

UNIVERSITY OF ABERDEEN

Study on “THE EVIDENTIARY EFFECTS OF AUTHENTIC
ACTS IN THE MEMBER STATES OF THE EU, IN THE
CONTEXT OF SUCCESSIONS.” IP/C/JURI/IC/2015-020

QUESTIONNAIRE

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A Brief Introduction to Authentic Instruments

The legal institution of an authentic instrument is commonly found in those ‘Civil Law’ legal systems that are based on Roman Law and may sometimes also be found (in various forms) in ‘Mixed’ legal systems also with a Roman Law heritage. Authentic instruments are not however a feature of any ‘Common Law’ legal system and may not necessarily feature in those codified legal systems that are not based on Roman Law.

An authentic instrument is a type of public document, created by a public official who is usually, but not always, a notary. Depending upon the domestic legislation, some courts and other public officials may also be able to create authentic instruments. This note will only consider authentic instruments created by notaries.

As an authentic instrument is a public document it can only be created by those persons or authorities who have been expressly empowered by the authority of the State to create such public documents: this is one reason why in some Member States that have a notarial profession it is not possible for these notaries to create authentic instruments, they have no express public authority to create authentic instruments.

An authentic instrument created during the life of a party can formally evidence and record facts about its creation and also about the declarations made by that party (or parties) when he ‘appeared’ before the notary. If the authentic instrument is created after the death of a testator in connection with the succession law duties of the notary in that Member State it may still authoritatively evidence and record important matters concerning that succession. In either case, because this information is recorded in a public document (i.e. the authentic instrument) created by a public official (i.e. the notary) it will have a higher evidential status and evidential value than if the identical information were presented in other privately created documents.

The notarially verified facts recorded by the authentic instrument can, thereafter, be proven as *conclusive evidence* to any domestic court or other official body in that legal system by the simple production of an official copy of the authentic instrument. For example, an *inter vivos* authentic instrument could contain the following forms of evidence:

- (a) that a given party actually personally visited the notary – the notary will verify the identity of the party; and,
- (b) that the party visited the notary in connection with the creation of an authentic instrument on a particular day – the notary will verify the fact of the visit and also the date of his creation of the authentic instrument; and,
- (c) that the party actually made the declaration(s) that the authentic instrument records – the notary will verify the fact that the declarations were made in his presence by the party (*note that this verification does NOT necessarily mean that the declarations made were true – see (d) below*).

(d) Depending on the circumstances, an authentic instrument may go further than (c). If the notary can be sufficiently persuaded of the truth of a given declaration by a party he may not only record the making of the declaration by the party (as in (c) above) but also may record *the truth* of the declaration as a fact that he has formally verified.

In the legal system of creation the authentic instrument may not only benefit from the enhanced evidential status and admissibility of a public document, but may also benefit from other enhanced evidential effects. Thus it is commonly the case that an authentic instrument can be created in such a way as to allow its immediate enforcement if a party does not comply with his declarations. Such an 'enforcement' possibility effectively treats the authentic instrument as if it is *already* an enforceable judgment and removes the need to first visit the court for a declaration of enforceability. Equally, in the context of a post-mortem succession, an authentic instrument created by a notary in the course of that succession could produce evidentiary effects that allow its holder to act on behalf of the estate of the deceased.

Although the legal systems that feature authentic instruments treat them as public documents, and usually accord conclusive evidential effects to each of the notarially verified facts that they contain, it is still possible to challenge different aspects of an authentic instrument before the courts of the place in which that authentic instrument was drawn-up. The types of challenge can be grouped into three categories:-

(1) a challenge based upon a defect in the *formalities* required to create an authentic instrument. Such a technical challenge is sometimes described as a challenge to the formal validity or the *instrumentum* of the authentic instrument.

(2) a challenge based upon a defect in the evidential *content* of the authentic instrument. Such a challenge to the material validity of the authentic instrument is sometimes described as a challenge to its *negotium*.

(3) depending upon how the legal system of creation allows for this possibility, the actual enforcement of the authentic instrument may also effectively be 'challenged', but only on a one-off basis, in the course of judicial proceedings whether by convincing a court hearing an incidental matter not to follow the evidence contained in the authentic instrument, or, by way of possibilities allowed by that legal system to challenge the actual enforcement of the authentic instrument.

Considered in functional terms, an authentic instrument is therefore a means of formally and officially recording, preserving and then communicating conclusive evidence concerning notarially verified facts and aspects of party declarations in a convenient form and manner within the legal system of creation.

In some circumstances however the evidence contained in an authentic instrument created in one State may also be used in another State. There are three possible ways in which this could happen:-

1) The authentic instrument from State 1 could be produced and received in State 2 merely as a foreign document containing ordinary documentary evidence but not benefitting from any enhanced evidential status concerning that documentary evidence.

2) *The authentic instrument from State 1 could be produced and received in State 2 as a foreign authentic instrument under a bilateral treaty between State 1 and State 2 that treats such foreign authentic instruments more favourably than mere foreign documentary evidence. N.B. This possibility is not relevant for this study and is only included for completeness.*

3) The authentic instrument created in one EU Member State could be produced and received in another EU Member State as a foreign authentic instrument under an EU Regulation that expressly allows a ‘foreign’ authentic instrument as defined by that Regulation (e.g. see Article 3(1)(i) of Regulation 650/2012) to benefit from one or more of the following:

- a) cross-border enforcement – e.g. Article 60 of Regulation 650/2012,
- b) cross-border acceptance – e.g. Article 59 of Regulation 650/2012,
- c) cross-border ‘*recognition*’ (a misleading use of the term recognition is found in Brussels IIbis and in the Maintenance Regulation but was deliberately NOT used in Article 59 of Regulation 650/2012 concerning authentic instruments).

It should however be noted that in all cases concerned with EU Regulations allowing cross-border effects to authentic instruments, any attempt to challenge either the formal validity (*instrumentum*) or the material validity (*negotium*) of such a foreign authentic instrument can **only** proceed in the Member State in which the authentic instrument was created. Thus, though under Regulation 650/2012 the Member State addressed may, exceptionally, refuse to ‘accept’ or to ‘enforce’ a foreign succession authentic instrument because to do so would violate public policy, it cannot EVER accept challenges that question the formal validity or the material validity of that foreign authentic instrument: these issues can only be raised in the Member State of origin.

We are concerned with establishing and understanding the domestic evidentiary effects of authentic instruments created by notaries that concern successions. This is because under Article 59 of Regulation 650/2012 there is a duty on the 25 EU Member States concerned to domestically reproduce, as far as possible, the domestic evidentiary effects that a foreign authentic instrument concerning a succession would have in the Member State of origin. The only exception to this duty is in the exceptional circumstance that the reproduction of such evidentiary effects would be manifestly contrary to public policy (*ordre public*) in the Member State addressed.

We hope to use the information that you will provide to make it simpler for a lawyer or official in the Member State addressed who receives such an authentic instrument to appreciate what its domestic evidential effects could be.

Questionnaire

Introduction

This Study will assist the operation of Article 59 of Regulation 650/2012 by setting out the domestic evidentiary effect of any possible authentic instruments concerning succession in each EU Member State bound by the Regulation.¹ It is intended that this information will assist a practitioner in one Member State who encounters an unfamiliar foreign document concerning a succession from another EU Member State to understand:-

- a) whether or not the foreign document is an authentic instrument falling under Regulation 650/2012, and,
- b) whether or not Article 59 of Regulation 650/2012 applies to that authentic instrument and, if it does so apply,
- c) what are the domestic evidentiary effects that this authentic instrument would produce in the Member State of origin.

This questionnaire asks you to provide information and an explanation of the operation of succession law in the legal system(s) of a Member State to assist the legal practitioner who will soon be faced with these questions when applying Article 59 of Regulation 650/2012.

The focus of this questionnaire is thus upon the potential operation of Article 59 of Regulation 650/2012. We ask basic and potentially wide-ranging questions about the creation of Wills and the operation of succession law (and succession procedures) in each Member State; however we do this only to acquire enough information about each legal system to provide answers to the practitioner who will eventually face questions (a) – (c) above. The practitioner needs to understand the basic processes of succession law in ‘your’ Member State if he is to appreciate the points at which an authentic instrument falling under Regulation 650/2012 could (or could not) be created in ‘your’ Member State. Assuming that such an authentic instrument can actually be created, the practitioner then needs to know what domestic evidentiary effects this (for him) foreign authentic instrument would produce in ‘your’ Member State to apply Article 59 to that authentic instrument.

