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

**THE EU'S REGULATION ON SUCCESSION**

WEDNESDAY 9 DECEMBER 2009

MR JONATHAN FAULL and MS CLAUDIA HAHN

Evidence heard in Public

Questions 95 – 125

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WEDNESDAY 9 DECEMBER 2009

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Present

Blackwell, L.  
Bowness, L. (Chairman)  
Burnett, L.  
Maclennan of Rogart, L.  
Renton of Mount Harry, L.  
Rosser, L.  
Sandwich, E.  
Wright of Richmond, L.

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Witnesses: **Mr Jonathan Faull**, Director-General, DG Justice, Freedom and Security, and **Ms Claudia Hahn**, Assistant to the Director-General, European Commission, examined via video link.

**Q95 Chairman:** Mr Faull, as you know this is a meeting of the Law and Institutions Subcommittee of the European Union Select Committee that is conducting an inquiry into the proposed Regulation on wills and succession. We are particularly grateful that you are prepared to give evidence to the Committee and answer our questions. I understand that you have already been advised of the interests that have been declared by members. For the record, I declare my interest as a practising solicitor and notary public. As you know, because you have done this before, the session is on the record. You will be sent a transcript which will give you the opportunity to make any corrections that you wish. It is being broadcast live and eventually will be on the parliamentary website. I would be grateful if you could begin, for the record, by stating your name and official title and your position. In so doing, I do not know whether you want to make an opening statement or go straight to questions. Mr Faull, please address us now.

**Mr Faull:** Thank you very much. Good afternoon. My name is Jonathan Faull. I am, and remain for the next few months, Director-General of Freedom, Security and Justice at the

European Commission. I am assisted today by my Assistant, Claudia Hahn, who is sitting next to me. I am very grateful to you for taking this evidence by video conference.

**Q96 Chairman:** Thank you. I take it that you do not want to make an opening statement on the proposal?

**Mr Faull:** No, I am happy to go ahead with questions.

**Q97 Chairman:** Perhaps I could just ask you this in opening. In the Commission's Impact Assessment you refer to the number of cases where there is a cross-border issue involving wills and succession and have made an estimate, I think 450,000, and ten per cent of those cause problems. I have to say that our previous witnesses have all indicated that it is very difficult to put a figure on the number of cases. Perhaps you could give us an indication of what you have based your figures on and how robust you believe those figures to be.

**Mr Faull:** Thank you. It is difficult to find precise data on which to base estimates in this area. We do not claim to be doing more than making the best possible estimate that we can based on studies, impact assessments, Green Papers, consultations, all of which led up to the proposal. The figure that we have given is not a scientific claim, but it seems to us to be the closest possible to a reasonable estimate of the size and magnitude of the problem. I can explain the methodology which went into calculating that figure, which I believe is contained in the Impact Assessment, if you wish.

**Q98 Chairman:** It might be helpful if briefly you could give us an indication of how that figure was arrived at.

**Mr Faull:** With pleasure. We start by estimating that roughly eight million Europeans live in a Member State other than the one in which they were born. That is in itself an estimate because there are no reliable figures kept for that purpose, but it is usually said that there are

about eight million. I think we can assume that perhaps most of those people will own property in more than one European country, either immovable property or bank accounts, investments, and things of that sort. We also estimate that about 4.5 million people die each year in the European Union and that the value of the average estate, about 5.5 times the average per capita gross national income, is around €137,000. That means that the total value of estates per year would be €46 billion and we estimate that around ten per cent of the number of successions involves some international dimension and that leads us to the figure of roughly 450,000. The average value of estates we estimate would be around €274,000, making a total, again according to the Impact Assessment, of some €123 billion per year.

**Q99 Chairman:** Thank you. Also referring to previous witnesses, Mr Faull, they have indicated to us, as I think we recognise for ourselves, just how complex is this subject and how great the differences between the laws of succession and property are in the different Member States. There seems to be a feeling that this could all have an unintended consequence and the situation made worse, in a way, by some of the proposals in the Regulation on recognition and enforcement and perhaps it would have been better to limit the proposal to deciding upon the applicable law rather than being as ambitious as you have been in the proposal. Can I have your reaction to that?

