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## **Guidelines on the treatment of *renvoi* in European Union instruments on applicable law in civil matters**

### **Introduction**

GEDIP notes that, with one exception (Regulation (EU) No 650/2012 on Succession), European Union instruments on applicable law explicitly refuse, where they prescribe the application of the law of a third State – which is, by definition, not bound by the European Union’s own choice of law rules – to allow a *renvoi* resulting from the law of the third State. In general, this refusal to allow *renvoi* is not the subject of explicit discussion in the recitals or preparatory work of the Regulations<sup>1</sup>.

Contrary to this trend in European Union legislation<sup>2</sup> on private international law – a trend that is also found in treaty law – GEDIP considers that the admission of *renvoi*, like other cases of consideration of foreign private international law,<sup>3</sup> may in certain circumstances contribute to the achievement of the objectives pursued by European choice of law rules and to the coordination of the legal systems of the States concerned, or may be justified in order to facilitate the administration of justice in the State of the forum.

GEDIP considers it desirable that the rules on *renvoi* contained in European Regulations on choice of law be based on a nuanced analysis. These rules should be laid down by the European legislator in the light of the specific needs of each area of choice of law. They would ensure a balance between promoting simplicity in the functioning of the European choice of law system (which tends to exclude *renvoi*<sup>4</sup>) and the interests which, on the contrary, may justify taking into account the choice of law rules of third countries. They could be based on the following Guidelines.

### **Notes:**

<sup>1</sup> The Group particularly regrets the stereotypical nature of the justifications given for the complete exclusion of *renvoi* in the Rome II, Maintenance Obligations, Rome III, Matrimonial Property Regimes and Property Effects of Partnerships Regulations: see Part I of the Annex to these guidelines [*French version only*].

<sup>2</sup> In order not to burden the rest of the text, reference will be made to "European" choice of law rules when referring to European Union choice of law rules.

<sup>3</sup> This applies in particular to the method of recognising situations: see the previous work of the GEDIP referred to *below* in note 7 under paragraph 3.

<sup>4</sup> It is indeed the simplicity of the system’s operation that is at issue, not “legal certainty” (although this was highlighted in some of the justifications given in support of the European Commission’s complete exclusion of *renvoi*, as cited in Part I of the Annex to these guidelines [*French version only*]); legal certainty is not at issue where the European legislator has clearly set out the circumstances in which *renvoi* should be apply.

## 1. Acceptability of renvoi

Where the European choice of law rule prescribes the application of the law of a third State, the consideration of the rules of private international law of that State should neither be systematically refused nor unconditionally accepted. Renvoi is not a matter of abstract logic.

In the event that the European choice of law rule has been adopted within the framework of enhanced cooperation, a non-participating Member State is considered a third country.

## 2. Different types of renvoi

The application of the rules of private international law of a third State may refer to the law of the forum (renvoi by remission<sup>1</sup>), to the law of another Member State (extended renvoi by remission<sup>2</sup>) or to the law of another third State which would designate its own law (renvoi by transmission<sup>3</sup>).

The justifications for renvoi, if accepted, may be:

- either that it contributes, for a particular European choice of law rule, to the achievement of the objectives pursued by that rule and to the coordination of the legal systems of the States concerned,
- or that it facilitates, in the event of a renvoi by remission, the administration of justice in the forum State by allowing the application of the law of the forum, since the third State is not interested in the application of its own law<sup>4</sup>.

Foreign private international law is understood to include, in addition to choice of law rules in the strict sense, any rule that may lead to the designation of a law other than that designated by the European choice of law rule, in particular rules relating to characterisation<sup>4</sup>.

### Notes:

<sup>1</sup> The *equivalent terms* for the concept of "renvoi by remission" and those for the concept of "renvoi by transmission" in other European languages are given in Part II of the Annex to these Guidelines [*French version only*].

<sup>2</sup> This implies that, where renvoi leads to the law of a Member State other than the State of the forum, the court seised will apply the substantive law of that other Member State and not its choice-of-law rules; these will, by assumption, be identical to those prevailing in the State of the forum. Thus, from the point of view of the applicable law, the system of the Member State to which the case is referred may be regarded as a virtual European forum which, if seised, would apply the same law as the court seised.

