



HOUSE OF LORDS

European Union Committee

2nd Report of Session 2007–08

Green Paper on Succession and Wills

Report with Evidence

Ordered to be printed 27 November 2007 and published 4 December 2007

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£6.50

HL Paper 12

The European Union Committee

The European Union Committee is appointed by the House of Lords “to consider European Union documents and other matters relating to the European Union”. The Committee has seven Sub-Committees which are:

Economic and Financial Affairs, and International Trade (Sub-Committee A)
Internal Market (Sub-Committee B)
Foreign Affairs, Defence and Development Policy (Sub-Committee C)
Environment and Agriculture (Sub-Committee D)
Law and Institutions (Sub-Committee E)
Home Affairs (Sub-Committee F)
Social and Consumer Affairs (Sub-Committee G)

Our Membership

The Members of the European Union Committee are:

Lord Blackwell	Lord Mance
Baroness Cohen of Pimlico	Lord Plumb
Lord Dykes	Lord Powell of Bayswater
Lord Freeman	Lord Roper
Lord Grenfell (Chairman)	Lord Sewel
Lord Harrison	Baroness Symons of Vernham Dean
Baroness Howarth of Breckland	Lord Tomlinson
Lord Jopling	Lord Wade of Chorlton
Lord Kerr of Kinlochard	Lord Wright of Richmond
Lord MacLennan of Rogart	

The Members of the Sub-Committee (Sub-Committee E, Law and Institutions) are:

Lord Blackwell	Lord Mance (Chairman)
Lord Bowness	Lord Norton of Louth
Lord Burnett	Baroness O’Cathain
Lord Jay of Ewelme	Lord Rosser
Baroness Kingsmill	Lord Tomlinson
Lord Lester of Herne Hill	Lord Wright of Richmond

Information about the Committee

The reports and evidence of the Committee are published by and available from The Stationery Office. For information freely available on the web, our homepage is:

http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm

There you will find many of our publications, along with press notices, details of membership and forthcoming meetings, and other information about the ongoing work of the Committee and its Sub-Committees, each of which has its own homepage.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at

http://www.parliament.uk/about_lords/about_lords.cfm

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website.

General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London SW1A 0PW

The telephone number for general enquiries is 020 7219 5791.

The Committee’s email address is euclords@parliament.uk

Green Paper on Succession and Wills

The Green Paper

1. In March 2005 the Commission published a Green Paper seeking views from interested parties on what action might be taken at Union level in relation to the law governing wills and succession, including intestate succession.¹ The Green Paper acknowledged that it would be “inconceivable” to harmonise substantive rules relating to wills and succession and accordingly the Commission restricted itself to posing questions relating to private international law (jurisdiction, applicable law and recognition) issues *i.e.* to cases where there is a foreign/transnational element. The Green Paper also considered ways of removing certain administrative and practical obstacles facing individuals wishing to have their status as “heir” recognised across Europe. The idea of establishing a “European Certificate of Inheritance” was mooted.

Scrutiny history

2. The Green Paper was first considered by Sub-Committee E (Law and Institutions) in May 2005 when it sought clarification of certain issues from the Government as well as sight of the Government’s Response to the Commission. The Committee reconsidered the proposal in the light of this further information and cleared the proposal from scrutiny in October 2006.
3. Representations from the Law Society and the Society of Trusts and Estate Practitioners caused the Sub-Committee to revisit the Green Paper and on 10 October 2007 the Committee met Professor Jonathan Harris, University of Birmingham, and Mr Paul Hughes from the Ministry of Justice. This provided the opportunity for the Sub-Committee to examine, with their assistance, the question of the harmonisation within the Union of private international law rules relating to wills and succession and, in particular, to seek to identify those areas where action at Union level would be helpful and how UK citizens might secure worthwhile practical benefit from such action.
4. Following that meeting the Committee wrote to the Government setting out further views on the Green Paper and in particular identifying certain “red lines” for the UK. A copy of that letter and of the transcript of the evidence of the meeting with Professor Harris is annexed to this Report, which is made for the information of the House.

Next steps

5. The Commission’s annual policy strategy for 2008² and its recent Legislative and Work Programme 2008³ mention that a legislative proposal on succession and wills is a key action envisaged for 2008. In the meantime the

¹ *Green Paper Succession and wills*, COM(2005) 65 final. Brussels, 01.03.2005.

² COM(2007) 65 final. Brussels, 21.02.2007.

³ COM(2007) 640 final. Brussels, 23.11.2007.

Government are urgently preparing a further paper for submission to the Commission, drawing attention again to those matters of great concern to the UK.

6. The Committee intends to monitor carefully the progress of this work and to scrutinise the Commission's proposal when it emerges next year. We have asked the Government to keep the Committee fully informed of developments and in any event to let us know how matters stand by the end of March 2008.

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee are:

Lord Blackwell (from November 2007)
Lord Borrie (until November 2007)
Lord Bowness (from November 2007)
Lord Brown of Eaton-under-Heywood (Chairman until November 2007)
Lord Burnett
Lord Clinton-Davis (until November 2007)
Lord Jay of Ewelme
Baroness Kingsmill
Lord Leach of Fairford (until November 2007)
Lord Lester of Herne Hill
Lord Lucas (until November 2007)
Lord Mance (Chairman from November 2007)
Lord Norton of Louth
Baroness O’Cathain (from November 2007)
Lord Rosser (from November 2007)
Lord Tomlinson (from November 2007)
Lord Wright of Richmond (from November 2007)

Declarations of Interest

Lord Bowness

Non-parliamentary consultant, Streeter Marshall—Solicitors

Notary Public (fees)

Partner, P & J Consultants (legal consultants)

Lord Mance

Membership of Lord Chancellor’s Advisory Committee on Private International Law (though not involved in its recent discussions on Wills and Succession)

A full list of Members’ interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: REPORTS

Recent Reports from the Select Committee

Annual Report 2007 (36th Report, Session 2006–07, HL Paper 181)

The EU Reform Treaty: work in progress (35th Report, Session 2006–07, HL Paper 180)

Evidence from the Ambassador of Portugal on the Priorities of the Portuguese Presidency (29th Report, Session 2006–07, HL Paper 143)

Evidence from the Minister for Europe on the June European Council and the 2007 Inter-Governmental Conference (28th Report, Session 2006–07, HL Paper 142)

The Further Enlargement of the EU: follow-up Report (24th Report, Session 2006–07, HL Paper 125)

