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NOTE

from:	the United Kingdom delegation
date of receipt:	22 October 2009
to:	Committee on Civil Law Matters (Succession)
Subject:	Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession - Comparative analysis of the laws of the Member States on the issue of clawback

Delegations will find attached a comparative analysis of the laws of the Member States on the issue of clawback prepared by Roddy Paisley, Professor of Commercial Property Law at the University of Aberdeen.

COMPARATIVE ANALYSIS OF THE LAWS OF THE MEMBER STATES ON THE ISSUE OF CLAWBACK

1. The UK Government commissioned the attached analysis from Professor Paisley, Professor of Commercial Property Law at the University of Aberdeen.

2. This analysis concerns the potential impact within the UK of the laws of the Member States concerning "clawback". These laws operate in the majority of the Member States with the purpose of protecting the interests of beneficiaries who are, entitled under the succession laws of those States, to mandatory heirship provision on the death of a family member. This form of protection operates so as to enable these beneficiaries, on conditions which vary widely between the Member States, to bring claims in respect of gifts of property made by the deceased during his or her lifetime. These claims are designed to ensure that a beneficiary's entitlement is not diminished as a result of such lifetime gifts made by the deceased.

3. A summary of the salient features of the clawback regimes in the Member States is contained in Appendix 1. A fuller description of these regimes is contained in Appendix 2.

4. In the light of his comparative analysis, Professor Paisley has identified the following possible adverse effects of applying such clawback regimes within the UK:

   - The potential to increase the time and costs of conveying both moveable and immovable property. Such additional expense may reflect the costs of taking out an appropriate insurance based title indemnity policy.

   - The potential to make it impossible for the vast majority of UK solicitors to give complete advice in relation to the risks attendant upon the conveyance of property.

   - The potential to undermine the integrity of the various UK Registers of title to land.

   - The potential to undermine charitable giving in the UK.

   - The potential to undermine the use of *inter vivos* trusts as a mechanism for estate planning within the UK.

   - The potential to undermine the use of insurance or pension policies taken out in the name of the deceased, where the premiums are paid for by the deceased during his life, and written for the benefit of a surviving relative of the deceased as a means of testamentary provision.

   - The potential to undermine the title to both immoveable and moveable property situated in the UK. This could arise in a case where the property

had previously been acquired as a result of a lifetime gift where the donor later dies and the law of a Member State recognising clawback applies to the succession. This could apply not only to rights to property, but also to rights of security, such as mortgages, created over such property.

- The potential to give rise to liability on the part of the State to indemnify family heirs where a title to property has been conferred on a third party by registration so as to deprive that heir of title to that property.

- The potential to encourage the evasion of clawback provisions and the consequent legal uncertainty as to whether such evasion is lawful.

- Potential difficulties about the determining the valuation of any sums subject to clawback.

5. Finally, Professor Paisley draws attention to the inaccessibility of the law relating to clawback as it exists in the Member States. This particularly concerns the lack of translations of that law. This lack of proper accessibility creates obvious problems for legal advisers and their clients.

MINISTRY OF JUSTICE – CIVIL LAW BRANCH

A COMPARATIVE ANALYSIS OF THE SUCCESSION LAWS OF MEMBER STATES OF THE EUROPEAN UNION ON THE ISSUE OF CLAWBACK

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30th APRIL 2009

REMIT

1. By letter dated 31st March 2009 I was instructed to carry out research for the Ministry of Justice into a particular aspect of the succession laws of a number of Member States of the European Union. This instruction follows upon the European Commission's Work in this field: *Commission of the European Communities: The Green Paper [COM (2005) 65 final of 1st March 2005]*.

2. This report is limited to the issue of what is known in the jargon of succession lawyers as "clawback" arising from the application of the succession laws of certain European legal systems and its potential effect on *inter vivos* transactions carried out in the various jurisdictions of the United Kingdom of Great Britain and Northern Ireland comprising (a) Scotland, (b) Northern Ireland and (c) England and Wales. Albeit Scots law differs very significantly from the other two domestic legal systems in relation to the areas of property, trusts and succession, all three are similar in one fundamental respect: for the purpose of calculating the sums available for beneficiaries in succession the law generally does not allow the clawing back of items alienated by the testator by means of *inter vivos* gifts. In all of the three UK jurisdictions it would be fair to say there is a high value placed on security of title to property.

3. In terms of a Draft Regulation of the European Union the door may be opened to legal systems outwith the United Kingdom governing not only succession to moveables but also succession to land and other immoveables located within one or other of the three jurisdictions within the United Kingdom. It is in this context that the issue of "clawback" arises as several European legal systems recognise forms of "clawback". The potential of these to affect *inter vivos* transactions will be addressed in this report.

4. As contractor I have been instructed to assess the various differences between the various "clawback" provisions of Member States of the European Union in terms of:

(a) whether the value of the compensation claim made by the heirs assesses the value of the gift as at the date the gift was made or the date of death;

(b) whether there are limits to the size of a compensation claim in respect of a gift made during the lifetime of the deceased;

(c) the time limits applicable beyond which gifts cannot be challenged; and

(d) the likely impact of such rules on the laws of the UK.

5. It is immediately worth commenting that on some of these issues there is no clear answer in the relevant legal systems. In some cases the existing law has proved unsatisfactory and has been relatively recently reformed or reform is proposed.[1] This alone is a factor for caution in any decision to recognise the effect of the "clawback" provisions of the legal systems of Members States.

CLAWBACK – WHAT IS IT?

6. Before any investigation of "clawback" may be undertaken it is important to determine what "clawback" actually is and what it is not.

7. "Clawback" does not denote the rule found in various forms in many legal systems (and known under various titles including "collation"[2] and "hotchpotch") to the effect that a lifetime gift is presumed to be an advance of the inheritance or a forced provision to a particular donee. The aim of this rule of "hotchpotch" or "collation" is to put all heirs on the same footing before division of the estate. In most legal systems the donor may exempt the donee from the obligation to collate. In contrast to this, the testator cannot contract out of "clawback".

8. Clawback is more than this rule of collation or hotchpotch as regards a presumed advance. In the various legal systems in which it exists, the aim of "clawback" is to protect against the defrauding or prejudice by means of lifetime gifts (whether to a forced heir or otherwise) of those beneficiaries who are entitled to forced heirship provisions.[3] Broadly speaking, the disposable portion of estate (which

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[1] E.g. France. In Deutschland reforms are imminent.

[2] Collation *inter liberos* presently applies in Scotland as regarded advances of legitim (25 Stair Memorial Encyclopaedia, para 808) but the Scottish Law Commission have recommended its abolition: Scottish Law Commission, *Report on Succession*, Scot. Law. Com. 215, April 2009, page 48, para 3.49. Hotchpotch has been repealed in both Northern Ireland and England.

[3] See Dieter Henrich und Dieter Schwab, *Familienerbrecht und Testierfreiheit im europäishen Vergleich*, 2001, verlag Ernst und Werner Gieseking, Bielefeld, ISBN 3-7694-0903-5; Anne Röthel, Reformfragen des Pflichtteilsrechts, Carl Heymanns Verlag, München, 2007, ISBN 978-3-452-26648-4.

the testator is free to bequeath or give away) is calculated not only by reference to the estate owned by the deceased on death but, in addition, by adding, the lifetime gifts made by him. In the words of a Belgian commentator, the fictive hereditary mass comprises:

"une masse de biens qui doit correspondre autant que possible à ce qu'aurait été le patrimonie du défunt à son décès, s'il n'avait aucunement disposé à titre gratuit."[4]	A mass of goods which must correspond as closely as possible to that which would have fallen within the patrimony of the deceased at his death if he had never made any gratuitous disposals.

9. The disposable portion is a fraction of this fictional mass. If the total figure of lifetime gifts and testamentary gifts made by the deceased would exceed the disposable portion then the beneficiaries entitled to a forced provision may enter a claim preventing the testamentary gifts being made and for reduction of gifts *inter vivos* (which, by definition, have already been made), or in some systems, for a claim for the value of those gifts. The various legal systems within Europe are not uniform on the form of the rule adopted as this report will show. However, they all accept that the operation of the rule is not automatic and the benefit of the rule must be claimed by the relevant entitled beneficiary. Hence arise the need for rules governing the time in which the beneficiary must claim and the possibility of discharge (renunciation) of the entitlement.

TITLE OF THE DONEE

10. Clearly a rule which allows a forced heir or beneficiary to reduce a gift made *inter vivos* and to seek return of actual *corpus* of the property confers a stronger right on that person when compared with a rule than merely allows a claim as to value. However, there are variants even within the framework established by this simple distinction. The rule admitting a right to seek return of the property could be a personal right enforceable *in personam* against the holder from time to time of the property. It could be a real right like a form of heritable security or statutory charge burdening the property right in the item of property whoever is the owner thereof. As regards the right to seek payment of value, this too could be a personal right enforceable *in personam* against the holder from time to time or a real right in the form of something akin to a rent charge or pecuniary real burden. Still further are the possibilities that the right of the beneficiary as regards return of the gift or payment of money could be exercisable against the original donee only or, in other cases, against the original donee and his successors in title. The latter is a variant particularly objectionable to a legal system that values security of title.