**Mr Faull:** Certainly. We do not deny the complexity of the subject. If it were not complex it would not cause problems and we would not have to deal with it. There are many aspects of the subject which are not covered in the proposal. We thought, and still do think, that we had been reasonably modest and circumspect in dealing with the set of issues we have. We hope that in the subsequent legislative process we can persuade Council and Parliament that is indeed the case.

**Chairman:** Thank you.

**Q100 Lord MacLennan of Rogart:** We have had evidence, Mr Faull, from a number of people that the differences between the legal systems in different States of the Union are not just confined to classically the civil law and the common law, but also between civil law jurisdictions. In particular we have heard about the problem of claw back, which is a major issue dividing the systems between those who have assets given to them who can hold on to them and those who are not able to hold on to them because of the Napoleonic type of legislation. Can you give us some indication as to what is the extent of concern in countries other than our own, that is to say the United Kingdom? Have you had indications of comparable concerns?

**Mr Faull:** Yes. This has been a subject of considerable discussion and will continue to be so. It is certainly not simply a matter which divides common law jurisdictions from civil law jurisdictions, there are differences between civil law jurisdictions, there are differences between common law jurisdictions and, if I may say so, there are even differences within the United Kingdom. The legal situation is remarkably complex and we are well aware of the difficulties, once again, that arise because we are seeking to address them in this proposal. If the situation were less complicated it would be less necessary to deal with it. Yes, the differences between legal systems are very relevant in this regard and the issue of reduction, or claw back, is very much a matter of debate in the legislative process now underway in the Council of Ministers and the European Parliament. I am quite sure that there will be further debate on this and I hope very much that the proposal at the end of the day, when enacted as legislation, will provide answers satisfactory to all jurisdictions in all Member States.

**Q101 Lord Wright of Richmond:** Director-General, it is very nice to be in contact again. I remember with gratitude the evidence you gave several times to Sub-Committee C when I was Chairman. Can you tell us, why did the Commission not define “habitual residence”,

particularly as the European Court of Justice indicates that the meaning of the phrase depends on its particular legislative context?

**Mr Faull:** With great respect to the Court of Justice, that is true but not the whole picture because it depends certainly on the legislative context and it also depends very much on the factual situation in the case under consideration. Our legal advisers here in the Commission told us that it would not be useful, even if it were possible, to provide a general definition of “habitual residence” because it would almost certainly be too vague to be of much use to the persons called upon to use and interpret it. It is obviously an expression very widely used in different contexts in many of the legal systems of the European Union’s Member States, but we have taken the view that rather than seek to provide in advance a legislative definition it would be better to leave that to assessment of the particular circumstances of cases.

**Q102 Lord Wright of Richmond:** My second question is, in a sense, the reverse of that. It goes back to the discussion of whether the Regulation could not have been less ambitious. Could the scope of the applicable law provisions have been limited to determining who gets what?

**Mr Faull:** They could have been, but it seemed to us that would make it a rather inadequate proposal and would leave the debate in the legislature a little devoid of content because so many other issues would arise, would be discussed, and the proposal before the Council and Parliament would not offer any suggestions. Who gets what is obviously a very important question, but so is who does what in the sense of administration and execution. There were many other issues which we felt should be dealt with at this stage. We will see in the process of legislation precisely where the scope ends up, but we thought in order to start the legislative process it was a service to the legislative institutions of the Union that we set our ambitions a little higher.

**Lord Wright of Richmond:** Thank you very much.

**Lord Burnett:** Mr Faull, you have very kindly given evidence to us before and I am extremely grateful to you. I wanted to go back to Lord MacLennan's question. He talked about claw back, and I would include with that the freedom to dispose at the testator or testatrix's option.

**Chairman:** Lord Burnett, forgive me interrupting you but could we deal with this later on. We specifically deal with claw back later.

**Q103 Lord Burnett:** My question is not to do with that actually. What I would like to know is what is the philosophy of the proposed change? Is it uniform succession rules? Is it swift understanding of applicable law on movables and immovables? Is it to ensure that individuals can choose within limits as to which law is available? It is that fundamental underlying philosophy behind the proposed changes.