The Commission's Annual Policy Strategy for 2008 (23rd Report, Session 2006–07, HL Paper 123)

Evidence from the Ambassador of the Federal Republic of Germany on the German Presidency (10th Report, Session 2006–07, HL Paper 56)

The Commission's 2007 Legislative and Work Programme (7th Report, Session 2006–07, HL Paper 42)

Government Responses: Session 2004–05 (6th Report, Session 2006–07, HL Paper 38)

Evidence from the Minister for Europe on the Outcome of the December European Council (4th Report, Session 2006–07, HL Paper 31)

The Further Enlargement of the EU: threat or opportunity? (53rd Report, Session 2005–06, HL Paper 273)

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

Correspondence with Ministers March 2005 to January 2006 (45th Report, Session 2005–06, HL Paper 243)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, Session 2005–06, HL Paper 229)

Recent Reports from Sub-Committee E

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 10 OCTOBER 2007

Present	Bowness, L	Jay of Ewelme, L
	Brown of Eaton-under- Heywood, Rt Hon L	Kingsmill, B
	Burnett, L	Mance, L
	Clinton-Davis, L	Norton of Louth, L

Examination of Witnesses

Witnesses: PROFESSOR JONATHAN HARRIS, University of Birmingham, and MR PAUL HUGHES, Ministry of Justice, examined.

Q1 Chairman: Professor Harris, Mr Hughes, welcome to Sub-Committee E. We are very grateful to you for coming along. I do not know whether either or both of you have given evidence before this or other Committees before but just to tell you the form, we are in public, on air. A transcript will be taken of the discussion we have this afternoon and you will get a copy of the transcript and an opportunity therefore to make sure it accurately records what you want to say and to supplement it with anything you think would be helpful to us. I am very grateful—I think we all are—to Professor Harris, not least for having provided us with a draft of the paper that he will eventually share with the Department but which certainly Ministers have not yet had an opportunity to look at and indeed, we are grateful to him for providing it to us and, understandably, he has not provided it to a wider audience because that would not be appropriate unless it becomes, so to speak, the Ministry's approach to this particular topic. The Law Society invited the Committee to revisit this Green Paper, as I think perhaps you know, last year and I know they are most interested and concerned with its scope and implications. I understand, Mr Hughes, you would like to make a short introductory address to us, and we would welcome that, and then perhaps we will proceed with the area of questioning of which you have already I think been alerted.

Mr Hughes: Thank you, my Lord Chairman, and thank you for inviting us to give evidence today. I am Paul Hughes. I head up the branch within the Ministry of Justice which is dealing with this European dossier. The present position is that the Commission is developing its proposals in the light of the responses to the Green Paper and the European Parliament's resolution of last year and the evidence session that was held last November. We understand from officials of the Commission that the

Commission hopes to publish a proposal in the second half of next year. The Government's position on the issues raised in the Green Paper remains as stated in the response that was submitted. Ministers have not taken any further policy decisions on the dossier and our task as officials at the moment is to prepare a paper for Ministers setting out, hopefully, the outline of a proposal that would protect the UK's interests if it were to be adopted by the Commission in the proposal that it itself completes. To assist us in that, we have retained Professor Harris to prepare the paper which, my Lord Chairman, you have mentioned. That, as you say, has not been seen by Ministers and at the moment remains a draft. The thoughts and ideas in it are entirely Professor Harris's; they are not those necessarily of the Government. We are very grateful to the Committee for considering the paper and look forward to receiving its views upon it and upon any other issues relating to the dossier that you wish to pass on to the Government so that they can be taken into account in the preparation of the paper that we hope to take to the Commission in the next couple of months.

Professor Harris: My Lord Chairman, I would just add that the draft I have produced is perhaps derived partly from my own views but also I have been very carefully through each and every response that was received to the Green Paper and tried to pick a path that seemed to represent the views that were acceptable to the professions and others that gave their views. That was quite difficult because there were often diametrically opposed views on some very fundamental questions such as what the choice of law rules should be. My aim was to produce a paper that would broadly attract consensus amongst those who responded. Increasingly, as I wrote the paper, I reached the conclusion that a lot of the concerns and the different views that were expressed were because different parties had different views about what the

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

scope of this legislation might be and, in particular, what one meant by “succession” and how widely it was to be defined. Many of the questions, such as, for example, what the choice of law rule should be may flow from the question of how wide or how narrow the scope of the regulation is.

Q2 Chairman: We do not know that yet, do we? We have a Green Paper which is really very wide-ranging. As I understand it, it does not, of course, seek to harmonise substantive rules but it does on the face of it address all sorts of private international law questions—jurisdiction, conflict, applicable law, recognition and so forth. I do not know whether either of you can say anything as to whether it is being narrowed down as the Commission focus on the proposed legislation.

Mr Hughes: Indications from the Commission officials taken from the public evidence session last November and the published summary of replies to the Green Paper both seem to indicate that the Commission is thinking very much in terms of a wide-ranging instrument. We do not have any evidence that the Commission is pulling its horns in in that respect at the moment.

Q3 Chairman: Do you have much idea yet as to the exact shape of the legislation and what course they are going to take on the various issues that arise?

Mr Hughes: No, my Lord Chairman.

Q4 Lord Burnett: Could I say how grateful I am to you both, particularly for letting us have sight of this paper. I have a series of questions. I will deal with the embryonic stuff first. Professor Harris, you have said that when you asked for comments on this paper you received a number of views that were diametrically opposed. You will have seen the joint paper produced by the Law Society and the Society for Tax and Estate Practitioners. They are obviously two very important bodies—and I do see here a member of the Law Society who came to brief Lord Jay and me, and I am grateful that they are here. Could you please give us a flavour of the opposing views and whence they came?

Professor Harris: For the avoidance of doubt, I have not had a series of views on this paper. I compiled the paper having looked at the responses to the Green Paper and tried to build bridges between the different views. There were very different views, for example, on the question of whether there should be a unitary choice of law and whether that law, probably the law of the deceased’s residence at death, should apply to succession to immovables. The Law Society view was certainly that we should move to a unitary choice of law rule, which would probably be the law of the deceased’s habitual residence at death.

Q5 Lord Burnett: What we call domicile you mean, or habitual residence? They are different concepts.

Professor Harris: I think residence is very much more likely to be what is ultimately adopted. All of the papers I have seen from the Commission have used the term “residence” rather than “domicile”. There were a number of people who submitted views. Professor Matthews was one person that I can recall off the top of my head who expressed exactly the opposite view to the Law Society and said that we must retain the law of the place of the property for succession to immovables and said that he thought the practical problems of applying any other law in relation particularly to land situated in England, and foreign concepts of property rights, such as the usufruct would be so great as to cause undue difficulty.