11. Whatever the case, the title acquired by a donee in the *inter vivos* gift appears to be in all cases, at the date of the making of the gift, a subsistent title to the thing gifted. Despite some bald statements in some continental legal codes[5] it is not the case that the deceased has no power to make the gift: the gift is not void *ab initio*. The

[4] Paul Delnoy, *Les Libéralités et les Successions*, 2e édition, Larcier, 2006. ISBN 987-2-8044-222-6, page 237.
[5] E.g. Spain: Spanish Civil Code 636.

donee becomes the owner of the thing donated as a result of the transfer of property from the maker of the gift to the donee. The property is immediately taken out of the estate of the donor. The donee can transfer the property to someone else.

12. In the weaker version of the rule the donee initially acquires a contingent liability to pay a forced heir (who may not yet exist) in terms of the "clawback" rules. In the stronger version of the rule the donee falls under a contingent liability to convey the property to the forced heir in terms of the "clawback" rules or, alternatively, the title of the donee may be avoided (reduced) in terms of the "clawback" rules whereupon it reverts to the heir who must convey to the beneficiary. If the stronger versions of the rule applies to successors in title then this possibility of losing title will apply *mutatis mutandis* to that successor in title. These distinctions are important not least because they assist in determining the effect and extent of a rule but many continental codes are so tersely expressed that they do not clearly identify the basis or fundamental nature of their "clawback" rules. This failure makes it all the more difficult to predict how the concept of "clawback" would operate if it were allowed to apply to property within any of the jurisdictions within the United Kingdom.

13. In the various continental codes and legal writings there is also a strange lack of detailed examination of the interaction with the acquisition of title by positive means such as positive prescription and good faith possession. One does indeed wonder if in fact the rules on "clawback" are indeed operated in practice as the various codes do suggest. There is reason therefore to be cautious in the application of what can be gleaned from the sources alone. There are rafts of unanswered questions such as:-

(a) if property is subject to a Compulsory Purchase Order are the authorities liable to trace heirs or make provision in compensation for future forced heirs yet to come into existence?

(b) what exactly occurs if the property is altered in its nature as, for example, if a moveable is attached to land (only some codes provide for detachment) or if land is dug out in terms of a minerals lease?

(c) what happens to derivative real rights not granted by the donee but acquired by prescription such as servitudes (known as easements in Northern Ireland and England and Wales)?

14. An initial donee in an *inter vivos* gift can be expected to know he is receiving a gift and to have some idea of its legal consequences. The transfer of property may be carried out in accordance with one of the UK legal systems with which he is familiar. It is a much greater thing to expect the donee to be aware that the gift could be reduced by a foreign legal system later chosen by the donor to govern the rules of division of his estate that seeks to protect forced heirs not in existence as at the date of the gift. The connection with the foreign legal system may not arise until years later. The donor, having made a gift in middle age may not decide to retire to Spain or Italy until he has reached the age of 60. As regards someone who acquires from the original donee, he may not be aware of the fact that the item in question was ever owned by the donor. It may not be possible for him to find out even if he wished to do so. Even

if the acquirer from an original donee was aware of the original gift, it will prove practically impossible to check if the donor has subsequently married or acquired a life partner entitled to a forced share or has had children (extra marital or otherwise) who may be entitled to a forced share and a right to reduce the gift. There is no comprehensive register of such events and a party acquiring property cannot be expected to trawl through the equivalent of the Register of Births Deaths and marriages in a multiplicity of jurisdictions. In fact that task, even if attempted would be futile, as the marriage of the deceased or birth of the child to the deceased may have occurred anywhere in the world.

15. In one sense, however, the niceties of the distinctions between the various possible bases of the various rules of "clawback" need not detain us here. One can confine one's attention simply to the potential practical effects of recognising the operation of any of the variants of "clawback". These are set out, in summary, in the paragraph headed "Summary of Effects".

LEGAL TRADITION

16. The matter of legal tradition is not something simply for academic study. It has the practical value of assisting the determination of whether an import from another legal system is likely to work or, alternatively, to cause problems. Scots law is a mixed legal system and its property and succession law are largely Civilian. These laws resemble those found in many continental legal systems. By contrast, the law of Northern Ireland and those of England and Wales are based in the Common law tradition and are distinct from the legal systems found elsewhere in Europe. At first blush one might surmise that an import from Europe may be more tolerated in Scotland than elsewhere in the UK. However, it is just as possible to have an import from Europe that does not work well in Scotland as it is to have such a phenomenon elsewhere in the UK.

17. It is worth noting in this regard that, alone of the legal systems in the UK, Scots law does have a system of forced provision based on fixed shares to protect close family members against disinheritance.[6] In Scots law, however, these legal rights of protected family members can be defeated by the deceased giving away his property even with the express intention of defeating the legal rights.[7] The lesson is clear: recognition of a forced provision system of inheritance does not necessarily entail recognition of a "clawback" system. By contrast, In Northern Ireland[8] and in England and Wales,[9] the family provision legislation allows a form of "clawback" of the value of items disponed by the testator by means of lifetime gifts made within six

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[6] The Scottish rights known as legal rights comprising *ius relictae*, *ius relicti* and legitim are presently exigible only from moveable property albeit the Scottish Law Commission has proposed the reform of these rights so that they extend to property of all natures: Scottish Law Commission, *Report on Succession*, Scot. Law. Com. 215, April 2009, Part 3.

[7] *Allan v Stark* (1901) 8 S.L.T. 468; *Hutton's Trs v Hutton's Trs* 1916 SC 860; 1916 2 S.L.T. 74; 25 Stair Memorial Encyclopaedia, para 812.

[8] Inheritance (Provision for Family and Dependants) (NI) Order 1979, Art. 12.

[9] Inheritance (Provision for Family and Dependants) Act 1975, c.63, ss.10, 12 and 13.

years of death for the intention of defeating an application for financial provision. Albeit, such applications for "clawback" are understood to be rare,[10] it would therefore be inaccurate to say Common law lawyers are wholly ignorant of schemes of "clawback". So too should all lawyers in the UK be familiar with the concept of "potentially exempt transfers" made under the Inheritance Tax Act 1984, c.51 in terms of which a transfer is potentially liable to tax if made within the seven year period before the testator's death.[11] Albeit these do not lead to additional rights of succession but instead to a taxable charge (a form of debt payable ahead of succession rights) there are many analogies that can be made. If a debt due at death is not paid and the estate sequestrated it is possible that some lifetime gifts made by the deceased may be reduced as unfair preferences if the debt is not otherwise paid.

18. The short conclusion is that any "clawback" system should be assessed on its merits having regard to its effects on the existing legal structures and rules within the three domestic UK legal systems.

SUMMARY OF EFFECTS

19. The recognition by any of the three separate jurisdictions within the United Kingdom of the application of the "clawback" provisions of other Member States has the potential:

(a) to increase costs and time taken in carrying out *inter vivos* conveyancing transactions of both moveable and immoveable property in all of the jurisdictions in the United Kingdom. In many cases a solicitor will feel obliged to obtain a legal opinion from an experienced foreign lawyer – adding considerable cost. Alternatively, a practice may develop of taking out an insurance based title indemnity policy for each transaction: again, costs will be added. The traditional method of dealing with adverse rights would be to have the person entitled (the potential forced heir) to renounce his rights in advance and consent *in gremio* of the deed itself. However, this simple expedient will not work as the donor may have no spouse and no children as at the date of the gift. He may still be resident in the UK with no intention of moving abroad. Furthermore, may legal systems expressly exclude a renunciation of a future claim to a forced share and "clawback"[12] or, where it is allowed, impose special requirements as to the method of discharge.[13]

(b) to make it impossible for the vast majority of UK solicitors to give complete advice in relation to the risks attendant upon conveyancing of property. It is *a*

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[10] Cf the Northern Irish case *Re Morrow* [1995] 6 BNIL 98 where a surviving spouse successfully invoked 1979 Order, Art 12 when her last husband had transferred his farm (his only significant piece of property) to his son about one year prior to his decease.

[11] 1984 Act, 3A(4).

[12] E.g. Bulgaria, Italy (now subject to amendement), Portugal and Spain. The same particular rule may be generated in many other countries as a result of a general prohibition on contracts relative to succession.

[13] E.g. France (since 2006).

fortiori the case that it will preclude the possibility of a layperson in the UK carrying out his own conveyancing. Following upon any importation of "clawback", the tendency of lawyers to shy away from what they do not know because to the possibility of liability in negligence when coupled with the inability to comply with lenders' instructions to obtain a good title for a security over the property (mortgage) will have the tendency to enhance a conveyancing monopoly in the hands of a very small number of legal firms who may have specialist knowledge of legal systems abroad.

(c) to undermine the integrity of the various UK Registers of titles to land including the Registers of Scotland. They will simply contain insufficient information and be blind to the possibility of "clawback".