Our intention is to solicit enough information concerning succession law and authentic instruments in each EU Member State to allow a practitioner who

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Article 59 of Regulation 650/2012 requires that an authentic instrument falling under the Regulation, ‘... shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned’.

encounters a document concerning a cross-border succession to answer questions (a) – (c) set out above. We wish to emphasise that it is not expected, and nor is it necessary, for a national reporter to provide more information than this when filling out this questionnaire.

Thank you in advance for your answers.

I. General description of legal regime(s) in MS

1) Does the Member State you are reporting on consist of one legal system or of multiple legal systems?

Belgium is a federal state. It includes various types of sub-national levels. The most important ones are the so-called 'Regions' ('Régions' / 'Gewesten'), which have competence in various matters including economic policy. Next to the Regions, Belgium also comprises three 'Communities' ('Communautés' / 'Gemeenschappen'), which mainly have competence in education, sport and culture. At this stage, the civil law aspects of succession remain firmly within the hand of the federal legislator. However, the Regions do have exclusive competence to levy taxes in succession matters.

2) If the Member State consists of multiple legal systems please briefly set out the name of each legal system, the legal family (e.g. civil law / common law / other type) to which each system belongs, and indicate the extent of its territory within that Member State.

(N.B. If the Member State you are reporting on includes multiple legal systems please indicate in your answers to the questions below whether the answers for each legal system are the same, or differ, for each legal system).

This questionnaire is mainly concerned with civil aspects of succession matters. For these issues, Belgium may be considered as a unitary legal system, since the federal legislator has exclusive competence in respect of those civil aspects. Hence, in the remainder of the questionnaire, no mention will be made of the sub-national levels of government.

3) Where, within the legal provisions constituting the legal system, are the law and the procedural rules concerning succession located?

Please provide details and a hyperlink if there should be an official website including the text of this law and or procedure. Please also provide details and a hyperlink if you are aware of an English language version of these provisions.

The rules regarding succession are in the first place to be found in the Civil Code, which was adopted in 1804 in France (and remained law of the country when Belgium became independent in 1830). More precisely, the Civil Code includes 3 'Books' ('livre'), the third of which is concerned with rules on acquisition of property. It is within this Book 3 that the main rules on the law of succession may be found. The first title of this Book is entirely devoted to the rules on succession. The Civil Code must be supplemented with a number of specific provisions, adopted in various Acts of Parliament. These Acts include the Act of 16 May 1900 relating so-called “small”

estates and the Act of 29 August 1988 in relation to succession estates including agricultural land or farms.

All legislation in force in Belgium may be found, free of charge, on the Juridat platform (<http://www.ejustice.just.fgov.be/loi/loi.htm>). This is an official web-site which is regularly updated. Please note, however, that when a statute is updated, a consolidated version of the statute may not always be available. Unfortunately, no official translation of the Civil Code in English has ever been published.

The Code of Civil Procedure also includes a number of legal provisions relevant in case of succession. This applies in particular for Articles 1205 to 1225 of this Code, which provides detailed rules on the sharing out of the estate.

Belgium is also a party to several international conventions which may have an impact on succession matters. This applies in particular to the Washington Convention of 26 October 1973 providing a Uniform Law on the Form of an International Will, which has been implemented in Belgium with the Act of 2 February 1983.

4) The EU Succession Regulation (EU Regulation 650/2012) is fully applicable from 17 August 2015 – please provide details and references (*including a hyperlink address to any official websites*) to any **new legislation** and / or **new procedural rules** that have been drafted to implement this Regulation in ‘your’ Member State.

Belgium is preparing to adopt specific legislation which will serve to ease out the implementation of the Succession Regulation. At this stage, this legislation has not yet finally be adopted. In a nutshell, the legislation will include various provisions enabling notaries to issue European certificates of succession. It will also abolish several provisions included in the Code of Private International Law (Act of 16 July 2004), which provided until now a legal framework for cross-border successions.

II. General description of the concept of authentic instruments in the legal system(s) of the Member State

5) Does the legal system use authentic instruments?

N.B. for your answers to this question please consider use of authentic instruments in general (i.e. in areas other than succession law).

Yes

No

If it does then: -

a) Please indicate where the legal provisions concerning authentic instruments and their enforcement are to be found in this legal system.

The basic provision relating to authentic acts may be found in Article 1317 of the Civil Code. This provision is included in a section of the Code dealing with evidence and the evidentiary value of different documents. Article 1317 is almost identical to the provision found in the French Civil Code. It provides that “An authentic act is one that has been received by public legal officers who have the authority to draw up such acts at the place where the act was written and with the requisite formalities”. Other details in relation to authentic acts may be found in the articles 1318, 1319, 1320 and 1321 of the Civil Code. Other provisions deal with specific authentic acts. Article 35 of the

Civil Code for example, deals with authentic acts drafted by civil status officers.

b) Are there any transactions that are legally required to be carried out by using an authentic instrument (e.g. an application to record a right in a property register)?

All transactions concerning rights *in rem* on immovable must be recorded with an authentic act. This follows from Article 1 of the '*Loi hypothécaire*' (Act of 16 December 1851 on mortgages and other security mechanisms), which provides that every transaction in relation to an immovable must be duly recorded in the registers of the so-called 'mortgage registry' ("*conservation des hypothèques*" / "*hypotheekbewaarder*"). According to Article 2 of the same Act, registration is only allowed provided the transaction is recorded in an authentic act, a judgment or a non authentic act which has been duly recognized by parties before court or before a notary. Authentic instruments are also required in other contexts, such as e.g. to draw an authentic Will. Outside the context of successions, many documents must be drawn up using an authentic instrument.

c) Please explain who (e.g. a notary / another type of lawyer) or what (e.g. a court / other official body) may create such authentic instruments.

Notaries are primarily entrusted with the mission of drawing up authentic acts. This follows from Article 1 of the so-called 'Ventose Act' (Act of 25 Ventose Year XI in relation to the organisation of public notaries). According to this provision, notaries are appointed as public servants who may receive all acts and contracts for which parties may want to or must give an authentic character.

Next to notaries, courts may also deliver authentic acts. Rulings, decisions and judgments handed out by courts are delivered under the format of an authentic act (art. 780 Code of civil procedure). Courts are also empowered to register the agreement made by parties and confer it authentic value. Court clerks ('*greffiers*' / '*griffiers*') are also empowered to deliver authentic acts. The same applies for bailiffs ('*huissier de justice*' / '*gerechtsdeurwaarder*').

Other authorities may also deliver authentic acts, outside the context of succession. This is in particular the case for civil status officers ('*officiers d'état civil*' / '*ambtenaar van de burgerlijke stand*'), whose task it is to draft civil status documents (such as marriage acts, birth certificates etc.). Mayors are also entrusted with receiving authentic acts in limited circumstances. So are governors who oversee provinces and civil servants entrusted with buying out real estate and other assets on behalf of the State.

d) Please explain (in outline) the typical domestic evidential value, evidential effect and enforceability associated with these authentic instruments.

According to Article 1319 of the Civil Code (which is the exact copy of the same provision to be found in the French Civil Code), authentic acts serve as conclusive evidence of the agreements they contain between the contracting parties and their heirs and assigns. This provision means in effect that some of the elements included in the authentic act benefit from a higher evidential value.

The special evidential value attached to authentic acts only pertain to those elements which have been duly recorded by the notary ('*ex propriis sensibus*'). This includes the fact that a given party has been present at the notary's office on a given day, that that person solicited the notary's assistance with a given matter and that the person has made certain declarations in relation with the creation of an authentic instrument. The parties' signature (and the signature of the notary) also benefit from the special evidential value. So do certain actions undertaken by parties, which may have legal consequences (*e.g.* the fact that one party has paid a certain amount of money to another party).

Legal issues may as such never benefit from the special evidential value, as they are not simply recorded by the notary, but are based on a reasoning followed by the notary. When an immovable is sold, the authentic deed does not possess a special evidential value in respect of the question whether the seller was indeed the true owner of the immovable. The same applies for example to the fact that the amount of money paid by one of the parties to the other actually belonged to a third party.