**Mr Faull:** In simple terms it is that there should be one legal system applicable and that within the constraints to which you referred there should be a choice made available to a person making a will or making provision for succession more generally. Those are the underlying principles. Of course, however complex the issue, as I think we all agree it is, at the end of the day we would also like to provide legislation which is understandable for the general public.

**Q104 Chairman:** Carrying on with the applicable law for a moment, Article 22 includes some very wide derogations from the basic principle that the choice of law follows habitual residence. What impact is that going to have on the proposal? Does it not inevitably detract from any benefit which citizens would otherwise derive from this? In answer to Lord Burnett you talked about a common legal system. There is a paper that has been circulated of questions and answers from the Commission in which there is a statement that says it has no

significant effect on the legal systems of Member States. I just wondered how you reconciled that part of your answer to the question in that guide.

**Mr Faull:** I think there may be a misunderstanding. Obviously each Member State has its legal system, or systems, and what we are saying is that the individual should be able to choose one, and in most circumstances only one, applicable to his or her succession on the basis of freedom of choice within the constraints which we have discussed. I do not think there is any contradiction between the choice of the individual and the maintenance of each Member State's separate system. This is not a harmonisation measure setting up a European law of succession; it is providing Europeans with clearer rules about which one to choose. On your question about what are said to be in the question I have seen as broadly drafted derogations, we rather hoped they were narrowly drafted and deal with specific circumstances which are enumerated in Articles 22 and following. No doubt in the discussions in the Council and the Parliament there will be further issues of possible derogation to be considered, but these are ones which we were able to foresee at the stage following the consultation process to which I referred earlier and it seemed to us appropriate to put them in. If the language is not as tight as it could be we will certainly look at that again in the process in the Parliament and the Council.

**Q105 Chairman:** Just as a last question on applicable law, Mr Faull, the question is posed why not give the testator more choice as to the law to be applied to the estate by making available the possibility to choose the applicable law of habitual residence at the time he makes the will?

**Mr Faull:** We start from a position in which in most countries most of the time people have no choice at all. Looking at it from that end of the argument, this is already quite a radical proposal. Frankly, I do not think we would have got very far if we had gone the whole hog,

as you suggest, and allowed people to choose even more freely. Most of the criticism we are hearing is that we have created too much choice.

**Q106 Earl of Sandwich:** Mr Faull, I am a very new member of the Committee. Good afternoon. I was one of those quite horrified to read about claw back in the Impact Assessment and I think many people in this country are going to be appalled by this prospect. I then was mollified a little by Professor Kerridge's evidence that we have had in the last few days and he seems to think there is common ground if you take, for example, family provision law in the 1975 Act in the UK and you can find examples of not forced heirship but something of that kind. Do you feel there is more common ground than is made out in the Impact Assessment, in particular with reference to lifetime gifts? I think what worries people is that they are now built into our law. Then the question of charitable gifts as well will cause great alarm.

**Mr Faull:** We are certainly aware of the sensitivity and importance of this issue and there has been a lengthy process of discussion. In the various consultation proceedings we have conducted with British lawyers, British Government officials and others on this, so we are not underestimating the issue at all. It is indeed heartening, at least at a philosophical level, to know that in all of our countries, but to widely differing degrees, there are limits placed on the absolute freedom to dispose of one's estate as one wishes. We cannot hide the fact that the circumstances which you describe as having mollified you a little are very different from the very strict rules in force in some other countries. There is a difficult issue and it is one which has to be dealt with. It is one which will, of course, play a big part in the United Kingdom's ultimate decision whether or not to be part of this legislation; we are aware of that. We tried to craft our proposal in a way which was most likely to meet the support of most Member States in the legislative process, but that process is now underway and it is going to be time for the hard decisions about where precisely balances should be struck. This is a process, by

the way, to which your Committee is contributing. We still hope that we can come to some satisfactory conclusion which will allow all Member States to be part of this legislation when it is ready for adoption. This is, indeed, a very difficult and sensitive issue for all sides.

