiction, recognition and enforcement; furthermore, they unify the rules of conflict-of-laws to determine the applicable law in international issues. It comes with the desirable consequence that, in several fields – the rules on jurisdiction, recognition and enforcement as well as the rules on conflict-of-laws – international private law rules became unified in all Member States. Consequently, in the same matters of fact, the courts (arbitration courts and other jurisdictional organs) of all Member States will apply the same rules of international conflict-of-laws norms and, accordingly, the same substantive law. The determination of the applicable substantive law therefore does not depend on which state's forum the case will be brought before, or which state's organ will proceed in the case.

II About the Succession Regulation

To these regulations belongs 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 (hereinafter Succession Regulation or Regulation).[6] This Regulation shall be applied to the succession of persons who died on or after 17 August 2015. Before the succession regulation entered into force, the conflict-of-laws rules of the Member States applied *different connecting factors* for the determination of the applicable law. In some legal systems (such as the Hungarian),[7] the last citizenship of the deceased, in others the last residence, while again in others the last habitual residence was the basis for determining the applicable law.[8]

Similarly to other EU regulations, the conflict-of-laws norms of the Succession Regulation have a *loi uniforme* character. This means that the courts apply, through the Regulation, the

[5] As a theoretical preparation of the unification of the European contract law, we can consider the monumental and – because if its method – innovative work edited by Nils Jansen and Reinhard Zimmermann, *Commentaries on European Contract Laws* (more than 2000 pages) (Oxford University Press 2018).

[6] Regarding the succession regulation, see Anatol Dutta, Sebastian Herrler (Hrsg.), *Die Europäische Erbrechtsverordnung* (C. H. Beck 2014, München); Astrid Deixler-Hübner, Martin Schauer (Hrsg.): *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)* (Nomos 2015, Baden-Baden); Vékás Lajos, 'Objektive Anknüpfung des Erbstatuts' in Gerle Reichelt, Walter H. Rechberger (Hrsg.), *Europäisches Erbrecht* (Jan Sramek Verlag 2011, Wien) 41–56; Mádl Ferenc, Vékás Lajos, *Nemzetközi magánjog és nemzetközi kapcsolatok joga* (ELTE Eötvös Kiadó 2018, Budapest) 500–505.

[7] Act No. 13. from 1979. 36. §, 11. §.

[8] See the summary in the study of the Max Planck Institute in Hamburg: (2010) 74 RabelsZ 522, 125–126. margin numbers.

same substantive law, *whether the applicable rule is that of a Member State or not.* The basic idea of international private law is that the applicable law cannot depend on the proceeding forum. This principle requires that every forum of all Member States apply the norms determined by the Regulation, even if the applicable law is that of a State where the Regulation is not applicable or even that of a non-Member State. In this way a so-called 'double channelled application process', the application of different conflict-of-laws rules for cases within and outside the European Union, can be avoided. It would lead in the given case to the application of different substantive laws and unnecessary difficulties. However, there is generally no reason that would make different conflict-of-laws rules necessary in internal EU and external cases. In extreme cases, the court of a Member State can deflect an unacceptable result by using the *ordre public* clause.

The Succession Regulation accepts the principle of the *unity of the estate.* It means that it makes no difference between movable and immovable assets and therefore the issue of the estate is subordinated to one single state's law. With this solution, the Regulation intends to avoid complications which arising from the division of the estate. In cases when the assets are located in several states, these problems would increase the costs and significantly hinder the testator in planning the issue of succession. As one of the Member States where the Succession Regulation is applicable, the earlier *French succession law* followed the principle of dividing the estate: the law of the location of the subject *(lex rei sitae)* was applicable to the immovable assets, and the deceased's personal law to the movable assets.[9] [Note: *Denmark* (using the opportunity assured by Articles 1. and 2. of the Protocol No 22. attached to Article 81 of the TEU) ruled out its participation in the unification process, which is based on Article 81 of the TEU. Consequently, the succession regulation is not applied in Denmark. The *United Kingdom* and *Ireland* did not use their *opt-in* possibility in Articles 1–3 of Protocol No. 21 attached to Article 81 of the TEU. Accordingly, the succession regulation is not applicable in these states either.]

The objective connecting factor of the Succession Regulation is the *habitual residence* of the deceased at the time of the deceased's death. There is an *escape clause,* which helps the reasonable solution of extraordinary situations. When the overall assessment of all the factual circumstances of the case indicates that the deceased was manifestly more closely connected with another law (typically to the law of the state of his/her citizenship), the latter law has to be applied. The testator can provide that the issue of his/her estate has to be determined by the law of the state of his/her nationality at the time of making the choice or at the time of death. This *restricted possibility of choice of law* wants to ensure that he/she can order the estate under whichever state's law was the familiar, economic and cultural centre of his/her life.

[9] See ibid.

III The Differences in Substantive Succession Rules

1. The differences in substantive succession law are found in the background of the unification of the European conflict-of-laws rules. The aim of the Succession Regulation is – above the differences in substantive laws – creating unity by harmonising international private law rules and by ensuring the *international harmony of decision-making*.

In the legal literature, the perception is considerably prevalent that traditions play a more significant role in the differences between national succession laws than regarding contractual laws. This is presumably the truth, even if we can discover many differences in succession laws that have no deep roots and for which substantial reasons cannot be found.