The special evidential value attached to authentic acts does not mean that the information covered cannot be challenged. In every case a challenge remains possible. The special evidential value only means that the information covered benefits from a statutory presumption of truthfulness, which can only be overturned in specific circumstances, following a particular procedure. Failing such a challenge, the information can be used as conclusive evidence in any court proceedings or before any other authority. The mere production of the authentic instrument triggers the application of the special presumption, without any need for an additional verification. Further, the presumption can only be challenged using a special procedure, which is quite cumbersome to activate, i.e. the '*procédure d'inscription de faux*' ('*betichting van valsheid*'). This is in a nutshell the evidential effect of authentic acts. The evidential effects apply fully between the parties to the act. *Vis-à-vis* third parties, the special evidential effect of an authentic act is more limited: authentic acts do not have evidential value *vis-à-vis* third parties. They must therefore also activate the special procedure in order to challenge the content of the authentic act. However, when doing so, third parties are not bound by more stringent evidence rules, such as the rule that one can only challenge written evidence with another written element.

Authentic acts also possess a special feature, in that they may be directly enforceable. A creditor may therefore directly attempt to enforce the promise made in such an authentic act, without having to first obtain authorisation to do so from a court or tribunal (Article 19 of the Ventose Act). The authentic act is enforceable *per se*. This applies, however, not to all authentic acts, but only to such acts delivered by notaries. In order for the enforceable character to be present, the creditor must, however, obtain an authentic copy of the act (called an '*expédition*' or '*grosse*'). This authentic copy is delivered by the notary, who always keeps the original in his own archives. The authentic copy will include a general statement explaining that the act is duly enforceable (the so-called '*formule exécutoire*' / '*uitvoeringsclausule*') – see art. 25 of the Ventose Act. The direct enforceability of authentic acts does not go as far as

the enforceability granted to judgments and court decisions. Contrary to what is the case with such judgments, a court may indeed still grant the debtor the possibility to pay in several instalments (Article 1244 Civil Code). This explains why a creditor whose claim is included in an authentic act, may still go to court and obtain a judgment ordering payment of his claim. However, courts have somewhat broadened the enforceability of authentic notarial acts, holding for example that authentic acts also enjoy enforceability when they do not include a promise to pay a fixed amount of money but also in other cases.

e) By what general or special legal processes may there be a domestic challenge to:-

(i) the authenticity/ *instrumentum* of an authentic instrument?

A special procedure is organized in order to allow a party to challenge the instrumentum of an authentic act. This is the so-called “*procédure d'inscription en faux*” / ‘*betichting van valsheid*’ (special forgery proceedings). This may be done using two different methods : forgery proceedings may first be launched before a criminal court. The proceedings are then launched by the public prosecutor and conducted against the notary (or against another authority which delivered the authentic act). Specific rules may be found in the articles 193 to 197 of the Criminal Code. As soon as the special forgery procedure is launched, the enforceability of the authentic act is provisionally stayed. The forgery issue may also be raised as an incidental issue during the course of proceedings on the merits before an ordinary jurisdiction which is called upon to decide on an issue on which the authentic act has an impact. The procedure, which is governed by Article 895 Code of Civil Procedure, is then not aimed at the notary, but at the act itself. When a civil procedure is launched against an authentic act, its special evidential value and enforceability are *not ipso facto* stayed. It is up to the court to decide whether the act will indeed keep these two special features during the procedure.s These two procedures are deemed to concern public policy. Hence, no other possibility exist to challenge the authenticity of an authentic instrument.

(ii) the material validity/ *negotium* of an authentic instrument?

The negotium does not benefit from the special evidential value referred to above. As a consequence, *the negotium* may be challenged without having recourse to the special forgery proceedings. The ordinary rules of civil procedure will apply. This also includes the special evidentiary provisions, which may limit the possibility to challenge the act. Indeed, according to Article 1341 of the Civil Code, witnesses and oaths may not be used to challenge *the negotium*. In order for a challenge to be succesful, written evidence will have to be used. The material validity of an authentic instrument is not automatically affected by proceedings initiated against the act. During those proceedings, the authentic instrument retains its value and effect.

(iii) the actual domestic enforcement of an authentic instrument?

The enforcement of an authentic instrument may be challenged. No special procedure has been created therefore. The challenge may be made before the enforcement court (*'juge des saisies'* / ‘*beslagrechter*’) as would any challenge against an enforcement measure. If no enforcement measure has yet been taken by the creditor, a challenge may be brought before the ordinary court (court of first instance).

Please refer briefly in your answers to the effect of such challenges upon the evidential value, evidential effect and enforceability of the authentic instrument.

6) Does the legal system you are reporting on use authentic instruments in connection with the operation of its domestic succession law?

Yes
No

If it does then:-

a) Please indicate the location of the domestic legal provisions concerning such authentic instruments concerning succession.

In essence, the same general provisions apply in relation to authentic instruments concerning succession than to authentic instruments in general. Hence, the general provisions of the Civil Code (Article 1317 ff.) are also relevant in succession matters. Specific to succession matters are the provisions dealing with authentic wills, i.e. will drafted using an authentic act. Article 971 of the Civil Code provides that “A testament by public act shall be received by one notary attended by two witnesses or by two notaries”. Articles 972 ff of the same Civil Code include further rules on the drafting of authentic acts.

b) Please explain the evidential effects of these authentic instruments in a matter of succession.

There is no special regime for the evidentiary effects of authentic instruments used in succession matters. Those authentic instruments are indeed afforded the same evidentiary effects as other authentic instrument. In a recent case, the Court of Appeal of Mons made application of those general principles. A woman had drafted her Will with the assistance of a notary, while staying in a hospital where she was treated for an incurable cancer. The Will had been drafted while two witnesses were present. After the testator passed away, her grand-children challenged the Will. The Court held that it was bound to accept that the two witnesses had been present during the whole process of drafting of the Will, as this had been recorded in the Will. The Court also held that it could not be challenged that the Will had been drafted by the notary with the testator indicating orally her wishes. Those elements were covered by the special evidential value afforded to authentic instrument and had not been challenged properly by the grand-children (Court of Appeal of Mons, 17 September 2013, *JLMB*, 2015, at p. 803).

c) Please explain the evidential value of these authentic instruments in a matter of succession.

As with the evidential effects, there is no special regime for the evidential value of authentic instruments in succession matters : the general regime applicable to all authentic instruments, also applies to authentic instruments in succession matters.

d) Please explain whether it is obligatory in law, or common in practice, to use an authentic instrument in the course of a succession.

Use of an authentic instrument is only in limited way compulsory in succession matters. Certain forms of Wills must be drafted using authentic instruments, such as the authentic Will. The use of this form of Will is, however, merely a possibility and not an obligation.

When a succession is opened, certain elements must take the form of an authentic act. This is the case *e.g.* when the deceased had left an olograph Will. Such a Will must, according to Article 976 of the Civil Code, first be presented to a notary. The notary must, when opening the will, draft a deed (*procès-verbal*) indicating when the will was opened. This deed must take the form of an authentic act.

Likewise, certain decisions taken by the heirs must be recorded using authentic acts. This is the case for the decision whereby an heir accepts the succession while claiming benefit of an inventory. Article 794 of the Civil Code requires that an inventory of the assets of the deceased be filed. The inventory must be drafted using an authentic act (Article 1177 Code of Civil Procedure).

A deed of partition (*acte de partage* / *'verdelingsakte'*) must also under certain circumstances, be drafted using an authentic act. This is the case when one of the parties to the act is a minor (Art. 1206 Code of Civil Procedure). However, such a deed of partition is not always compulsory in succession proceedings.

When a notary is called upon to identify an heir and the rights he/she may claim, the act drafted for this purpose must also be an authentic act (Article 1240*bis* Civil Code). Please note, however, that another mechanism may be used to identify heirs, which does not require using the services of a notary and does not give rise to the creation of an authentic act.

e) Please describe and explain the processes by which the authenticity */instrumentum* and /or the material content */negotium* of an authentic instrument concerning a succession may be challenged. *In your answer please refer to the effect of such a challenge on the evidential value, evidential effect and domestic enforceability of the authentic instrument.*

There is no specific regime for challenges to the authenticity or material content of authentic instruments in succession matters. Such challenges are subject to the general regime. See answer to question II-5-e above.

III. Concerning succession law and succession procedures in the Member State legal system(s)

7) Please explain in your answers to this question who can make a Will in the legal system and also comment upon the types of Will that the testator can make.

a) Can the testator make a Will **without** the assistance of a notary, other lawyer or other official (e.g. a holograph Will, a privileged Will)?

Yes, a testator may draft a Will without the assistance of a notary : recourse to a so-called holograph Will is allowed (Article 970 Civil Code). Such holograph Will must be entirely written by the testator. It must also be signed and dated.

b) Can the testator make a Will via a notary? If your answer is 'yes' then please explain what types of Will a notary may create (or otherwise facilitate by holding for the testator (e.g. a secret or mystic Will))?