(d) to have unfortunate and unforeseeable side effects in relation to the systems of Automated Registration of Title to Land in Scotland (and any similar system of electronic conveyancing to be introduced elsewhere in the UK). The fundamental registration policy for electronic conveyancing of "tell me: don't show me" will be undermined as the person carrying out the electronic conveyancing will not be aware of the potential of "clawback" in many cases and will have nothing to tell – i.e. no information to supply in his application. There are no registers that one can search to check is a named party is (or may be at some time in the future) subject to "clawback". The fact is that all natural persons will have the potential for their estates to be subject to "clawback".

(e) to undermine lifetime charitable giving in the UK whether to religious charities, churches or otherwise. Except where there are specific exceptions (none known[14]), regular charitable giving (whether in the form of one off gifts or monthly direct debits) potentially will be liable to "clawback". It is possible that exceptions for "customary"[15] gifts or gifts to a "public or community purpose"[16] might extend to this. However, that is uncertain. Charities easily cannot resort to the expedient of taking out insurance against the possibility that donations to them will be clawed back at some time in the future. Perhaps in the past this was not a particular problem as much charitable giving was largely untraceable as it was, to a greater or larger extent, carried out by donors in ways that were piecemeal, extemporary and ill-evidenced. That may still be the case with *ad hoc* street collections. However, with much charitable giving now based on monthly direct debits or similar transfers, there will be a simple audit trail to follow and these well evidenced lifetime donations by the deceased are potentially liable to "clawback" in appropriate cases.

(f) to undermine the use of *inter vivos* trusts as a mechanism for estate planning within the UK. Additional provision in this form for a deserving individual such as a disabled child or donations in the form of structured charitable giving could be prejudiced.

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[14] Unless the exceptions of discharge of a "moral" debt (e.g. Deutschland) are construed widely: but there is no authority found to support this.
[15] E.g. Netherlands Art 4: 67; Poland, Polish Civil Code, Art 994.
[16] E.g. Österreich.

(g) to undermine the use of insurance or pension policies taken out in the name of the deceased (where the premiums are paid for by the deceased during his life) and written for the benefit of a surviving relative of the deceased as a means of testamentary provision. Only Belgium appears to have an express provision exempting these policies.[17]

(h) to undermine the title to both immoveable and moveable property situated in the United Kingdom where it has previously been acquired by means of lifetime gifts where the donor later dies and the law of a Member State recognising "clawback" applies to divide the succession. This will apply not only to rights of property but also to rights of security created over such property. Where property is recovered some variants of "clawback" enable these to be reduced.[18] This additional risk may have an impact on the initial costs of setting up mortgages as lenders seek to offset the risk by the taking out of insurance policies. It may even, on a modest scale give rise to a form of "blight" on the title unless and until lenders are satisfied that a suitable title indemnity policy is in place.

(i) to give rise to potential liability on the part of the State (or at least, Executive Agencies such as the Registers of Scotland) to indemnify forced heirs where a title has been conferred on a third party by registration so as to deprive the forced heir of title (and, perhaps also) his right by reduction to recover specific items of immoveable property.[19] Albeit the matters in this regard are exceptionally complex and cannot be foreseen entirely (as the judicial response is yet to evolve), to avoid such liability primary legislation will have to be altered. It is essential that the Registers of Scotland (and I would expect also their Northern Irish and English counterparts) are consulted on this matter. As the Scottish Law Commission is also at present finalising reforms of the Land Registration system its input would also be greatly beneficial. In this regard, I would draw your attention to the fact that the Scottish Law Commission has recently rejected adaptation of the Scottish forced provision system on succession to include a form of "clawback".[20] They commented:

> "There was almost unanimous opposition to this idea. As many respondents pointed out, any anti-avoidance scheme would create numerous practical difficulties and would be likely to be complex. And, from a principled perspective, it would frustrate or disrupt otherwise legitimate and intentional acts on the part of the deceased before death.

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[17] Law of 25 June 1992.

[18] E.g. Belgium BCC Art 929; Italy (subject to some complex exceptions).

[19] See discussing *Short's Tr. v Chung (No.2)* 1999 SC 471 and the saga leading up to that decision discussed in George L. Gretton and Andrew J M Steven, *Property, Trusts and Succession*, Tottel Publishing , 2009, ISBN 978 1 84592 153 8, page 93, paras 6.51-6.53.

[20] Scottish Law Commission, *Report on Succession*, Scot. Law. Com. 215, April 2009, page 5, para 1.20.

(j) as a side effect, to give rise to an industry fostering evasion of the "clawback" provisions with the consequent uncertainty of whether such devices are legitimate or whether they are invalid. It is to be noted, however, that most continental legal systems seem to have some sort of system to deal with simulate gifts.

(k) to give rise to difficult problems as to valuation of any sums to be clawed back. In many cases the sum will be determined by judgement rather than by a mechanistic formula (despite, or rather because of, the terse guidance given in the various codes). Disputes may arise between the interested parties.

ADDITIONAL PRACTICAL RECOMMENDATION

20. The various provisions of the Civil Codes and relative laws of succession that contain "clawback" are difficult to find in good English translations in the UK or on the Web even for enthusiastic academics. Even as regards the largest country in Europe, Deutschland, no official translation of the relevant part of the BGB is available either in hard copy or on the Web. In the present state of affairs there would be little information available for practitioners who would wish to give advice within the United Kingdom at the time of the making of an *inter vivos* gift. This simple barrier of language adds an important element into the possibility of acceptance into the various UK jurisdictions of the effects of continental "clawback" regimes. As matters stand, the lack of good English translations renders the admission of such a "clawback" little more than the opening of the door to the complete unknown. If "clawback" is to be admitted anywhere in the UK, the government of the UK should at the very least promote translations into English of the various continental Civil Codes and make them readily available at reasonable cost. It is wholly unreasonable for parties acquiring land in Scotland, Northern Ireland or England to have their title potentially subjected to a law written in a language they have no possibility of understanding. If our laws were still written in Latin, one could imagine the reaction of the general public but the possibility of admission of various continental "clawback" schemes in the absence of English translations of the various Civil Codes is little better than that.

MEMBER STATES

21. In this context the Members States whose laws I have been instructed to examine are:

(a) Belgium;
(b) Bulgaria;
(c) Cyprus;
(d) Deutschland;
(e) France;
(f) Greece;
(g) Italy;
(h) Malta;
(i) Netherlands;
(j) Österreich;

(k) Poland;
(l) Portugal; and
(m) Spain.

22. I have also been asked to comment on the legal system of South Africa in relation to “clawback”.

APPENDIX 1

MEMBER STATES - SUMMARY OF FINDINGS

STATE	TIME FOR VALUATION	ANY LIMITS FOR SIZE OF GIFT?	TIME LIMITS FOR CHALLENGE	LIKELY IMPACT OF SUCH RULES IN U.K.
Belgium	Time of death of deceased. Gifts relating to family businesses valued at time of gift.	None.	30 years after death.	Recovery permitted from original donee and further acquirers and security holders (mortgages).
Bulgaria	Immoveable property – time of death of decease. In all other cases – time of gift.	None.	1 year after the death for land. As regards other items – probably period of long negative prescription (unknown).	Not known if available against third parties other than first donee.
Cyprus	N/A	N/A	N/A	N/A
Deutschland	Usual rule is valuation as at death – subject to exceptions.	None.	3 years after awareness of adverse provision subject to a maximum of 30 years.	Original donee can be pursued for recovery. Includes insurance policies.
France	Date of death	None	Usually 5 years after death.	Appears to affect third parties who acquire from donee.
Greece	None stated in Code. Appears to depend on accepted practice.	None.	2 years after death.	Action available only against original donee and his heirs.
Italy	None stated in Code. Appears to depend on accepted practice.	None.	20 years after death with possible extension of time.	Action can affect third parties for a period of twenty years.

				Securities granted over the subject of the gift may be reduced. Some vague protection for acquirers for value.
Malta	Moveables valued at donation. Immoveables valued at death.	None.	10 years after death.	Property may be recovered from parties acquiring from donee.
Netherlands	Usually the date of making the gift.	None.	5 years after death.	No recovery of property from donee: just pecuniary claim.
Österreich	Moveables at death and moveables at the time of making the gift.	None.	No specific limitation. Appears to follow expiry of period of long negative prescription	Appears to be limited to original donee.
Poland	Date of death.	Minor donations excepted. No fixed sum.	3 years after death.	Claim for money not recovery of property.
Portugal	None stated in Code. Appears to be assessed by reference to accepted practice.	None	2 years after death.	Not clear from Code. Appears to be limited to original donee.
Spain	None stated in Code. Appears to be based on accepted practice.	None.	6 years from death for moveables and 30 years for immoveables	Property may be recovered from original donee and persons who acquire therefrom.
South Africa	N/A	N/A	N/A	N/A

APPENDIX 2

MEMBER STATES – LAWS IN MORE DETAIL

BELGIUM[21]

The provisions relevant to forced heirship and "clawback" are contained in the Belgian Civil Code, Articles 913-930.