Comparative law implies the possibility of closing legal solutions concerning the order of succession. The observation of foreign laws was already a common method in the era of codifications since the end of the 19th century. For example, Béni Grosschmid took the solutions of foreign legal systems into account in almost all the problems he discussed in his study evaluating the justification of the draft act on the intestate succession *'ex privata diligentia'*.[10] The utilisation of the results of comparative law is even more unavoidable in the process of preparing national legislation nowadays. As an example, we can refer to the preparatory work on the fourth book, on succession, of the *Dutch Burgerlijk Wetboek* of 2003, during which the solutions of almost every European codification – among these the first Hungarian Civil Code – were considered.[11] Of course, this method of legislation does not result directly in the unification of legal solutions.

2. In the following we are going to reflect on two possible *differences in the general part* of succession law (section IV). After this we will discuss in detail the significant differences in the intestate succession rules of some legal systems (section V). Despite the practical importance of the question we are not discussing the substantive requirements of the testament. This topic is simply passed by, because the Succession Regulation – in accordance with the Hague Convention[12] of 1961 and the principle of *favor testamenti* – aims that the validity of a written testament shall be saved if possible. This is served by that rule of the Regulation which prescribes that the testament is formally valid if it fulfils the requirements of the law where it was made, of the testator's personal law or the law of his/her residential state or the law of the state of his/her habitual residence. Furthermore, a clause about an immovable is valid if the formal requirements of the state's law where the immovable is located were fulfilled. In the last part of our study we shall deal with the problems that derive from

[10] See the study which was first published in the Magyar Igazságügy in years 1885 and 1886 Zsögöd Benő, *Magánjogi tanulmányok* 2. vol. (Politzer 1901, Budapest) 63–257.

[11] See the study by Wilbert D. Kolkman in Kenneth G. C. Reid, Marius J. de Waal, Reinhard Zimmermann (eds): *Intestate Succession* (Oxford University Press 2015) 229, 236; For the new Dutch succession law see Csizmazia Norbert, 'Az új holland öröklési jog' (2003) 5 (2) Polgári jogi kodifikáció 30–38.

[12] Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Entered into force on 1 May 1964.

different interpretations of the compulsory share of inheritance. The Succession Regulation extends the applicable law to the compulsory share.

IV Differences in the General Part

First of all, we present two possible problems in the *general part*, therefore we are going to answer the questions which can occur in intestate and testate succession, as well as regarding compulsory shares.

1. There are differences in legal systems as to whether they prescribe a requirement of some legal action to bring about succession. The majority of modern legal systems do not contain such a requirement, which means that without any specific legal action the succession comes about by the force of law at the moment of the death of the deceased: the principle of *ipso iure* succession.[13] This also means that the deceased's assets do not become derelict; there is no estate without a claimant. On the other hand, there are some legal systems today that prescribe a requirement for some legal action to bring about succession. These systems – on the contrary to *ipso iure* systems – are called *aditionalis* succession systems. Such are, for example, the Austrian and Italian succession laws. According to Austrian law – with specific exceptions – the heir does not immediately become the owner of the estate that passes to him, but the law on succession requires a non-contentious procedure and the successor's declaration *(Einantwortung)* to acquire the estate. According to the Italian law, legal succession comes about only due to the so called *accettazione*.[14]

2. The second problem is another difference in the regulation of renunciation contracts concluded with the testator. The ABGB and the BGB, as well as the majority of the legal systems following the German succession law tradition (e.g. Hungarian law) as well as the Nordic legal systems are familiar with the legal institution of renunciation *(Erbverzicht)*.[15] On the contrary, renunciation contracts are null and void in some Romance legal systems (Spanish, Catalonian, Portuguese) without exception, while in others (French, Belgian, Italian) with specific exceptions. Art. 25 of the Succession Regulation seeks to solve this question. However, not even the unified conflict-of-laws rules are capable on their own to balance all the problems which originate from the different basic understandings, for example in the event of a change of statues due to a change in the deceased testator's habitual country of residence.[16]

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[13] See for example: HCC 7:87. §, BGB 1942. §.

[14] ABGB 797. §, 819. §; Codice civile Article 459., Articles 470–476.

[15] BGB 2346. § – 2352. §; ABGB 551. §; HCC 7:7. § – 7:9. §.

[16] Regarding this problem, see Sebastian Seeger: *Erbverzichte im neuen europäischen Kollisionsrecht* (Mohr Siebeck 2018, Tübingen).

V Notable Differences of Intestate Succession in the Legal Systems of the European Union

1. We can conclude that the rules of intestate succession define the issue of the estate in every legal system on an *auxiliary basis.* These rules are applicable only in the absence of a valid testament, in the event of the debarment of the designated heir in the absence of an alternate heir or if the testament does not contain dispositions on the whole estate. This auxiliary role was made possible by the evolution of law: the succession laws of the modern era – almost without exception[17] – gave up[18] the Roman legal principle which excludes the parallel application of testate and intestate succession: *nemo pro parte testatus pro parte intestatus decedere potest.*[19]

This logical sequence is not reflected by practice, because in most European states – for multiple reasons – the testation rate is far from 50%,[20] and the majority of successions are intestate.