Yes, a Will may be made with the assistance of a notary. Wills drafted via a notary are called 'authentic' wills. Belgian law no longer offers the possibility to draft a so-called mystic Will (this possibility was abolished in 1983 when Belgium introduced the so-called 'international Will' upon ratifying the 1973 Washington Convention).

(i) Does any type of Will created via a notary benefit from an elevated evidential status compared to Wills not created via a notary?

Yes, Wills drafted by a notary benefit from the evidential status afforded to authentic acts generally. Hence, they have a higher evidential status than holograph wills. This applies, however, only to authentic Wills, i.e. which have been drafted by a notary, not to Wills which are merely entrusted to a notary after their creation, for conservation purposes.

(ii) Can a Will itself – if created by a notary – ever take the form of a domestic authentic instrument?

Yes, authentic Wills take the form of an authentic instrument.

c) Can the testator make a Will via another type of lawyer?

Yes. Lawyers other than public notaries, may assist their client in the process of drafting a will. This occurs not infrequently, especially with the development of a specialized estate planning bar. Lawyers provide drafting for Wills, as well as advice on the various issues raised by the Will.

(i) Does such a Will benefit from any elevated evidential status compared to other types of Will?

A Will drafted with the assistance of a lawyer (practicing attorney) does not benefit from any special evidential status.

(ii) Can such a Will – created by another type of lawyer – itself ever be regarded domestically as an authentic instrument?

No

d) Can the testator make a Will via another type of official?

In exceptional circumstances, certain categories of individuals may make a Will with the assistance of a special authority. This is the case for soldiers working in the army (Article 981 Civil Code), people on board of ships (Article 987 Civil Code) and Wills made by people living in an area closed because of a contagious disease (Article 985 Civil Code). In all these cases, the will may be made with the assistance of a representative of the public authorities (officer of the army, captain of the ship, justice of peace in case of contagious diseases). Needless to say, those provisions are rarely applied.

(i) Does such a Will benefit from an elevated evidential status compared to other Wills?

No special evidential status is given to these Wills.

(ii) Can such a Will – created by another type of official – itself ever be domestically regarded as an authentic instrument?

No.

e) Is it a legal requirement or common practice that the Will (or an official copy of the Will) will be deposited with:- a notary, another lawyer, a court, an official Wills Registry? (*please provide outline details of the name and website of any official Registry*).

Yes, there is a legal requirement to register certain types of Wills with a central register. The Central Wills Register was created and is managed by the Royal Federation of Notaries. A Royal Decree has provided some details on the working of this Register (Royal Decree of 21 June 2011). The obligation to register Wills concerns authentic Wills. Olographs Wills must also be registered when they have been entrusted to notaries. For olograph Wills, there is a possibility for the person concerned to refuse the registration. The obligation to register also applies to acts modifying Wills, such as a revocation.

The central Registry is called the 'CRT' - *Registre central des dispositions de dernières volontés*. Details of the official Registry may be found at www.notaire.be/donations-successions/les-successions/enregistrement-des-testaments-le-crt.

(i) If the deposit of the Will is legally required, what would be the legal consequences of failing to deposit that Will?

If a Will is not registered, there could be a disciplinary measure taken against the notary who has neglected to request the registration. The absence of registration will, however, not affect the Will as such : it will have no effect on the evidential value or effects of the Will.

f) *Inter vivos* contractual agreements involving the deceased concerning an inheritance from the deceased's estate:-

(i) Are such contractual agreements allowed and enforceable in the legal system under investigation?

In principle, it is prohibited to conclude agreements concerning one's future estate. Such agreements are deemed to be null and void (Article 791 Civil Code; Article 1130 Civil Code; Article 1388 Civil Code; Article 1600 Civil Code). However, increasingly, such contractual arrangements are recognized and given effects. Two examples may be mentioned. The first one is the so-called '*Valkeniers*-pact', which is regulated in Article 1388 of the Civil Code. Under this provision, two persons may, upon getting married, agree that one of the spouses or two, waive any and all rights he/she may have in the other's estate. Such waiver is, however, only allowed provided the other spouse already has children from a previous marriage or relationship. Another example may be found in Article 918 of the Civil Code : under this provision, an heir who benefits from a reserved portion, may consent to a gift made by the deceased. If such consent has been given, the heir may no longer require that the assets given away by the deceased be fictitiously collated with the remainder of the assets of the deceased. This provision only applies, however, if the gift has been made to another heir of the deceased and provided the deceased has retained some form of control over the assets given away (e.g. by providing that he will continue to benefit from the '*usufruct*' of the assets). Other examples may be found in the Articles 1091 ff Civil Code.

(ii) If such agreements are allowed are they regarded as falling within the law of contract or within the law of succession?

A *Valkeniers* pact is clearly regarded as falling within the law of succession. It is true that the basic legal provision regarding such pacts may be found in the section of the Civil code dealing with marriage contracts. It has, however, only effects in case one of the spouses passes away. A gift made using Article 918 Civil Code is deemed to have a mixed nature : it falls partly within the law of succession and partly within the law of contracts.

(iii) Could or would such a contractual agreement be created via an authentic instrument?

A *Valkeniers* pact must be created using an authentic instrument. Such a pact is indeed subject to the same formal requirements as a marriage contract. A gift falling under Article 918 Civil Code does not have to be recorded in an authentic instrument. It may also be recorded using other means. However, in practice, such gifts are very often created using an authentic instruments, because this gives more certainty to the parties (e.g. from a tax perspective).

(iv) Can such a contractual agreement / whether contained in an authentic instrument or not be revoked? In particular, would the later creation of a Will with different provisions to the earlier contractual agreement override and revoke the earlier contractual agreement?

Contractual arrangement may not be unilaterally revoked by one of the parties. This applies whether or not such arrangement has been, recorded in an authentic instrument or not. When there is a conflict between a contractual arrangement and a later Will, the former will

prevail. A testator may not unilaterally derogate from earlier contractual arrangements.

g) Revocation of any of the types of Wills discussed above:-

(i) Please explain (briefly) whether, and if so how, any type of Will discussed above may be wholly or partially revoked / amended.

Wills may always be revoked. The freedom to revoke Wills is in fact a basic principle of Belgian law. This explains why mutual wills are not allowed under Belgian law (Article 968 Civil Code).

(ii) Would any such revocation involve the replacement or creation of an authentic instrument?

Wills may be revoked either by a new Will or by an authentic act received by a notary (Article 1035 Civil Code). This means that there is no need to use an authentic instrument to revoke a previous Will. Even if a Will has been created using an authentic instrument (authentic Will), it may be revoked without such an authentic instrument.

(iii) Please explain whether in the legal system under investigation there are any events that would **automatically** revoke a Will (e.g. the subsequent marriage or divorce of the testator)?

Some events lead automatically, by operation of the law, to the revocation of the Will. This is the case if the person who stood to benefit from the Will, dies before the testator. Article 1039 of the Civil Code provides that in this case, the Will loses all its effects, at least in so far as the Will included a provision benefiting the legatee. The same applies if the asset which was legated, disappears before the testator passes away. In case of divorce, the spouses lose as of right all advantages which they have agreed upon during the marriage, including the advantages which would have taken effect upon the death of one of them. These advantages are those included in marriage contracts (Article 299 Civil Code).

8) In what circumstances will there be an intestacy? Who, in brief outline, benefits from the operation of the intestacy rules?

There is intestacy each time a person dies without having validly made any provision regarding his/her assets. Only natural death gives rise to intestacy. Attainder has been abolished under Belgian law.

In case of intestacy, the deceased's assets will primarily go to the surviving spouse and the deceased's children. The children are each entitled to the same part of the estate. No distinction is made between children born in and outside wedlock. Children inherit by distribution in equal shares and *per capita*. When one of the children died before the death of the parents, his part of the parent's estate goes to his children (if any) and is also divided in equal shares.

When someone dies without leaving any children (or grand-children etc), the assets go out to the brothers/sisters of the deceased (Article 750 Civil Code). Brothers and sisters are each entitled to an equal portion of the deceased's assets.

If the deceased does not leave any children nor has any brother/sister, his assets go to his parents (Article 746 Civil Code). Each line is entitled to half of the assets : the half for the relatives of the ascending lines of parentage in the father's side and half in the mother's side.