<sup>3</sup> In the event of a renvoi by transmission, in the very rare cases where the law of the other third State refers to the law of another third State (which may refer to a fourth State, etc.), it seems justified to follow these referrals until the third State that would apply its own law is reached.

<sup>4</sup> This objective justifies the application of the law of the forum even in cases where the third State follows – contrary to the European system of renvoi by remission as presented in these Guidelines – the system of double renvoi (*foreign court theory*), as is the case in matters of succession according to certain English authorities, as well as in Swiss law (Article 90, paragraph 2 LDIP: "*The succession of a person who had his or her last domicile abroad is governed by the law designated by the rules of private international law of the State in which the deceased was domiciled. If these rules refer to Swiss law, the law of succession of the State of the deceased's last domicile shall apply*"). It seems justified (and useful) to interrupt the chain of references after the reference to the law of the European forum, as the jurisdiction assumed by the latter's courts normally attests to a close (or at least sufficient) link between the dispute and the European State concerned. Moreover, in this particular case, the reference to the law of the forum has the advantage – often absent in the case of renvoi by remission – of contributing to the international harmony of decisions on the applicable law.

<sup>5</sup> An illustration of a divergence in qualification rules is as follows: a conflict of qualifications arises, for example, when the choice of law rule on matrimonial property regimes applies in the European forum, whereas according to the choice of law rule of the third State designated by the European rule, the matter falls under inheritance law

and is subject, by renvoi, to the law of the European forum. But there may be other types of divergence between choice-of-law systems. In addition to differences in connecting factors and differences in characterisation, there may also be differences in the handling of *preliminary questions*.

### 3. Cases where renvoi should be considered by the legislator

Consequently, the European legislator should, in particular, consider renvoi, in the following cases:

- (a) where the application, under the foreign choice of law rule, of the law of a Member State other than the forum State ensures harmonised solutions within the European area of justice, in particular where the courts of that other Member State would also have had jurisdiction under a European rule;
- (b) where the application, by virtue of a renvoi by transmission, of the law of a third State which would apply its own law has the effect of ensuring coordination of solutions in all the States concerned by the situation, in particular in matters of succession<sup>1</sup> or the functioning of companies<sup>2</sup>;
- (c) where it ensures the validity or effectiveness of a legal act or relationship considered desirable, for example with regard to freedom of movement or fundamental rights enshrined in EU law<sup>3</sup>;
- (d) if it is likely to facilitate the recognition in a third State of a judgment granted in the European State of the forum<sup>4</sup>;
- (e) when the application of the foreign choice of law rule corresponds to the objectives of the European choice of law rules<sup>5</sup>.

The mechanism of recognition of situations created abroad, provided that it is applicable<sup>6</sup>, may play a role similar to that of renvoi by transmission and therefore replace it in the case referred to in point 3(c).

#### Notes:

<sup>1</sup> See Article 34(1)(b) of the Succession Regulation (EU) No 650/2012.

<sup>2</sup> A convincing example in national case law is the case decided by the Paris Court of Appeal on 3 October 1984, *Banque Ottomane*, Rev. crit. 1985, p. 527, where renvoi by transmission allowed Turkish law to be applied to the company, whose real seat was situated in England; the application of Turkish law was consistent with the company's practice since its inception and with the solutions accepted in English and Turkish private international law. The problem is largely resolved, it is true, if the choice of law rule does not refer (as the French choice of law rule at issue in this case) to the place of the real corporate seat, but to the place of incorporation.

<sup>3</sup> The implementation of renvoi should take into account the possible implications of primary law on freedom of movement, read in the light of the fundamental rights enshrined in the Charter of the European Union. As a reminder, both the regime governing the freedom to provide services and that governing the freedom of movement of European citizens illustrate the obligation for the authority or court of the forum to take into consideration the rights acquired in the Member State of origin of the business entity or in the Member State of residence of the citizen in accordance with foreign law, which must be understood as including choice-of-law rules (see, significantly, in relation to services, the *eDate Advertising* judgment of 25 November 2011, C-509/09, and, in relation to citizenship, the *Grunkin & Paul* judgment of 14 October 2008, C-353/06, and the *Coman* judgment of 5 June 2018, C-673/16, although the latter is limited to the migratory effects of the status acquired abroad). Admittedly, this reasoning is not based on the technique of renvoi, since the reference to foreign law does not result from a designation by the choice of law rule of the forum, but rather from an exception of mutual recognition of legal norms or from acquired rights. Furthermore, European case law does not yet seem to provide any example in which the forum would have to take into account a renvoi made by the choice of law rule of the State of origin designated by the choice of law rule of the forum, whether that renvoi is to the substantive law of the forum or to the law of another Member State. However, it would be consistent to respect a wish expressed in this regard by the Member State of origin. For example, in a variation of the *Coman* case, it is not impossible that the Romanian