2. Among the intestate succession rules of the legal systems, we can nowadays find *several differences*. This might be considered surprising from many aspects.

a) First of all, the meaningful differences that show up in the details are hard to explain, because the *motives* behind intestate succession are common. At least it is true concerning the close relatives and the spouse. In the background of the intestate succession of every legal system there is one requirement that is always emphasised, namely that the law should determine the order of heirs in the way that the deceased would have ordered it, if he had made a will, which means, that the law should formulate the presumed intention of the deceased. It is said that it is even more correct, if the rules of the intestate succession are formulated in the way in which the deceased would have disposed – in accordance with the expectations of society. Such a requirement of society is family solidarity or care for family members.[21] These requirements are formulated somewhat generally and therefore they are unclear, if we consider the individual aspects of the deceased and the diversity of the amount and composition of the estate, although they do explain the essence. The canon of the law can hardly be more delicate than the mentioned aspect, and all closer and individualised considerations can be formulated by the will of the testator.

b) The national succession law rules have been approaching each other on many issues because of the social changes over the last 70 years. These changes are directly and specifically

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[17] According to the handbook edited by Reid, de Waal, Zimmermann (n 11) 445: in Europe this principle lives only in Catalonia's and San Marino's succession order.

[18] In the Hungarian succession law this principle was given up in 1715. See the study by Vékás Lajos in Reid, de Waal, Zimmermann (n 11) 274.

[19] Iustinianian Institutions 2,14. For a rare exception of the principle, see Földi András, Hamza Gábor, A *római jog története és institúciói* (21st edn, OFI 2016, Budapest) 608.

[20] See in the handbook by Reid, de Waal, Zimmermann (n 11) as a summary, 444. For the estimated Hungarian data see the study by Vékás (n 18) 275.

[21] See Reid, de Waal, Zimmermann (n 11) 445ff.

in connection with *social developments,* as for example the changed role of women in society, as well as their emancipation, and perhaps they are connected with the increased life expectancy.[22] As a general tendency, we can consider the strengthening of the legal status of the surviving spouse in intestate succession.[23]

In more recent times, the rules of succession have to fulfil several *constitutional and human rights requirements,*[24] which are bringing the order of intestate succession even closer together in the legal systems. From the middle of the 20th century, we can treat the equality of the spouses as one such requirement concerning intestate succession. Besides these, the European succession laws have come closer to each other, for example due to the fact that, in every legal system of the European Union, the full successor status of an adopted child as an intestate successor has been accepted.[25]

Even later, it took quite a lot of time to accept the equal position of a child born outside marriage, especially regarding the succession of the estate of the biological father.[26] In Hungarian law, the legal acceptance of equal succession rights for children born in marriage and outside marriage was implemented relatively early, in 1946.[27] This is impressive, because it happened much later in legal systems with a significant democratic history. In French law, for example, the rules causing a negative discrimination of any child born outside marriage only started to change in 1972, and the discrimination disappeared entirely in the first years of the 21st century.[28] In German law, the Weimar Constitution gave equality to children born outside marriage in 1919. However, the practical consequences of this constitutional principle were not included in the succession law rules. So – based on the constitutional thesis of the Grundgesetz of 1949 and the strong requirements of the sentence of the German Constitutional Court – an act *(Nichtehelichengesetz)* was passed in 1969, which basically (but yet not perfectly) assured the same successor status for the child born outside marriage.[29] Finally, we should mention that legal systems approach each other because, most recently, more and more legal systems are recognizing the same-sex partner's intestate succession rights as those of a spouse[30] or registered partner.[31]

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[22] For all of these as a summary, see Reid, de Waal, Zimmermann (n 11) 511ff.

[23] 489ff.

[24] Ibid, 448.

[25] Regarding the Hungarian evolution of law, see the study by Vékás (n 18) 279ff; for the French law see the study by Cécil Pérès in Reid, de Waal, Zimmermann (n 11) 40; regarding the German law see the study by Reinhard Zimmermann in Reid, de Waal, Zimmermann (n 11) 202ff.

[26] On the discrimination of children born out of marriage, which lasted for centuries, see Reid, de Waal, Zimmermann (n 11) 197, 481ff, and the quoted literature.

[27] Act No. XXXIX. from 1946. 1. §. On the gradual acceptance of equality in the practice of the Curia see Vékás (n 18) 278ff.

[28] See the study by Pérès (n 25) 37, 44.

[29] See the study by Zimmermann (n 25) 197ff.

[30] For the French law, see the study by Pérès (n 25) 49.

[31] For the Hungarian law, see the study by Vékás (n 18) 289; on the German law, see the study by Zimmermann (n 25) 219.

c) In the following, we will discuss the differences in the intestate succession rules of *European* legal systems (and among these, first of all, the states where the Succession Regulation is applicable). We will proceed in this way because of the limits to our knowledge and the framework; however, according to the Succession Regulation (due to its demand for universal application) the application of rules outside Europe is possible if the deceased's last habitual residence or – in the case of a choice of law – his/her citizenship connects the inheritance case to a legal system outside Europe.