The surviving spouse is entitled to a right of usufruct ('*usufruit*' / '*vruchtgebruik*'). The substance of that right differs depending on the circumstances. If the deceased had any children, the surviving spouse is entitled to a right of usufruct on all the deceased's assets (Article 745bis § 1 Civil Code). If the deceased does not leave any children, the surviving spouse is entitled to ownership of the deceased's part of the joint estate and usufruct over all other assets (Article 745bis, § 1 Civil Code).

a) Is it ever possible for there to be both a partial intestacy and also an otherwise effective Will at the same time?

Yes this is possible. This will happen every time a deceased has drafted a Will including only limited indications concerning the testator's estate. A testator could *e.g.* indicate that some of his assets would go to a given party, without providing any indication as to the bulk of his assets. In this case, there will be a mixed system with a partial intestacy and an effective Will. The same applies if a person dies leaving a Will, the effects of which is only partially accepted by the beneficiaries. If one of the beneficiaries does not accept the Will, the assets he should have received must be disposed of *ab intestat*.

9) Is there a legitimate portion / *réserve héréditaire* rule in the legal system under investigation?

Yes
No

If so then:-

a) How does this rule operate and what classes of person are entitled to claim a share of the estate?

Various categories of persons are entitled to a reserved portion of the estate of the deceased.

The first category includes all descendants.

The second category of privileged heirs include the surviving spouse or surviving partner.

The last category includes the parents of the deceased. Belgium is one of the last countries where parents are indeed protected against Wills.

Children and other descendants are entitled to at least 50 % of the deceased's assets. If the deceased left more than one child, this portion of reserved assets will duly increase (*e.g.* if the deceased left two children, the deceased may only freely dispose of one third of his assets; if the deceased left three or more children, the deceased may only freely dispose of one fourth of his assets).

The surviving spouse is entitled to a reserved portion in usufruct : according to Article 915bis of the Civil Code, this right covers half of the deceased's estate. In addition, the surviving spouse is also entitled to a right of usufruct on the immovable in which the spouses lived together.

b) Would an express provision in a Will that conflicted with the legitimate portion / *réserve héréditaire* rule be regarded as an attempted evasion of this

rule? If so, would the conflicting provision in the Will be invalidated by the operation of domestic public policy (*ordre public*) rules?

Provisions in a Will conflicting with the legitimate portion are deemed to be null and void. This is expressly provided for in the law (Article 913 Civil Code). Hence, there is no need to consider such provisions from the angle of public policy or evasion of law.

c) May a person with a claim to a reserved share of the estate bring a claim to 'claw-back' a life-time gift by the deceased? (see also question 10)(i) below)

Yes, claw-back is allowed. In fact, the provisions relating to reserved share apply not to the estate of the deceased as it stood when the person passed away, but to a *fictitious* estate which includes assets which may have been given away by the deceased. The actual assets present at the deceased's death are combined with the assets given away by the deceased *inter vivos*. This follows from Article 922 Civil Code.

10) **Assuming the testator has died leaving a valid and uncontested Will**, please describe the legal steps and procedures associated with and concerning the subsequent devolution of the testator's estate.

For each sub-question below please indicate if at any stage of the succession proceedings domestic law either requires or permits the use of an authentic instrument, or another official document. Also please indicate by whom or by what such an authentic instrument or official document would be created and please explain its domestic evidentiary nature and evidential effect.

Please explain in your answer;-

a) How death triggers the operation of domestic succession law.

Death of a person triggers automatically the application of domestic succession law. There is no need for any court or other authority to intervene : the application of succession law operates *ex lege*. When a person dies, a certificate of death will be established by the civil status officer (Article 78 Civil Code). This certificate is an authentic act.

b) How the existence or absence of a Will is determined and what effect (if any) an intestacy has upon the procedures followed and the devolution of the estate.

Whether or not the deceased left a Will, must be determined after the death. Typically, the person benefiting from the Will, will know where to find the Will or at least know that a Will exists. If the Will has been recorded in the official registration system (see answer to question II-7-e above), it will be very easy to uncover it. If the Will has not been recorded in the system, it may be difficult to find it. Much will depend on the honesty of the person who knows about the existence of the will. As intestacy opens up immediately and automatically after the death, there is no need for any particular procedure to be opened.

c) What types of heir are possible in this legal system? If so please explain whether there are different succession rules, procedures and / or documents required for different types of heir.

Under Belgian law, there are different types of heirs. As explained under Question III.8, the main categories of heirs are the *children* and the *surviving spouse*. In exceptional cases, when a person dies without leaving any children (or grand-children etc), the *brothers/sisters* of the deceased are also called upon the succession as heirs (Article 750 Civil Code). If the deceased does not leave any children nor has any brother/sister, the deceased's *parents* are also called upon the succession as heirs. These different categories are subject to different rules, in that their rights are provided for by different provisions. However, all these heirs are automatically called upon the succession, by the mere fact of the death of the deceased. Hence, no procedure is needed for these heirs to obtain that quality. In order to demonstrate their quality, heirs may be required to produce documents. In most cases, these documents will be civil status documents, such as birth certificates or marriage certificates. These civil status documents are authentic documents.

d) Please explain how and when in the course of domestic succession proceedings a potential heir is formally deemed to acquire the status of heir (e.g. is the status conferred automatically by law, or conferred by the Will, or is conferred by reason of an application made to a court / a notary / another official?). *Please indicate the existence and evidentiary nature of any authentic instrument, official document or other record that these proceedings would generate.*

According to Article 724 of the Civil Code, heirs automatically acquire that status by operation of the law. There is no need for a Will to confirm this status or for a court to declare or confirm that heirs have acquired that status. It is only when the status of an heir is challenged, that a court will be called to rule upon this question. When doing so, the court will defer to normal rules of evidence. Authentic instruments may therefore play a crucial role in such litigation.

This principle does apply for legatees. Legatees are not always automatically deemed to acquire this status by operation of the law. So it is that legatees enjoying a 'general legacy' ('legs à titre universel', i.e. who are granted all assets of the deceased), must file a petition to obtain recognition of their status, when they are in competition with other heirs who enjoy a reserved share (art. 1004 Civil Code). If such legatee does not come in competition with an heir enjoying a reserved portion, their status is automatically conferred by law, without any need for an additional step.

e) What happens if a potential heir refuses to accept the inheritance? *Please indicate whether any authentic instrument, official document or other record would be generated or affected by this refusal.*

Heirs may refuse to accept the inheritance. They must make this known. A declaration of renunciation may be made either before the court of first instance or before a notary (Article 784 Civil Code). If an heir chooses to renounce before a notary, the latter will draw an authentic act recording the renunciation and will file a copy thereof with the court. Heirs are not required to justify why they refuse to accept an inheritance. An heir may also decide to

accept the inheritance, while reserving the right to first obtain an exhaustive inventory of the assets and debts. In such case, the heir will only be held to the deceased's debts if the succession includes sufficient assets to pay for such debts.

f) Please explain whether is it possible (or ever required) that a notary or another official or representative will be appointed to assist with the administration and devolution of the estate. If such an appointment is possible please explain when and how this could happen.

It is certainly possible that a notary is appointed to administer the estate and work around a partitioning of the estate. In principle, when a person dies, his heirs are deemed to be joint owners of the deceased's assets. Heirs may freely decide how to end this joint ownership. To that end, they may draw up an agreement outlining their respective rights and obligations. The agreement will include provisions indicating to which assets each heir is entitled. Such agreement does not need to be recorded in an authentic act.

If parties cannot agree on the partitioning of the estate, a petition must be filed by one of the parties before the court of first instance (Article 1207 Code of Civil Procedure). The court will appoint a notary and order the notary to prepare the partitioning. Parties will be heard by the notary, who will first collect all relevant information and then suggest a partitioning. If parties do not agree with the notary's suggestion, they may take the matter back to the court, which will rule on the partitioning. If parties agree with the partitioning suggested by the notary, the notary will draw an authentic act outlining how the assets must be divided.

If one of the heirs is a minor, parties do not have the freedom to agree on the partitioning as they wish. A notary must be appointed, who will supervise the partitioning. The agreement between parties must be approved by a court (justice of peace, Article 1206 Code of Civil Procedure).

g) Please explain by whom the assets and liabilities of the deceased's estate (including any taxes payable by the estate or by the heir(s) or legatees) are calculated and also explain whether any such calculation could or would normally involve the use of an authentic instrument or equivalent official document.

The heirs have the possibility to proceed themselves to the partitioning of the deceased's estate. In that case, they will need to find out by themselves what were the deceased's liabilities. They will also need to file a document with the tax authorities, at the latest four months after the death occurred, indicating what the estate includes (assets minus liabilities). The tax authorities will proceed to calculate the succession taxes which are due. The document issued by the tax authorities indicating how much taxes are due and by whom is an official document.