Q6 Lord Burnett: What is your view on that particular point?

Professor Harris: I think it comes down to a question of scope of the Regulation. I suspect that Mr Hughes and I may be using the word “scope” in two different senses and perhaps it would be helpful to clarify. There is obviously the question of scope as to whether this regulation covers choice of law, jurisdiction, recognition, certificates of inheritance, registration and so forth in the sense that Mr Hughes has discussed. The question of scope I was thinking of was really a question of the subject matter of what actually is succession law: does it include such matters as administration of estates; does it include questions of the particular right that might be specified in the will, for example, that the property is left on a discretionary trust or subject to a usufruct? If the scope in terms of the subject matter is very broad and includes all the panoply of property rights that might arise on death, I rather take the view that English law has adopted for a very long time in relation to immovables, that there will be considerable difficulty in departing from the law of the place where the property is. However, if, as I personally would favour, there were a much clearer definition of what succession is and what succession is not, so that it might exclude, for example, questions relating to the validity and operation of testamentary trusts and the various property rights existing in foreign law—usufruct and tontines are examples that appear in the responses—if this regulation does not apply to those rights and we are not required to recognize those rights exactly as they exist in foreign legal systems, my own view is that the objections to using the law of residence for immovables to a very considerable degree subside. If we can have a narrow scope in terms of subject matter, I would favour a unitary choice of law. That is the sense—perhaps I was not very clear—in which I would link the subject

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

matter scope with what the choice of law rule turns out to be.

Chairman: That is very clear.

Q7 Lord Jay of Ewelme: I wanted to change tack slightly. The issue which interested me is the issue of advantages and disadvantages of opting in, in the sense that if there were a Commission proposal and we decided we did not like it and therefore we did not want to opt in, to what extent would it in any event impact on our own law and our own arrangements, particularly given the fact that it will presumably be affecting large numbers of British citizens who have property partly here and property partly in France, Spain or Italy? How far in any event will we be affected by a proposal?

Professor Harris: I find that quite difficult to answer because the evidence from the Commission in terms of how many people will be affected, what sort of problems the existing situation gives rise to, is in my view fairly thin. My own view is that if there is a regulation and, assuming otherwise that the scope of it and its content is satisfactory, it would be damaging not to be party to it. The existing situation does give rise to difficulty; there are clearly different choice of law rules in different Member States at the moment, particularly in relation to immovable property, so it is very hard to advise an English resident about succession issues relating to their holiday home in mainland Europe because they may have different solutions in different jurisdictions. In that respect, harmonisation would be a good thing. Certainly in relation to immovable property, it is extremely difficult to see how one can ignore the regulation in any event if one's land is situated in another Member State. I think we currently have one set of problems, which is that the choice of law rules are different in England to other Member States, and we will end up with a different and arguably worse one in that they would have a regulation and we would not. I think that would be very damaging.

Q8 Lord Jay of Ewelme: Would you or Mr Hughes see the policy implications of that as being that it would be in our interests to work to ensure that it is the kind of regulation that we could support?

Professor Harris: That would be my view. I think the current situation is untidy.

Q9 Lord Burnett: But you do understand—of course, you understand it better than any of us here—that there are fundamental differences between what we, as British people, used to our “wish and can do” in our testamentary dispositions, or lifetime gifts for that matter, and—they are diametrically opposed to what can be imposed on them in other jurisdictions within the EU. That is what concerns us. I would have thought the Treasury are useful people to tell

you how many people there are in the UK who have properties overseas. I read the figure of hundreds of thousands of these people. To what extent do you think that there is some scope or that there should be some scope for people to be able, within the EU, by will or otherwise, to specify which law they wish to have as appropriate in the administration of their affairs and estates?

Professor Harris: The question of whether they have freedom to choose the governing law? On the one hand, the freedom that one has in English substantive law to choose to whom one leaves one's property is not and never has been replicated at the private international law level, where there has not been traditionally any right to choose the governing law at all. Our current situation is certainly not a rule of testator autonomy, so any right to choose the governing law will be a departure from the existing position. My own view is that party choice would be useful in some circumstances where the testator does have a material connection to the particular jurisdiction. I would want to limit it in that fashion. That seems to me, for example, to argue for allowing the testator to choose between the law of his residence at the time of making the will and the time of death. One might want to extend the choice in very difficult borderline situations where it is hard to pin down someone's residence: the English worker who is going abroad for a number of years does not know whether they might return or not and may wish to be able to elect, depending on the definitions we get, between domicile and residence as well at the time of making the will but I would want to make the choice fairly narrowly confined to those legal systems with which the testator can be said to have a material connection. Otherwise, for example, in Scotland, rules of compulsory heirship could be undermined by just choosing another law. In England, I think we will run into difficulties with other legal systems which believe equally strongly in compulsory rights of heirship.

Q10 Lord Bowness: Professor Harris, perhaps I should just declare an interest as a practising solicitor, although not necessarily expert in this. It seems to me that there are a lot of principles referred to in your paper which present difficulties, which you have referred to. At a very practical level, can I ask you why there appears to be such resistance to accepting a procedure of automatic recognition of the status of personal representatives? At a practical level, leaving aside difficult legal principles, we are getting situations now where people routinely own property, movable or immovable, in different states of the Union. For the administration of the estate, never mind whose law governs that administration, there is a difficulty about the personal representative and accepting authority and I firstly think that could be simplified. I just wonder why we appear to be so

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

strongly against that automatic recognition of the PR status.

Professor Harris: This is very much an issue on which I have been guided by the responses, as opposed to forming my own personal views on this subject, so I may not speak with the greatest of authority. It seems that there is quite widespread reluctance to allow automatic recognition of the status of foreign administrators in relation to English assets. The responses have ranged from the private international law view that this is essentially a procedural matter, that it is getting into the processes of English law and is outwith the ambit of a private international law regulation, to serious concern about who might be appointed in other jurisdictions and whether one would automatically be prepared to recognise their authority, and to concerns that in other jurisdictions the whole process of administration is fundamentally different. In some systems the property is vested in the beneficiaries themselves, as I understand it, who are called upon to administer the estate and there are very strong statements in a number of the responses to the Green Paper along the lines that any foreign law that purports to vest property directly in the beneficiaries could not be given effect in England.