3. The *descendants* forego the ascendants and the collateral relatives in every European legal system, and the sequence of succession among the ascendants is based on the same principle in the European legal systems. The European laws, almost without exception, distribute the estate *per stirpes.* It means that the share of a child who died before the deceased or is debarred from succession for other reasons will be inherited by his/her children or further descendants and not his/her siblings.[32] As a consequence, the deceased's closer and further descendants can inherit at the same time. The justification for the legal systems' substantively similar legal solutions as well as the legal literature gives different explanations.[33] However, the essential reason is obvious. By distributing the estate *per stirpes* among descendants, we can avoid the unfair consequences of those situations when the child of the deceased who has children dies before the deceased himself. Without distributing the estate *per stirpes,* the children (perhaps further descendants) of the child of the deceased who dies before the deceased would not receive a share of the estate, and they would be discriminated against, compared to the family of the deceased's other children.[34]

At first sight, succession *per stirpes* might seem unfair if the children who are debarred from succession have children of their own in a different number (these are the grandchildren of the deceased).[35] In these cases, the grandchildren receive the share of their parent who is debarred from succession, and their shares can be different depending on the number of their siblings. This problem is attempted to be solved by one of the regulations of the Scottish succession law, which follows the 'next-of-kin system' (also applied in some states of the USA). It makes an exception from the principle of succession *per stirpes,* and it prescribes an equal share for all grandchildren in those cases when the estate is inherited only by grandchildren, who come from different children.[36] The fairness of this system is questionable, because it makes the shares of the grandchildren depend on whether the grandchild's uncle or aunt or

[32] See for example the Hungarian HCC 7:55. § (3) sec., German BGB 1924. § (3) sec.

[33] See Reid, de Waal, Zimmermann (n 11) 462ff; for the historical background, which leads back to Justinian's Novels, see ibid, 453ff; in detail the study by Thomas Rüfner in Reid, de Waal, Zimmermann (n 11) 26ff.

[34] The same Reid, de Waal, Zimmermann (n 11) 466.

[35] The equal inheritance of the grandchildren to protect families with more children was suggested by Gustav Boehmer, *Vorschläge zur Neuordnung der gesetzlichen Erbfolge (BGB §§ 1924–1936)* (de Gruyter 1938, Berlin) 76ff. The prevailing point of view in the literature of the European states maintains succession *per stirpes* in this case too.

[36] Succession (Scotland) Act 1964 section 6(a). See the study by Kenneth G. C. Reid in Reid, de Waal, Zimmermann (n 11) 389. A similar suggestion occured during the preparation works of the Dutch Burgerlijk Wetboek, but this was rejected; see the study by Kolkman (n 11) 234.

a person who belongs to another branch of the ascendants was debarred from succession or not before the death of the deceased.[37]

4. The succession laws of the member states of the European Union are different in the definition of the status of the *surviving spouse*.[38]

a) As we mentioned [up in section 2 b)] the strengthening of the surviving spouse's *successor position* is outlined in the latest legal evolution. From a historical perspective, there were fundamental changes in this field over the last two centuries. While according to the original version of the *Code civil* – similarly to the principles laid down in Justinian's Novels[39] – the surviving spouse, alongside blood relatives, did not inherit,[40] but only a hundred years later the German BGB gave a quarter to the surviving spouse, even alongside the children[41] and in the 20th century (e.g. in Italy in 1975) similar changes were made in most European legal systems. The reforms concerning the surviving spouse's successor status took place at the beginning of the 21st century in the French (2001, 2006), Dutch (2003), Hungarian (2013) and English (2014) law.

All these changes mean that by now the surviving spouse has come to a very beneficial successor status in the European legal systems.[42] Perhaps the most favourable status is granted by the Dutch Burgerlijk Wetboek and the northern legal systems. In these legal systems, the surviving spouse inherits everything and the common descendants of the deceased are residual 'subsequent heirs'; they will inherit only after the death of the spouse.[43] The surviving spouse has the worst status in Spanish law: in the *'three-line system*[44], the surviving spouse theoretically has to share even with the farthest ascendant, and gets usufruct on only the half of the assets.[45] If we assess the successor status of the surviving spouse, the rules of the matrimonial property regime have to be taken into consideration, as well as other rights of the surviving spouse.[46]

In the details there are still *differences.* These divergences – among other reasons – can be attributed to the differences between the rules of the matrimonial property regimes.[47]

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[37] Reid himself thinks that this rule is difficult to prove: ibid, 390.

[38] On these problematics, see Weiss Emilia, A *túlélő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban* (Akadémiai Kiadó 1984, Budapest) 309; Reinhard Zimmermann, 'Das Ehegattenerbrecht in historisch-vergleichender Perspektive' (2016) 80 (1) RabelsZ 39–92.

[39] See Földi, Hamza (n 19) 626; Rüfner (n 33) 28.

[40] This inimical situation was later lightened by the rules of the matrimonial property regime and other possibilities. See the study by Pérès (n 25) 46.

[41] BGB 1931. §, see the study of Zimmermann (n 25) 211ff.

[42] As causes of these improvements see Reid, de Waal, Zimmermann (n 11) 490ff.

[43] See the study of M. Scherpe in Reid, de Waal, Zimmermann (n 11) 317ff, and the study of Kolkman (n 11) 242ff.

[44] See up in section 4.*c).*

[45] Spanish Civil code, Articles 935–944.

[46] See the study of Sergio Cámara Lapuente in Reid, de Waal, Zimmermann (n 11) 106ff.