In many cases, the various operations following a person's death will be undertaken by a notary : the notary will collect all relevant information in order to draw up a table including all assets and liabilities of the deceased. The notary will then file the document with the tax authorities. It will again be up to the tax authorities to calculate how much taxes are due and by whom.

h) Maintenance - Please state whether or not it is possible in this legal system for the deceased's estate to face claims for Maintenance that **do arise by reason of his death** (See Article 1(2)(e) of Regulation 650/2012). If such claims are possible, please indicate by what class of person they may be brought and please also explain whether or not such a claim could or would be based upon an authentic instrument that falls within the scope of the Succession Regulation.

In principle, maintenance claims disappear with the death of the maintenance debtor (this principle applies to statutory maintenance claims, not necessarily to maintenance claims created by contract). A maintenance claim between two ex-spouses will cease to exist when the debtor passes away (Article 301 § 10 Civil Code). There is, however, one exception to this principle. When a surviving spouse needs to be supported, a claim may be made against the estate of the deceased spouse. This principle may be found in Article 205*bis* of the Civil Code. Such a maintenance claim can only be made provided the spouses were still married when one of them passed away. It comes on top of the various rights and entitlements of the surviving spouse (among others the reserved share of the surviving spouse). The maintenance claim is a debt of the estate. It must be assumed collectively by all heirs.

Article 205*bis* § 2 of the Civil Code also provides that the parents of the deceased are entitled to a maintenance claim, which must be assumed by the deceased's estate. This maintenance claim only exists provided the deceased did not leave any children. The claim can only be made provided the parents were deprived of their rights in the estate by gifts made to the surviving spouse.

These maintenance claims are *statutory* claims. There is no need for any authentic instrument to be drafted in order for these claims to exist or to be asserted against the estate.

i) Collation – please explain whether *inter vivos* gifts and other advances from the deceased's estate will be taken into account in establishing entitlements to the estate (e.g. is collation 'automatic' in this legal system or will it only occur if an heir / legatee makes an application for collation?) Please also explain how the fact of a collation would be evidenced, particularly, could an authentic instrument be involved in, or affected by, a collation?

Inter vivos gifts and other advances are indeed collated. The goal of collation is to ensure that heirs are treated equally. According to Article 920 of the Civil Code, such gifts are "reducible" if they impinge upon the reserved portion of one or more heirs. This means collation does not take place automatically, by operation of the law. Collation must be requested by the heirs/legatees. Authentic instruments will be involved in the process of collation, as many *inter vivos* gifts are recorded by notarial deeds.

j) Clawback – please explain whether or not it is possible for a person entitled under a domestic legitimate portion / *réserve héréditaire* rule to bring a claim in connection with a life-time gift made by the deceased that has diminished the value of the estate (and hence the reserved amount that is owed to the claimant).

Any person entitled to a reserved portion may request that a gift made by the deceased be reduced. The reduction will not operate *ex lege*, even though

provisions in relation to the reserved option are deemed to be of public policy. An application must be made by the heir. Things may be different when the clawback is aimed not at a gift but at a disposition of property in favor of a legatee. In that case, the legatee must indeed claim possession of the asset after the death of the testator. The heir whose reserved portion is affected by this disposition will not have to start proceedings to invalidate the disposition. The heir may simply wait until the legatee starts proceedings to claim the asset and oppose the claim using its reserved portion.

- (i) How is a 'clawback claim' commenced and how long is the limitation / prescription period for such a claim?

A 'clawback claim' may be initiated informally, when heirs discuss the partitioning of the deceased's estate. An heir may in that context make a claim challenging a gift made by the deceased. If a notary has been entrusted with the partitioning (see above, question 10-f), the heir will inform the notary of its wish that the clawback be applied. In that case, the notary will first investigate if the 'clawback claim' is legitimate and should be granted. If the notary accepts the claim, this may be challenged by any party before the Court supervising the partitioning process (Article 1216 Code of Civil Procedure). Likewise, if the notary refuses to take into account the clawback claim, the party who applied for such clawback may take the matter to court. Clawback claims are subject to the general regime of statute of limitation, meaning that the prescription period is 30 years (Article 2262 Civil Code). The starting point of this time period is the death of the deceased.

- (ii) How would a successful clawback claim affect payments or delivery of property already made in connection with the succession?

A successful clawback claim has the effect of annulling all gifts made by the deceased, in so far as the gifts impinged on the reserved portion. Hence, what has been given by the deceased must be handed back to the estate. This applies to gifts of movables and immovables alike. A successful clawback claim would also affect payments and delivery of property made in the framework of the succession : if a legatee has already received money or an asset as directed by the deceased in its Will, this will need to be repaid to the estate.

- (iii) How would a successful clawback claim affect any earlier authentic instrument or analogous document drawn-up in connection with the succession?

A successful clawback claim could have effect on earlier authentic instruments. Say that the deceased gave away an immovable to a third party before passing away. If this gift is challenged by an heir on the ground that it impinges on its reserved portion, the gift will be found to be null and void *ab initio*. Hence, the beneficiary of the gift will be deemed never to have been the legitimate owner of the immovable. As a consequence, a possible sale of the immovable by the

beneficiary of the gift to a third party will also be null and void. This could affect the authentic instrument which has been drafted to record the sale. Different legal provisions, however, bring some nuance to this picture. So it is that under Article 930 of the Civil Code, if the beneficiary of the gift has already sold the asset given by the deceased, the heir who has successfully challenged the gift, must first attempt to obtain compensation from the beneficiary. It is only if this attempt proves unsuccessful, that the heir may seek redress from the third party. While the general rule is that a successful clawback claim allows the heir to take back the asset which was wrongly given to the third party, this redress takes a particular form under Article 930 Civil Code : the heir may not claim the asset, but must claim compensation from the third party.

k) Partition – please explain in what circumstances a partition of the estate will be required and also when and how such a partition would normally be carried out. Would any aspect of such a partition normally involve (or be recorded in) an authentic instrument?

A partition of the estate is always required when there is more than one beneficiary of the estate. In that case, the various beneficiaries are deemed to own jointly the estate. Under Article 815 of the Civil Code, they may decide not to partition the estate, and indeed in many cases, estates remain undivided for years, if not decades. However, any of the beneficiaries always has the possibility to request a partitioning. Such partitioning may be done informally, even tacitly. An authentic act is required if the estate includes an immovable whose transfer *inter vivos* is subject to formal registration in the immovable register.

l) How are the heirs / legatees of the estate identified and how is the property that they are to receive determined then delivered or paid? Would an authentic instrument or an analogous official document be created or used in any part of this process? How – if at all – is the fact of delivery / payment recorded and evidenced?

Heirs and legatees are identified using traditional civil status documents, such as birth certificates, marriage certificates and the like. The information contained in these documents has also been recorded in the so-called 'National Registry', which includes information on all person living in Belgium. In some cases, it may be required to issue a certificate evidencing the heir's rights under the succession. Such certificate may be issued by a notary (art. 1240bis Civil Code). When issued by a notary, such certificate is an authentic act. The fact of the delivery /payment will not automatically be recorded. Parties may, however, choose to record such fact, e.g. by drawing up a recognition of payment. This will not necessarily be done using an authentic act.

m) How (briefly) does the legal system provide for the eventuality that an heir or a legatee cannot be found but is not known to be dead?

If an heir or legatee is not to be found, but is not officially dead, the court will first appoint a notary (Article 129 Civil Code). The notary's mission is to take care of the person's interests until this person is either found or declared dead

or absent. Article 126 of the Civil Code provides that when a person is missing in circumstances indicating that the person could be dead (i.e. in circumstances where the person's life was in danger), the court has the possibility to issue a judgment stating that the person is dead.

n) Is there a period of time after which an heir / legatee would lose the right to act or claim and, if so, how long is that period?

If an heir has not claimed his rights, he may lose the possibility to do so provided more than 6 months has passed since the estate was partitioned and provided the link between the heir and the deceased was only established after the death of the deceased (Article 828 Civil Code). Typically this applies when a child of the deceased appears after the latter's death, and the child's link with the deceased is only established after the death. When other heirs have acted in good faith in partitioning the estate, the newly discovered heir loses the right to claim his part of the estate *in natura*. The heir may, however, claim its part in kind.

11) Please briefly explain whether (if at all) the legal steps, processes and procedures you have outlined in your responses to question 10 (above) would change if the succession was 'contested' from the beginning or became 'contested' after commencing as an 'uncontested' succession.