Q11 Lord Bowness: Is the reverse not equally true? People are not very impressed by grant of probate or letters of administration. They want to know who the heirs and the beneficiaries are. It is not a one-sided issue, is it?

Professor Harris: Indeed. I speak only to the responses that I have received, which have not really addressed that point.

Mr Hughes: The Government's position has been that, if a practical way can be worked out to improve the present system, then let us go for it but there are systems facing completely opposite ways, which does not make it easy to absorb them in one system, a foreign being from another system.

Q12 Lord Burnett: Is that not another reason? You, Professor Harris, were talking about the advantages of harmonisation and I can see those but where you have diametrically opposed systems, is that not going to be extremely difficult to achieve?

Professor Harris: That is certainly my view. My view, if I could sum it up rather succinctly, is that, if one can get a regulation of suitable scope and content, it would be highly beneficial to us but the regulation needs to be very carefully circumscribed in terms of its subject matter and I think it probably needs to exclude matters such as administration of estates, and it needs to exclude the actual particular property rights that arise under a will, such as a trust, which I do not think will be recognized readily in other EU jurisdictions, which have very much shunned the Hague Trust Convention. I do not see why they are

suddenly going to be willing now to give full effect to English trusts. I think it requires careful exclusion of matrimonial property law, and exclusion of interests terminating on death such as joint tenancies. My own view is that the subject matter, and being very clear exactly what "succession" is, and that succession is principally the question of who is entitled to the property—is it A or is it B—rather than getting into the panoply of property rights and procedures is crucial to finding common ground.

Q13 Baroness Kingsmill: On a practical level, is there a hierarchy of objections?

Professor Harris: I think so, yes. Perhaps the point that has come across most forcefully in the responses has been concern about the phenomenon of clawback and particularly . . .

Q14 Lord Burnett: Setting aside lifetime gifts and things like that?

Professor Harris: Yes, setting aside lifetime gifts or alternatively, as many continental legal systems do, not setting aside, for example, a lifetime trust but providing for a right of compensation as if that had been part of the testator's estate. The opinions, led perhaps by the Law Society, the Bar Council, but I think largely across the board, have been strongly of the view that it would be extremely damaging to the certainty of lifetime transfers, and very damaging to the trust industry as well, if it becomes the case that these dispositions on trust or by gift during a party's lifetime are vulnerable to attack by a foreign law which says that this property nonetheless forms part of the testator's estate at death.

Q15 Lord Mance: Professor Harris, perhaps I ought to just mention as an interest in this matter that I am actually a member of the North Committee, the Lord Chancellor's advisory committee on private international law, which I know you have been advising. I was unable to attend the meeting where you did advise them so I approached this completely fresh. I want to go back to the question Lord Jay mentioned relating to immovables, which was one of the problem areas you identified. I thought that the key lay in your paragraph 43, where you point out that the principal concern in the UK is the foreign domiciliary resident abroad who dies and leaves immovable property in the United Kingdom. It is a concern that we should find ourselves expected to recognize and give effect to concepts we did not understand, like usufruct. I am not sure how common such problems would be but the converse case, which is next mentioned, the advantage of a unitary system, is that other Member States would apply English law where an English domiciliary and resident leaves immovable property in their territory. I think the *quid pro quo* we would be accepting for the

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

problems relating to usufruct would be that foreign courts would apply English law and would recognize perhaps trusts and that sort of thing but it does seem a considerable *quid pro quo*, a unitary system. We will be looking after our domiciliaries and residents in respect of their foreign property even if we had some difficulty in giving full effect to the rights of foreign domiciliaries and residents in respect of immovable property here.

Professor Harris: My Lord Chairman, I have one or two observations about that. In the converse situation of the English domiciliary or resident who leaves property abroad, I do think there are quite considerable advantages to a unitary approach. A number of the responses mentioned the positive effect of being able to advise an English client effectively as to the devolution of their estate, including immovable property overseas, if one is applying English law. There may be quite considerable advantages if one goes back to the basis for the regulation, which is the internal market and improving the situation for English domiciliaries and residents.

Q16 Lord Mance: That is what I was suggesting. It seemed to me so. I would have thought the last sentence of your paragraph 43, suggesting a special exception for immovable property in the United Kingdom, was a complete non-starter in European terms.

Professor Harris: I imagine it would be. I just set out a range of options. Another thing that I point out in my paper is that we do already have, of course, the Hague Trust Convention and the Recognition of Trusts Act 1987 in the UK. That applies equally to trusts of land and allows the settlor to choose the governing law applicable to a trust of land, including any powers that they may have to terminate the trust and claim the property. That radical departure from the law of the *situs* does not appear to have caused practical problems. It is already a major inroad into the law of *situs*, but I think my main point again would be one of scope. My preference would be to say that questions relating to trusts are just that; they are dealt with successfully in the UK by the Hague Trust Convention and I think it is appropriate to delineate succession law from the particular property rights that arise under a will, trusts, usufruct and so forth and that if the scope of the regulation is sufficiently narrow, one will not be required to recognize those rights under it.

Q17 Chairman: Can I just ask you what, in summary form, you would regard as the absolute red lines that we ought to be standing by, the non-negotiable aspects of the existing law? As I understand it, one is the refusal to accept any scheme of clawback, which

would obviously then cast doubt on otherwise valid *inter vivos* dispositions.

Professor Harris: The problem of clawback features more heavily than any other issue in the responses.

Q18 Chairman: That is the purple line. That is, so to speak, red plus, plus.

Professor Harris: Perhaps so. I think one has to insist on a very careful definition of succession and understand what succession is and what it is not. There are numerous references in documents I have seen from the Commission referring to trusts and so forth. There is a very clear delineation if one compares the Hague's Succession Convention with the Hague Trust Convention. I think succession is one issue and it relates to the question of who, in bald terms, is the heir under a will: is it A or is it B? But the particular nature of the rights, how the property is left, on usufruct, trust and so forth, I do not think are appropriately harmonised under this regulation. They may be appropriately harmonised elsewhere. I also think it would be curious that one would have a widespread system of recognition of testamentary trusts but no such scheme for *inter vivos* trusts when it seems to me that once a trust is operational, its genesis as testamentary or *inter vivos* is essentially irrelevant. I think that would be a strange outcome. So I would push for a very tight definition of succession. Because I think succession is hard to define positively, it may be easier to push for a list of exclusions of matters which are not succession. That may include administration of estates, it may include trusts and property rights unknown in the legal system of the forum, it will almost certainly exclude matrimonial property and other interests terminating on death such as joint tenancies. It seems to me that those are the key issues. If the scope is kept sufficiently narrow, I think one has very much less to fear from applying foreign law and concerns that foreign rights are going to be given direct effect on English land registers, and I actually think that is in my judgement more fundamentally important even than what the choice of law rule should be.