[47] See Reid, de Waal, Zimmermann (n 11) 494ff. For Hungarian law see the study of Vékás (n 18) 284ff.

b) In the case of succession *alongside the descendants,* the *succession of usufruct,* which was earlier considered the main rule, was gradually forced back. Behind this development, we can find the financial, demographical and family-sociological changes of the 20th century. The inheritance of usufruct was formed under those circumstances when the essential inherited assets (in the first place, the lucrative *immovable assets*) were profitable stocks and not articles for personal use. Under these circumstances, the usufruct assured the livelihood of the spouse, without risking the future enjoyment of the estate by the other heirs after the expiration of the usufruct.

In the meantime the nature of the assets has significantly transformed. Nowadays most movable assets that can be inherited are relatively exhaustible; they are subject instead to consumption and depreciate quickly. In connection with the usufruct on some assets (copyright, patent and other rights, business shares, stocks, cash etc.) the interests of the spouse and the other heirs are often in sharp conflict. The increased life expectancy has extended the conflicts between the spouse who is the beneficiary of usufruct and the other heirs, especially in those not so rare cases when the other heirs come from the deceased's earlier marriage, and they are often just a bit younger or even older than the spouse.

Because of all of these, according to more and more European laws, the surviving spouse inherits a *share of the estate*. The Italian law[48] – starting the reform in 1975 – and from 2013 the Hungarian law[49] belong to these legal systems as well. According to the reformed (2001, 2006) *Code civ*il the widow can choose between a share of the estate (one-quarter) and the usufruct of the whole estate.[50] The Belgian[51] and the Spanish[52] Civil Codes still assure usufruct. The share inherited by the surviving spouse is typically defined as a certain proportion.[53] This can be one-quarter of the estate,[54] one-third,[55] a half[56] or a child's-share (whether defining the minimum share[57] or not).[58]

c) More legal systems intend to assure the *family house* used before the death of the testator and *the habitual circumstances* for the surviving spouse even alongside the descendants. Austrian law makes it possible for the surviving spouse, by a legacy, to use the house occupied together with the deceased, as well as the use of the usual furniture and appliances are

[48] Codice civile Article 581.; see the study by Alexandra Braun in Reid, de Waal, Zimmermann (n 11) 84.

[49] HCC 7:58. § (1), *b)*; see the study by Vékás (n 18) 284ff; Vékás Lajos in Vékás Lajos, Gárdos Péter (szerk.), *Kommentár a Polgári Törvénykönyvhöz,* 2. kötet. (2nd edn, Wolters Kluwer 2018, Budapest) 2614ff.

[50] Article 757.; see the study by Pérès (n 25) 46.

[51] Article 745.;

[52] Article 834.; see the study by Lapuente (n 46) 107.

[53] Determining the share of the surviving spouse in English law is more complicated. See the study by Roger Kerridge in Reid, de Waal, Zimmermann (n 11) 343ff.

[54] For example, Code civil Article 757.; BGB 1931. §.

[55] For example, ABGB 757. §; Codice civile Article 581. in the case of sharing with more than one child.

[56] For example, Codice civile Article 581. in the case of sharing with one child.

[57] For example, Polish Civil Code Article 931.

[58] For example:, Hungarian Civil Code 7:58. § (1) *b).*

necessary to maintain their former standard of living.[59] Hungarian law makes this possible by usufruct.[60] The widow, upon his/her intestate share, receives the legacy or the usufruct. The *Code civil*[61] and the Italian jurisdiction[62] assure the surviving spouse's usufruct of the house used together with the deceased, as well as the associated furniture etc., but the value of these are deducted from his/her other share. By no means all European laws go so far in ensuring that the surviving spouse can maintain their earlier life conditions.[63]

d) There are differences in the laws of the EU member states concerning the definition of the successor status of the surviving spouse in *absence of descendants.* There are nowadays legal systems where, in the absence of descendants, the whole estate is inherited by the widow. This is the situation, for example, in English[64] and Danish law[65] and – with exception of the ancestral assets – the Hungarian Civil Code[66] of 1959 had the same regulations. According to other succession laws (for example the *Code civil,*[67] the Polish Civil Code[68] and Norwegian law[69]), the surviving spouse halves the estate with the parents. With the exception of the house used together with the deceased, as well as the usual furniture and appliances, this system was introduced in the Hungarian Civil Code of 2013 (HCC), too.[70]

The widow receives two-thirds of the estate according to the Austrian ABGB while, according to the BGB, he/she is entitled to one half in the event of sharing with the deceased's parents, grandparents and their descendants.[71] The Italian *Codice civile* also gives two-thirds to the surviving spouse, in the event of sharing with ascendants or siblings.[72] Spanish law, as we have mentioned, gives only a usufruct to the widow/widower and only on the half of the estate, in a given case, even when he/she shares with further ascendants.[73]

5. As much the European legal systems can be considered uniform in the intestate succession of descendants (see section 3 above) we can find as many differences in the *intestate succession of ascendants and collateral relatives*. There is unity in only one question: according to every European succession law, the *ascendants and the collateral relatives* may only become intestate successors in the absence (when there are no descendants or they are debarred from

[59] ABGB 758. §.
[60] HCC 7:58. § (1) *a).*
[61] Code civil Articles 764–766.
[62] Cass UU, no 4847, 2013.
[63] See Reid, de Waal, Zimmermann (n 11) 491; 501ff.
[64] See the study by Kerridge (n 53) 340.
[65] See the study by Scherpe (n 43) 314.
[66] 607. § (4).
[67] Article 757-1.
[68] Article 933.
[69] See the study by Scherpe (n 43) 314.
[70] 7:60. §.
[71] ABGB Article 757., BGB 1931. Article (1).
[72] Article 582.
[73] Spanish *Code civil* Articles 935–944., see the study by Lapuente (n 46) 106ff.