12) Commission Implementing Regulation 1329/2014 distinguishes between an application for an attestation concerning **a decision** in a matter of succession (Annex 1 Form I) and an application for an attestation concerning **an authentic instrument** in a matter of succession (Annex 2 Form II). **This question is concerned only with a decision and Annex 1 Form I.**

a) Please identify any domestic court, office or other professional person to which or to whom an application for an attestation concerning **a decision** in a matter of succession (Annex 1 Form I) may be made.

No court has been officially appointed to issue an attestation concerning a decision in succession matters. In view of their competence in succession matters domestically, it is expected that applications for an attestation concerning a decision in successions matters will be made to the Court of First Instance (*rechtbank van eerste aanleg / tribunal de première instance*).

b) Please identify when, if ever, an application for an attestation concerning **a decision** in a matter of succession (Annex 1 Form I) will be made **to a notary**. Although no legislation or regulation has been adopted to deal with applications for attestation concerning a decision, it is quite unlikely that a notary will ever be seized of such an application. Notaries do not have any jurisdiction to certify or authenticate court decisions. There is no good reason why it would be different in succession matters.

c) Please identify the types of party who may make an application for an Annex 1 Form I attestation in the legal system you are reporting on.

In the first place, an application for an Annex 1, Form I may be made by the parties to the decision which has been issued. It may also be that an application for an Annex 1, Form I could be made by another party, *e.g.* a creditor of one of the parties to the procedure which led to the decision. In any case, a party seeking an Annex 1, Form I will be requested to demonstrate having an interest to obtain such a Form.

13) Regulation 1329/2014 distinguishes between an application for an attestation concerning a decision in a matter of succession (Annex 1 Form I) and an application for an attestation concerning **an authentic instrument** in a matter of succession (Annex 2 Form II). **This question is concerned with an authentic instrument and Annex 2 Form II.**

- a) Please identify any court, office or other professional person to which or to whom an application may or must be made for an attestation concerning **an authentic instrument** in a matter of succession.

No specific legislation has yet been adopted in relation to the applications concerning authentic instruments. As information in relation to these applications are not required to be communicated to the Commission under Article 78 of the Succession Regulation, it is difficult to know with certainty which authority will be entrusted with the mission to deliver such attestation. Based on previous experiences with other European Regulations, it may be expected that this task will be entrusted to the notary who drafted the authentic act. This would be in conformity with Article 59 § 1 which provides that a person wishing to use an authentic instrument in another Member State may ask the “authority establishing the authentic instrument in the Member State of origin” to fill the form.

- b) Please identify when, if ever, an application for an attestation concerning **an authentic instrument** in a matter of succession must or may be made **to a notary**.

As already indicated, no final answer can be given to the question which authority will be required to deliver the Annex 2 Form II. It is, however, expected that this matter will be left to the notary who drafted the authentic act. It is unlikely that authentic acts issued by other authorities than notaries may be submitted to a notary for the issuance of the attestation.

- c) Please identify the types of party who may make an application for an Annex 2 Form II attestation in the legal system you are reporting on.

As no specific legislation has yet been adopted in relation to this issue, no final and firm answer can be given to this question. It is expected that an application for an Annex 2 Form II attestation may be requested by the parties to the authentic act. This will include all parties who derive rights from the authentic act. More generally, an application could also be entertained when it is filed by a party with an interest in the succession, even though this party is not named in the authentic act, nor derives any benefit from the act.

- d) Please explain when it would be necessary to seek the cross-border ‘acceptance’ of a domestic authentic instrument concerning succession by ticking ‘Yes’ at box 4.1.1. of Annex 2 Form II of Regulation 1329/2014?

It is difficult to predict at this stage when it will be necessary to seek the cross-border acceptance of an authentic instrument. There will probably be various situations in which such cross-border acceptance will be necessary but the usefulness of box 4.1.1. remains somewhat mysterious.

i) Are there any circumstances in which an attestation concerning the 'acceptance' of the authentic instrument under Article 59 AND also its 'enforceability' under Article 60 of Regulation 650/2012 would BOTH be required?

At this stage, it is difficult to see in which circumstances one would need to seek both the acceptance *and* the enforceability of an authentic instrument.

ii) Are there any circumstances in which ONLY an attestation concerning 'acceptance' under Article 59 of Regulation 650/2012 would be required? (see also question 15)

This will be the case when a party does not seek the enforcement of an authentic act, but only needs to rely on the evidentiary effect of the authentic act. In practice, the practical use of the acceptance will, however, be limited.

iii) Are there any circumstances in which ONLY an attestation concerning 'enforceability' of the authentic instrument under Article 60 of Regulation 650/2012 would be required?

Yes, this will be the case when a party is only seeking enforcement, without being bothered or concerned by the evidentiary effect of the authentic act.

iv) In your opinion, do you think it will be common for an applicant to tick 'No' at box 4.1.2. of Annex 2 Form II of Regulation 1329/2014 but then to tick 'Yes' at box 6.1.1? (see also question 16)

No, this will not be a common situation. This is because when one seeks to enforce an authentic act in another Member State, one will probably also seek to have that authentic act accepted in that Member State. While it is strictly speaking not necessary to obtain the acceptance to secure the enforcement of the act, it may be reassuring for a party seeking enforcement of an authentic act to know that the act will also be 'accepted' in the other Member State.

e) Please explain whether or not a domestic authentic instrument could or would normally produce any or all of the specific evidentiary effects contemplated by Annex 2 Form II 4.2 – 4.2.1.1.7 of Regulation 1329/2014 as a consequence of its 'authenticity' (see also Recital 62 of Regulation 650/2012²) particularly:-

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Recital 62: The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on

- i) The date the authentic instrument was drawn up
Yes
 - ii) The place where the authentic instrument was drawn up
Yes
 - iii) The origin of the signatures from the parties of the authentic instrument
Yes
 - iv) The content of the declarations of the parties
No
 - v) The facts that the authority declares as having been verified in its presence
Yes
 - vi) The actions which the authority declares to have carried out
Yes
 - vii) Other (*please indicate any other evidentiary effect that a domestic authentic instrument could produce*)
Certain actions undertaken by parties, which may have legal consequences (*e.g.* the fact that one party has paid a certain amount of money to another party) are also covered by the special evidentiary value afforded to authentic acts, provided they have been witnessed directly by the notary.
- f) Please indicate how an authentic instrument would lose any or all of the specific evidentiary effects detailed in question 13)(e)(i-vii) (above) by reason of a domestic challenge as set out by parts 4.2.2 – 4.2.2.2. of Annex 2 Form II of Regulation 1329/2014.
If the authentic act is challenged using the special procedure of “*inscription en faux*” / ‘*betichting van valsheid*’ (special forgery proceedings), the act will lose its special evidentiary value and effects. When such special procedure is initiated before a civil court, the evidentiary effects of the act is not automatically stayed. However, the court may decide to stay these evidentiary effects during the procedure (Article 1319 Civil Code; Article 19 of the Ventose Act).
- g) Please explain how an authority in the Member State of origin asked to complete parts 4.2.3 – 4.3.2 of Annex 2 Form II of Regulation 1329/2014 would know of, or could discover, that the authentic instrument at issue in the attestation application is, or is not, being domestically challenged on one or more of the following grounds:-
- i) its authenticity (see Recital 62 of Regulation 650/2012)
There is no register specifically recording information in relation to challenges made against the authenticity of an authentic act. Hence, the authority required to complete Annex 2 of Form II will not have an authoritative answer on the question whether such a challenge has been brought. However, when the authenticity of an authentic act has been

the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

challenged in court, it is most likely that the notary who drafted the authentic act will be informed of the existence of this challenge. This is because the notary will be party to proceedings aimed at challenging the authenticity of an authentic act, at least when the challenged is brought before a criminal court. In any case, once a court has ruled on the challenge, the court's ruling will be notified to the notary who issued the authentic act. The court's ruling must be recorded on the authentic act. This will guarantee that anyone using the act afterwards, will not ignore the court's decision.

- ii) the legal acts and /or the legal relationships recorded that specifically relate to the attestation application (see Recital 63 of Regulation 650/2012)

It may be very difficult for the notary who is required to complete Annex 2 of Form II to be informed of challenge to the legal acts or legal relationships recorded in an authentic act. The notary will not be a party to court proceedings relating to such challenge. Further, there is no official register of such court proceedings, which could be accessed by the notary. The likeliest option for the notary will be to request information from the party who has sought an attestation under Article 59.