Belgium has forced heirship rules known as the reserved compulsory share. The protected persons are principally the children, (whom failing the grandchildren[22]). If there is one child the reserved share is one half of the fictive hereditary mass (see below), two thirds thereof where there are two children and three quarters thereof if there are three or more children.[23] Where the deceased has no child but two living parents they are entitled to one half of the fictive hereditary mass[24] and, if he leaves one parent, that parent is entitled to a quarter. There are further complex variations if the deceased leaves a spouse.

The reserved portion available for the calculation of these forced provisions is calculated not on the basis of the assets existing as at the time of death but on the basis of a fictive hereditary mass in which all gifts *inter vivos* made by the deceased are added to the existing assets.[25] This is known as resititution "*méchanisme de rapport*". Once the compulsory share is calculated the remaining part of the succession is free disposable by the deceased. The lifetime gifts that have been made and, thereafter, testamentary dispositions are imputed to that disposable part. Put another way, *inter vivos gifts* are never reduced until the value of all the property included in testamentary dispositions has been exhausted.[26] If the combined total figure exceeds the disposable portion, it must be reduced and the heir with a reserved portion may file a claim for reduction of testamentary dispositions or gifts *inter vivos* (*méchanisme de reduction*).

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[21] John H. Crabb, *The Constitution of Belgium and The Belgian Civil Code*, Fred Rothman & Co., Littleton, Colorado, 1982. ISBN 0-8377-0438-3; *Introduction to Belgian Law*, edited by Hubert Bocken and Walter De Bondt, Kluwer/Bruylant, 2001. ISBN 90411 1456 4; Paul Delnoy, *Les Libéralités et les Successions*, 2e édition, Larcier, 2006. ISBN 987-2-8044-222-6; Denis Phillipe and Delphine Dehasse, *Code Civil*, 2006, Bruylant, Bruxelles, 2006, ISBN 2-8027-2177-1; Volker Hustedt und Bernard Sproten, *Erbrecht in Belgien*, 1277-1322 in Dr. Rembert Süss, *Erbrecht in Europa*, 2. Auflage, Zerb Verlag, 2008, ISBN 978-3-935079-57-0, Seite 330.

[22] Representation is allowed in terms of BCC, Art 914.

[23] BCC, Art 913.

[24] BCC, Art 915.

[25] BCC, Art 922.

[26] BCC, Art 923.

The comprehensive extent of the massing is clear:

"*On ajoute toutes les donations entre vifs: donations authentiques immobilières ou immobilières, avantages matrimoniaux considérés comme les donations, dons manuels, donations indirectes, donations déguisées*".[27]	One adds all the *inter vivos* gifts, formally authenticated gifts of moveables or immoveables, matrimonial advances and preferences considered as gifts, gifts directly handed over, indirect donations and disguised donations.

The donor may expressly exempt an heir from the obligation to make a return or alter the priority of the return and reduction i.e. an exemption from collation or hotchpotch.[28] This exemption will be set off against the available part of the succession but cannot derogate from another heir's right to demand "clawback" ain that the testator cannot deprive any forced heir of his reserved portion.

The Belgian provisions relative to "Reduction of Gifts and Legacies" are contained in the Belgian Civil Code, ("BCC"), Arts 920-930. They apply to lifetime gifts of property whether that property be classified as moveable and immoveable. This appears to refer to all lifetime gifts made by the deceased during his lifetime without limitation of time. There is no limit on the size of such gifts that are brought into account. It is confirmed expressly that an action in reduction or recovery may be brought by heirs against third parties holding immoveable property that was part of gifts and alienated by donees, in the same manner and in the same order as against the donees themselves, with enquiry first being made into their assets.[29] Presumably this means the party seeking to recover the value of his inheritance must first seek recovery from the original donee before passing on to seek recovery from someone who has acquired title from the original donee. Such action must be brought following the order of the dates of alienations, by commencing with the most recent.

Recovery of property has an effect on derivative real rights. Real properties involved in a reduction will be recovered free of charges of debts or mortgages created by the donee.[30] This has the potential to affect heritable securities in Scotland and mortgages in Northern Ireland and England and Wales.

Clearly the asset could produce some income and the Belgian Civil Code deals with this in the following way. A donee must restore the fruits from that which exceeds the disposable portion, counting from the day of the decease of the donor, if the petition in reduction is made within one year; if not, from the day of the petition.[31]

As to the action of reduction itself, there is no clear limit of time within which it may be brought. One must refer to the general provisions of the BCC on negative prescription.[32] Albeit it is stated that prescription does nor run between spouses,[33] as

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[27] Delnoy, page 237
[28] BCC, Art 927.
[29] BCC, Art 930.
[30] BCC, Art 929.
[31] BCC, Art 928.
[32] BCC, Arts 2251-2259.
[33] BCC, Art 2253.

the marriage of the testator is automatically dissolved on death, one may suppose that prescription will run after death against the estate (even if it has no administrator).[34] The period for negative prescription, regardless of the nature of the property, is thirty years[35] and it is interrupted only by court action.[36]

There is special provision in Belgian law to exclude from the possibility of reduction life assurance policies on the life of the deceased where the deceased paid the premiums but where the benefit of the policy is stated to be for beneficiaries.[37]

The value used for this purpose is the value as at the date of the death of the donor. Thus one commentator has observed that the estate is calculated by taking into account "the estate that would have been present if the deceased had made no gifts".[38] They are valued according to their state at the time of the donation and their value at the time of the donor's death.[39] Article 922 of the Belgian Civil Code makes this clear: one adds to the "fictitious mass" the deceased's lifetime gifts "*d'après leur état à l'époque des donations et leur valeur au temps du décès du donateur*." In the light of this one Belgian commentator has observed:[40]

"*En principe, en ce qui concerne les donations entre vifs, on ajoute la valeur que les bien donnés auraient au décès si le défunt les avait conservés dans létat où ils étaient au moment où il les a donnés*"	In principle, in relation to *inter vivos* donations, one adds the value that the gifted items of property would have had at the date of the deceased's death if the deceased had kept them in the state in which they were at the moment of their being gifted.

There is an exception to this general provision in relation to certain gifts involving family companies and businesses. These are valued as at the time of the gift and not as at the time of death.[41]

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[34] BCC, Art 2258.
[35] BCC, Art 2262.
[36] BCC, Art 2244.
[37] Article 124 of law of 25 June 1992 see Paul Delnoy, page 237: *Il convient de mentionner ici la donation par la voie d'une assurance vie au profit de l'héritier. Les primes payées par le défunt constituent l'objet de la libéralité dans le cadre de la réduction des libéralités. En vertu de l'article 124 de la loi du 25 juin 1992 sur le contrat d'assurance terrestre, elles sont, en principe, non sujettes à la réduction. En principe, on ne les ajoute donc pas à la valeur nette des biens existants, sauf dans la mesure où les versements effectués ont été manifestement exagérés eu égard à la situation de fortune du défunct, mais sans que la réduction éventuelle puisse excéder le montant des prestations exigibles.*"
[38] Bocken and De Bondt, page 198.
[39] Belgian Civil Code, Art 922; Bocken and De Bondt, page 199.
[40] Paul Delnoy, pages 237-238.
[41] *Précis du Droit des Successions et Libéralités*, sous la direction d'Alain-Charles Van Gysel, Bruylant, Bruxelles, 2008, ISBN 978-2-8027-2537-4, pages 467-468.

BULGARIA[42]

No primary legislation, case reports or other information translated into English, French or German can be located. This summary is therefore based on secondary sources written in German and a German translation of the relevant parts of the succession law of 18th January 1949.

A limited number of persons within the close family circle are afforded compulsory provisions on succession. These include the descendants, the parents and the surviving spouse of the deceased.[43] The Bulgarian system affords these various beneficiaries different proportions of estate depending on who survives and in what combination.[44] For example if the surviving relatives comprise a spouse and a child, they will each receive one third of the estate. If there survive two or more children and no spouse the children collectively are awarded two thirds of the estate. If there are two children and a surviving spouse, each child receives a quarter and the spouse a quarter. If there are more than two children and a spouse, together they account for five sixths of the estate. A surviving spouse alone is entitled to one half of the value of the estate. Surviving parents alone receive one third of the estate. A surviving parent (or parents) and a spouse receive one third of the estate each. Over and above these fractions the deceased is free to dispose of the estate.