succession) of descendants.[74] By a common perception and according to the studies of the summary handbook cited before, the rules of intestate succession concerning ascendants and the collateral relatives basically can be categorised into *three main systems* in civil law jurisdictions.[75]

a) We can call the first the parentelic succession system, which was formed in the *Erbfolge-patentgesetz* in 1786, and later in *ABGB.*[76] In *parentelic* systems – such as the Hungarian succession system[77] – the ascendants and the collateral relatives form a class of heirs according to levels of ascendants (class of parents, grandparents etc.). The heirs of the class that is closer to the deceased inherit before those in further classes and collateral relatives will become heirs only if their own ascendant is debarred from succession. For example, the sibling of the deceased will inherit only if his/her father or mother is debarred from succession but, in this case, the sibling inherits before the surviving grandparent. This sequence is supplemented by the mutual claim for the maintenance and the compulsory share between the parent and the child. All these are reflecting and representing the strong relationship between the parents and the children. In the grandparent's class and in the even further ascendants' class of heirs – whose members inherit only in exceptional situations – the principle of the parentelic succession can only be explained by the logics of the system. Deeper argumentations are not available.[78] The deceased may only express his/her closer emotional relationship with one of the grandparents or uncle/aunt if he/she left a testament to this end.

b) The second one consists of those succession systems that are based on the *Code civil.* According to the *Code civil,* and in those succession systems following this one,[79] the parents and the sibling may become intestate successors at the same time and any debarred sibling is substituted by his/her descendants (the deceased's nephew or niece). The parents each inherit one quarter of the estate, and the siblings share the other half of the assets and, similarly, they inherit the share of the debarred parent. The further ascendants (grandparents etc.) comprise the third class of heirs, and they inherit before the further collateral relatives who make up the fourth class of the heirs (uncles, aunts, cousins, etc.).[80]

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[74] Reid, de Waal, Zimmermann (n 11) 468.

[75] See Helmut Coing, *Europäisches Privatrecht,* vol. I. (C. H. Beck 1985, München) 604ff; Heinz Neumayer, 'Intestate Succession' in *International Encyclopedia of Comparative Law,* vol. 5, ch. 3 (2002), 4–58. margin numbers; Dieter Heinrich, Dieter Schwab (Hrsg.), *Familienerbrecht und Testierfreiheit im europäischen Vergleich* (Gieseking 2001, Bielefeld); Reid, de Waal, Zimmermann (n 11) 458ff.

[76] German, Swiss, Hungarian, Greek, Polish law, Dutch law from 2003.

[77] HCC 7:63. § – 7:66. §. The ancient example of the parental system is the Austrian ABGB, which was followed by the German BGB, the Polish Civil Code and many other laws.

[78] See Reid, de Waal, Zimmermann (n 11) 474ff.

[79] The Belgian Code civil, the Luxemburgish law, the Dutch law from 1838 and in its main part the Dutch law from 2003 *(Burgerlijk Wetboek),* the Romanian civil code from 1864, the Italian Codice civile from 1865 and from 1942. To this system can be listed the succession law of the new Romanian Civil Code, which entered into force in October 2011 *(Codul civil).* On this see Veress Emőd, Székely János, 'Törvényes öröklés a román öröklési jog rendszerében' (2018) (4) Közjegyzők Közlönye 23–45. It should be noted that, outside Europe this succession system was accepted by both of Québec's codifications (1866, 1994).

[80] See the study by Pérès (n 25) 40ff.

c) The third, so called *three-line system,* is followed by the Spanish Civil Code from 1889 and the Catalonian and Portuguese codes.[81] In this system, the collateral relatives do not inherit at the same time as the ascendants, but they form a separate class of heirs and, according to this system, the collateral relatives inherit only after all of the ascendants who are entitled to inherit. This means, for example, that the deceased's grandparents (theoretically even further ascendants, too) inherit before the deceased's siblings.[82]

6. Within the three basic succession systems there are *further differences,* too, in the order of succession of ascendants and collateral relatives. These small differences are often not separated from each other according to the basic systems because they cross over that classification.

a) The European succession laws differ according to the furthest ascendants who are entitled to inherit.[83] The Hungarian Civil Code, for example, does not limit the intestate succession of the ascendants but, concerning the collateral relatives, the intestate succession is closed by the descendants of great-grandparents.[84] With this solution, the Hungarian law (similarly to some other laws e.g. the Austrian[85] and the Polish[86] law) is placed in the middle between those legal systems that are not familiar with any limits[87] and those which make strict barriers,[88] even though it is closer to those mentioned before.

b) The Hungarian *lineal inheritance (droit de retour)* is a unique institution in today's European succession laws.[89] The Hungarian Civil Code of 2013 has kept the system of lineal inheritance and this decision was supported by remarkable arguments.[90] In the absence of descendants according to lineal inheritance, an asset that was inherited by or donated to the deceased by one of the parents (or in defined cases from collateral relatives) goes back to the branch where it came from. Those who inherit according to lineal inheritance must prove that the acquisition was free-of-charge.[91]

c) The institution known in French as *la fente successorale* is a unique solution concerning the succession of the ascendants. According to these rules, half of the share due to a parent without descendants who is debarred from succession will be inherited by the other parent; the other half will be inherited by the closest ascendant of the debarred parent (in typical case

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[81] Catalan law 1960, 1987, 1991, 2008), Portugiese law (1867, 1966). It should be noted that outside Europe this succession system was accepted by all Latin American codifications.