- iii) *other* legal acts and /or the legal relationships recorded in the authentic instrument that *DO NOT* specifically relate to the attestation application (see Recital 65 of Regulation 650/2012)

Again, it will be very difficult for the notary who is required to complete Annex 2 of Form II to be informed of challenge to other legal acts or legal relationships recorded in an authentic act that do not specifically relate to the attestation application. The notary will not be a party to court proceedings relating to such challenge. Further, there is no official register of such court proceedings, which could be accessed by the notary.

IV. Relevant remarks concerning private international law concerning succession in the legal regime(s) in the MS

N.B. For question 14 please also consider the law BEFORE 17 August 2015.

14) Before 17 August 2015 (i.e. before Regulation 650/2012 enters fully into force) was it ever possible for a foreign decision or a foreign authentic instrument to affect a domestic succession in the legal system you are reporting upon?

Yes
No

- a) Please indicate whether a **foreign decision** on succession could be recognised and /or enforced to then produce legal effects in a domestic succession. *Please provide actual examples to illustrate your answer.*

Foreign court decisions in succession matters enjoyed recognition *de plano* in Belgium since at least 1st of October 2004 (at which time the Code of

Private International Law, Act of 16 July 2004, came into force). Recognition *de plano* meant that such decisions enjoyed *res judicata* effects in Belgium as of right, without any need for any prior court proceedings (Article 22 Code of Private International Law). Foreign court decisions could also be enforced in Belgium. This required obtaining prior authorization ('*exequatur*') from the court of first instance (Article 22 Code of Private International Law). In all cases, recognition and enforcement could be denied on the basis of a public policy exception. In the relations with France and the Netherlands, Belgium was bound by two old bilateral conventions (concluded in 1899 and 1925). These Conventions also allowed the recognition *de plano* of court decisions in succession matters and provided that foreign court decisions could be enforced with prior court approval. There are very few (known) court precedents of cases where foreign court decisions have been accepted in Belgium in succession matters.

- b) Please indicate whether the legal system upon which you are reporting has ever denied effectiveness to a **foreign decision** in a matter of succession because of incompatibility between that **foreign decision** and the **public policy** of the forum. *Please provide actual examples to illustrate your answer.*

Public policy has not played an important role when it comes to foreign decisions in matters of cross-border successions. As already indicated, there are very few known cases where foreign decisions were relied upon in succession matters. To our knowledge, no foreign court decision has been denied effect in recent decades in Belgium on the basis of public policy considerations.

- c) Please explain whether, and if so how, a **foreign authentic instrument** could be 'received' and or enforced by the legal system to then produce evidentiary effects in a domestic succession. *Please provide actual examples to illustrate your answer.*

Foreign authentic instruments could be received in Belgium. Until 2004, the legal basis to do so was unclear. Article 47 of the Civil Code provided that "*Tout acte de l'état civil des Belges et des étrangers, fait en pays étranger, fera foi, s'il a été rédigé dans les formes usitées dans le dit pays*" (translation : "Full faith must be given to acts of civil status of Belgian citizens and foreigners made in a foreign country and drawn up in the forms in use in that country"). On that basis, effect was given to foreign authentic act. Starting in 2004, Article 27 of the Code of Private International Law provided that foreign authentic acts should be recognized *de plano*, i.e. without any need for a prior court approval. The *de plano* recognition was subject to the verification that the authentic act was in conformity with the law which would have been applied on the basis of rules of Belgian private international law. Foreign authentic instruments could also be enforced in Belgium. Article 27 § 2 of the Code provided that enforcement was only possible after prior verification by the court of first instance (*exequatur* proceedings).

- d) Please indicate whether the legal system upon which you are reporting has ever refused to accept (or denied effectiveness to) a **foreign authentic instrument** in a matter of succession (*or in any other matter*) because of incompatibility between an aspect of that **foreign authentic instrument** and the **public policy** of the forum. *Please provide actual examples to illustrate your answer.*

I have not found any example in recent decades of a case where a foreign authentic instrument (in succession matters) had been denied effect in Belgium on account of a violation of the public policy of the forum. Commentators have given examples of situation where a foreign authentic act would be denied effect. Professor Weyts for example has argued that a foreign authentic act which would have as effect to deprive heirs of their reserved share should be denied effect in Belgium (L. WEYTS, “Wat is de waarde van mijn notariële akte in het buitenland, en vice versa? Over de circulation van notariële akten binnen de Europese Unie”, *Tijdschrift voor notarissen*, 2014, at p. 534). This has, however, not been tested in court and can therefore not be confirmed.

Outside succession matters, authentic acts have been denied effect quite frequently on public policy grounds. One of the most frequent example concerns marriages celebrated abroad : courts have regularly refused to take into account such marriages after having found that this was a marriage of convenience or sham marriage.

- e) Please explain whether or not the legal system upon which you are reporting would potentially receive the evidence contained in a foreign authentic instrument as ordinary written evidence (i.e. without any special or elevated evidential value) despite refusing to accept, ‘recognise’ or enforce the foreign authentic instrument in which it was contained. *Please provide actual examples to illustrate your answer.*

If a foreign authentic act has been denied recognition in Belgium on public policy grounds, it is most probable that the court's first reaction would be to dismiss any and all effect to the foreign act. However, technically speaking, it would be possible to distinguish between several effects linked to the act. If say a foreign authentic will is denied recognition in Belgium on public policy grounds because it introduces a difference of treatment between heirs of the deceased based on their sex or religion, this authentic act cannot be used to by the heirs to obtain what they are entitled to under the will. The *negotium* of the authentic act will not be accepted as such in Belgium. This does not mean, however, that authorities in Belgium should not investigate further whether account may be taken of the evidential value of the act. A challenge to the *negotium* does not necessarily deprive the act of its special evidentiary value. The authentic will may still be relied on to demonstrate that the deceased appeared in front of the foreign notary on the date indicated in the will, that the deceased made certain declarations, that witnesses were present, etc.

15) Please explain what (if anything) appears to be understood in the legal system you are investigating by the concept of ‘**acceptance**’ of a foreign authentic instrument via

Article 59 of Regulation 650/2012 and please also explain how this ‘**acceptance**’ concept differs from the concept of ‘**recognition**’ accorded to a court decision under Article 39 of the same Regulation.

This question has not yet been addressed by courts in Belgium. According to commentators, the 'acceptance' must be distinguished from the recognition of foreign decisions. Acceptance relates only to the possibility to rely in Belgium on the evidential value of foreign authentic acts (E. GOOSSENS & A.-L. VERBEKE, «De Europese erfrechtverordening», in *Themis IPR*, Die Keure, 2012, p. 125, nr. 54). Commentators also underline that the probative value of a foreign authentic act must be addressed on the basis of the law of the State of origin of the act (CH. CASTELEIN, “De impact van de Europese Erfrechtverordening op de afwikkeling van een grensoverschrijdende nalatenschap in België”, in *Tendensen Vermogensrecht* 2015, R. BARBAIX & N. CARETTE (eds.), Intersentia, 2015, p. 145, § 30).

16) Please explain what is understood in the legal system you are investigating by the concept of ‘**enforcement**’ of a foreign authentic instrument via Article 60 of Regulation 650/2012 and how this concept differs from the concept of ‘**acceptance**’ under Article 59 of the same Regulation.

There is no court practice yet on Article 60 and the enforcement of foreign authentic acts. It may be expected that courts and other authorities will have no difficulty understanding the difference between 'acceptance' and 'enforcement' of foreign authentic acts, because courts have been used to distinguish between 'recognition' and 'enforcement' of such acts, as these were subject to different regimes under Article 27 of the Code.

17) Please explain and describe any domestic provisions that concern an application for the cross-border ‘acceptance’ of an incoming authentic instrument (via Article 59 of Regulation 650/2012) that is **not** accompanied by an Annex 2 Form II attestation. (See Articles 47 and 59 of Regulation 650/2012 which make it plain that the use of Form II is not compulsory).

No specific provision has been adopted to deal with application for cross-border acceptance of foreign authentic instrument in case no Annex 2 Form II attestation has been drafted.

18) Are there any provisions in the private international law of the legal system you are reporting upon that address the possibility of conflicting foreign authentic instruments (as envisaged by Recital 66 of Regulation 650/2012)? Please explain and set out any such domestic provisions intended to resolve conflicting authentic instruments.

No specific provision exists in Belgian private international law on conflicting authentic instruments. It is expected that such conflicts will be resolved using the public policy exception.

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