The Nordic Input on the EU’s Cooperation in Family and Succession Law - Exporting Union law through “Nordic Exceptions”

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I Sweden and Finland as “backseat drivers”

A How a State can Gain the Reputation of being a Troublemaker

Sweden applied for EU membership in 1991 and Finland in 1992 in the aftermath of the radically changed geopolitical situation in Europe following the collapse of the Soviet Union and the Iron Curtain. Both states joined the EU on 1 January 1995 (together with Austria). The applications by Sweden and Finland were motivated predominantly by political and economic concerns, whereas the legal implications of membership raised mixed feelings and, in general, much less enthusiasm.

I feel tempted to refer to the two states as “backseat drivers”, who have not been entrusted with the driving of the vehicle called “the EU’s cooperation in family and succession law” but who feel a need to intervene, often irritating the driver. I aim to analyse whether the interventions by Sweden and Finland have prevented the EU from finding and taking the optimal course or whether, on the contrary, their contributions have enabled the vehicle to stay on the road/on course and to reach the destination in a more stable manner. The reason for this focus is the reputation of the two states as troublemakers in the context of cooperation in family and succession law. This label

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1 In the Explanatory Report to the Brussels II Convention Alegría Borrás mentions that the negotiations between the Member States had been very difficult and that they had not been facilitated by new Member States which joined the Union in 1995. While the Austrian position on important issues rarely differed from the mainstream, Sweden and Finland emerged as the troublemakers. This semi-official report by Borrás is published in [1998] OJ C 221/27. The conclusion drawn here is confirmed by, for example, statements by the German delegate to the negotiations, Dr. Jörg Pirrung: ‘Ich halte die Einführung einer fast uneingeschränkten Kläger- oder genauer gesagt, ’Klägerinnen’-Zuständigkeit auf Wunsch dreier eher ’nördlicher’ EU-stateen für einen EU-einheitlichen Ansatz im Gegensatz zu rein nationalen Lösungen für unglücklich, weil damit dem forum shopping Tür und Tor geöffnet und ein Ausgleich über eine effective Rechtsverhältnisregel unerläßlich wird.’ J Pirrung, ‘Europäische justitielle Zusammenarbeit in Zivilsachen – insbesondere das neue Scheidungsübereinkommen’, (1999) Zeitschrift für Europäisches Privatrecht, 844. The reference to three Nordic countries can be explained by the fact that Denmark was fully involved at that stage, as the Brussels II Convention was adopted within the framework of multilateral civil law cooperation within the EU.
dates back to the negotiations on the Brussels II Convention\textsuperscript{2}, which was subsequently replaced by the Brussels II Regulation\textsuperscript{3} and later by the Brussels II bis Regulation\textsuperscript{4}. Sweden and Finland’s decision not to take part in the Rome III Regulation\textsuperscript{5} reinforced the reputation of the two states as “states difficult to negotiate with” and “half-hearted” Member States.

The requests by Sweden and Finland for the right to apply in their mutual relations a given inter-Nordic convention instead of the regulation in question can be expected to have contributed to this reputation. Such a request has been made each time a family or succession law regulation has been under negotiation. Such requests may, at first sight, appear to be “legal irritants”, reducing the impact of each regulation and raising concerns about “split loyalties”, i.e. to the EU on the one hand and the Nordic Region on the other. The exceptions granted to Sweden and Finland as a result of these requests (the “Nordic Exceptions”) will be dealt with in further detail below.

B Negotiating the Brussels II Instruments

When joining the then pending negotiations on the Brussels II Convention in 1995, the EU’s first purely family law instrument, both Sweden and Finland had serious reservations regarding the project’s added value. Both states would have preferred measures encouraging all the Member States of the EU to ratify the 1970 Hague Convention on the recognition of foreign divorces and legal separations,\textsuperscript{6} and to concentrate on the ongoing negotiations within the Hague Conference on Private International Law on a global child protection convention.\textsuperscript{7}

Both states feared that a special Union instrument on marriage dissolution would subject their citizens and inhabitants to more conservative and even oppressive rules, and make divorce proceedings much more complicated and expensive. In their opinion, this spoke for a multitude of jurisdictional grounds. Bearing the differences in divorce law among the Member States of the EU in mind, they feared, in addition, that their own divorce decrees would not be recognized in all the other Member States if granted upon the

\begin{flushleft}
\textsuperscript{5} Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.
\textsuperscript{6} Convention on the Recognition of Divorces and Legal Separations, concluded at The Hague Conference on Private International Law on 1 June 1 1970.
\textsuperscript{7} The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the protection of Children was concluded at The Hague Conference on Private International Law on 19 October 1996. This Convention, which preceded the Brussels II Convention, came to include a so-called disconnection clause, Art 52.2, aimed in favour of the latter Convention (and the subsequent regulations).
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request of one spouse only. Both states had abolished all divorce grounds (other than a spouse’s wish to terminate the marriage) in their domestic law (as well as, in effect, in their private international law through the application of the lex fori to divorce claims), in addition to abolishing the instruments of legal separation and marriage annulment. 8