[82] See the study by Lapuente (n 46) 105ff, 111ff.

[83] On this, see Reid, de Waal, Zimmermann (n 11) 475ff.

[84] HCC 7:66. §.

[85] ABGB 735. § – 741. §, see the study by Christiane Wendehorst in Reid, de Waal, Zimmermann (n 11) 174.

[86] See the study by Frederyk Zoll in Reid, de Waal, Zimmermann (n 11) 302.

[87] For example, the German BGB 1929. §, see the study by Zimmermann (n 25) 197; Scottish law, see the study by Reid (n 36) 389ff.

[88] For example, English law, see the study by Kerridge (n 53) 327ff; further the Nordic laws, see the study by Jens M. Scherpe (n 43) 310ff.

[89] See Reid, de Waal, Zimmermann (n 11) 472.

[90] See Vékás Lajos (n 49) 2624ff.

[91] HCC 7:67. § – 7:71. §.

the deceased's grandparent in the same line). The surviving parent will inherit the whole share of the debarred parent, if this parent has no ascendants.[92] However, the parent is closer to the family of the deceased than the grandparent who is on the other line of ascendants, or even another further ascendant.[93] Considering the historical root of *la fente successorale* is a residue of the *paterna paternis materna maternis* principle and of the tradition of protecting the family property, which does not really fit together with modern succession laws. Nowadays it is family solidarity that is leading the order of intestate succession and not the intention of keeping the family property together. It is a great difference compared to lineal inheritance, that behind the institution of *la fente successorale* it can be only presumed that the asset derives from the ascendants, while it must be proved in the case of lineal inheritance.

7. There are significant differences in the European succession laws concerning the intestate successor position of the *state,* or perhaps the federal state (Germany[94]) or the municipality (Poland[95]).[96] In this field, the first dividing line between the legal systems is whether the state acquires the assets by virtue of succession. There are some European legal systems (for example France, Austria and the Netherlands),[97] where the state's acquisition of derelict assets is based on *sovereignty (iure imperii)* and not on succession upon the death of the owner. Article 33 of the succession regulation prescribes that such a Member State (in the absence of any other heirs) independently from the applicable law, can acquire those assets that are *located on its territory* but the state shall assure the satisfaction of the claims of creditors.

The differences between the laws that accept the legal succession of the state *by virtue of succession (iure successionis)* comprise after which ascendants or collateral relatives the state will be the intestate heir. In those legal systems where are no barriers to considering the level of ascendants and collateral relatives (German law) or ascendants (Hungarian law) in intestate succession, the state inherits only in the absence of all other heirs, perhaps as a necessary intestate heir, who cannot refuse the estate.[98] In other legal systems (for example in Italy), the intestate succession right of the ascendants and the collateral relatives is limited to a definite level and these laws determine the state as an intestate heir.[99]

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92 *Code civil* 747–749. Article; see – for the historical base of the institution as well – the study by Pérès (n 25) 40ff. The Dutch and Italian laws, which followi the succession order of the *Code civil,* did not implement this institution.

93 The same Reid, de Waal, Zimmermann (n 11) 472.

94 See the study by Zimmermann (n 25) 192ff.

95 See the study by Zoll (n 86) 302.

96 See Neumayer (n 75) 165–177 margin numbers. For the problematics of unlimited family succession and the solidarity of the community see Reid, de Waal, Zimmermann (n 11) 480ff.

97 *Code civil* Article 724., Article 811., see the study by Pérès (n 25) 45; ABGB 760. §, see the study by Wendehorst (n 85) 170; Dutch Burgerlijk Wetboek Article 4:189, see the study by Kolkman (n 11) 231.

98 BGB 1936. §; HCC 7:74. §.

99 Codice civile Article 586., see the study by Braun (n 48) 87ff.

VI Significant Differences between the Legal Systems of the European Union Considering the Rules of the Compulsory Share

1. The institution of the compulsory share was formed by the European private law as an instrument to release the conflict between the idea of the freedom of *testamentary disposition and the care of the family and solidarity* or keeping the property in the family. By assuring the claim for the compulsory share, the legislator intends to give a particular share of the assets (mostly the value of these in money instead) to the closest relatives and the spouse of the deceased, against the expressed will of the testator in the testament. The compulsory share is therefore the minimum share of the estate which the closest relatives and the spouse of the deceased shall receive *ex lege*.

Except for *English* succession law, which limits the freedom of testamentary disposition only exceptionally and therefore does not know the institution of the compulsory share according to our civil law concept, and it only assures a claim for adequate maintenance and support for specific people against the heirs,[100] debates concerning the compulsory share always flare up. In the civil law systems that are treated as models, theoretical and philosophical questions occur from time to time. This is comprehensible because, behind the idea of this question, there are significant contradictions. The question comes up again and again: does the legislator have the moral basis to ensure, for one part of the deceased's assets, who shall be the owner, among specific close relatives and for the spouse against the deceased's explicit will, only considering the family relationship? The valid arguments for and against this institution, are being searched for; moreover, the constitutional and human rights related ramifications are nowadays being examined.