Lifetime gifts are added to the estate owned by the deceased at death to find the total of the fictive hereditary mass. By reference to this are the forced shares calculated.[45] In regard to immoveable property the value taken is the value as at death. In all other cases the value taken is the value as at receipt of the gift. If the sum available to satisfy the forced shares at death falls short, the beneficiary entitled to the forced provision is entitled to seek the reduction of the bequests and lifetime gifts.[46] Testamentary bequests are reduced first then the lifetime gifts in reverse chronological order – the most recent first to be reduced.[47]

Albeit a discharge after a forced share has vested is possible, it seems that prior discharge of the forced provision is not possible. One German commentator has observed:[48]

"*Insofern der Pflichtteilsverzicht die Frage betrifft, ob den Pflichtteil auch*	Let us consider the question of whether, by means of a contract with the testator,

[42] Stela Ivanova, *Erbrecht in Bulgarien*, in Dr. Rembert Süss, *Erbrecht in Europa*, 2. Auflage, Zerb Verlag, 2008, ISBN 978-3-935079-57-0, Seiten 401-403; Christa Jessel-Holst, *Bulgarien*, H.C. Murad Ferid, K Firshing, Heinrich Dörner und Rainer Hausmann, Internationales Erbrecht, Band 1, Verlag C.H.Beck, München, ISBN 978 3 406 379321 ergänzt bis 978 3 406 587108, Seiten 19-20.
[43] Law of 1949, Art. 28.
[44] Law of 1949, Art. 29.
[45] Law of 1949, Art. 31.
[46] Law of 1949, Art. 30.
[47] Law of 1949, Art. 33.
[48] Ivanova, Seite 402.

schon vor dem Eintritt des Erbfalls, etwa durch Vertrag mit dem Erblasser, verzichtet werden kann, so wäre ein solcher Verzicht nach bulgarishem Recht nicht wirksam."	the statutory forced provision could be discharged prior to the opening of the succession? Such a discharge is not effective according to Bulgarian law.

This would also appear to apply to the right of a person entitled to a forced share to seek reduction of gifts.

There are some time-limits to striking down of gifts and recovery of property albeit these do not appear to be comprehensive in their scope. The law on succession provides that as regards land, vehicles and agricultural machinery the gift cannot be reduced after a period of one year after the death. However, a subsequent law relating to property in 1951 appears to have rendered inoperative this provision as regards vehicles and agricultural machinery albeit it has not been formally revoked.

CYPRUS[49]

In Cyprus there is a forced provision available on the opening of the succession to certain of the deceased's close family members such as the deceased's spouse, children etc.. However, these forced provisions calculated by a formula based on the value of the net estate of the deceased at death without any notional adding of any lifetime gifts made by the deceased. There is therefore no question of abatement of such gifts or clawback in order to make up the value of the forced provision.[50]

There is therefore no potential impact on any lifetime transfers in respect of which any of the legal systems within the United Kingdom has an interest.

DEUTSCHLAND[51]

The provisions relevant to the compulsory share known as *Pflichtteil* are found in *Bürgerliches Gesetzbuch* (BGB), Articles 2303-2338. There are, however, proposals (as yet not enacted) to reform this legislation in terms of a proposed law *Entwurf eines Gesetzes zur Änderung des Erb-und Verjährungsrechts*.[52]

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[49] Andreas Neocleous & Co, *Introduction to Cyprus Law*, Center for International Legal Studies, Yorkhill Law Publishing, ISBN 3-902046-21-X; *European Succession Laws*, 2nd Ed., Ed. David Hayton, Jordans, 2002, ISBN 0 85308 816 0, Chapter 5, page 173, para 5.20.

[50] Neocleous, page 635.

[51] Norbert Horn, Hein Kötz and Hans G. Leser, translated by Tony Weir, Clarendon Press, Oxford, 1982, ISBN 0-19-825382-6; Dieter Schwab, Peter Gottwald and Eva Nourney, *National Report for Germany* in *International Encyclopaedia of Law: Family and Succession Law,* Kluwer Law International, 2006, ISBN 90 6544 888, paras 71-383.

[52] Deutscher Bundestag 16. Wahlperiod, Drucksache 16/8954 (24.04.2008). A copy of the material is available on the Beck on Line database at http://www.beck.de/rsw/upload/Beck_Aktuell/bt-drs1608954.pdf

The purpose of the *Pflichtteil* is to secure the succession rights of the immediate family. These comprise descendants, parent and surviving spouse and register partners but not siblings.[53]

In order to calculate the *Pflichtteil* the estate is valued as at the time of death but gifts which the testator had made to strangers in the last ten years of his life and which prejudice the *Pflichtteil* may be brought into account so as to increase it in the manner described below.[54] Broadly speaking the compulsory portion amounts to half of the value of the intestate share.[55] The value is taken as at the time of the opening of the succession:[56] *Der Berechnung des Pflichtteils wird der Bestand und der Wert des Nachlasses zur Zeit des Erbfalls zugrunde gelegt.*

A social assistance authority can transfer the claim to a compulsory portion to itself without the consent of the entitled person.[57]

The claim for a compulsory portion negatively prescribes if it is not claimed within a certain time. The formula to calculate this period is as follows. That day which falls three years after the beneficiary became aware of the disposition that made contradictory testamentary provision subject always to a maximum of thirty years after the opening of the succession.[58] This is to be modified slightly in terms of the proposed new law noticed above.

Where a testator has made lifetime gifts German law seeks to protect those entitled to a supplementary compulsory portion. This is known as the *Pflichtteilsergänzungsanspruch bei Schenkungen*. The right to a supplementary compulsory portion is calculated by fictitiously including in the testamentary mass not just the estate at death actually available at death but also the amount of gifts made by the deceased in the last ten years of his life.[59] There is an exceptional lengthening of this period in the case of a gift to the deceased's spouse where gifts prior to this ten year period may be taken into account.[60] The proposals to reform the law noticed above would vary what has been stated by entitling the beneficiary entitled to the forced provision to recover a fraction of the value of the gift that varies according to the age of the gift. For example, if the gift were to be reduced in the first year after it was made the beneficiary would be entitled to recover 100%. In the second year, he could recover 90%, in the third year 80% and so on.

There are some exclusions and many complex situations in determining what gifts are taken into account. A gift in discharge of a moral debt is not included.[61]

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[53] Art. 2303.
[54] Horn, Kötz and Leser, page 199.
[55] Art 2303.
[56] Art 2311.
[57] BGH ZEV 2005, 117, with note by Muscheler referred to in Schwab et al, page 140, para 372 fn 2.
[58] Art 2332.
[59] Art 2325.
[60] Art 2325(3).
[61] Art 2330.

Commentaries give examples of a gift of a house to a wife or partner who has cared for the deceased for years without payment.[62] There are, of course, possibilities of "mixed" transfers of assets where a part is remuneration and part is an outright gift. Insofar as a transfer can be regarded as remuneration it is not a gift but the remainder may be.[63] In the case of life assurance on death there appear to be different views. Some take the view the full insurance payment is to be taken into account whilst calculating the supplement whilst another view is that only the insurance premiums paid within the last ten years are to be taken into account.[64]

Value attributable to the subject matter of the gift is dealt with in a threefold provision as follows.[65] There general rule is that the subjects of gifts are brought into account at the value they had at the date of the opening of the succession. There are two exceptions. When something has a negligible value as at the date of the gift, it is that negligible value that is used. This would deal with the situation of shares gifted at negligible value that rocket in value thereafter. Secondly, where something has been worked out or has been exhausted it is taken into account at the value it had at the time of the gift. This deals with the situation of a gift of a BMW that has been driven so hard that it is now in a worthless state.

Where there is insufficient in the estate to pay a party entitled to a supplementary compulsory portion, the party entitled can pursue the original recipient of the gift – the donee.[66] That donee can retain the subject matter if he pays the party entitled to enhanced share the value of the gift.[67] There is no provision in terms of which third parties who have acquired from the donee can be forced to return the subject matter of gifts.

It is possible for a beneficiary to renounce in advance his rights in a succession.

FRANCE[68]

France makes provision for forced heirship by means of a concept known as *la reserve*. Only the direct descendants of the deceased, or his ancestors in the absence of descendants, and the spouse of the deceased are afforded the benefit of these compulsory shares.(Civil Code, Arts 913 and 914).

A lifetime gift that extends beyond the extent of the disposable share is capable of reduction. (Civil Code, Art, 920).

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[62] E.g. Palandt, *Bürgerliches Gesetzbuch*, Band 7, Verlag C.H.Beck, München, 2007, ISBN 10: 3406 55266 8, page 2435.
[63] Pentz, *Pflichtteilsergänzung bei „gemischten" Schenkungen*, (1997), FamRZ, Seite 724.
[64] Dieter Schwab, Peter Gottwald and Eva Nourney, para 381.
[65] Art 2325(2).
[66] Art 2329(1).
[67] Art 2329(2).
[68] Philippe Malaurie, *Les Successions: Les Libéralités* 2e édition, Defrénois, ISBN 2-85623-102-0; Henry Dyson, *French Property and Inheritance Law: Principles and Practice*, 2003, Oxford University Press, ISBN 0-19-925475-3.

Since 2006 an action for reduction prescribes after 5 years starting with the opening of the succession. There is a special provision for the period beginning to run when those entitled to the reserve knew of the alienation but in all cases there is a long stop cut off date of ten years after the death. (Art 921). Previously the period was 30 years from death which was regarded as being far too long.[69]

Since 2006 gifts can be consented to in advance to the effect of renouncing the right of reduction.[70] It has been commented:[71]

"*Alors même que la succession ne serait pas ouverte, tout héritier réservataire peut renoncer à exercer une action en réduction, avec le consentement du défunt et au profit d'une ou plusiers personnes déterminées (art 929, al. 1 nouv.) Cette liberté est étendue: la renonciation peut être génerale – toute la réserve, - ou une quote part, ou un bien déterminé, ou une donation, ou un legs."*	So, even if the succession has not yet opened, each beneficiary entitled to a forced share, may renounce his right to initiate an action of reduction, with the consent of the deceased and to the benefit of one or several selected persons. This facility is extensive: the renunciation may be general – it may extend to the totality of the reserved portion, - or a fractional part, or only to a certain piece of property, only to a particular *inter vivos* donation or only to a particular legacy.