The concerns of Sweden and Finland were taken into account to a considerable degree in the final drafting of the Brussels II Convention. Firstly, the Brussels II Convention came to include several alternative grounds for divorce jurisdiction, with no hierarchy among them. Secondly, an explicit provision was included, prohibiting any Member State from refusing the recognition of another Member State’s divorce decree, on the ground that the divorce could not have been obtained in that state based on the same facts. 9 Both solutions were inspired, indirectly or directly, by the 1970 Hague Convention, 10 to which both Sweden and Finland are parties. These solutions were later on transferred, unaltered in substance, to the Brussels II Regulation of 2000 and the Brussels II bis Regulation of 2003. 11

C The Enactment of the Rome III Regulation

The apparent resentment in several other Member States against these two solutions encouraging, according to critics, forum shopping and a race to court turned into a driving force behind the adoption of the Rome III Regulation. This Regulation containing “universally applicable” Union rules regarding the law applicable to divorce and legal separation was adopted in 2010, as the European Union’s first “test case” of enhanced cooperation in the field of civil justice and specifically family and succession law with, originally, 14 Member States on board.

It cannot have been a source of surprise for any initiated body that the Rome III initiative on the unified conflict rules for marriage dissolution was “a mission impossible” from the very beginning from the Swedish and Finnish points of view. 12 As Sweden’s Minister of Justice Beatrice Ask expressed it during the course of the negotiations “Our position is

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9 This provision is currently found in Article 25 ‘Differences in applicable law’ of the Brussels II bis Regulation. Mutual recognition is, explicitly, not made dependent on any kind of harmonization regarding the applicable choice of law rules or substantive law.
10 The jurisdictional grounds of the Brussels II, i.e. Art 3-5, can be compared with the “indirect jurisdictional grounds” for recognition in Art 2-5 of the 1970 Hague Convention. Regarding the irrelevance of the grounds for divorce, see in particular Art 6.2 of the 1970 Hague Convention, to be compared with Art 25 in the Brussels II bis Regulation.
11 As we know, this Convention never entered into force but was replaced by the first Brussels II Regulation already in 2000, but basically unaltered in substance. It was only in the Brussels II bis Regulation, adopted in 2003, that considerable changes took place, since the new Regulation aimed to cover all issues concerning parental responsibilities. The provisions on marriage dissolution remained intact.
12 These states could be expected to endorse only a pure lex fori approach.
solid. As representatives for a modern and equal state in the north of Europe we cannot compromise fundamental rights”.13 In her statement, “fundamental rights” refer to the basic right of each spouse to request a divorce without the state imposing any restrictions on this right, i.e. the Swedish outlook on divorce law. Even if Sweden was the only Member State to raise a veto against the adoption of the Regulation, Finland shared Sweden’s concerns. In a note to the Council (Coreper), Finland raised concerns regarding the EU’s choice of enhanced cooperation in a field closely linked to fundamental values and traditions in each Member State.14 Finland found this unfortunate, because the chosen procedure disregarded the differences between the Member States’ outlook on divorce. Even if Sweden for some reason abstained from a similar statement, it shared Finland’s view.15

Seen from the point of view of Sweden and Finland, and their reasons for abstaining from the cooperation, the rhetoric of a “two-speed Europe” indicating the existence of two camps of Member States – a progressive one and a conservative one – makes little sense when related to the Rome III Regulation. It appears to me that those who resented the fact that not all Member States were willing to participate, chose to disregard the underlying complexity of the issues at stake.