In France in the last third of the 19th century, there was an intensive political dispute, and the standard opinion of the institution of the compulsory share, which is accepted by the *Code civil,* was questioned for financial and social reasons. To understand this dispute, it has to be taken into consideration that the original rules of the *Code civil* kept a defined amount of the deceased's assets *(réserve)* for those entitled to a compulsory share *(héritiers réservataires)* and it did not define it as an obligatory claim against the successors, but as a real share of the estate. This type of the compulsory share was considered as a harmful restriction of the owner's disposal rights and as one side of the deformation of the social structure in the dispute.[101] The modification of the *Code civil* in 2006 made significant changes concerning the nature of the compulsory share claim, but the basic idea of this institution remained.[102]

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[100] First the Inheritance (Family Provision) Act of 1938, then the Inheritance (Provision for Family and Dependants) Act of 1975, which is still applied.

[101] See Pierre Guillaume Frédéric Le Play, *La réforme sociale en France, déduite de l'observation comparée des peuples européens* (1864 Paris); Charles Brocher, *Étude historique et philosophique sur la légitime et les reserves en matière de succession héréditaire* (1868 Paris); Gustave Boissonnade, *Histoire de la reserve héréditaire et de son influence morale et économique* (1873 Paris).

[102] Philippe Malaurie, Laurent Aynès, *Les successions, les libéralités* (Defrénois 2006, Paris); Alain Delfosse, Jean-François Peniguel, *La réforme des successions et des libéralités* (LexisNexis 2006, Paris).

One of the important legal disputes during the preparation works of the German BGB concerned the compulsory share. Rejecting the arguments which maximally preferred the freedom of testamentary disposal, the majority opinion accepted the institution of compulsory share.[103] The original rules in BGB (§§ 2303–2338) have essentially remained the same until nowadays despite the later disputes and a few modifications.[104] It has to be mentioned that the German Constitutional Court – in one of its decisions of 2005 – not only did not consider the specific compulsory share guaranteed to a child as unconstitutional, noting that it does not harm constitutional regulations which are defending the right to property and succession, but it declared the assurance of the compulsory share to be protected based on these rules.[105]

Similar conceptual issues came up during the preparation works on the Hungarian Civil Code[106] and the Austrian legal reform in 2015.[107]

2. Despite the conceptual disputes, the decisive majority of the legal systems where the succession regulation is applicable *know and apply* the institution of the compulsory share, because their starting point is that the social changes did not make this instrument of familial solidarity unnecessary. This is also true for those legal systems that apply other legal tools to provide support inside the family where there is a death. In summary, the European legal systems do not differ concerning the conceptual approach of the compulsory share but in the details of its regulation.

There are differences concerning the *persons who are entitled* to compulsory share. The descendants and the surviving spouse usually belong to this group of persons, and their mutual relationship is formed according to the rules of intestate succession. An increasing number of European legal systems (but not every one) treat a registered partner the same way as the spouse concerning the rules of compulsory share. The picture is more diverse concerning the parents. For example, according to the HCC (similarly to the BGB), the parents of the deceased are entitled to compulsory share, if they have been excluded from succession by disposition mortis causa.[108] On the other hand, the new Austrian law, with the modification of ABGB § 762, eliminated the parent's right to compulsory share. There are differences between the amount of the compulsory share as well: in general half or one third of the intestate share forms the quota for the compulsory share. Besides these, the legal systems'

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[103] See Hans-Georg Mertens, *Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht* (de Gruyter 1970, Berlin) 81–112.

[104] *Gleichberechtigungsgesetz* of 1957, *Nichtehelichengesetz of* 1969*, Gesetz zur Änderung des Erb- und Verjährungsrechts,* BGBl I 2009, 3142–3144.

[105] Grundgesetz Article 14. (1); BVerfG von 19 April 2005, BVerfGE 112, 332–363.

[106] See Weiss Emilia, 'Néhány gondolat a törvényes öröklés és a kötelesrész szabályainak reformjához' in *Liber Amicorum, Studia. L. Vékás dedicata* (ELTE ÁJK, Polgári Jogi Tanszék 1999, Budapest) 289–307; Csehi Zoltán, 'Észrevételek és javaslatok az új Polgári Törvénykönyv tervezetének kötelesrészi szabályaihoz' (2007) (7–8) Közjegyzők Közlönye 16–22; Vékás (n 49) 2639ff.

[107] Lásd Rudolf Welser, *Die Reform des österreichischen Erbrechts* (Manz 2009, Wien) 13ff, 73ff, 95ff; The reform was made in the *Erbrechtsänderungsgesetz* of 2015 (BGBl I no 87/2015), which entered into force on 1 January 2017.

[108] HCC 7:75. §; BGB 2303. § (2).

different regulations concerning the determination of the relationship between the compulsory share and the *foundation,* or the compulsory share and the *contract of inheritance* can result significant differences.

VII Summary

As we presented above, there are still many differences today in the substantive succession law of those European legal systems where the succession regulation is applicable – despite a spontaneous harmonisation – and these differences can have a significant impact on the issue of the estate, the determination of heirs and many other questions which have to be decided in many cases. According to this, it is very important that the Succession Regulation – above the differences in substantive law – has made unity, unifying the rules in the majority of the European states on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and has introduced the European Certificate of Succession.