



E: oc@overseaschambers.com | Chestnut Farm
T: +44 (0)1534 625 879 | Mont du Ouaisne
F: +44 (0)1534 491 195 | St Brelade
www.overseaschambers.com | Jersey, JE3 8AW

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Subject : Europa Error on Regulation 650/2012

Date : 7th April, 2015 updated on 9th April, 2015.

This is a copy of a private Linked In discussion group chat on a fallacious response from the EU Commission or rather its delegated NGO ECAS concerning the UK opt out. Reproduced with permission of Dan Harris TEP. Photos removed

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Europa advise UK nationals that they cannot make an election for English law to apply to the devolution of their estates under 650/2012

Daniel Harris TEP - Senior Associate Solicitor, Cross border specialist, at Stone KingTop Contributor

I had an enquiry last week from a British national living in France to say that their notaire had told them that because the UK had opted out of the Regulation, that they could not elect for (in this case) English law to apply to the devolution of their estate.



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I responded by gently pointing out the provisions of Article 20 and 22; before 'throwing in' article 34 for good measure (to fuel the 'member State' 'third State' debate) while adding a few comments about formal and essential validity of wills.

Imagine my surprise then when (having prudently checked the facts with Europa) the clients sent me an email from Europa, stating the notaire was quite right and that the Regulation did indeed enshrine the principle of discrimination on the basis of nationality!

For ease I have swapped the order of correspondence so that the first one that appears below is the phone enquiry from the client, and the second one is the response from Europa. Names have been redacted.

Needless to say I spent a happy couple of hours at the keyboard 'hammering out' an appropriate response to Europa (a formal complaint). I will keep members apprised of their response.

Phone query: I'm a British citizen living permanently in France. I've spoken to a lawyer, but I believed I've been given incorrect information. I believe that according to Reg 650/2012, I have right to make a will under the UK law, because I have right to follow the law of my nationality. Could you clarify this?

Dear Sir,

Please note that the advice given by Your Europe Advice is an independent advice and cannot be considered to be the opinion of the European Commission, of any other EU institution or its staff nor will this advice be binding upon the European Commission, any other EU or national institution.

Thank you Mr and Mrs XX for contacting Your Europe Advice.

Regrettably, the advice you have been given is correct.

While it is true that new EU rules contained in Regulation 650/2012, give EU citizens the right to choose which law applies to their will from 17 August 2015, the Regulation is not currently in force, which means you cannot rely on it at present.

This Regulation gives EU citizens the choice of the law that applies to their inheritance. This would mean that EU citizens will be able to choose the law to apply to their estate upon their death by explaining this in their will. You will find out more about the new EU rules here:
http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm

However, the UK Government has decided not to sign up to this EU Regulation. This means that you cannot elect to have UK law apply to your inheritance from 17 August 2015.

This is confirmed by recital (82) of the Regulation which reads as follows:
 In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and



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F: +44 (0)1534 491 195
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Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.

However, the UK can decide later to sign up to this EU Regulation.

For now, since you reside in France, regrettably this means you will need to comply with the French rules on wills:

<http://vosdroits.service-public.fr/N16265.xhtml>

We hope this answers your query.

Contact Number 10 number10.gov.uk

10 Downing Street is the official residence and the office of the British Prime Minister. The office helps the Prime Minister to establish and deliver the government's overall strategy and policy priorities, and to communicate the government...

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Daniel

[Daniel Harris](#)

TEP - Senior Associate Solicitor, Cross border specialist, at Stone King

Top Contributor

The middle of the Europa email (below) was mistakenly deleted but it is worth seeing.

However, the UK can decide later to sign up to this EU Regulation.