D Later Contributions

EU’s later initiatives in the field of cooperation in family and succession law have been less problematic, at least from the Swedish and Finnish perspective. Irrespective of how well new initiatives have corresponded to their national laws (private international law included),16 Sweden and Finland have chosen to emphasise the expected practical benefits, the added value from the citizens’ point of view, and the compliance of the measures with the principles of subsidiarity and proportionality. In part, of course, this might be explained as a necessity considering the prevailing narrow understanding within the EU regarding what qualifies as “family law”. Neither the adoption of the Maintenance Regulation17 nor the adoption of the Inheritance Regulation18 qualified as family law measures, giving each Member State the right to a veto.19

14 JUSTCIV 128, JAI 583, 11429/10, Brussels 5.7.2010.
16 Both states accepted from the beginning that the Maintenance Regulation (with Protocol) would require them to accept foreign rules and decisions which went beyond their own outlook, according to which any duty to provide maintenance was restricted to parents in respect of their under-aged children and to inter-spousal relations; a spouse may only exceptionally be obliged to maintain the other spouse after a divorce. Both states have also been ready to accept common rules which are less progressive than those in their national private international law. More choices are, e.g., available according to Finland’s conflict rules on a deceased person’s right to choose the law applicable to succession rather than according to the EU’s Inheritance Regulation. The forth-coming Regulation on Matrimonial Property Relations is expected to endorse a more limited party choice of law than the one provided by the current universally applicable Swedish and Finnish conflict rules.
A new test case can, nevertheless, be envisaged. The Commission’s proposal for a special regulation concerning registered partners’ property relations has been received with mixed feelings by the Member States. In Sweden and Finland, registered partners enjoy the same rights as married couples and are subject to the same rules (private international law included). Sweden has gone as far as to abolish the institution of registered partnership in connection with a law reform in 2009, which introduced a gender-neutral marriage concept into Swedish legislation. There are demands for a similar law reform in Finland. Bearing in mind that all the other Nordic countries permit same-sex marriage, Finland can be expected to follow suit in the near future. It cannot be ruled out that both states will be opposed to the forthcoming regulation, if the adopted final solutions differ significantly from those applicable to spouses. More conservative EU states, on the other hand, might be opposed towards the Regulation if it endorses solutions very similar to those applicable to the property relations of spouses. If enhanced cooperation is chosen as the model with which to proceed, the rhetoric of a “two-speed Europe” will once again not adequately reflect the reasons given by the Member States for not participating. Whatever decision a Member State makes, it will require a complex balance between national interests and European goals.

All in all, Sweden and Finland’s input concerning the more recent regulations would appear to have been at an average level or even above average. Both were among the group of Member States which pleaded in favour of an increased certainty regarding the concept of habitual residence in the EU’s Inheritance Regulation, for example, by linking it to a fixed minimum period of residence (such as a duration of five years or, at least, two years). As we know, this proposal was not adopted, but the states’ concerns are to some extent met in the preamble of the Regulation. Nor were Sweden and Finland convinced that the law applicable to succession should cover the procedural aspects of

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22 In the pending negotiations, the policy of both states has been to act for the same or essentially similar rules for both spouses and registered partners. In the Nordic countries, only same-sex couples have been able to enter into a registered partnership.
23 Considering that registered partnerships are an institution which was originally (in Denmark in 1989) created for same-sex couples, and that such couples are not recognised in all Member States, the adoption of the Regulation can be expected to put pressure on those Member States which are opposed to formalising same-sex unions. This impact needs to be balanced against, e.g., Sweden’s explicit legislative policy that the same rules should always apply to both same-sex and opposite-sex couples, leaving no scope for any kind of lex specialis on same-sex relationships.
24 Preamble to the Regulation, recitals 23-25.
estate administration, in addition to matters of substantive law, due to their domestic law systems of estate management.\textsuperscript{25} They needed to retrace their steps also in this respect.\textsuperscript{26}

E Requests for Nordic Exceptions

In one specific respect, Sweden and Finland have set their joint footprint on each of the family and succession law regulations they have participated in. Each of these regulations includes, namely, an explicit provision mandating Sweden and Finland to apply, in their mutual relations, certain provisions in a given inter-Nordic convention, instead of the Regulation. These concessions, often called “Nordic exceptions”, originate from requests by Sweden and Finland, made during the negotiations.

I indicated above (Section IA) that these requests have contributed to the reputation of the two countries as half-hearted partners in EU cooperation on family and inheritance law. What lies behind the requests from the two states and how have these requests been met by the EU? What is the effect of the concessions granted on the EU’s vision of a common European area of justice?

In the following section, my focus will be on the Nordic exceptions. I wish to show that the exceptions granted have not been detrimental to the visions of the EU. On the contrary, the EU has in this manner in part exported its rules to three non-participating states, namely Denmark, Iceland and Norway, to be given effect within the application of inter-Nordic conventions (in their mutual relations and in relation to Sweden and Finland).