**Q107 Lord Burnett:** I suppose, Director-General, we are, are we not, in Britain out on a limb or are there any who have similar regimes to us? For example, the Earl of Sandwich mentioned the Provision for Family and Dependants Act. In my experience that does assist widows but not many others. What other countries have similar regimes and allow testators and testatrices effectively pretty considerable freedom to dispose of their assets as they will?

**Mr Faull:** There is no Member State, or part of a Member State, which does exactly what England and Wales do. In saying that, I am indirectly pointing out that the situation in Scotland, as we understand it, is different and closer to the situation in the continental Member States. You English and Welsh are a little bit out on a limb in the sense that you have the most liberal - if that is the word to use in this context - system. The others share a range of restrictions far in excess of the ones present in English and Welsh law.

**Q108 Lord Burnett:** Thank you. That relates to the position of trusts. Do you see these Regulations having any impact whatever on UK trust law, or are the provisions contained in these Regulations intended to have any knock-on effects, effects on any other matters, other than those relating strictly to succession?

**Mr Faull:** No. We believe after lots of discussion and lots of reflection that we do not have a problem with trusts in this proposal. That was a widely debated issue and many of my colleagues learnt a great deal about the law of trusts and, I hope, satisfied British officials and British lawyers we came into contact with that this proposal would leave the law of trusts untouched. I think the claw back is the main issue. Even though the law of England and Wales is very different from the others, the reason why so much effort has already gone into,

and will continue to go into, finding solutions which can be satisfactory for all parties is quite simply that there are many foreigners living in England and Wales and there are many Britons living in other jurisdictions of the European Union, large numbers, and we believe among our eight million people living in other countries those people too deserve attention. Nobody ever thought that we needed to do something simple and surgical and craft something for 26 countries and allow the United Kingdom not to opt in, it seemed to us that would be unfortunate for foreigners living in the United Kingdom and for Britons living abroad and, by the way, for the Scots.

**Q109 Lord Burnett:** Could I just ask for a reply to the second limb of my question. Is this paper supposed to deal only with succession matters and is it intended to have any other consequence whatever outside the law of succession?

**Mr Faull:** I do not mean this to be in any way an evasive answer. In a broad sense of what is meant by succession matters and the law of succession the answer is definitely yes, but I cannot deny that what is considered to be the law of succession in some countries and their languages may not be exactly the same as in others. I know that there has already been considerable debate about whether some of this proposal goes beyond what some legal systems consider to be the law of succession *stricto sensu*. We do not think that we have done that. We have certainly not done it deliberately. I know there is concern about unintended consequences and we have spent a long time trying to foresee all the consequences that we can and, of course, the legislative process is far from over and we expect national parliaments such as your own, the European Parliament and the Council of Ministers to continue this debate probably for some time to come.

**Q110 Lord Rosser:** Mr Faull, we have heard evidence that where a testator has chosen an applicable law other than his or her habitual residence there is a significant possibility of the

courts of the Member State of habitual residence retaining jurisdiction. I would have thought that could create complications. Should not the link between applicable law and jurisdiction be mandatory?

**Mr Faull:** I do not think we would stand much chance of persuading most Member States that there should be a mandatory link. The link between applicable law and jurisdiction is, indeed, as you say, not mandatory and the courts of the habitual residence may apply the applicable law chosen by the testator or the testatrix. The proposal does provide for the possibility of referral to a court of a Member State, the law of which has been chosen, if that court is better placed to rule on the succession. In our proposal we have chosen a flexible rule which would allow for the two to come together but would not force them to come together.

**Q111 Lord Rosser:** You do not feel it has any downsides?

**Mr Faull:** No doubt it would be neater and more convenient for courts to apply the law with which they are most familiar, and so bring together choice of court and choice of law, but frequently that does not happen in private international law, these are usually considered to be two separate issues. Frankly, that may come at a later stage of development of European law in this area, but at this stage where we are starting out on what - I repeat - is considered by many to be a rather radical proposal, that is probably a step too far at this stage.

**Q112 Lord Rosser:** As I understand it, the proposal would confer on the courts of a Member State a broad residual jurisdiction to deal with the succession of those who die habitually resident in a third country and would combine that with only a limited facility for the transfer of jurisdiction. If that is right, will that not cause potential difficulties? For example, would it not be a recipe for forum shopping?