Q19 Lord Mance: On clawback, I saw your interesting proposal in paragraph 25 that it should on no account affect assets which had been transferred properly under the law governing them. I just wonder whether that will always work. There may be public policy aspects here. Suppose you have, for example, a French domiciliary who has a London bank account and transfers it to his mistress rather than his wife a month before he dies. The law governing the bank account is English law. Would one expect that to escape the French law which governed otherwise all aspects of the deceased domiciliary's affairs? I am not sure.

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

Professor Harris: On any view there is going to be a public policy derogation for all Member States. Certainly if this were to be applied in France, I imagine the answer to that may be that there would be a public policy derogation from the essential principle that this is not part of the estate. I think one has to remember that, even in the United Kingdom, under the Inheritance (Provision for Family and Dependants) Act 1975 we have an extremely limited form of clawback of dispositions. For example, if you take a disposition made in bad faith within six years of death, it may be that in that sort of extreme case we would not have much to fear from clawback. What I think we have to fear is very broad rules of clawback applying other than to dispositions made in bad faith and going back a very long period of time. I noticed one of the responses by Professor Hayton as an annex to the Law Society response said that although in theory we have a very limited form of clawback under the 1975 Act, he describes it as “astonishingly rare” that clawback is applied in England.

Lord Burnett: I should like to return to Baroness Kingsmill’s point which was to do with the hierarchy of objections. In a way, it relates to what Lord Mance has just been talking about. Setting aside lifetime gifts and so forth was in the hierarchy at the top. Presumably, what came second was choice of beneficiaries, the ability for the settler or the testator to choose his or her beneficiaries.

Baroness Kingsmill: As opposed to compulsory heirship.

Q20 Lord Burnett: What did come second then?

Professor Harris: I am not so sure that I would rate the issue of ability to choose beneficiaries so highly. Under the existing system we would apply the law of domicile at death to movables. If that law has rules of compulsory heirship we would be willing to give effect to them. Scotland has such rules in any event. I personally do not think that is an overriding objection.

Q21 Lord Burnett: It would be an objection in this country if it were foisted upon us.

Mr Hughes: If that were to come within the scope of private international law instruments, it would have very strong objections.

Q22 Lord Burnett: I would hope so too.

Mr Hughes: Freedom of testamentary disposition is not to be interfered with by the instrument.

Q23 Lord Burnett: How strong is that? Has the Government laid that down in other countries and made it absolutely clear?

Mr Hughes: It has said any European instrument must not limit the operation of the principle of the freedom of testamentary disposition. That was the line that we put in our response to the Green Paper.

Q24 Lord Burnett: How likely are we to be able to preserve that position?

Mr Hughes: I would not expect us not to be able to preserve it.

Professor Harris: I quite agree with what Mr Hughes says but I think it would be most surprising and most unacceptable if the proposal were to deal with what essentially would be harmonising a matter of uniform law as to whether substantive law allowed one to leave one’s estate to whomsoever one chose. I do not think it would be at all appropriate or within the scope of jurisdictional competence to harmonise the uniform substantive law of different legal systems but I think if the choice of law rules of this regulation point to French law, say, and French substantive law happens to say that you have to leave a fixed percentage to your spouse, I personally (a) do not think there is an overriding objection and (b), if we do have an overriding objection, we have no possibility of reaching common ground with other Member States, almost all of which, including—though not a Member State—the Scottish legal system, have some form of compulsory heirship.

Q25 Chairman: I see. So we must continue to have freedom of testamentary disposition. We can leave property to whom we wish but we would recognize other EU jurisdictions which limit that freedom?

Professor Harris: What I am saying is yes, if the governing law according to the choice of law rules in this regulation points to English law, then English succession law must be completely unaffected; the freedom that we have to leave to whomsoever we choose must be unaltered; but if according to these choice of law rules we end up applying French succession law, then subject to any overriding public policy concerns—and I imagine there would be a public policy derogation in the regulation—I think we would be expected to give effect to that law.

Lord Bowness: Just to clarify, taking this very firm stance that we must have our right to leave everything, for the record, we are only talking about movables, are we not? Immovables we do not have the right to leave to whomsoever we choose. That is why we have to advise people to make wills in Spain. You cannot leave your French house to whom you choose, or your Belgian house.

Lord Burnett: You can certainly do so with your English house.

Q26 Lord Bowness: Precisely, but my point is that the advantage of preserving sanctity and doing everything the way we always do it is not necessarily

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

to everybody's advantage. There could in certain circumstances—I am not saying there should—be benefit to a British citizen who may wish to leave his house in France or Belgium or Spain to somebody other than where French, Belgian or Spanish law would otherwise take it. So we do not have a totally free choice. What I was seeking to establish was that we are only talking about movables; we are not talking about immovables when we talk about a complete freedom of testamentary choice. If I am wrong, please say so.

Professor Harris: My Lord Chairman, there are two issues we need to distinguish. One is the question of which choice of law rules we should go for, to which legal system the rules of the regulation should point; and the other question is, having identified the particular legal system, whether this regulation should override it with any rules of uniform law. The question you have asked me has choice of law implications. Certainly under the current system that we have, it would be almost inconceivable to avoid the law of the place where the immovable property is situated; but one advantage of moving to a unitary choice of law rule, if that turns out to be the law of the residence of the testator and it is an English resident, is that now one will be able to apply English law even to those foreign immovables and leave it to whomsoever one wishes. The role of English Law will be enhanced. What is totally unacceptable is, once we have identified what our choice of law rules are, and when they point to English Law, I think that the regulation must absolutely not overlay rules of uniform law which say that you cannot now leave your property to whomsoever you choose.

Q27 Lord Jay of Ewelme: Can you see circumstances in which the French would accept that a British citizen with a property in France could leave it to somebody other than the nearest relative?

Professor Harris: My Lord Chairman, I find that very difficult to answer. One of the problems with this regulation is that England—and I would not even say the UK—but England on the one hand and other Member States and Scotland on the other do have a different view about freedom of testamentary disposition. If we cannot reconcile that by at least saying we will accept each other's laws when the choice of law rules points to them, then the regulation has no chance.