II Inter-Nordic Conventions on Cross-Border Family or Inheritance Law

A Background

Since the early 1930s, the five Nordic countries, i.e. Denmark, Finland, Iceland, Norway and Sweden, have adopted conventions for their mutual relations containing rules on the various aspects of private international law, in some cases following the adoption of harmonised Nordic substantive law legislation.\textsuperscript{27} The inter-Nordic conventions have from the beginning aimed to facilitate the mobility of Nordic citizens within the Nordic Region, and the administration of justice in such cases. The criteria for the applicability of each convention vary to a certain extent, depending on the subject matter. Normally, however, relevant connecting factors must exist with at least two of the (Nordic) countries, usually in the form of both citizenship in one of the states and habitual

\textsuperscript{25} When a person dies, his or her assets are not immediately transferred to the heirs (etc). Instead, the estate is regarded as a legal subject of its own, governed by special rules on administration until the estate is divided between the heirs.

\textsuperscript{26} Art 29 of the Inheritance Regulation tries to meet the concerns of Sweden and Finland to some extent. The provision has, however, been drafted in an extremely complicated manner. Opinions can be expected to become divided on how it should be interpreted and applied.

\textsuperscript{27} In family law this cooperation reached its peak in the 1920s, with the result that in some fields, in particular with regard to marriage, the legislation in the Nordic countries became almost uniform.
According to the main common principle of the conventions, jurisdiction is vested in the Nordic state of habitual residence. Correspondingly, the rules on choice of law refer to the law of the Nordic state of habitual residence. The applicable law changes either automatically, when a Nordic citizen assumes habitual residence in another Nordic country, or after a certain period of residence in the new state. Decisions by a competent authority in any one of the (Nordic) countries (if covered by an inter-Nordic convention) are automatically recognized in the other (Nordic) states and are directly enforceable there.

B Topicality – Civil Justice Cooperation in the EU

The Nordic countries have had a common labour market since 1955, but the mobility of the citizens in the region dates much further back. Once the EU initiated measures in the fields covered by the inter-Nordic conventions in family and succession law, the Nordic countries appointed a working party to compare and evaluate the inter-Nordic rules with the proposed EU measures. The structure and basic principles of the conventions (see above Section IIA) were found to be solid and, in certain respects, essentially superior to those under consideration in the EU. This relates in particular to the system of mutual or automatic recognition and the enforcement of judgments. The following quotation, from a 2011 joint proposal by Finland and Sweden to the EU working party in charge of the drafting of the Inheritance Regulation, captures the concerns of the two countries about changes for the worse, if Sweden and Finland in their mutual relations were to be covered by Union rules:

Having to introduce less flexible rules and, not least, rules on exequatur after more than 70 years without such provisions would send the wrong message to our citizens on the benefits of further EU integration, and we are strongly opposed to this.

In other words, how would it affect the legitimacy of EU cooperation on civil law if restrictions to mutual trust had to be introduced just because EU regulations, due to greater diversities between EU Member States, are not able to enhance a corresponding trust? It is also possible to identify a concern regarding a threat towards continued inter-Nordic unity, hampering mobility between the Nordic countries. The request for the

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28 When the Conventions were drafted, the eastern Nordic countries (Sweden and Finland) followed the principle of nationality in cross-border family and inheritance matters, whereas the western Nordic countries (Denmark, Iceland and Norway) adhered to the principle of domicile. These two approaches were accommodated by focusing on Nordic citizens with their habitual residence in another Nordic country, prioritizing the principle of habitual residence.

29 This task was given to the inter-Nordic working party in matters of family law which has existed since the early 1990s.

30 Brussels, 4 November 2011, 16386/11, LIMITE, JUSTCIV 290, CODEC 1893.

31 Over the years, I have attended several hearings in the Swedish Parliament on whether special Nordic rules can be regarded as entailing an added value. Each time I have been able to observe the politicians’ (irrespective of political party) unreserved support for such rules in cross-border matters of family and inheritance law. Facilitating citizens’ mobility between the states is an important political concern. See also K Kjaerheim Fredwall, ‘Nordisk konvensjon om arv och dödsboskifte – till nordisk nytte?’, Utviklingen i nordisk arverett – tegn i tiden, TemaNord 2013:517, 52.
Nordic exceptions, by Sweden and Finland, in each of the EU regulations adopted, must be seen against this background (Section III). A corresponding request is currently pending regarding the forthcoming regulation on the property relations of spouses.32

III The Nordic Exceptions in the Regulations on Family and Succession Law

A The Relationship between the EU Regulations and Existing International Conventions

All of the EU regulations adopted include provisions on the relationship between each regulation in question and existing international conventions, even if the solutions chosen differ. The position of the Brussels II bis Regulation is to replace the conventions applicable in the Member States.33 The Maintenance Regulation, on the contrary, gives priority to existing conventions, unless the mutual relations between Member States are at stake.34 The same applies under the Inheritance Regulation.35 The stipulations regarding the Nordic exceptions are found in this context. Each of the three regulations has an explicit provision concerning how it relates to a given inter-Nordic convention, in the mutual relations between Sweden and Finland.