**Mr Faull:** We are aware of that danger, of course, which is why we hoped in the proposals, Article 6, to have provided for circumscribed circumstances in which that residual jurisdiction

rule would apply. Once again, the test of how good the drafting is, perhaps among things, certainly has to involve an assessment of whether it invites or facilitates forum shopping and we have to make sure that is not one of the unintended consequences. Looking at Article 6, it seems to us that we have a sufficiently clear set of rules in (a), (b), (c) and (d) to substantiate the residual jurisdiction provision.

**Q113 Lord Burnett:** Why should there not be forum shopping? Why should people not have the ability to elect to have their estates administered by any law within the EU? What is the reason for that?

*Mr Faull:* Any law within the constraints of having to show some reasonable link is what we are trying to do. People should be allowed to choose the law most relevant to their circumstances, but we want to avoid forum shopping which would mean looking for the country and its courts where the most suitable result might be obtained.

**Q114 Lord Burnett:** What do you mean by “suitable result”?

*Mr Faull:* Whatever the result sought. People forum shop with a certain set of objectives in their mind and forum shopping means going where you think you have the greatest chance of having those objectives satisfied.

**Q115 Lord Burnett:** What is wrong with that?

*Mr Faull:* Because there should be a real link between the forum and the matter being considered that would be in the interests of the heirs, the creditors, all the people concerned in the case of a succession, some of who might find it more onerous and expensive to have to follow someone’s forum shopping than others.

**Q116 Lord Burnett:** Have you taken soundings from the treasuries of individual Member States? I am talking about inheritance tax now, taxation matters.

**Mr Faull:** We have deliberately excluded taxation matters from the scope of this proposal. It is absolutely neutral in tax terms. Each Member State has its tax system which will apply to successions covered by its taxation law. This is not about tax.

**Q117 Lord Burnett:** That is not quite correct because if the assets are not available to be obtained in an individual jurisdiction by a treasury, an Inland Revenue, or whatever, it is going to make things more difficult for them anyway.

**Mr Faull:** Yes, but I do not see how the Regulation as we have drafted the proposal contributes to making that more difficult than it would be otherwise.

**Lord Burnett:** I probably might not agree with that but, nevertheless, that is it, I have made the point.

**Q118 Chairman:** Mr Faull, this Committee has generally favoured mutual recognition and the facilitation of cross-border enforcement in a variety of different areas, but it has been suggested it would be going too far to treat authentic instruments drawn up by notaries as if they were court decisions. Have you any comment on that?

**Mr Faull:** They do play an important part in practice in succession matters and we have provided four specific safeguards, including recourse to the courts and an appeal, if there is doubt about the enforcement of an authentic instrument. Given the important role they play in the law of succession, we thought it necessary that the basic principles should be of mutual recognition and enforcement.

**Q119 Chairman:** Thank you. Going on to the European Certificate of Succession, this again was something which the Committee was quite enthusiastic about to begin with but one of our witnesses has interpreted Article 36 to mean the UK could retain an obligation for the holder of a Certificate to secure the appointment of personal representatives by a UK court in

order to deal with property in the United Kingdom. Do you think that is correct? If it is correct, does it not somewhat undermine the perceived usefulness of the European Succession Certificate?

**Mr Faull:** First of all, I think it is important to record that the European Certificate would not be compulsory, that its effect should be recognised in the Member State where it was issued, and that the law applicable to the succession should not be an obstacle to the application of the law of the Member State in which property is located where it is subject to the administration and liquidation of the succession to the appointment of an administrator or executor of the will. Under our understanding of the rule and laws applicable in the United Kingdom there could be the appointment of an administrator under English law, and here I have to concede that there is a tax relevant issue, in particular where there is a taxation issue to be considered, but that would be at the discretion of the British authorities in this case. We have looked carefully at the suggested interpretation of Article 36 and are consulting our lawyers on this because it is not an interpretation which immediately came to our minds or one that we had intended. We will provide you with a written statement on that as soon as we get advice from our Legal Service.