choice of law rule could designate Belgian law, for example if the partners are Belgian, but that the Belgian choice of law rule could designate, for example, the law of the place of registration of the partnership, for example German law.

Furthermore, a reference to fundamental rights could justify taking into account a foreign choice of law rule when it prevents the creation of an inconsistent status. For example, the divorce of Belgian Catholics residing in Egypt is subject, before a European court, to the law of their habitual residence (Egyptian law), which prohibits the divorce of Catholics by application of the applicable religious regime but whose choice of law rules subjects divorce to the law of the spouses' nationality. In this case, *renvoi* allows for divorce without having to invoke the public policy exception.

<sup>4</sup> This refers in particular to cases where, in the context of the recognition of a European judgment, courts in the third State will verify, either generally or in a specific context (e.g. in family matters), the application by the European court of the law prescribed by the choice-of-law rules of that State. The same applies where the courts of the third State verify only the jurisdiction of the court of origin on the basis of the principle that the competent court will normally apply its own law.

<sup>5</sup> This justification is particularly useful for the admission of *renvoi* by remission. Here are two clear examples of connections that are compatible with the European system of choice of laws:

A first illustration of the reconciliation of the connections in force in different States is provided by the case law of the CJEU which, characterising the choice of law rules of the Succession Regulation, emphasises that “both habitual residence and nationality are objective connecting factors which, taken together, contribute to the objective of legal certainty for the parties to the succession proceedings pursued by the Regulation (No 650/2012), as is apparent from recital 37 thereof” (ECJ, 12 October 2023, *OP (Choice of law of a third country for succession)*, C-21/22, paragraph 32). This judgment further holds that the rule of unity of succession is not one of the principles on which the Succession Regulation is based. Indeed, it is apparent from Article 12 of that Regulation that the EU legislator expressly intended, in certain specific cases, to respect the model of division of succession that may be implemented in relations with certain third States (paragraphs 35 et seq.).

A clear example of a very high degree of compatibility with the European choice-of-law system would be the following: within the Union, the choice of law rule linking the applicable law to the nationality of the person concerned is rejected for political reasons (importance of citizenship of residence rather than national citizenship), but it also follows from that rationale that if a third country continues to use this connecting factor for its own residents, the European Union may well agree and follow the *renvoi* of the law of that third State.

<sup>6</sup> It should be noted that, at its meeting in Milan in 2023, Gedip adopted guidelines on the recognition a foreign legal relationship.

#### **4. Cases where *renvoi* should not be permitted by the legislator**

The European legislator should not allow *renvoi*, in particular, in the following cases:

- (a) if the European choice of law rule includes alternative connections favouring the validity or effectiveness of a legal act or relationship, whereas the law to which the *renvoi* leads does not allow that aim to be achieved;
- (b) if the parties have effectively chosen the applicable law, unless they have included the private international law of the third country concerned;
- (c) if the applicable law has been designated by means of a choice of law rule prescribing the express consideration of the closest connection, in particular by applying an exception clause <sup>1</sup>;
- (d) where the foreign choice of law rule is contrary to fundamental rights, in particular to the principle of non-discrimination<sup>2</sup>.

#### **Note**

<sup>1</sup> On the other hand, where the closest connections are taken into account as a *subsidiary* connecting factor for the case where the main connecting factor should be lacking, *renvoi* to the choice of law rule of the third State should

not be excluded outright.

2. For example, renvoi would be ruled out where the foreign choice of law rule is based on a discriminatory connecting factor (connection to the husband's nationality for the resolution of choices of law in matrimonial matters), by analogy with recital 30 of the Rome III Regulation, which states: "This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 21 thereof, which prohibits any discrimination [...]".