In the next sections, I will comment on each of the Nordic exceptions that have been granted and their impact on the common area of justice within the EU.

B The Outcome of the Requests for Nordic Exceptions

i The Brussels II bis Regulation

The precedent for granting inter-Nordic exceptions was created in the Brussels II Convention of 1998 and transferred unchanged to the first Brussels II Regulation and, later the Brussels II bis Regulation.36 According to this provision, Finland and Sweden have the option of declaring that the (so-called) 1931 Nordic Marriage Convention37 will apply, in whole or in part, in their mutual relations, instead of the rules of the Regulation in question.

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32 No corresponding request has been made regarding the proposed regulation on registered the property relations of partners. The explanation is that registered partnerships are not covered specifically by any of the inter-Nordic conventions.
33 See Art 59.
34 See Art 75.1-75.2.
35 See Art 69.1-69.2.
36 Art 38 of the Brussels II Convention, Art 36.2 of the Brussels II Regulation and Art 59.2 of Brussels II bis Regulation.
37 The Convention between Denmark, Finland, Iceland, Norway and Sweden containing private international law provisions on marriage, adoption and guardianship, concluded in Stockholm on 6 February 1931. Because of the dominance of the provisions on marriage, this Convention is commonly referred to as “The Nordic Marriage Convention”. Occasionally, the title “Nordic Family Law Convention” is also used.
The exception granted is tricky in several respects. It has enabled Sweden and Finland, once they made the required declaration, to continue applying the more simple rules of recognition in the 1931 Convention compared to those in the Brussels II instruments. The relevant content of the Convention is an automatic recognition which cannot be refused on any grounds.\(^{38}\) This continues to apply between Sweden and Finland. The exception granted does not cover \textit{exequatur} proceedings. Enforcement between the Nordic countries is, namely, regulated in another inter-Nordic convention from 1977, which was not included in the exception, contrary to the request made by the two countries.\(^{39}\) As a result, \textit{exequatur} proceedings became applicable between Finland and Sweden. A further limitation to any priority of inter-Nordic rules is subject to the interpretation of the concept of “civil law matters”, as established by the Court of Justice of the European Union in respect of issues concerning parental responsibilities to be covered by the Regulation.

Two preliminary rulings by the Court of Justice of the European Union in cases concerning child protection with a Swedish-Finnish connection, namely case C-435/06 523/07 and case C-523/07, both delivered upon a referral from the Finnish Supreme Administrative Court, make it plain that unless otherwise provided, the Brussels II bis Regulation is exclusively applicable between the two states. According to these rulings, placement orders taking children into care (outside the parental home), without the consent of the children’s parents, qualify as “civil law matters” under the Brussels II bis Regulation. This prevents the application of harmonized inter-Nordic rules on the enforcement of (public law) care orders, in accordance with an agreement between the Nordic countries from 1970.\(^{40}\) This interpretation was contrary to the expectations in Finland and Sweden regarding the scope of the Regulation of application, and one which they had not taken into account.\(^{41}\) Due to this “miscalculation”, no request for a corresponding exception was made during the negotiations. The outcome from a Swedish-Finnish perspective entails that informal and simple rules, which do not require \textit{exequatur}, have been replaced by more complicated EU rules.

The right for a continued application of the 1931 Convention was made conditional on that:

i) the principle of non-discrimination on the grounds of nationality between citizens of the Union is respected; and

\(^{38}\) See Art 22 of the 1931 Convention. This means, i.a., that there is no scope for an exception on the grounds of public policy (\textit{ordre public}). In case law, see e.g., the decision by the Swedish Supreme Court \textit{NJA} 1978 C 480.

\(^{39}\) The Convention of 11 October 1977 between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments on civil and commercial matters.