He provides the example:[72]

"un entrepreneur a trois enfants: il voidrait que son enterprise soit, lors de son décès, transmise par son legs à son fils aîné, qui lui parait le plus qualifié pour la gérer, sans avoir à indemniser ses frères et soeurs; lors d'une réunion de la famille, en présence de deux notaires, les deux prûnés renoncent, par avance, à l'action en réduction qu'ils auraient pu exercer, mais uniquement entre le legs de l'enterprise identifiée avec précision. L'entrepreneur accepte cette renonciation, qui devient définitive à son décès."	A businessman has three children: he wishes, upon his death, that his business be bequeathed to his eldest son who seems to him to be the most qualified to manage it, without having to indemnify his brothers and sister. So, at a family meeting, in the presence of two notaries, the two children, to be left out, renounce, in advance their right to pursue an action of reduction which they could otherwise have pursued, but that to the extent only of the legacy of the business which is defined with precision. The businessman accepts this renunciation which becomes irrevocable at his death.

The general rule is that newer donations are revoked prior to older donations consonant with *prior tempore potior jure*.[73] Different donations made of the same date are reduced at the same time.

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[69] Philippe Malaurie, *Les Successions: Les Libéralités* 2e édition, page 316, para 653.
[70] Philippe Malaurie, *Les Successions: Les Libéralités* 2e édition, pages 315-316, para 652.
[71] Malaurie, pages 315-316, para 652.
[72] Page 316, footnote 12.

The French rule after 2006 is now not to require reinstatement of the subject matter of the gift but for the donee to indemnify the beneficiary entitled to the share of the forced provision. (Art 924) However, the person who received the gift may insist on giving the item back: Art 924 or the beneficiary may be able to recover the gift if the beneficiary is insolvent.

The value is assessed at the date of death by relevance to the state of the item as at the date of the gift.[74]

GREECE[75]

The compulsory portion provisions are contained in Civil Code, Sections 1825-1838.[76]

The forced heirs are the children (whom failing, grandchildren), ascendants and the surviving spouse of the deceased.[77] If there are descendants the ascendants are excluded. The compulsory portion consists of one half of the provision available to the relevant beneficiaries on intestacy.[78] The surviving spouse's share may vary from one eighth to one half of the estate depending on the existence of other forced heirs.

The forced provision is calculated by reference to a fictive hereditary mass. The lifetime gifts that are added into the massed estate include everything that the deceased had granted in his lifetime to a compulsory heir (descendants, parents and surviving spouse) without consideration either by way of donation or otherwise and any donation made by the principal during the last ten years of his life except if the donation was prescribed by reasons of decency or by a special moral duty.[79] These rather vague terms are not further defined in the Code.

A beneficiary cannot be deprived of his forced provision just because the actual estate left by the deceased may be inadequate: instead, his share may be payable out of sums recovered from lifetime gifts. No matter what their size or date, these may be rescinded. Only the lifetime gifts that are amassed as aforesaid are liable to

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[73] Malaurie, page 316, para 653.
[74] Malaurie, page 326, para 675.
[75] Greek Civil Code, translation by Constantin Taladoros, Ant. N. Sakkoulas publishers 2000, ISBN 960-15-0193-2; *Code Civil Hellénique*, traduit par Pierre Mamopolous, Deuxième Edition, A.N. Sakoulas, Athens, 1981; Konstantinos D. Kerameus and Phaedon J. Kozyris, *Introduction to Greek Law*, 3rd Ed., 2007, Kluwer, ISBN 9789041125408; Dr. Isme Androulidakis-Dimitriadis, *National Report for Hellas* in *International Encyclopaedia of Law: Family and Succession Law,* Kluwer Law International,2003, ISBN 90 6544 888, paras 426-432.
[76] Konstantinos D. Kerameus and Phaedon J. Kozyris, *Introduction to Greek Law*, 3rd Ed., 2007, Kluwer, ISBN 9789041125408, page 214.
[77] Art 1825(1).
[78] Art 1825(2).
[79] Art 1831.

recission.[80] The action may be raised by the beneficiary only against the donee and his heirs for the recission of the donation to the extent of the part missing from the compulsory portion.[81]

A donee may avoid recission by paying the equivalent of the missing part.[82] The right to seek recission is extinguished at the elapse of two years from the demise of the deceased.[83]

ITALY[84]

Italian law makes provision for a forced share for certain surviving relatives. The provisions are found in the Italian Civil Code, Articles 536-664.

The parties afforded forced provision shares include the surviving spouse, legitimate children, natural children (who failing grandchildren) and legitimate ascendants.[85] Where the deceased leaves only one child one half of the patrimony is reserved in his favour. If there are more than one child a share of two thirds is reserved for them.[86] Where only ascendants survive, one third of the patrimony is reserved for them.[87] Where only a spouse survives, one half of the patrimony is reserved for that spouse.[88] There are suitable adaptations where a spouse and a child survive or a spouse and ascendants survive. The maximum reserved under such combinations is three quarters.[89] Only the parties entitled to these forced shares can seek to reduce gifts in the manner noted below.[90]

To determine the fractions attributable to the forced shares Italian law requires the calculation of a fictional hereditary mass comprising all the net value of all property belonging the deceased at his death and property disposed by gift.[91] Gifts which exceed the share of which the deceased is free to dispose are subject to reduction.[92] Gifts are reduced beginning with the last and proceeding to the next earlier in order.[93] There is special provision as to separation of part or, if this cannot be done

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[80] Art 1835.
[81] Art 1836.
[82] Art 1836.
[83] Art 1836.
[84] *The Italian Civil Code*, translated by Mario Beltramo *et al*, Oceana, ISBN 978-0-379-20968-6; Franco Salerno Cardillo, *National Report on Italy*, *International Succession*, ed. Louis Garb, Kluwer, 2004, ISBN 90 411 0781 9, page 364; *European Succession Laws*, 2nd Ed., Ed. David Hayton, Jordans, 2002, ISBN 0 85308 816 0, Chapter 12, pages 325-649, para 12.13.
[85] Italian Civil Code, Art 536.
[86] Italian Civil Code, Art 537.
[87] Art 538.
[88] Art 540.
[89] Arts 542 and 544.
[90] Art 557.
[91] Art 556.
[92] Art 555.
[93] Art 559.

conveniently, payment of compensation by the donee where the value of the claim of the forced heir is less than the value of the immoveable gifted to a donee.[94]

Immoveables restored as a consequence of reduction are free of any lien or mortgage to which the donee may have subjected them,[95] except where an action for reduction is raised after ten years from the opening of the succession. In the latter, exceptional, case a judgement for reduction cannot prejudice third parties who have acquired rights for value (non-gratuitously).[96] In the general case the liens and mortgages remain valid if the reduction is requested after twenty years from the registration of the donation except where the obligation of the donee to compensate, with money, the forced heirs for the lower value of the assets occurs, to the extent that the request is made within ten years from the opening of the succession.[97] This applies *mutatis mutandis* to moveables registered in a public register.[98] The period may be extended for a further period of 20 years (renewable again) where the spouse or heir registered a notice of intent to challenge the gift.[99]

Where a donee has transferred an immoveable to a third party and less than twenty years have elapsed since the registration of the title in implement of the donation, the forced heir can pursue the third party for recovery of the property in the same way as he could against the original donee[100] The period may be extended for a further period of 20 years (renewable again) where the spouse or heir registered a notice of intent to challenge the gift.[101] The forced heir must first exhaust his rights against the donor.[102] Later gifts are to be reduced first.[103] This also applies to moveable property in the hands of third parties subject to the effects of possession in good faith.[104]

A third party acquirer can free himself of the obligation to restore a thing given by paying the equivalent in money.[105]

In the Code it is provided that parties entitled to forced provision cannot renounce their right to reduce gifts while the donor lives, either by express declaration or giving their assent to the gift[106] but there now some modifications in relation to this along French lines. However, the rights to reduce gifts can be waived after the death of the donor.[107]

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[94] Art 560.
[95] Art 561.
[96] Art 2652, No. 8.
[97] Art 561.
[98] Art 561.
[99] Art 563.
[100] Art 563.
[101] Art 563.
[102] Art 563.
[103] Art 563.
[104] Art 562.
[105] Art 563.
[106] Arts 458 and 557.
[107] Art 563.

MALTA[108]

The Maltese provisions are contained in the Malta Civil Code, Arts 647-653.