Q28 Lord Mance: That, I thought, was the great advantage that you were identifying in paragraph 43, that English law would be recognized in precisely that situation. Can I come to a different point in paragraph 33, application of the regulation to non-Member States? Can you just explain how you contemplate a regulation might operate which purports to have worldwide effect? If one takes the

example of someone domiciled and resident within a country of the European Community who has immovable property in Colombia or the United States, this regulation apparently says that the United States property must be distributed in a court in Europe in accordance with the law of, say, the domicile or habitual residence or whatever the test adopted is, yet Colombian law may say something completely different and the parties involved may achieve in litigation completely opposite results. It just seems to me that, if it is really suggested that the regulation is going to apply to non-Member States, as you appear to be accepting, it will not just be very difficult to enforce; there will be an intolerable system of potentially completely different legal results in different jurisdictions.

Professor Harris: I essentially agree with the point that Lord Mance makes.

The Committee suspended from 5.02 pm to 5.12 pm for a division in the House

Q29 Chairman: Professor Harris, you were part-way through your response to Lord Mance's question on the possibility of universal application of this proposed new instrument.

Professor Harris: I do think the issue here is not straightforward. In part, it is bound up with which choice of law rule one goes for. If one keeps the scission system and has the law of the place of the property for immovables, that removes one of the objections to Lord Mance's point because we would be applying the same law as the Colombian court or whatever court it might be. If one has a unitary system and it is the law of residence, I absolutely accept that, whatever an English court does, there may be real difficulties of enforcement in a non-Member State if we are not applying the law of the *situs* of the property. However, I reached the conclusion that firstly, the regulation is concerned with what we in the United Kingdom are going to do with these particular situations rather than purporting to affect the law of any other jurisdiction and it is very much consistent with other regulations—Rome I and Rome II, for example—that their scope in an English court or for English practitioners is universal. The reason for that is that one of the fundamental points of having this regulation is to try and ease the position for English residents, to make it easier to advise them as to the devolution of their estate. I think we will end up with something that is probably more complicated than we started with if we try to have one regime under a regulation for devolution of property, immovables, located within Member States and one for property outside those states. I am not sure that will actually improve the position for English residents. So on balance I took the view that it would be better to have

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

a universal scope. If one looks in a book like *Dacey, Morris and Collins*, although normally English courts do not assert jurisdiction over foreign immovables, there are recognized exceptions, such as the possibility of *in personam* orders directing a party to transfer land in a foreign state, which are already recognized. I took the view that there is no straightforward solution but that it would be too convoluted and would not improve the internal market to have two different regimes.

Q30 Lord Mance: That was exactly the sort of thought I had in mind, but if you really do contemplate an English court issuing an *in personam* order, an injunction or something that is enforceable by contempt and a Colombian authority taking the exact opposite view as to entitlement, we have a very odd situation.

Professor Harris: Indeed. Another possibility if one went for a unitary choice of law rule is to recognize it for property within Member States but to have a derogation in relation to immovable property in non-Member States so that the law of the *situs* will nonetheless still apply to immovables in non-Member States. Personally, I think that is preferable to being left with two different legal regimes, the regulation and common law principles.

Q31 Chairman: Do think that is a feasible solution to all this? Get rid of scission and have a unitary scheme with an exception for immovable foreign property?

Professor Harris: It is a feasible solution for immovable property in non-Member States. Indeed, I think it is. Even within Member States, if the United Kingdom could not accept a unitary system in its entirety, what one might consider is some sort of hybrid between a unitary system and scission which looked something along the lines of all succession to movables and immovables being governed by the law of residence at death but with some sort of mandatory rule provision allowing the overriding mandatory rules of the *situs* nonetheless to be applied. That might be a compromise solution. It may, however, not be as simple as either a unitary approach or a scission system.

Mr Hughes: Something along those lines is referred to in the summary of responses to the Green Paper, so the Commission is considering that kind of derogation.

Q32 Lord Burnett: Could I go back to this choice of law business or settlor or testator autonomy, as you have called it? If the testator has a connection with two countries, for example, a Frenchman who comes to live in England, should there therefore be an opportunity for that testator, that Frenchman, when he dies in the United Kingdom to opt for French law

rather than British in the administration of his estate? Do you think there is any compelling ground against advancing that thesis for movables and immovables?
Professor Harris: My Lord Chairman, I do not think there is any compelling ground. I am anxious to ensure that freedom to choose the governing law is not taken to its extremes. I do not think that would be acceptable to other Member States precisely because they do have rules of compulsory heirship and they will not want their testators to be able to evade it by choosing English law. It might be good for us that they continually choose English law but I do not think it will be politically realistic. I am anxious to ensure that the law that is identified on basic choice of law principles means that the testator could be said to have some significant connection with that country and its legal system either at the time of making the will or at the time of death. If that means a choice between two countries with which he has a close connection, it seems to me that that would be an entirely reasonable situation where choice would be entirely legitimate.

Q33 Lord Burnett: With respect to both movable and immovable property?

Professor Harris: I think so, if one accepts a unitary system.

Q34 Lord Burnett: The election would be made in a will or in a letter.

Professor Harris: Yes, I think the election would have to be made in a will.

Q35 Chairman: Professor Harris, one has the impression that the one thing you are not in any sense set upon is our own last domicile aspect of the scission approach and you would settle for habitual residence pretty readily. Is that right?

Professor Harris: Yes, in part because I do not think domicile always leads to a particularly good result. There are many cases one can study in the textbooks of those whose domicile revives in odd circumstances or domicile which one never loses. One wonders why one's estate should be devolved according to that law. I think there is much more of a likelihood of a material connection with a system where one dies resident, where one's estate is probably going to be administered, where one's assets and one's heirs may well be; but I also think in part it is a pragmatic view that it is very unlikely we will get anything close to domicile in the English sense of the word, and it seems to me there is not any overriding objection to residence. The challenge will be to try and get some kind of definition of residence, otherwise we are in a more uncertain situation than ever. At least an advantage of the law of *situs* is that everybody knows what it is. There is no point in moving to a test of residence to improve certainty and then find each

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

Member State disagreeing about what residence is. That is the challenge.

Q36 Chairman: Do think there is room between the red lines of all the various states and schemes involved to actually hatch out a satisfactory Brussels IV regulation?

Professor Harris: As to the whole regulation?

Q37 Chairman: Yes.