You may therefore want to write a letter to Downing Street requesting the UK Government to sign up to the proposal:

<http://www.number10.gov.uk/contact-us/>



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The Ministry of Justice is the responsible UK department for taking the decision at the Council of the EU and you may want to ask them why they have decided not to sign up:
<http://www.justice.gov.uk/contacts/moj>

We also invite you to contact your MP and MEP to lobby for the UK Government to sign up to the Regulation:

<http://www.europarl.org.uk>

<http://findyourmp.parliament.uk/>

For now, since you reside in France, regrettably this means you will need to comply with the French rules on wills:

<http://vosdroits.service-public.fr/N16265.xhtml>

We hope this answers your query.

We remain at your disposal, should you require further information.

To submit another enquiry, please visit Your Europe Advice, but do not reply to this e-mail.

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

This is complete rubbish, based on an attempt at politicisation of the opt out on unlawful premises.

Firstly UK Citizens are EU citizens under the overriding provisions of the TFEU on the matter. The Regulation cannot override that, even were the idea to be stated as a legal basis in the preamble. The statement appears to rely on § 7 of the preamble, which is not a ground for this arbitrarily restrictive interpretation. It ignores §18 which deliberately refers to a State, not to a Member State. Let us not be insular about this; UK, Irish and Danish citizens are EU citizens under the citizenship proclamation provision of the TFEU. So incidentally are those British citizens treated as Channel Islanders and Manxmen, whose TFEU rights were created by the TFEU.

Secondly the Regulation makes no attempt to segregate one flock of nationalities from another. The Nationality option is for residents within the EU, and is not dictated by whether or not they are Citizens of any state, but by reference to their habitual residence.

The Commission as a body has no right to lay down the law in this manner, which is an abuse.. I note the disclaimer. "Europa" is not an official body in the sense that it has judicial or jurisprudential authority.

The French Notary deserves to be taken out and put in the internet stocks with an adequate supply of rotten fruit to hand.



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Daniel

Daniel Harris

TEP - Senior Associate Solicitor, Cross border specialist, at Stone King

Top Contributor

Medieval punishments may also have to be extended to English solicitors and other will writing professionals...

I say this because I spoke at the Institute of Professional Will Writers annual conference last week on cross border matters with James Kessler QC and others, and during lunch I chatted with a number of delegates (some of whom were qualified solicitors) who were also under the mistaken impression that the UK opt-out meant UK nationals could not make an election.

While it is disconcerting that with just over four months to go there is such a widespread lack of understanding amongst practitioners, it is frankly alarming that a body such as Europa (which for the uninitiated majority carries all of the trappings of an official voice piece for EU jurisprudence - notwithstanding the disclaimer) should be so misinformed and should be actively perpetuating the misinterpretation.

Equally disturbing is the manner in which Europa appear to be using their incorrect advice as a political platform to lobby for a UK opt-in...

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

Quite the issue is the it comes out of the DG Legal Affairs office, which should not be doing this. I have thrown a suitably worded tweet at their stocks, which is unlikely to be favoured. @EU_Justice

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

If you wish to start a storm, go to twitter @Harristax, favourite the French language tweet to to @Eu_Justice and RT

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

I should say the first one. <https://twitter.com/HarrisTax/status/58322833095325696> which is harsh The second one really exposes the hypocrisy by reference to Part 2 TFEU on Citizenship rights.....

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Grazia

Grazia Antoci

Independent Law Practice Professional

Art. 34 of the EU Regulation n. 650/2012 clearly states that the choice of any "third State" law (even assuming that UK is to be considered as a third State) can be made by a national of that State and no renvoi shall apply in such case.

It is , therefore, granted that the States linked to the EU Reg 650/2012 shall accept such choice of law and shall not accept any possible renvoi to another law made by the international private laws of such third State.

Another matter is whether the choice of English (or Scottish ..) made by a British national under art 22 of the Regulation will be accepted by UK and will prevent, under UK perspective, the renvoi (set by the UK conflict laws) to operate (member State or third State?). I understand that this is the opinion of many UK practitioners but this issue is still to be clarified.

I hope that the inaccurate answer made by "Your Europe Advice" is related to this "space of uncertainty" and not to other reasons!