\(^{40}\) These rules aim primarily to facilitate the return to care in an institution in another Nordic country for people on the run, but also apply to (public law) care orders made in any of the Nordic countries.

ii) the rules on jurisdiction in any future agreement between Finland and Sweden and related to matters governed by the Regulation are in line with those laid down in this Regulation.\textsuperscript{42}

Even if the concession due to its narrowness was a disappointment from a Nordic perspective, the countries concluded that the advantages outweighed the disadvantages. As the quotation above shows, the exception granted was made conditional on two grounds. According to one of the conditions, the future inter-Nordic rules (on jurisdiction) must be in line with the Union rules. The Nordic countries saw the advantages of this. It obliged them to modernize the existing inter-Nordic rules. Consequently, in 2001, the rules of the 1931 Convention on jurisdiction and \textit{litispendens (lis (alibi) pendens)} were remodelled on the Brussels II Regulation. The revised rules apply in situations where both spouses were \textit{both citizens of and habitually resident in the contracting states}.\textsuperscript{43} The Nordic countries considered this combination of connecting factors sufficient to exclude any alleged discrimination on the basis of nationality and, thus, in conformity with the second condition.

ii The Maintenance Regulation

According to Article 69.3, the Maintenance Regulation does not preclude the application of the \textit{1962 Nordic Convention on the recovery of maintenance}, due to the said Convention’s “simplified and more expeditious procedures” \textit{and} its system on “legal aid which is more favourable” than that provided in the Regulation. The application of the Convention may not, however, deprive the defendant of certain protection, specifically guaranteed by the Regulation.\textsuperscript{44}

The exception granted is the most generous of the “Nordic exceptions”.\textsuperscript{45} From the point of view of Sweden and Finland, it is of great practical relevance. The Nordic countries recover more maintenance payments from the other Nordic countries than from any other foreign state, which illustrates both how common it is for families to be split among the Nordic countries and the effectiveness of the 1962 Convention.

Until the adoption of the Maintenance Regulation, jurisdiction in issues of maintenance was covered by the Brussels I Regulation (earlier Brussels I Convention). Since the Brussels I and Lugano instruments corresponded to each other, the Nordic countries agreed already in 2000 to repeal the rules on jurisdiction in the 1962 Nordic Convention

\textsuperscript{42} Furthermore, contrary to the generally applicable prohibition to review the jurisdiction of the Member State of origin, such a review appears to be obligatory in every EU Member State whenever the judgment originates from Sweden or Finland, see Art 59.2.d.

\textsuperscript{43} The revised rules on jurisdiction in matrimonial matters and matters of parental responsibility of the Nordic Marriage Convention, still reflect those of the first Brussels II Regulation.

\textsuperscript{44} Art 69.3 refers in this respect to Art 19 (right to apply for a review) and to Art 21 (refusal or suspension of enforcement).

\textsuperscript{45} Art 69.1 starts by giving priority to existing conventions. Para 2 declares, however, that the Regulation shall take precedence in relations between Member States, whereas para 3 grants a special, favourable status to the inter-Nordic Maintenance Convention.
in favour of these common EEA rules. This is an additional example of the impact of European civil law cooperation.

iii The Inheritance Regulation

Article 75.1-2 of the Inheritance Regulation provides that international conventions to which one or more Member States were party at the time of the adoption of the Regulation remain unaffected, unless they were concluded exclusively between two or more Member States. The generally drafted provision is followed by a specific stipulation in Article 75.3, according to which Sweden and Finland are not precluded from applying, in their mutual relations, provisions in the inter-Nordic Convention on Inheritance of from 2012, as regards procedural aspects of estate administration, and simplified and more expeditious procedures for the recognition and enforcement of judgments. The drafting of this provision raises several concerns.

The exception granted refers to a convention from 2012 on the amendment of the 1934 Convention, an amendment which has not yet (2014) entered into force in the states in question. The amended Convention was adopted and signed just before the Inheritance Regulation, on 1 June 2012. It is modelled on the conflict rules of the Inheritance Regulation, but with the exception of estate administration which continues to be governed by the *lex fori* (as in the 1934 Convention). From the Nordic perspective, estate administration is largely about proceedings whereby the application of the *lex fori* has practical advantages. If the 2012 Convention were not to enter into force, failing the final ratification by the five states concerned, the exception would not be applicable. In that scenario, if the preceding paragraphs were taken literally, as a multilateral convention including third states, the 1934 Convention would apply in full. This interpretation can hardly be the intended one. The provision’s placement after the general rules appears, on the contrary, to indicate that from a Union perspective, the Nordic Inheritance Convention is regarded as a kind of anomaly, not quite fitting into the category of multilateral conventions. Bearing in mind that all of the Nordic countries have signed the 2012 Convention, they can be expected to ratify it as well, at the latest in 2015. Preferably, the revised rules should enter into force simultaneously with the Inheritance Regulation, i.e. on 17 August 2015.