Professor Harris: My sense on that is that we start from extremely different legal traditions. The phenomenon of clawback seems to be as important in most Member States as it is important to us not to have widespread clawback. The freedom to leave to whoever one chooses within very broad scope in England seems to be as important to us as it is to almost every other place, including Scotland, that there be some form of compulsory heirship. If one tries to get into the panoply of property rights that might arise on death—trust, tontine, usufruct—I think it is an exceedingly audacious project. I think it is unrealistic and also unjustified to create a difference in regime between lifetime and testamentary transfers. That is why I have reached the conclusion that subject matter scope is absolutely crucial, and that does mean excluding administration of estates, it does mean excluding trust and property rights and recognizing the very distinction that the Hague Succession Convention and the Hague Trust Convention draw between succession on the one hand and what happens afterwards, so that the raw question we are really each asking under the regulation is who is entitled to this estate, A or B, and the particular rights that arise are not harmonised under this regulation. The scope must be kept narrow, and I think the best way to deal with succession is not to define it positively, which I think will be politically difficult, but to push for a list of exclusions from the regulation, and that list might include administration of estates, trusts and other property rights arising on death. If one pushes for a list that looks like that and if one pushes for a statement that nothing in this regulation shall affect the validity of dispositions disposed of *inter vivos* by their governing law or permit compensation claims in relation to that disposition, then I think you have the basis for a workable regulation. That is why I said at the start that I was very clear that subject matter scope is crucial because I do not think the Commission has been clear enough on what succession is and what it is not. The proposals suggest succession is something very much broader than I have in mind.

Q38 Chairman: So if it is not over-ambitious, it could actually be useful.

Professor Harris: Indeed.

Q39 Lord Bowness: Professor Harris, you have listed the exclusions. I was going to ask you, rather than red lines and exclusions, what would be your order of priorities to put into the regulation if you were going to adopt a step-by-step approach? You have answered it to some extent in the negative.

Professor Harris: I would answer it in the negative because I think pushing for exclusion of anything other than pure succession law is absolutely critical. Politically, one is more likely to get that agreement about what it is not than trying to define it positively. If one can get a very tightly construed regulation that really answers the bald question of who is the heir according to the governing law, is it X or Y, I think I would be less concerned about the range of the regulation in terms of the private international law issues it might cover. I think it would be desirable to lay down a choice of law rule. I personally think that, within those narrow bounds, a unitary choice of law rule would be perfectly acceptable and actually would be quite advantageous in advising English residents and would improve legal certainty for them. I think some rules on jurisdiction would be advantageous and I think some form of limited recognition of each others' judgments would be advantageous once one has limited the subject matter and excluded, for example, administration of estates. What I think will be more difficult is European certificates of inheritance or a compulsory system of registration of wills. Even if we get a narrow subject matter scope, that might be too much too soon.

Q40 Lord Bowness: What about mutual recognition of personal representatives?

Professor Harris: Speaking entirely personally, I think it would be beneficial to have a system of mutual recognition of personal representatives. Whether that system gives them priority rights to apply, as suggested by some responses, to be made personal representative in England or goes further and automatically entitles them to that status I think is moot. I think I would be willing to accept that there would be situations where the representative would be totally unacceptable. One can think of examples which would be contrary to English public policy but otherwise I think it is desirable. What I do not think we can get into is the actual process of administering estates. If a foreign law directly vests the property in beneficiaries, I do not think we can accept that at this stage.

Q41 Lord Burnett: You touched on this in your answer to Lord Bowness's question. What would be the respondents' views on a European Union-wide system of registration of wills?

10 October 2007

Professor Jonathan Harris and Mr Paul Hughes

Professor Harris: It is very clear from the responses that different people interpreted the proposal in very different ways. Some interpreted it as a list of wills that exist but with no access to content of those wills. Others interpreted it as a list of wills that exist but also access to the content and that produced very strong negative reactions. Others again thought you might have access to both but only on the death of the testator. Until one knows exactly what system is contemplated—

Q42 Lord Burnett: Are we talking about lifetime registration of wills?

Professor Harris: My understanding, my Lord Chairman, of what the Commission has in mind is that it would just be a register of wills that exist, such as, for example, the will of Fred Smith.

Q43 Lord Burnett: During his lifetime?

Mr Hughes: Yes, I think that is right. It is finding the missing will.

Q44 Lord Burnett: What did your respondents think about that? Did they think it was a good idea that if you made a will, you had to register it somewhere?

Professor Harris: I do not think there was a single response in favour of compulsory registration.

Q45 Lord Burnett: I am not surprised but I am nevertheless interested to hear.

Professor Harris: Some of the responses said it was impractical, some of them made points about the possibility of undue influence if one knew that a particular person, family member, had left a will but was unsure about its content, others said that there had been no pressing need established for such a register. Almost every respondent said there was nothing to be said against an optional system. They were quite happy to have that but I do not think there was any support for anything mandatory.

Chairman: Professor Harris, I think we have now covered one way or another all the matters that we were anxious to get your help on. Unless any other

members of the Committee have any other questions for you, it remains for me to thank you once again.

Q46 Baroness Kingsmill: Can I just ask one further question? Are you aware of the extent of objections from other Member States, the extent to which other countries have major objections?

Mr Hughes: On the majority of the topics we have talked about, from the summary of responses published, most Member States do not have as many problems as we have. There is considerable support for a wide scope in the range of PIL, there is considerable support for wide scope as in the sense of succession administration and wide support for the European certificate of inheritance, to just pick three of the principal topics we have touched on.

Q47 Baroness Kingsmill: We are being difficult again, are we?

Mr Hughes: No. We just start from a different place. We have to have our legitimate interests protected.

Professor Harris: I would add in that respect that it is interesting that other Member States have not balked, as one might have expected, about the possibility of a regulation of a very broad scope that would require them to recognize trusts. Almost all of them have shunned the Hague Trusts Convention but almost none have said, so far as I know, that they are not prepared to recognize, even register in some cases, English testamentary trusts and there is a view—I hope I do not misrepresent the view—I think the Law Society certainly may take this view—that a wide regulation would actually give us quite a lot to gain because we will be exporting our trusts to these jurisdictions, and if the price is having to register the odd usufruct or tontine, it may be a price worth paying; but it does lead to an odd schism between the broad recognition of trusts on death and *inter vivos*, which I think is not justifiable. I think the Hague Trusts Convention is the way to recognize trusts, not this regulation.

Chairman: These are deep and difficult questions. Thank you very much indeed.