Legitim is afforded to the descendants of the deceased, whom failing, the ascendants of the deceased.[109] The children are entitled to one third of the estate if they are not more than four in number. Where there are five children or more they are entitled to one half of the estate.[110] Grandchildren represent predeceasing children.[111] The ascendants are entitled to one third of the estate.[112] Where there are children surviving, the surviving spouse is entitled to a usufruct of one half of the estate of the deceased.[113] Where there are no children surviving, the spouse is entitled to one quarter of the estate in full ownership.[114] There is special provision for illegitimate children providing for a fraction of the *legitim* afforded to legitimate children.[115]

For the purpose of legitim the estate includes all *inter vivos* donations made by the deceased.[116] This includes gifts in contemplation of marriage and gifts in favour of any person whomsoever.[117] There are excluded from this calculation expenses as may have been incurred for the education of any of the children or other descendants.[118] These *inter vivos* donations may be reduced to satisfy any sum due as part of an entitlement to *legitim*. The avoidance does not occur *ipso iure* but must be initiated by an entitled beneficiary. The right may be assigned and transmitted to heirs. Creditors of beneficiaries cannot reduce *inter vivos* dispositions.[119] Later gifts are to be reduced first. The action for recovery may also be taken against a third party in possession of immoveable property forming party of donations received from the testator and subsequently passed on by the donee but not until the beneficiary has exhausted rights against the donee. If the property is moveable the beneficiary may recover only the value thereof from the donee.

An action for demanding legitim shall lapse on the expiration of ten years from the day of the opening of the succession.[120] A provision is made to extend this for minors

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[108] Laws of Malta, Chapters 13-30, Vol. II (revised Edition 1984), prepared for the Law Commission; Simon Tortell, *National Report for Malta* in *European Succession Laws*, 2nd Ed., Ed. David Hayton, Jordans, 2002, ISBN 0 85308 816 0, Chapter 14, pages 371-372, paras 14.61-14.66.
[109] Art 615.
[110] Art 616.
[111] Art 618.
[112] Art 619(2).
[113] Arts 631 *et seq*.
[114] Art 633.
[115] Arts 640 *et seq*.
[116] Art 648 (b).
[117] Art 620(3).
[118] Art 620(3).
[119] Tortell, page 372, para 14.64.
[120] Art 845(1).

or persons under disability. In these cases the action of demanding legitim expires on that day occurring one year after the minority or disability ceases.[121]

The valuation of property gifted *inter vivos* differs depending on whether the property is moveable or immoveable. As regards moveable property its value is that which it had at the time of the donation.[122] As regards immoveable property it is valued as at the date of death of the deceased but in the condition it was in as at the date of the donation.[123]

Where a thing forming the subject of a lifetime gift has perished without the fault of the donee before the death of the donor it shall not for the purposes of valuation be included in the fictitious mass.[124] There is no statement that gifts abate *prior tempore potior jure*. There is provision for separation of the gifted item where it can be done without damage to the separated items.[125] Where this cannot be done the donee or third party can pay an amount equal to the value.[126]

NETHERLANDS[127]

The forced heirship and clawback provisions are found in the Civil Code of the Netherlands, Book 4, Section 3, respectively at Articles 63-88 and Articles 89-92.

The forced heirs comprise the descendants of the deceased.[128] The amount to which a child is entitled is one half of the portion that the child would have received if the deceased had died wholly intestate.

The amount afforded to forced heirs is calculated by reference to a fictive hereditary mass calculated by taking into account the value of all the estate that the deceased left at his death together with the value of some – but not all - lifetime gifts.[129] The right of the forced heir is not a right to specific assets but to a value i.e. a monetary claim.

Apart from a limited number of exceptional cases, gifts are valued at the date of the making of the gift.[130]

In general terms the main gifts that are taken into account are:[131]

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[121] Art 845(2).
[122] Art 648 (b).
[123] art 648(b).
[124] Art 649.
[125] Art 653(1).
[126] Art 653(2).
[127] Hans Warendorf, Richard Thomas and Ian Curry-Sumner, *The Civil Code of the Netherlands*, Kluwer Law International, 2009, ISBN 978-90-411-2766-2; *Introduction to Dutch Law*, eds. J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius, Kluwer Law International, 2006, ISBN 90-411-2507-8, page 199.
[128] Art 4:64.
[129] Art 4:65.
[130] Art 4:66.1. The exceptions are listed in the remainder of the article.
[131] Art 4: 67.

(a) gifts manifestly made and accepted with the prospect that these would be to the detriment of forced heirs;

(b) gifts made to descendants provided the descendant (or a descendant of the latter) is a forced heir; and

(c) other gifts made within five years prior to the deceased's death.

Gifts excluded from account are:

(a) gifts to persons to whose support the deceased was morally obliged to contribute during his or her life and which were in conformity with the income and capital of the deceased; and

(b) customary gifts to the extent that these were not excessive.

The forced heir has a personal claim on the donee (donees of later gifts being liable prior to donees of earlier gifts). The sum claimable amounts to the deficit insofar as this does not exceed the value of the gift.[132] The donee cannot nullify gifts.[133]

The time limit for seeking abatement of a gift is framed in a rather odd way. A forced heir's right of abatement of a gift shall lapse on expiry of a reasonable period set for the forced heir by the donee for this purpose, but no later than five years after the death of the deceased.[134]

ÖSTERREICH (AUSTRIA)[135]

Provision for a statutory inheritance share (known as the *gezetzlicher Pflichtteil*) and "clawback" is made in *Allgemeines Bürgerliches Gesetzbuch* (ABGB"), Sections 762-796.

In Austria the statutory inheritance share is afforded to the spouse and descendants and ascendants of the testator. These heirs are known collectively as *Noterben* (forced heirs).[136] If there are no descendants then the ascendants and the spouse are entitled to the statutory inheritance share. So long as descendants exist, ascendants are not entitled to a compulsory share. The amount of the entitlement of descendants and the spouse is one half of what they would have been entitled to under the intestacy

[132] Art 4:89.
[133] Art 4:90.
[134] Art 4: 90.3.
[135] Merran Loewenthal and Dr. Friedrich Schwank, *National Report on Austria*, in *International Succession*, ed. Louis Garb, Kluwer, ISBN 90 4110781 9, page 40; Franz Haunschmidt, *Erbrecht in Österreich*, in Dr. Rembert Süss, *Erbrecht in Europa*, 2. Auflage, Zerb Verlag, 2008, ISBN 978-3-935079-57-0, Seiten 1099-1102.
[136] ABGB, s.764.

rules.[137] Ascendants are entitled to one third of what they would have inherited under the intestacy rules.[138]

To calculate the amount of the statutory inheritance share all gifts (subject to a number of exceptions) made by the deceased during his lifetime are to be added to a fictional hereditary mass.[139] The size of the gift is irrelevant. It includes gifts on marriage made to a daughter, gifts made to set up sons or grandsons in business or in a profession and payment of debts of an adult child.[140] The value of the gift is determined by reference to the following rules.[141] If the gift is in cash then the cash value is taken. Where the gift comprises moveable property the value is taken as at the time of the opening of the succession. If the gift comprises immoveable property then the value is taken as at the time of the making of the gift.

The following gifts are exempt from being taken into account in the calculation of the fictive hereditary mass:[142]

(a) Gifts which the deceased made out of *aus bloßen Erträgnissen* – the meaning of this phrase is obscure but it appears to mean gifts made from pure fruits. Possibly it means a gift made from an income stream where the testator had no right to the underlying capital.

(b) Gifts made for a public or community purpose, to fulfil a moral duty (such as a gift to a child who has surpassed any duties falling upon him or her e.g. an adult child who looks after the testator in old age) and gifts made *aus Rücksichten des Anstandes*. What this enigmatic phrase means is somewhat obscure but, literally translated, it means, out of considerations of decency. It may be the equivalent of the German "moral debt".

(c) Gifts which were made more than two years before the deceased's death to persons who were not entitled to a compulsory statutory share.

Potential heirs such as the spouse and children can, by means of contract with the testator, waive their entitlement to the estate (*Erbverzicht*). To be valid, the contract must be executed by way of notarial deed (*Notariatsakt*), or it has to be documented by a court protocol (*gerichtliches Protokoll*).[143]

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[137] ABGB, s. 765.
[138] ABGB, s.766.
[139] ABGB, s. 785.
[140] ABGB, s.788.
[141] ABGB, s.794.
[142] Haunschmidt, Seite 1101.
[143]Dr Andreas Lintl, *National Report for Austria*, in *European Succession Laws*, 2nd ed., Ed. David Hayton, Jordans, 2002, page 33, para 2.51.

POLAND[144]

Provisions for a forced heirship provision (Legitim) and "clawback" are respectively contained in Polish Civil Code, Articles 991-999 and Articles 1000-1007.