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46 Negotiations for a revision of the 1934 Convention were initiated in 2006, and a draft Convention was presented in 2009, approximately at the same time as the proposal by the Commission on an Inheritance Regulation. Once the Member States had reached an agreement on the final content of the Regulation, the Nordic draft Convention was adjusted to the Regulation. Concerning the content of the contemplated but abandoned draft of inter-Nordic rules on inheritance, see M Jänterä-Jareborg, ‘Inter-Nordic Exceptions in EU Regulations on Matters of Family and Succession Law’ in A L Verbeke et al (eds), *Confronting the Frontiers of Family and Succession Law, Liber Amicorum Walter Pintens* (Intersentia, 2012) 743-5.

47 See also the Preamble, recital 74. See also the Preamble, recital 74. Regard should also be had to Art 351 of the Treaty on the Proper Functioning of the European Union.

48 In Sweden, a Commissioner in charge of proposing adequate measures to correctly implement the Inheritance Regulation has proposed that Sweden ratify the Convention by a certain date safeguarding the simultaneous entry into force of the Regulation. See SOU 2014:25 (*Internationella rättsförhållanden rörande arv*).
I have previously mentioned (Section I.D above) that Sweden and Finland would have preferred the procedural aspects of estate administration to be governed by the law of the state where the administration of the deceased person’s estate takes place. The Inheritance Regulation, on the other hand, entails that “succession as a whole” under the law applicable to succession is to be determined on the basis of the deceased person’s last habitual residence (Article 21) or his or her choice of the law of nationality (Article 22). In their mutual relations, thanks to the exception granted, Sweden and Finland will be able to distinguish between the law applicable to “substantive issues” and the law applicable to “procedural aspects”. They may also continue to follow the inter-Nordic rules on recognition and enforcement, when asked to enforce each other’s judgments.

An explanation for the Nordic countries’ interest in a revision of the inter-Nordic Inheritance Convention, in accordance with the choice of legal rules in the EU’s Inheritance Regulation, can be found in their wish to maintain where possible a continued inter-Nordic unity of assessment of succession.49 In the amended Convention, Finland and Sweden explicitly undertake to give precedence to the Inheritance Regulation in all respects, unless otherwise provided. In essence, this means that they will apply the rules on jurisdiction and choice of law in the Regulation also in relation to the three other Nordic countries (with the exclusion of procedural aspects of estate administration). This demonstrates a highly pragmatic approach on behalf of Sweden and Finland and a loyalty towards the EU’s visions, accepted as necessary by the other Nordic countries.

iv The Marital Property Regulation

In a Note dated September 2013 to the working party in charge of the planned regulations on the property relations of spouses and registered partners, the Finnish and Swedish delegations pleaded for a Nordic exception in favour of the continued application, in the relations between Finland and Sweden, of the rules in the previously mentioned 1931 and 1977 Conventions.50 The request was drafted following the wording and the terms of the exception granted in the Brussels II instruments.

This request exceeds the scope of the exceptions previously granted to the two states. For the first time, modernised inter-Nordic conflict rules are at stake, adopted as late as in 2006. These rules differ in several relevant respects from the planned Union rules, in the light of the Commission’s proposal from 2011.51 The most striking difference between the inter-Nordic conflict rules and those of the forthcoming regulation is probably the Nordic solution of full mutability of the law which is applicable, once the new habitual


50 JUSTCIV 191, 13543/13, Brussels, 30 September 2013.

residence has lasted for two years in the new Nordic country of habitual residence, unless the spouses agree otherwise. 52 On the other hand, according to the EU proposal, the principle of immutability applies unless the spouses agree otherwise.53 The options in the proposed regulation regarding a party choice of law are more limited than those of the Convention.54 The inter-Nordic conflict rules are, however, not universal but drafted in such a manner that they can only lead to the application of the law of the Nordic country in question.

The revised inter-Nordic conflict rules entered into force in the five countries in 2008. Bearing in mind both their novelty and the fact that they have been carefully adjusted to the (reasonably harmonised) domestic laws of the Nordic countries, the interest of the Nordic countries in revisiting these rules in order to bring them in line with the forthcoming EU rules cannot be taken for granted. Equally, in the light of previous negotiations, it is unlikely that the EU will be willing to accept that Finland and Sweden in their mutual relations are able to apply these rules.55 The other parts of the request, which focus on aspects of recognition and enforcement in accordance with the 1977 Convention, should be less controversial from the EU perspective since corresponding exceptions have been granted in the other regulations.