**Supplementary letter from Lord Grenfell, Chairman of the European Union Committee,
to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice**

You will recall that in March 2005 the Commission published a Green Paper seeking views from interested parties on what action might be taken at Union level in relation to the law governing wills and succession, including intestate succession. The Green Paper acknowledged that it would be “inconceivable” to harmonise substantive rules relating to wills and succession and accordingly restricted itself to posing questions relating to private international law (jurisdiction, applicable law and recognition) issues. The Green Paper also considered ways of removing certain administrative and practical obstacles facing individuals wishing to have their status as “heir” recognised abroad. The idea of establishing a “European Certificate of Inheritance” was mooted.

We understand that the Commission is hoping to bring forward legislation on wills and succession, in the second half of 2008. We also understand that you and your officials are considering what the UK’s reaction

10 October 2007

to such a proposal might be. The Government made clear their position in their Response to the Green Paper, a copy of which was helpfully provided to the Committee by your predecessor. Discussions are taking place with interested parties within the UK and to aid that process the Government have retained Professor Jonathan Harris, University of Birmingham.

SCRUTINY HISTORY

As you will be aware from earlier correspondence the Committee has expressed a number of concerns relating to the possibility of EU action in this field. Prompted by an invitation from the Law Society and the Society of Trust and Estate Practitioners to revisit the Green Paper, on 10 October the Committee met Professor Harris and your official, Mr Paul Hughes. This provided the opportunity for the Committee to examine, with their assistance, the question of the harmonisation of private international law rules relating to wills and succession and, in particular, to seek to identify those areas where action at Union level would be helpful and how UK citizens might secure worthwhile practical benefit from such action.

TWO PRELIMINARY POINTS

Two preliminary points, we believe, deserve emphasis. The first is that, although the Commission may not have made out the most convincing case for action at Union level, there are an increasing number of people holding assets in more than one Member State. The growth in the number of UK citizens having second homes, working in or retiring in another Member State points to a need for simplification and greater legal certainty in this area. Second, there are substantial differences in the substantive rules and procedures relating to succession, testate and intestate, across the Union. While the extent of these differences, the Commission's Green Paper accepts, rules out harmonisation of substantive succession law, there is, we believe, scope for common conflicts rules. Accordingly we very much welcome and support, in principle, the present exercise being undertaken by the Government. It is important to ensure that an EU instrument, suitably qualified or flexible in its provisions, would provide real practical benefits to UK citizens.

NEED FOR REALISM

Our reconsideration of the Green Paper reinforces our view that the Commission's plans are highly ambitious. We recall that attempts in the past to produce international regimes for wills and succession matters have not been very successful. As we said in our earlier letter (13 June 2005) the absence of a positive response from States to the Hague Convention on the international administration of the States and on the law applicable to succession show the difficulty of finding common workable rules in this area. Why should the Commission be any more successful?

With Professor Harris's assistance, we have sought to identify the priorities for the UK in its approach to any Union initiative on wills and succession. We start from the position that the UK should be positive in the search for a Union measure which could bring benefits to its citizens and the citizens of other Member States. But we agree with Professor Harris that this may mean that it will be necessary to curb some of the Commission's ambitions.

RED LINES

It is at this time fashionable to talk in terms of "red lines". We agree that the first, if not the most important, red line in the present context relates to the issue of so-called clawback. The Union measure should not in any way call into question the validity of otherwise valid *inter vivos* dispositions. Second, it would be necessary to limit the scope of application to "succession" issues. As Professor Harris indicated, the easier way to do this might be to make clear to what matters any harmonisation or common rules did not apply, in particular to exclude matters such as administration of estates and questions relating to the validity and operation of testamentary trusts, matrimonial property law, and interests terminating on death such as joint tenancies.

UNIVERSAL APPLICATION

A separate issue of scope is the extent to which any EU instrument should apply to non-Member States; for example, to determine the governing law where the testator died habitually resident in the UK but having a house in Florida. We discussed the pros and cons with Professor Harris. A key consideration, in our view, would be whether the Community had competence to prescribe a rule having extra-Union consequences. It will not surprise you that the Committee takes a strict view of the scope of Article 65 TEC and we note that the new Article 69d proposed by the Reform Treaty refers to "civil matters having cross-border implications". The instrument would therefore not apply on the facts posited above to property outside the Union.

10 October 2007

SCISSION V UNITARY APPROACH

We believe the focus of the Commission's work should be on identifying an appropriate choice of law rule. We acknowledge that there are differing views as to what that rule might be and strong competition between a *scission* based approach and a unitary approach. Where, for example, an individual dies domiciled and resident outside the UK and leaves immovable property in the UK, we can understand that many here might balk at applying the law of habitual residence of the deceased rather than the law of the relevant law district of the UK as the *lex situs*. But in the converse case, namely where an individual is domiciled and resident in the UK leaving immovable property abroad, there would seem advantage in a UK court being able to apply domestic law in such circumstances, thus giving effect to the testator's intentions (a principle which we think should be respected where possible). For this reason we believe that a unitary scheme, based on the law of the domicile/habitual residence of the deceased, is potentially an attractive one and we would encourage the Government to give it further consideration. If, however, that were to prove impossible, we would request that further consideration be given to the possibility of parties being free to choose the applicable law, subject to there being an appropriate connection between the testator and that law.

MUTUAL RECOGNITION

We note that in the Government's Response to the Green Paper, whilst supporting in principle mutual recognition, it was considered that differences in legal systems across Member States in matters of succession give rise to significant obstacles to the creation of mutual recognition and enforcement measures in this area. We would urge the Government to give favourable consideration to mutual recognition of personal representatives, an issue we believe of ever increasing importance in practice.

REGISTRATION OF WILLS

We were interested to learn the results of consultation on this aspect of the Green Paper. We would not oppose a scheme for the lifetime registering of wills in Member States provided that registration was not mandatory.

EUROPEAN CERTIFICATE OF INHERITANCE

Finally, we believe that further consideration should be given to the question of the European Certificate of Inheritance (ECI). We do not see any objection to this being applied to heirs (in the civil law sense) but see a danger if it were in some way to be sought to be extended to deal with executors (in the common law sense). We doubt the wisdom of trying to bridge the two systems. We do not see why an ECI should not be created by an EU instrument. But as the law of wills and successions is one where a "one size fits all" solution would almost certainly be destined to fail, we suggest that any instrument at European level should provide the framework for the creation and recognition of ECIs into which Member States could opt if their domestic laws fitted. Jurisdictions with similar rules on 'heirship' should not be denied a system of mutual recognition.

We hope the above comments will be of assistance to the Government and would be grateful if you would keep us informed of developments and in any event let us know how matters stand by the end of March 2008.

25 October 2007