Maria Grazia Antoci
STUDIO LEGALE ANTOCI

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

Nothing like a DG creating uncertainty out of certainty is there?

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Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

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Grazia, the uncertainty is only in the minds of foreign lawyers outside the UK who are unused to our existing attribution system, which already functions on a basis of domicile. There is no uncertainty here as to the attributions internal to the UK in relation to the existence of the allocation system. The difficulties if any are related to individual circumstances in each case.

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

I should make it clear that the nationality option is open to residents and non-residents alike, under the Regulation.

The Europa intervention appeared to deny Brits living in France the nationality option on the basis that they were nationals of an opt out state. Hence my concern to address that situation specifically in my prior comment. It neglected to mention that the Regulation is in force, and that it only applies to decease after 17th August, a telling error.

The same principle applies to Brits habitually resident within the United Kingdom, again contrary to what the Europa response suggests. However, as no option needs there to be exercised, the law of the state of their habitual residence will govern the part of their succession or estate situated within the EU, except Denmark and Ireland. I stress that the Europa intervention appears to have been written by a consumer affairs lawyer/trainee, probably unaware of the full import of the Regulation, and whose mother tongue from the English used in their drafting is not English, but the now prevalent Brussels dialect.

However, the linguistic rot has set in out of an institutional webpage, and it will now take effort from everyone's part to ensure that otherwise untutored British nationals or other nationalities habitually resident in the United Kingdom are correctly informed as to their rights, and the intricate possibilities open to them. I stress that we, (i.e. Solicitors and the Bar) are trained for this, in a manner which the majority of continental lawyers are not. However looking at the number of IFAs and will writers seeking to keep their clientèle, I am not sure how much of that expertise will be made generally available, particularly as it appears normal to cite Europa as being authoritative, which its disclaimer states clearly it is not.

It is at that point that the notion of domiciliation will start to cause issues, some may go one way some another depending upon the facts and whether the Probate Court is prepared to take a fuller extra statutory jurisdiction over non-domiciliaries or not. I think that it is at that point that the IHT issues will start to become important as to choice. Here the point which Richard raised as to the Dependency questions will become a very intricate one, for example with one side of a family arguing a UK domicile of choice, another faction another domicile, of origin so as to escape the jurisdiction.

Please note that technically a British national habitually resident in another State or legal jurisdiction



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F: +44 (0)1534 491 195
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should be able to deploy the nationality option and therefore separate wills in each Member State, and what is more again may not be subject to British probate if he is not domiciled in the Probate jurisdiction or Scottish or Irish equivalent. The IHT issues here will start to become important.

Quite whether each Member State will realise that it is the testator's right under each "British" law concerned law is another question. My impression is that the "anglo-saxon way" of whatever that pre-Norman diaspora may now consist, is still being blamed by a general prejudice for the 2007-8 crash, despite the economics pointing to other culprits. It is unlikely that the legitimate concerns as to clawback's effect on transactions and "paper" issued by charities and other institutions using the City will be treated with any political objectivity in Europe, particularly in France. Our representation is being diminished, as the unnecessary politicisation of the response shows.

Any thoughts?

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

I have copied in a contact at the Legal affairs committee at the European Parliament who will be taking the matter up with the Commission next week. He agrees that the Europa position is nonsense and that it is a very serious issue. I too will keep everyone posted.

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Peter Harris

Barrister, specialised in tax advice at Overseas Chambers of Peter Harris

Follow @HarrisTax for the profiling of ECAS, an NGO working for the EU Commission as working beyond its capacity in the liberated legal services market. The replies for ECAS are tellingly unrepentant ...

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Please circulate as you see fit. I have the Daniel Harris' permission to print and circulate his post

Please also note that as a Barrister in practice at the English Bar, I am competent in this issue in the UK, and have practiced in France.



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Best wishes

Peter Harris

Barrister in overseas practice

*LLB. (Hons.) Dip. ICEI (Amsterdam)
Revenue Bar Association, Mediator*

E: peter.harris@overseaschambers.com