The forced heirs are the descendants, the spouse and the parents.[145] The forced provision is a fraction of what these persons would be entitled to upon intestacy. It amounts to one third in the normal case and one half if they are unable to work or are under age. To calculate the sum lifetime gifts made by the deceased are taken into account.[146] There are some exceptions as follows:

(a) minor donations which are customarily accepted in the given relationship – presumably this extends to wedding gifts from a husband to his wife and birthday presents to children; [147]

(b) all donations to persons who are neither heirs nor entitled to legitim provided they were made over ten years before the opening of the succession;[148]

(c) all donations made during the time when he had no descendants shall be left out of account when calculating the legitim of descendants. However, this is not to apply where the donation was made less than three hundred days before the birth of the descendant;[149]

(d) all donations made to a spouse by the deceased before concluding his marriage are to be left out of account in assessing the legitim of a spouse.[150]

The value of the donation is to be calculated according to its condition when it was made and at the value of the item at the time when the legitim was established i.e. as at the death of the deceased.[151]

There is a time limit for action by a person entitled to legitim against a person receiving a gift. The claim against a person obliged to complete a legitim as a result of

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[144] *Introduction to Polish Law*, edited by S. Frankowski, Kluwer International, 2005, ISBN 90 411 2331 8; *Business Law, The Polish Law Collection*, general Editor Danuta Kierzkowska, Tepis Publishing House of the Polish Society of Economic, Legal and Court Translators, Warsaw, 2004, ISBN 83-85430-76-8; *The Polish Civil Code*, Tepis Publishing House, Warsaw 1997, ISBN 83-85430-35-0; Slawomir Lakomy, *Erbrecht in Polen* in Dr. Rembert Süss and Dr. Ulrich Haas, *Erbrecht in Europa*, Zerb Verlag, 2004, ISBN 3-935079-10-9, Seiten 1154-1155.
[145] Polish Civil Code, Art 991, § 1.
[146] Polish Civil Code, Art 993.
[147] Polish Civil Code, Art 994, § 1.
[148] Polish Civil Code, Art 994, § 1.
[149] Polish Civil Code, Art 994, § 2.
[150] Polish Civil Code, Art 994, § 3.
[151] Polish Civil Code, Art 995.

a donation received from the deceased shall be barred by limitation of three years from the opening of inheritance.[152]

The claim is against the person who has received the donation from the deceased.[153] The claim is for a sum of money not recovery of the property.[154]. The donee, however, may free himself from the obligation to pay by releasing the item.[155] Donees are liable in the order of last donation first.[156]

PORTUGAL[157]

Provision for forced heirship known as *Legítima* (sometimes translated as "due portion") is made in the Portugese Civil Code, Articles 2156-2178. The parties entitled (known as *herdeiros legitimários*) comprise the surviving spouse, the ascendants and the descendants.[158] As with most other Civilian legal systems the fraction of the estate to which these surviving beneficiaries are entitled depends on who survives. Where a spouse alone survives she is entitled to one half of the estate.[159] Where a spouse and children survive they take collectively two thirds of the estate[160] with the size of the parts within that overall fractional share being determined by the number of children surviving.[161] Where a child alone survives he is entitled to one half of the estate and where more than one child survives they are entitled to two thirds.[162] Grandchildren may represent predeceased children. Where a spouse and ascendant survive they take collectively two thirds of the estate.[163] Where parents alone survive they take one half.

To calculate the value of the *Legítima* the fictitious hereditary mass (known as *massa de cálculo*) is calculated comprising not only the estate owned by the deceased as at the time of his death but also all gifts made by him in his lifetime. There is an exception made for gifts to descendants made for the purpose of marriage gifts, gifts for children's maintenance and education provided the gifts were suitable for their social standing.[164]

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[152] Polish Civil Code, Art 1007 § 2.
[153] Polish Civil Code, Art 1000 § 1.
[154] Polish Civil Code, Art 1000 § 1.
[155] Polish Civil Code, Art. 1000 § 3.
[156] Polish Civil Code, Art 1001.
[157] *Código Civil*, Volume II, Livraria Almedina, Coimbra, 1979; De Erhard Huzel, Dr. Burckhardt Löber und Ines Wollmann, *Erbrecht in Portugal* in Dr. Rembert Süss and Dr. Ulrich Haas, *Erbrecht in Europa*, Zerb Verlag, 2004, ISBN 3-935079-10-9, Seiten 810-81; Guilherme Freire Falcão de Oliveira, *National Report for Portugal* in *International Encyclopaedia of Law: Family and Succession Law,* Kluwer Law International, 2006, ISBN 90 6544 888, paras 469-471.
[158] Art 2157.
[159] Art 2158.
[160] Art 2159.
[161] Art 2139.
[162] Art 2159.
[163] Art 2161,
[164] Arts 2110 and 2162.

Lifetime gifts and testamentary provision to the extent that they are made in excess of the disposable portion are capable of reduction by the heirs entitled to the forced provision.[165] The order of reduction requires testamentary provision to be attacked first followed by the lifetime gifts, the latter being reduced in order of the date of their making, the most recent first followed by earlier gifts.[166]

There is a two year time limit for the reduction of gifts starting with the opening of the succession.[167]

The Portugese Civil Code is definitive in relation in excluding the possibility of advance renunciation of the legitimate portion or the right to reduce transfers in excess of the disposable portion.[168]

Não é permitida em vida do autor da sucessão a renúncia ao direito de reduzir as liberalidades.	The renunciation of the right to reduce lifetime gifts is not permitted during the lifetime of the person whose succession is in question.

SPAIN[169]

The Spanish provisions are found in the Civil Code of Spain, Art 636 when read with Arts 806-822.

Spanish law provides a forced provision for several surviving heirs known as the *Legítima*. The relevant surviving heirs comprise children and descendants (whom failing parents and ascendants) and the surviving spouse.[170] This leaves the testator with a right of free disposal of one third of his estate if he has children and descendants[171] and one half if he has no children but has ascendants.[172]. Where there is a surviving spouse the share of ascendants is limited to one third.

To establish the sums available for the forced provisions the fictitious hereditary mass is calculated. This comprises not only the estate owned by the deceased as at death but

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[165] Art 2169.
[166] Arts 2171 and 2173.
[167] Art 2178.
[168] Art 2170.
[169] *Civil Code of Spain*, translated by Julio Romanach, Jr, 1994, Laurence Publishing Company, Baton Rouge, LA, ISBN 0-9633610-1-5; Julio D. González Campos and Alegría Borrás, *National Report for Spain* in *European Succession Laws*, 2nd Ed., Ed. David Hayton, Jordans, 2002, ISBN 0 85308 816 0, pages 440-441, paras 17.39-17.44, Gabriel García Cantero and Joaquín Rams Albesa, *National Report for Spain* in *International Encyclopaedia of Law: Family and Succession Law,* Kluwer Law International, 2006, ISBN 90 6544 888, paras 387-394.
[170] Art 807.
[171] Art 808.
[172] Art 809.

also all lifetime gifts made by him.[173] A forced heir may demand the completion of the *Legítima* when he has received less than he is due.[174] Excessive donations may be reduced.[175] This appears to have real effect and may be pursued against those who acquire from the original donee in that it is provided expressly in the Code that no-one can give or receive by donation more than he can give or receive by testament.[176] A donation shall be ineffective in all that exceeds this limit. No are no limitations on the size or amount of the gifts involved or on their dates. This appears to apply to all gifts within the lifetime of the deceased.

There is no specific timelimit on a beneficiary's raising claims to reduce gifts. However, the general provisions on negative prescription would apply. The period of negative prescription relating to moveables is 6 years[177] and it is 30 years for immoveables.[178] There is a general provision excluding partition of inheritance from the operation of negative prescription[179] but this appears not to be relevant in this context.

The Spanish Civil Code excludes lifetime discharges of the *Legítima*[180] and, presumably also, this applies to an exclusion of a right to recover a gift to pay the *Legítima*.

SWEDEN[181]

No primary legislation, case reports or other information translated into English, or French can be located. This summary is therefore based on primary legislation translated into German and secondary sources written in German.

Sweden affords a forced provision on inheritance only to descendants – children, whom failing grandchildren. The size of the forced provision extends to one half of the estate left by the deceased. The remaining half, in respect of which there is freedom of testation, is known as the disposable portion. The forced share must be claimed within 6 months of the beneficiary becoming aware of the contents of the will.

Swedish law also recognises a form of right to require an upgrading of the forced share by taking into account some lifetime gifts.

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[173] Art 818.
[174] Art 815.
[175] Art 817.
[176] Art 636 notwithstanding Art 634.
[177] Art 1962.
[178] Art 1963.
[179] Art 1965.
[180] Art 816.
[181] Ernst Johansson, *Erbrecht in Schweden*, 1277-1322 in Dr. Rembert Süss, *Erbrecht in Europa*, 2. Auflage, Zerb Verlag, 2008, ISBN 978-3-935079-57-0, Seiten 1302-1304.

This right to call these lifetime gifts into account and seek their reduction is limited in time. It must be initiated within one year of the completion of the inventory of the deceased's estate. This is clearly later than one year after the date of death but the *terminus a quo* for the running of the period is not fixed in time: consequently, it could extend to several years after the death if the executry administration is not efficiently carried out.

SOUTH AFRICA

In South Africa the estate available for distribution to beneficiaries comprises what was owned by the deceased at the time of death. There are no forced heirship provisions in South Africa and no methods to reduce lifetime gifts or "clawback" to augment the estate for distribution to beneficiaries on death.