C Impact Analysis

The requests by Sweden and Finland to be permitted to apply inter-Nordic rules in their mutual relations instead of an EU regulation have been met only in part, indicating an irritation on behalf of the EU and its other Member States. Swedish and Finnish delegates to the negotiations have reported that considerable difficulties have prevailed regarding gaining any understanding for the requests for exceptions.56 This applies even in cases where the Nordic countries have mutually achieved what the EU is aspiring to achieve, namely the direct recognition and enforcement of the other states’ judgments due to the long since prevailing mutual trust.

Two of the three concessions granted so far were made conditional on a future law reform in a relevant inter-Nordic convention, to be modelled on the EU rules. This, if anything, demonstrates how seriously the Union takes its mission to develop a common European area of justice. As a result, three additional states, namely Denmark, Iceland and Norway, are now in part covered by rules modelled on the EU regulations insofar as inter-Nordic relations are at stake. This adjustment of the existing inter-Nordic

52 On the content of the inter-Nordic rules on marital property relations, see M Jänterä-Jareborg (n 46), 746-749.
53 Art 17 of the Proposal on EU’s Matrimonial Property Regulation.
54 Art 16 and 18 of the Proposal on EU’s Matrimonial Property Regulation. On the other hand, according to the proposed Regulation, the spouses may choose whether their choice of law agreement, concluded during the marriage, shall cover the whole of their property relations or only have effect for the future.
55 Both states remain bound by the Convention, in relation to Denmark, Iceland and Norway, which will delimit the scope of application of the EU conflict rules. Art 351 of the Treaty on the Proper Functioning of the European Union remains, nevertheless, problematic in this context.
56 See M Helin, Suomen kansainvälinen perhe- ja perintöoikeus, (Talentum, 2013) 687 on the Finnish perspective.
conventions has taken place either after the adoption of a regulation within the EU, which was the case with the rules on jurisdiction regarding marriage dissolution in the 1931 Convention, or in anticipation of measures to be taken by the EU, as in the case of the 2012 amendment Convention on inter-Nordic Inheritance. In essence, this means that the EU has succeeded in exporting its own rules to three non-participating states, through the Nordic exceptions granted to Sweden and Finland. The Nordic countries have gained a safeguarded unity of approach regarding inter-Nordic situations, in accordance with modernised rules corresponding to what applies within large parts of Europe. These outcomes are well in line with the spirit of Article 351 of the Treaty on the Functioning of the European Union, which obliges Member States to take all appropriate measures to eliminate any incompatibilities between Union law and international agreements with third countries. It appears not to be far-fetched to expect that preliminary rulings by the Court of Justice of the European Union will have a spin-off effect within the application of the corresponding inter-Nordic rules.57

IV Concluding remarks

The aim of this article has been to critically evaluate the contributions by Sweden and Finland within EU cooperation on family and succession law. The two states wielded considerable influence in the final drafting of the (first) Brussels II instrument. They objected to the adoption of the Rome III Regulation, which would have undermined their previous achievements. This opposition was legitimate, considering each Member State’s right of veto in EU cooperation on family law and that fundamental rights were at stake from their own point of view. The actions by Sweden and Finland have contributed to the creation of a more “divorce-friendly” Europe, which I believe to best meet the expectations of European citizens. Both states have welcomed the later initiatives by the EU and have played an active role in the negotiations.

The “Nordic exceptions” in the regulations adopted granting Finland and Sweden the right to apply a given inter-Nordic convention instead of the corresponding EU regulation may, initially, appear to be “legal irritants”, reducing the impact of each regulation. Upon a closer analysis, the concessions have turned out to be very limited in scope. Besides, it follows on from general Union law that the level of rights guaranteed by Union law cannot be downgraded. The requests for exceptions have provided an opportunity for the EU to take an explicit position, on the aimed impact of each regulation on existing inter-Nordic conventions. From this perspective, the Nordic exceptions can be regarded as clarifications or even restrictions to what would otherwise follow from the general rules of treaty law bearing in mind that the inter-Nordic conventions according to usual treaty law qualify as multilateral conventions. All in all, Sweden and Finland and the other Nordic countries have accepted the outcomes and used them to their mutual advantage. Inter-Nordic situations are, as a result, largely governed by rules essentially similar to those of the EU. The added value, in general European terms, is an increased predictability and legal certainty, due to the achieved unity of approach.

57 An example could be rulings by the Court of Justice of the European Union on a deceased person’s habitual residence.
It is important to emphasise that the exceptions granted have not been detrimental to the EU’s visions. On the contrary, the common area of justice has reached beyond the participating EU Member States, without any special efforts by the EU to export its own rules. It remains to be seen what scope, if any, there can be left for mutual actions between the Nordic states considering the European Union’s continuously increasing competence within cross-border family and succession law (and related areas).