**Q120 Chairman:** Thank you. Carrying on with the question of the Certificate and, again, suggestions that have been made to us in evidence. It has been suggested that because successions can be so complex it is too much of a risk to create a presumption that the contents of an ECS are correct and to give third parties absolute protection on the back of that Certificate. Do you share that concern?

**Mr Faull:** I understand it. It strikes me a little as a counsel of despair. We want to make the Certificates effective and Article 40, which deals with the Certificates, provides the courts may carry out their own inquiries and consider all matters of evidence brought before them on

the Certificate. It is not a blank cheque. It will reflect a genuine understanding of the situation and can be the subject of further consideration by the court.

**Q121 Chairman:** Our understanding also is if there is an error in the Certificate it has got to go back to the original issuer to correct it. Is this not going to be a somewhat cumbersome procedure?

**Mr Faull:** It could be, but I hope not and I hope it will not be necessary very often. To go back to the source seems to be the most sensible way of dealing with an error when it is established.

**Q122 Chairman:** Do you see maybe not so much difficulty if the issuer is a court, but more difficulty if the issuer is a notary on the basis that notaries are mortal?

**Mr Faull:** Courts are made up of men and women as well, but they are institutions. Notaries in the countries where they are very firmly established as an indispensable part of the system are pretty institutional as well. In my personal experience, they even tend to be passed on from parent to child, so they have their own succession issues as well, and they take on a permanence which I think deserves some respect.

**Q123 Lord Wright of Richmond:** Can I ask, are you aware of any other parliamentary chamber taking evidence on this subject at the moment?

**Mr Faull:** No, not at this stage, which is a compliment to you, if I may say so.

**Lord Wright of Richmond:** Thank you.

**Q124 Lord Renton of Mount Harry:** Mr Faull, might I ask you a rather basic question, not being a lawyer. I have two pieces of paper in front of me. One is from *The Economist* of 15 October which is headed, "Where there's a will, there's a row", and it then follows, "What inheritance laws tell you about Europe and why Britain is the odd man out". The second is

from the *Guardian* of 28 November and it is headed, “Spanish bank still won’t free my deceased mum’s account. An agonising battle to sort out a relative’s estate remains unresolved a year after their death”. From your very expert position, are you optimistic that you will be able to reach a solution to this succession story which will make it easier when people’s relatives die with properties scattered over Europe than it is now?

**Mr Faull:** Yes, I am very confident. I think that this legislation, if enacted, will not solve all problems but will solve some problems. Once we all get used to having European law in this area I think that some of the remaining problems may prove to be easier to address in due course. I hope very much that the United Kingdom will end up joining in this legislation because I think of not only the foreigners living in the UK but also of the Britons living elsewhere and the sorts of issues to which the *Guardian* and *The Economist* articles you mentioned refer. The current situation is extremely complicated at a very difficult time in people’s lives. It is complicated anyway within our countries, but it is considerably more complicated from one country to another, to which one has to add, of course, the bewildering variety of court systems, languages and so on. We believe that we can make a contribution to making the lives of Europeans moving around their Union a little easier at a very difficult time. I do not make exorbitant claims for this proposal. It is not as modest as some would wish and it is not as ambitious as it might have been, but it does deal with some of the main problems and, above all, within limits gives people the right to choose a legal system with which they have a real connection and, therefore, with which they are likely to be familiar and is likely to be expressed in a language and in terms which they can understand readily.

**Lord Renton of Mount Harry:** Thank you. That was an interesting reply.

**Q125 Chairman:** Have members any other questions for Mr Faull? Mr Faull, is there anything that you would like to add to your evidence that we have not covered in questions or where you think we may be misunderstanding the position and you want to correct us?

**Mr Faull:** No, not at all, just to repeat that I will write to you as soon as possible on the Article 36 point and, once again, to thank you and your Committee for leading the way among national parliaments in making a telling contribution to our consideration of an important subject.

**Chairman:** Thank you, Mr Faull. May I thank you on behalf of the Committee for giving us your time this afternoon. It has been very helpful indeed and we are very grateful to you. Thank you for agreeing to take up the outstanding issue and write to us. Thank you.